

# The Regrettable Clause: *United States v. Comstock* and the Powers of Congress

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## I. INTRODUCTION

In *United States v. Comstock*, the Supreme Court had cause to give elaborate consideration to the Necessary and Proper Clause of the Constitution. Near the end of his dissent from the Court’s judgment, Justice Clarence Thomas made a remarkable observation: “Regrettably, today’s opinion breathes new life into that Clause.”<sup>1</sup> *Regrettably?* In what sense can a member of the Court *regret* the fact that the Court has declined to treat a provision of the fundamental law as a dead letter? One might think that making the Constitution’s provisions effective was part of the job description. To be sure, Justice Thomas quoted as support for his lament a line from the opinion of the Court in *Printz v. United States* in which Justice Antonin Scalia referred to the clause as “the last, best hope of those who defend ultra vires congressional action,”<sup>2</sup> but that reminder of Justice Scalia’s scornful dismissal of the final provision of Article I, Section 8 only deepens the mystery. Justice Holmes long ago wrote something similar about the Equal Protection Clause—it was, he thought, “the usual last resort of constitutional arguments”<sup>3</sup>—but in hindsight, that opinion was not his finest hour, and the Equal Protection Clause has gone on to enjoy a most lively judicial existence. Why then this disdain for the Necessary and Proper Clause? Even if it is true, descriptively, that litigants with insubstantial claims often turn to a particular provision of the Constitution, that fact neither evacuates the provision of substantial meaning nor excuses the Justices from taking it seriously.

Justice Thomas, however, was not alone in suggesting uncertainty about what to make of the Necessary and Proper Clause. The opinions filed in *Comstock* supporting the Court’s judgment are not dismissive about arguments over the clause’s application, but they show neither simplicity

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1. *United States v. Comstock*, 130 S. Ct. 1949, 1983 (2010) (Thomas, J., dissenting). Seven Justices agreed with the Court’s judgment, although Justices Kennedy and Alito filed separate opinions and did not join in Justice Breyer’s opinion for the Court. Justice Scalia joined Justice Thomas’s dissent except for one subsection.

2. *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 923 (1997)).

3. *See* *Buck v. Bell*, 274 U.S. 200, 208 (1927).

nor clarity in how to bring the clause to bear on the straightforward question of constitutional law before the Court. The Justices' collective uncertainty was not, however, mere coincidence. In this Article, I argue that in *Comstock*, the Court encountered one of the oldest and most basic constitutional issues about the scope of congressional power—whether there are justiciable limits to the range of legitimate ends Congress may pursue. The Justices, without fully recognizing the fact, were taking sides in an ancient debate, and in doing so, they inadvertently reopened an issue that ought to be deemed long settled.

Part II of the Article first addresses the question before the Court in *Comstock*, which was limited to a pure question of Article I law: is a specific provision of a particular act of Congress, 18 U.S.C. § 4248, a legitimate exercise of implied congressional power under the Necessary and Proper Clause? I then present what I call the “obvious answer” to the question presented—§ 4248 is within Congress's powers—and the equally obvious rationale—the provision addresses the social problem posed by the potential release of sexually dangerous prisoners from federal custody on the basis of Congress's judgment that doing so is an appropriate part of the overall federal system of incarceration, which itself is a necessary concomitant to the existence of federal criminal laws. I argue that my rationale is correct in principle and as an application of *McCulloch v. Maryland*, the Court's iconic Necessary and Proper Clause decision.<sup>4</sup> In Part III, I discuss the four opinions filed in *Comstock*, none of which was willing to adopt my “obvious” rationale although seven Justices agreed with the outcome and all four opinions claimed to follow *McCulloch*. All four opinions are plagued with problems, and despite the disagreements between them, the opinions adopt unclear or unnecessarily complex approaches to addressing the issue before the Court.

Part IV presents an interpretation of the *Comstock* opinions as presenting, most clearly in Justice Thomas's dissent but obliquely in the other opinions, a Jeffersonian reading of *McCulloch*. The *Comstock* Justices' convoluted wrestling with the issue of implied congressional power echoes the suggestion in *McCulloch* that the Court is under a duty to strike down federal laws that rest on a pretextual use of Congress's enumerated powers, an idea that depends in turn on the argument advanced by Jefferson and Madison that Congress's purposes in exercising any of its powers are limited to those defined by the terms of Article I's

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

specifications of legislative power.<sup>5</sup> I go on to argue that in doing so, the *Comstock* Justices have reopened the old debate between the Jeffersonians and their nationalist foes over the scope of Congress’s legitimate ends. In Part V, I turn to evaluate *Comstock*’s revival of Jeffersonian constitutional thought and conclude that in that important respect, the Court has made a serious mistake. The nationalist view, that Congress has the constitutional authority to address any legitimate object of legislative concern even though the tools by which it does so are limited, is correct as a matter of law. My argument for that conclusion is that it is right in constitutional principle and makes better sense of the history of political practice, the Supreme Court’s case law, including *McCulloch*, and the specific role of judicial review in the constitutional system. It is the Court’s reluctant, half-uncomprehending stance toward Congress’s powers under the Necessary and Proper Clause, not the majority’s correct decision that the clause authorizes § 4248, that is truly regrettable.

## II. THE NARROW QUESTION IN *COMSTOCK* AND ITS OBVIOUS ANSWER

### A. *Defining the Issue Before the Court*

The question before the Court in *Comstock* concerned the constitutionality of 18 U.S.C. § 4248, enacted as part of the Adam Walsh Child Protection and Safety Act of 2006. Justice Stephen Breyer for the Court described § 4248 as a “federal civil-commitment statute authoriz[ing] the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released.”<sup>6</sup> Under § 4248, the federal government may institute proceedings in district court against any individual in the custody of the Bureau of Prisons who is believed to be a “sexually dangerous person”—someone who

(1) has previously “engaged or attempted to engage in sexually violent conduct or child molestation,” (2) currently “suffers from a serious mental illness, abnormality, or disorder,” and (3) “as a result of” that mental illness, abnormality, or disorder is “sexually dangerous to others,” in that “he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”<sup>7</sup>

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5. See Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY* 41, 41–42 (1991) [hereinafter *LANGUAGES OF POWER*]; James Madison, Speech in the U.S. House of Representatives (Feb. 2, 1791), in *LANGUAGES OF POWER, supra*, at 37, 37–38.

6. *Comstock*, 130 S. Ct. at 1954 (majority opinion).

7. *Id.* (quoting 18 U.S.C. § 4247(a)(5)–(6) (2006)).

If the government proves these assertions by clear and convincing evidence, the district court is required to order continued detention while the Department of Justice attempts to persuade officials of the state in which the individual was tried or is currently detained to accept responsibility for the detainee.

If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until (1) such a State will assume such responsibility; or (2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment; whichever is earlier.<sup>8</sup>

Although the statute requires “ongoing psychiatric and judicial review of the individual’s case, including judicial hearings at the request of the confined person at six-month intervals,” the district court may order the individual’s discharge from custody, with or without conditions, only if the party seeking discharge proves by a preponderance of the evidence that the individual is no longer sexually dangerous.<sup>9</sup> Section 4248 thus allows for the indefinite, potentially lifelong detention in federal hospital facilities of persons who have served their federal prison sentences or have not in fact been convicted of any federal crime.

*Comstock* consolidated § 4248 proceedings the federal government brought in district court in North Carolina against five individuals. Four had pleaded guilty to federal offenses involving child pornography or sexual abuse of a minor, and the government invoked § 4248 when “each of them . . . was about to be released from federal prison”; the fifth defendant “had been charged in federal court with aggravated sexual abuse of a minor, but was found mentally incompetent to stand trial.”<sup>10</sup> All five moved to dismiss the proceeding on various constitutional grounds, and the district court agreed, concluding that due process requires that the government prove its case beyond a reasonable doubt and that, in any event, Congress lacks the power under Article I to enact § 4248.<sup>11</sup> The Fourth Circuit affirmed on the Article I ground and declined to reach the due process issue.<sup>12</sup> The Supreme Court granted

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8. 18 U.S.C. § 4248(d) (2006).

9. *Id.* § 4248(d)–(e); *Comstock*, 130 S. Ct. at 1955.

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

11. *United States v. Comstock*, 507 F. Supp. 2d 522, 559–60 (E.D.N.C. 2007), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *rev’d*, 130 S. Ct. 1949.

12. *Comstock*, 551 F.3d at 276.

the government's petition for certiorari in *Comstock*, which framed the issue before the Court as “[w]hether Congress had the constitutional authority to enact 18 U.S.C. [§] 4248.”<sup>13</sup> Although the *Comstock* defendants asked the Court to rule on their due process claim as well if it agreed to review the case, the Court declined.<sup>14</sup> Subsequent to the Court's order granting certiorari, two courts of appeals upheld § 4248 against the Article I challenge.<sup>15</sup>

How should the Court have addressed the issue it agreed to review in *Comstock*? The Court only agreed to address the scope of Congress's affirmative power to enact § 4248.<sup>16</sup> There are serious arguments that § 4248 is inconsistent with the Due Process Clause or perhaps with other constitutional guarantees of individual liberty: the perhaps endless detention of American citizens for reasons other than criminal conviction raises very real constitutional concerns, but these were simply not before the Court. Justice Breyer for the Court was at pains to remind the reader that the *Comstock* decision did not address and does not foreclose those arguments.<sup>17</sup> The Court's business in *Comstock*, in short, was limited to resolving a question about the scope of Article I. No other constitutional concern was before the Court.

I should note one other feature of the question presented in *Comstock*. As their case was argued to the Supreme Court, the defendants in *Comstock* did not contest Congress's authority to enact the criminal statutes under which they were convicted or, in one instance, charged. In other words, the defendants in *Comstock* conceded, by implication, that the criminal statutes under which they came into federal custody

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13. Petition for Writ of Certiorari at i, *Comstock*, 130 S. Ct. 1949 (No. 08-1224).

14. The defendants argued against review but asked that the Court address their claim that “the Due Process Clause mandates the reasonable doubt standard for the factual determination required” by § 4248 in the interests of “judicial economy.” Brief in Opposition at i, 17, *Comstock*, 130 S. Ct. 1949 (No. 08-1224).

15. See *United States v. Volungus*, 595 F.3d 1 (1st Cir. 2010); *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009).

16. See *Comstock*, 130 S. Ct. at 1954 (“Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program.”).

17. See *id.* (“We have previously examined similar statutes enacted under state law to determine whether they violate the Due Process Clause. But this case presents a different question.” (citations omitted)); *id.* at 1956 (“[W]e assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances.”); *id.* at 1957 (“[T]he present statute's validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us.”); *id.* at 1965 (“We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.”). The hint seems fairly clear, and federal lawyers litigating individual liberty attacks on § 4248 may be in for a rough ride.

were constitutional but argued that even so, they could not be subject to involuntary commitment under § 4248. Granting *arguendo* that Congress had the constitutional authority to authorize their arrest, detention, trial, and imprisonment or other punishment, the *Comstock* defendants insisted that Congress lacked the authority to keep them in nonpunitive, remedial custody based on the showing of mental illness and sexual dangerousness required by § 4248. The extensive exercise of federal government jurisdiction over each could not constitutionally extend, they maintained, to that particular outcome.

### *B. The Obvious Answer and Its Equally Obvious Rationale*

*Comstock* thus presented the Court with a narrow and specific question. The Court's answer could have been equally cut and dried: § 4248 is within the scope of Congress's Article I powers. As we have seen, it was assumed that the Constitution delegates to Congress the authority to enact the criminal statutes pursuant to which the five defendants were charged.<sup>18</sup> Because the Constitution expressly authorizes Congress to enact criminal statutes in only a few instances, none relevant in *Comstock*,<sup>19</sup> we are already in the realm of implied rather than express powers, but that is of no constitutional moment. The enactment of criminal statutes, and the accompanying creation of the federal governmental

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18. See *United States v. Comstock*, 507 F. Supp. 2d 522, 526 n.2 (E.D.N.C. 2007) (discussing charges against the individual defendants). The child pornography statutes involved in *Comstock* all define the prohibited behavior with reference to "interstate or foreign commerce." See 18 U.S.C. §§ 2252(a)(2), 2252A(a)(5)(B) (2006 & Supp. III 2009). They are clearly exercises of Congress's power under the Commerce Clause, and there seems little doubt that they are in fact constitutional. The federal sexual assault provisions, 18 U.S.C. §§ 2241–2242 (2006), apply to actions "in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or [other federally supervised facilities]," circumstances in which it is generally conceded that Congress may exercise plenary legislative jurisdiction parallel to that possessed by the state legislatures. See, e.g., *Comstock*, 130 S. Ct. at 1978 n.10 (Thomas, J., dissenting) (stating that federal civil commitment proceedings might be valid for persons "who enter federal custody as a result of acts committed" in areas where the Constitution "grants Congress plenary authority"). In any case, it was the working assumption in *Comstock* that the underlying criminal statutes are valid.

19. "[T]he Constitution . . . nowhere speaks explicitly about the creation of federal crimes beyond those related to 'counterfeiting,' 'treason,' or 'Piracies and Felonies committed on the high Seas' or 'against the Law of Nations.'" *Comstock*, 130 S. Ct. at 1957 (majority opinion). The sexual assault statutes include acts "on the high Seas" but are not limited to that circumstance and could not be generally sustained under the clause of Article I, Section 8 addressing it.

apparatus necessary to criminal prosecution and punishment as a means to the execution of express powers, are steps beyond the enumerated powers initially taken by the First Congress. The Supreme Court has never questioned their validity. In *McCulloch*, Chief Justice Marshall wrote that “[a]ll admit that the government may, legitimately, punish any violation of its laws.”<sup>20</sup> Because Congress may enact criminal laws as part of its exercise of its regulatory powers over, for example, interstate commerce,<sup>21</sup> no one has ever doubted that it may also provide for the confinement of persons convicted of violating those laws.

Because Congress may create a prison system in order to carry out its design of imprisoning those who violate its criminal laws, under *McCulloch* it must also have the power to fill out the details of that system in a manner that is “conducive to the complete accomplishment of the object” of the prison system.<sup>22</sup> Prisoners need food, clothing, and care when they are sick, and no one has ever doubted that Congress may provide for these necessities while those convicted are prisoners. With respect to prisoners who are serving a term of years, their ultimate discharge is one of the outcomes of the prison system that Congress necessarily has in view, and the conclusion that Congress has no power to address the conditions of that discharge is patently unreasonable. Are prisoners with no clothes of their own to be released naked, prisoners confined on an island required to swim to shore, impoverished prisoners on daily medication sent on their way with no medicine or means of obtaining it? Section 4248 is simply one of the means that Congress has adopted because it is “conducive to the complete accomplishment of the object” of creating a prison system that addresses in a global and sensible manner the congressional program of imprisoning those who violate its laws.

There is no mystery about the source of Congress’s authority to do any of this: throughout this entire course of legislation, the constitutional end in sight has been “the beneficial exercise of those powers” that authorize the substantive criminal statutes under which defendants are charged with violating federal criminal statutes.<sup>23</sup> With respect to someone convicted of violating a law penalizing the receipt of child pornography that has moved in “interstate or foreign commerce,”<sup>24</sup> for example, § 4248 carries into execution the interstate and foreign commerce

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20. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819).

21. In fact, the Commerce Clause is the primary constitutional basis of federal criminal law. See Robin Morse, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1769 (2009).

22. *McCulloch*, 17 U.S. (4 Wheat.) at 424.

23. *Id.* at 409.

24. See, e.g., 18 U.S.C. § 2252A (2006 & Supp. III 2009).



powers delegated to Congress by Article I, Section 8, Clause 3. So do all of the other statutory provisions that create the federal prison system and regulate its dealings with federal prisoners when they bear on that individual: in the prisoner's case, the whole of the system is the means Congress has chosen to carry out its goal of punishing the use of the channels of commerce to obtain child pornography, and to do so in what Congress considers to be a fashion beneficial to the public interest. Section 4248, like all the other provisions creating and regulating the federal prison system, is "plainly adapted"<sup>25</sup> to the end of regulating "Commerce with foreign Nations, and among the several States"<sup>26</sup> for exactly the same reason that the criminal law prohibitions themselves are "plainly adapted" to that end: Congress has made the decision to use imprisonment in a comprehensive federal prison system as the means of enforcing its regulatory decision to close interstate and foreign commerce to child pornography. The same reasoning is equally apposite when § 4248 is applied to persons charged with federal crimes predicated on other powers of Congress. In each instance Congress's purpose is the "beneficial exercise" of the underlying power, "the complete accomplishment of the object" of enforcing its laws through a criminal justice system involving imprisonment.

The *Comstock* defendants pointed out to the Court that § 4248 addresses issues of mental illness and public safety about which the states ordinarily have responsibility,<sup>27</sup> but that observation raises no substantial question about the constitutional purpose or object of the provision. It has long been settled that "Congress, as an incident to [an enumerated power], may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."<sup>28</sup> If Congress enacted a sexual dangerousness statute permitting the federal executive to bring involuntary commitment proceedings because of sexual dangerousness against anyone in the United States simply on the basis of the individual's presence in the country, such an act would have as its apparent object matters over which Congress has no direct authority: by hypothesis it would have no end rooted in any enumerated power and would therefore be beyond the powers delegated by Article I. In contrast, § 4248 comes into play *only*

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25. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

26. U.S. CONST. art. I, § 8, cl. 3.

27. *United States v. Comstock*, 130 S. Ct. 1949, 1962–63 (2010).

28. *Hoke v. United States*, 227 U.S. 308, 323 (1913).

when someone is within federal criminal jurisdiction on the basis of a federal criminal law executing some enumerated power: in operation the section is *always* exercised incident to some enumerated power, like the rest of the statutory law creating the federal penal system. Its resemblance to the states’ “police regulations” is as constitutionally irrelevant as the existence of state banks’ providing parallel services was to the validity of the national bank in *McCulloch*.<sup>29</sup>

Chief Justice John Marshall thought this line of constitutional analysis quite clear as a matter of “general reasoning”<sup>30</sup>:

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.<sup>31</sup>

Congress has the power—“right” in that sense—to regulate interstate and foreign commerce and perhaps a political and moral duty to do so when there is or ought to be public concern over an issue falling within its scope—such as the dissemination of child pornography through the channels of commerce. That Congress has chosen a means, a comprehensive federal prison system, that in the abstract can be broken down into numerous individual exercises of legislative power requiring the use of a “vast mass of incidental powers”<sup>32</sup> not themselves regulations of commerce is constitutionally immaterial. The same could be said, and was said, of the National Bank Act that the Marshall Court upheld in *McCulloch*. As Chief Justice Marshall’s colleague William Johnson explained a few years later, *McCulloch* rested on “[t]he principle . . . that the grant of the principal power carries with it the grant of all adequate and appropriate means of executing it [and] the selection of those means must rest with the general government.”<sup>33</sup>

Modern Justices appear less comfortable than the Marshall Court Justices were with overtly deciding constitutional issues “according to the dictates of reason,”<sup>34</sup> and all of the *Comstock* Justices treated the constitutionality of § 4248 as entirely dependent on the correct interpretation of the Necessary and Proper Clause.<sup>35</sup> There too, however, the reasoning in *McCulloch* validates the straightforward constitutional

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29. See *McCulloch*, 17 U.S. (4 Wheat.) at 424.

30. *Id.* at 411.

31. *Id.* at 409–10.

32. *Id.* at 421.

33. William Johnson, Letter to James Monroe (June 1822), in *LANGUAGES OF POWER*, *supra* note 5, at 324, 325.

34. *McCulloch*, 17 U.S. (4 Wheat.) at 409.

35. See *infra* Part III.

justification for § 4248 that I have just outlined. The clause, Chief Justice Marshall explained, in no way modifies the conclusion dictated by reason that Congress may “exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.”<sup>36</sup> The clause’s legal effect is simply to make the conclusion express: “[T]he constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning” because “[t]o its enumeration of powers is added that of making ‘all laws which shall be necessary and proper.’”<sup>37</sup> *Necessary* in the clause does not mean “absolutely necessary,” as the bank’s opponents had argued, but must be read to “leave it in the power of congress to adopt any [means] which might be appropriate, and which were conducive to the end” of all of Article I’s grants of power, which is the “beneficial execution” of Congress’s enumerated powers.<sup>38</sup> It is for Congress, not the Court, to determine whether the means Congress adopts are sufficiently conducive to the beneficial execution of its powers to justify their adoption: “[T]he degree of its necessity, as has been very justly observed, is to be discussed in another place.”<sup>39</sup>

Under the *McCulloch* Court’s interpretation of the Necessary and Proper Clause, *Comstock* is an easy case. Section 4248 is conducive to the end of enforcing Congress’s criminal law regulations of commerce and all its other criminal law executions of its enumerated powers, *and for that reason* it is, in the clause’s terms, a “Law[] which [is] necessary . . . for carrying into Execution [those] Powers.”<sup>40</sup> Perfectly legitimate is debate over whether involving the federal government in addressing the problems raised by the discharge of sexually dangerous prisoners is valuable enough to the beneficial execution of Congress’s

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36. *McCulloch*, 17 U.S. (4 Wheat.) at 420.

37. *Id.* at 411–12.

38. *Id.* at 413–15.

39. *Id.* at 423. Perhaps fearing that readers in our more literalistic era might miss the elegant indirection of *McCulloch*’s reference to Congress as “another place,” Justice Breyer quoted a 1934 opinion spelling out the point:

If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.

United States v. *Comstock*, 130 S. Ct. 1949, 1957 (2010) (quoting *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934)) (internal quotation marks omitted).

40. U.S. CONST. art. I, § 8, cl. 18.

powers to warrant congressional legislation, but it is debate that belongs in the “other place” of the legislative process, not in the courts: “[T]o undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.”<sup>41</sup> The argument that “I think we are too far afield from the purposes of having federal criminal laws to warrant this additional wrinkle in the prison system” is a fine argument in the Senate, perhaps even a constitutional one, but under *McCulloch* it ought to be a nonstarter in a brief submitted to a court.

But wait a minute, the sharp-eyed reader is exclaiming about now, what about the strategic ellipsis in the last paragraph’s quotation of the clause? It is, after all, the Necessary *and Proper* Clause we are expounding, and laws passed pursuant to it have to meet the requirements inherent in each adjective. Furthermore, one might argue, Chief Justice Marshall clearly acknowledged that proposition in *McCulloch*, where he stated that the clause authorizes Congress to use not just any means that are “conducive” to the execution of enumerated powers but those means that “are appropriate.”<sup>42</sup> The observation is correct but changes nothing, for there is no argument in *Comstock* that § 4248 is not appropriate in Chief Justice Marshall’s sense. To the extent that Chief Justice Marshall had in mind Congress’s obligation to avoid transgressing express constitutional prohibitions, the reader will recall that *Comstock* did not address whether § 4248 runs afoul of *any* such prohibition. In fact, however, Chief Justice Marshall may well have had no justiciable legal issue in mind at all in his references to “appropriate” legislation. In the discussion that culminates with his disavowal of any judicial power to second-guess Congress’s decision about the national bank’s necessity, Chief Justice Marshall treated *appropriate* as one of a series of words describing the bank’s value as a matter of national policy.<sup>43</sup> The Necessary and Proper Clause authorizes Congress to enact only those laws that are appropriate

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41. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

42. *Id.* at 415 (emphasis added). Chief Justice Marshall’s discussion used the actual words *and proper* in the constitutional text curiously, if not very convincingly, to support his general thesis that *necessary* does not mean absolutely necessary. *See id.* at 418–19 (arguing that “the only possible effect” of adding *and proper* was “to present to the mind the idea of some choice of means of legislation not straitened and compressed within . . . narrow limits”). It is very likely that Chief Justice Marshall viewed *necessary and proper* as a pleonasm with the second adjective *proper* importing no additional, legally significant, or justiciable meaning.

43. *Id.* at 422–23 (discussing whether a bank is “an appropriate mode of executing the powers of government” in terms of the consensus that “it is a convenient, a useful, and essential instrument” and referring as well to “its importance and necessity” and “the utility of this measure”).

in the same way that Article I, Section 8 as a whole authorizes it to enact only those laws that serve the general welfare: the observation is true and important, but it is an essentially political principle rather than a legal rule.

The most famous passage from *McCulloch*, which both the Court and the dissent quote in *Comstock*,<sup>44</sup> can serve nicely to restate, and provide precedent for, the argument that I maintain establishes § 4248's constitutionality:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>45</sup>

*“Let the end be legitimate, let it be within the scope of the constitution.”* The constitutional end for which Congress enacted § 4248 is, with respect to each *Comstock* defendant, the enumerated power that authorizes enactment of the criminal law prohibition under which he was charged—the interstate and foreign commerce clauses, for example, in the case of those defendants convicted under the child pornography statutes. Someone charged under a federal criminal statute that is not itself valid under some enumerated power could not be subject to the § 4248 process even if the person met the section's criteria for commitment because as to such a person, Congress's end would not be within the scope of the Constitution.<sup>46</sup> In *Comstock*, however, as the reader will recall, the constitutionality of the underlying criminal statutes was a working assumption of the case before the Court. *“[A]ll means which are appropriate, which are plainly adapted to that end.”* As we have seen, § 4248 is appropriate in the *McCulloch* sense because it is obvious why Congress could consider it a means to making the most “beneficial” use of its power to enforce its enumerated regulatory powers, and as we have also seen, that is all that *McCulloch* requires to establish—that the exercise of an implied power is an appropriate means

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44. See *Comstock*, 130 S. Ct. at 1956; *id.* at 1971 (Thomas, J., dissenting).

45. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

46. The set of possible defendants in a § 4248 proceeding charged under an invalid federal criminal law is not empty: Imagine someone charged under an invalid act of Congress and involuntarily committed because the person was incompetent to stand trial, all before the Supreme Court struck down the act. Congress would lack the authority to subject that person to § 4248 because under those circumstances, the provision would not be a means of carrying into execution a valid exercise of an enumerated power.

of executing an enumerated one. “[W]hich are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” The Court, of course, did not address any of the arguments that § 4248 violates a constitutional prohibition, so this final *McCulloch* criterion was not in issue.<sup>47</sup> On the sole question before the Court in *Comstock*, *McCulloch* confirms the validity of § 4248.

*Comstock*, then, ought to have been an easy case, decided unanimously and announced in a short opinion pointing out the obvious line of justification running from the express powers enumerated in Article I that Congress enforces by criminal laws to the federal prison system of which § 4248 is a small part. *McCulloch* and its interpretation of the Necessary and Proper Clause provide all the judicial authority necessary to support the argument. No one on the Court clearly recognized this, although two of the Justices who filed opinions in *Comstock* came close. Summarizing what he thought common ground with the dissent on the scope of Congress’s authority, Justice Breyer wrote:

Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners’ behavior even after their release.<sup>48</sup>

Justice Samuel Alito’s opinion concurring in the *Comstock* judgment contained a rather similar passage:

[Section] 4248 . . . is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted. The Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes. In other words, most federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system.

All of this has been recognized since the beginning of our country. . . .

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47. There is no reasonable doubt that the first four clauses of the passage represent two criteria—respectively concerning the end of a law and its propriety as a means—each of which is expressed in two substantively synonymous phrases. One would expect the final two clauses, each of which addresses the possibility that the law will violate some prohibition in the Constitution, similarly to be parallel ways of expressing the same substance. In Chief Justice Marshall’s eighteenth-century English, the verb *to consist* could mean “not to contradict,” which further supports the conclusion that *consist with the letter and spirit* restates *are not prohibited* in different words. See SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Arno Press 1979) (1755) (defining *to consist* as meaning “[t]o agree . . . not to contradict”).

48. *Comstock*, 130 S. Ct. at 1964 (majority opinion).

... [And it is therefore] also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems.<sup>49</sup>

Both of these paragraphs are admirable for their cogency and concision; either would have served well as the core of the analysis in a straightforward opinion explaining the Court's judgment in *Comstock*. Regrettably, neither Justice Breyer nor Justice Alito nor any of their colleagues felt able to deal with the Necessary and Proper Clause issue in *Comstock* so simply.

### III. FOUR ROADS TO CONSTITUTIONAL CONFUSION: THE OPINIONS IN *COMSTOCK*

#### A. *Complexity out of Simplicity: Justice Breyer's Opinion for the Court*

From the beginning of his constitutional analysis, Justice Breyer made it clear that in the Court's view, resolving the question of § 4248's constitutionality required a complicated weighing of distinct factors rather than the simple analytic framework I have argued is sufficient: "[W]e conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. . . . base[d] . . . on five considerations, taken together."<sup>50</sup> This language of itself does not ordain an analytical framework to be applied across all cases, and Justice Breyer may have meant only that *in this particular case* it was this constellation of factors that led to the Court's conclusion, although in dissent, Justice Thomas described the majority opinion as adopting "a novel five-factor test."<sup>51</sup> What does seem unmistakably clear is that the five considerations were no mere random collection of observations but were essential to the majority's decision that § 4248 is a valid exercise of congressional authority and, indeed, that their convergence in *Comstock* was the basis in law for the judgment of the Court. Justice Breyer went through the considerations separately and by number, restated them at the end of his opinion, and in his conclusion told the reader twice over that it was on the basis of all five considerations, "[t]aken together," that the majority

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49. *Id.* at 1969–70 (Alito, J., concurring).

50. *Id.* at 1956 (majority opinion).

51. *Id.* at 1974 (Thomas, J., dissenting) (emphasis added).

believed itself able to uphold the provision.<sup>52</sup> The five considerations may not be a *test*, exactly, but they clearly are not dicta either; they are the substance of Justice Breyer's Necessary and Proper Clause analysis.<sup>53</sup>

We can usefully examine Justice Breyer's five considerations in the form he himself summarized them:

(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.<sup>54</sup>

Any opinion that announces such a particularized and unprecedented list of factors as the basis for the Court's judgment invites the criticism that the list is a doctrinal innovation that lacks adequate justification and is likely to have unhappy consequences, and Justice Thomas in dissent was happy to oblige. Justice Thomas's dissent leveled three specific charges against the five considerations "taken together": the Court's "newly minted test" (1) "cannot be reconciled with the Clause's plain text"; (2) cannot be reconciled "with two centuries of our precedents interpreting it," although Justice Thomas's basic complaint in this regard is that the majority "perfunctorily genuflect[ed]" to *McCulloch* and "then promptly abandon[ed]" its approach; and (3) "raises more questions than it answers."<sup>55</sup> Justice Thomas's first accusation is inconsequential, but his second and third are insightful and, I shall argue, persuasive criticisms.

### 1. A Pseudo-Problem: The Novelty of the Court's Analysis

Justice Thomas was right, of course, that Justice Breyer's five considerations are novel and that there is no immediately obvious sense in which they map onto the text of the Necessary and Proper Clause, but in itself, neither observation should carry any critical weight. Legal opinions interpreting and applying the Constitution almost invariably go beyond the terminology of the provision(s) they are implementing: Chief

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52. *Id.* at 1965 (majority opinion) ("We take these five considerations together."); *id.* (stating that "[t]aken together, these considerations lead us to conclude" that the provision is valid).

53. *See id.* at 1956–65. The author of an opinion for the Court faces the need to accommodate the views of the other Justices who join the author's opinion, and therefore we should not automatically assume that Justice Breyer presented the analysis in *Comstock* precisely as he himself saw the issues. But the five-considerations theme structures his entire opinion, and his insistence on the importance of the considerations as a set makes it difficult to think that he was radically opposed to a multifactor approach more or less of the sort that he published.

54. *Id.* at 1965.

55. *Id.* at 1974–75 (Thomas, J., dissenting).



Justice Marshall's opinion in *McCulloch*, which Justice Thomas evidently respects, was largely without judicial precedent,<sup>56</sup> ranged far beyond the language of the Necessary and Proper Clause, and indeed came to exegesis of the clause only late in Marshall's discussion of Congress's powers.<sup>57</sup> When an opinion creates new constitutional doctrine, its language is novel and distinct from that of the constitutional text by definition: the very purpose of doctrine is to create judicially manageable standards for carrying out the mandate of constitutional texts that the Court does not find possible to treat as a simple rule.<sup>58</sup> Whatever the exact status of Justice Breyer's five considerations, the fact that they are substantially his creation rather than a paraphrase of the Necessary and Proper Clause or of the Court's earlier decisions is of no moment.

## 2. *A Real Problem: Inconsistency with McCulloch*

The dissent's accusation that Justice Breyer's five considerations are inconsistent with precedent, in contrast, is a serious and plausible criticism: Justice Thomas was on solid ground in finding the opinion in *Comstock* in serious tension with the opinion in *McCulloch*, although in what follows, I shall generally present my own argument on that score rather than Justice Thomas's. In fact, three out of the five considerations that Justice Breyer invoked as part of the justification for upholding

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56. *McCulloch*, to be sure, clearly reflected Chief Justice Marshall's familiarity with the reasoning in Alexander Hamilton's 1791 cabinet opinion defending the constitutionality of a national bank, *see, e.g.*, J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 600 (2002), and implicitly corrected Marshall's earlier and much cruder treatment of Congress's implied powers in *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805), *see* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 162–64 (1985) (comparing *Fisher* with *McCulloch* and concluding that the later “formulation is a vast improvement upon *Fisher*”). This said, few readers have doubted the substantial originality—novelty, if you will—of Chief Justice Marshall's language—or its freedom from a slavish adherence to the Constitution's wording.

57. In his classic discussion of the opinion in *McCulloch*, James Boyd White noted that Chief Justice Marshall's language sought to rebut the “obvious criticism[,]” which his opinion itself had raised, that Marshall's method of “expounding” the Constitution involved “finding in it what simply is not there.” JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 256 (1984) (internal quotation marks omitted). Because of the character of the Constitution's own language, the activity of interpreting it cannot be limited to looking to see what is there. *See id.*

58. *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1740–47 (2005).

§ 4248 are immaterial under *McCulloch* to the resolution of that issue. Let us see how that is so.

*The second consideration.* The *Comstock* judgment rests in part, according to Justice Breyer, on the fact that § 4248 “constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades.”<sup>59</sup> Justice Breyer conceded that “even a longstanding history of related federal action does not demonstrate a statute’s constitutionality,” and he made no express reference to the argument from societal or popular reliance often thought to counsel acceptance of longstanding governmental practices.<sup>60</sup> Instead, the majority Justices evidently thought § 4248’s “modest[y]” as an “addition to a longstanding federal statutory framework, which has been in place since 1855,” was a constitutionally significant factor because, in some fashion, it supports the “the reasonableness of the relation between the new statute and pre-existing federal interests.”<sup>61</sup> This must mean, if it is to have constitutional significance, that a more innovative exercise of congressional power, one not as “reasonably” related to preexisting federal interests, might be unjustified under the Necessary and Proper Clause.

This is not a line of reasoning that one should expect to read in an opinion purporting to follow *McCulloch*. Chief Justice Marshall began his analysis with a discussion of “the former proceedings of the nation respecting” the national bank, in the light of which the bank’s validity could “scarcely be considered as an open question” in 1819.<sup>62</sup> But his treatment of the political history of the statute before him was very different from Justice Breyer’s. Chief Justice Marshall made nothing of the bank as a “modest” change in federal law—the bank was one of the most socially consequential federal instrumentalities in the early Republic—or its fit with longstanding federal policy and interests—there was no national bank between 1811 and 1816. For Chief Justice Marshall, the significance of the statute’s history was, in part, the issue of reliance that lingers only as a whisper in Justice Breyer’s opinion,<sup>63</sup> but its deeper importance for him lay in the seriousness with which the national political process had aired the question of the bank’s validity: “It would require no ordinary share of intrepidity to assert that a measure adopted

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59. *Comstock*, 130 S. Ct. at 1958 (majority opinion).

60. *Id.*

61. *Id.* at 1958, 1961.

62. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–02 (1819).

63. See *Comstock*, 130 S. Ct. at 1958 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (stating that a long “unbroken practice . . . is not something to be lightly cast aside”)). So perhaps Justice Breyer did mean to invoke the argument from reliance, albeit softly.

under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.”<sup>64</sup> Section 4248 can lay no claim to a similar history of constitutional debate in Congress and the executive, but by *McCulloch*’s standards, that merely eliminates one argument *in favor of* the statute’s constitutionality. There is nothing in *McCulloch* even hinting that the novelty or the broad scope of a congressional act ought to weigh *against* its validity as an exercise of implied power. Indeed, *McCulloch*’s conclusion in the bank’s favor, which Chief Justice Marshall was careful to state the Court thought clear quite apart from its history, seems to me irrefutable proof that Marshall and his colleagues would have found Justice Breyer’s modesty and nonnovelty consideration irrelevant to the question of § 4248’s constitutionality.<sup>65</sup>

*The fourth consideration.* The opinion of the Court gave as another constitutional consideration the majority’s conclusion that § 4248 “properly accounts for state interests” because it “requires *accommodation* of state interests” in various ways, ultimately by allowing a relevant state to take custody of anyone detained pursuant to a § 4248 proceeding.<sup>66</sup> Why this fact was of constitutional significance to the majority is unclear. The *Comstock* defendants argued to the Court that § 4248 is improper under the Necessary and Proper Clause because it “encroaches on the States’ police and *parens patriae* powers [and thereby] assum[es] these core state functions.”<sup>67</sup> The idea that there is some substantive core of state functions that Congress may not in effect “assume” through the use of its enumerated powers is not new, of course, but the Court has repeatedly rejected it.<sup>68</sup> If a legislative act is within the authority the Constitution delegates to Congress, its enactment is *by definition* not the exercise of a

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64. *McCulloch*, 17 U.S. (4 Wheat.) at 402. The First Congress adopted the first bank bill only after the most serious constitutional debate, with James Madison leading the opposition in the House. George Washington signed the bill into law only after deliberating over the conflicting constitutional arguments of Edmund Randolph, Thomas Jefferson, and Alexander Hamilton. Madison, who was President in 1816, signed the second bank bill into law after the lessons of experience had persuaded most of the first bill’s original opponents that a national bank was a practical necessity. See *id.* at 401–02 for Chief Justice Marshall’s elegant, if tendentious and oblique, summary of this history.

65. On the validity of the National Bank Act independent of the argument from political precedent, see *id.* at 402. Chief Justice Marshall’s remarks about the political history “are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.” *Id.*

66. *Comstock*, 130 S. Ct. at 1962.

67. Brief for Respondents at 37, *Comstock*, 130 S. Ct. 1949 (No. 08-1224).

68. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

power reserved to the states, as Justice Breyer recognized.<sup>69</sup> In executing its delegated powers, as Justice Thomas pointed out, Congress may override or accommodate state policies as it chooses: Article I has already made all the accommodation of state interests that is constitutionally required.<sup>70</sup> The various features of § 4248 that limit the federal process Congress established in the interest of allowing or encouraging states to address the issue of sexually dangerous persons may be good policy, but their presence is of no constitutional significance under *McCulloch*, and the implication in Justice Breyer’s opinion that the absence of such accommodations might weaken the argument for § 4248’s validity is flatly contrary to *McCulloch*.

*The fifth consideration.* As yet another factor in the argument for § 4248’s validity, Justice Breyer pointed to the section’s “narrow scope.”<sup>71</sup> Justice Breyer noted that he was answering the *Comstock* defendants’ argument that under the Necessary and Proper Clause, “Congress’ authority can be no more than one step removed from a specifically enumerated power,” and his opinion skillfully shows the incompatibility of this argument with precedent and with Chief Justice Marshall’s discussion in *McCulloch*.<sup>72</sup> In principle, and under *McCulloch*, there of course must be a real sense in which legislation Congress adopts under the clause is a means to the execution of some enumerated power: Chief Justice Marshall used the expression *plainly adapted to such an end*.<sup>73</sup> As *McCulloch* also insisted, however, the question whether the means are *closely enough* related to a proper end to warrant the exercise of implied power is a question for Congress: “[T]o undertake here to inquire into the degree of its necessity [as a means to a legitimate end], would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”<sup>74</sup> Whatever the extent of the judiciary’s competence

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69. *Comstock*, 130 S. Ct. at 1962 (“The powers ‘delegated to the United States by the Constitution’ include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution ‘reserved to the States.’”).

70. *Id.* at 1982 (Thomas, J., dissenting) (“[O]nce it is determined that Congress has the authority to provide for the civil detention of sexually dangerous persons, Congress . . . ‘may impose its will on the States’ [and therefore] Section 4248’s [‘accommodations’ are] thus not a matter of constitutional necessity, but an act of legislative grace.”). *Comstock* did not address the question of whether the Constitution imposes on Congress a relevant state sovereignty limitation on the exercise of its Article I powers that is analytically distinct from the limitation implicit in the enumeration of its powers and thus parallel to the anticcommandeering principle recognized in *New York v. United States*, 505 U.S. 144 (1992).

71. *Comstock*, 130 S. Ct. at 1965 (majority opinion).

72. *Id.* at 1963–64.

73. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

74. *Id.*

to ensure that there is *some* means-end relationship between implied-power legislation and enumerated-power end,<sup>75</sup> the real problem with the one-step-removed argument is that in application it amounts to nothing but an a priori characterization: whether § 4248 is one step removed from the enumerated Article I powers or many, and how many, is simply a question of how one states the answer verbally.<sup>76</sup> *McCulloch* gives no support to such verbal quibbles as a part of constitutional law: Chief Justice Marshall wrote not a single sentence breaking down the national bank into its various facets or considering the extent to which individual parts of the system were related more or less directly to the financial operations of the federal government that the National Bank Act was a means of executing.<sup>77</sup>

Justice Breyer made this point effectively but muddied the analytical waters unnecessarily by pairing his rejection of the one-step-removed argument with a second and quite different contention that § 4248 is not “too sweeping in its scope” or “is narrow in scope . . . appl[ying] to only a small fraction of federal prisoners,” and that it is a “narrowly tailored means of pursuing the Government’s legitimate interest as a federal custodian.”<sup>78</sup> As we have already seen in the discussion of the second consideration, under *McCulloch*, both on its facts and in Chief Justice Marshall’s analysis, the narrowness of a congressional exercise of implied power is not—and indeed cannot be if *McCulloch* itself was rightly decided—relevant to its constitutionality. The legitimacy of a

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75. Justice Breyer’s third consideration addresses this issue, concluding that § 4248 “satisfies the Constitution’s insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority.” *Comstock*, 130 S. Ct. at 1962.

76. Nothing in principle—or in *McCulloch*—suggests any reason why the following are not equally fair descriptions of § 4248, or why it should matter if you choose one of the following over the other: (1) the federal prison system, of which § 4248 is a part, is a means of carrying into execution the enumerated powers, such as the interstate commerce power, authorizing Congress to enact criminal statutes; (2) § 4248 is a means toward carrying into execution the criminal statutes that are a means toward carrying into execution the enumerated powers; or (3) § 4248 is a means toward carrying into execution the program for addressing the discharge of prisoners that is a means toward carrying into execution the prison system that is a means toward carrying into execution the criminal statutes. Lawyers could play this game with almost endless variations. *None* of them have any place in a constitutional universe in which *McCulloch* is authoritative.

77. See *McCulloch*, 17 U.S. (4 Wheat.) at 424 (stating in conclusory fashion that the bank’s “branches . . . being conducive to the complete accomplishment of the object, are equally constitutional”).

78. *Comstock*, 130 S. Ct. at 1963–65.

given exercise of implied power, under *McCulloch*, has nothing to do with its conceptual “size,”<sup>79</sup> and the entire tenor of Chief Justice Marshall’s opinion negates any possibility that he believed judges ought to make a metaphorical examination of how closely Congress has tailored its means to its end. Justice Breyer’s suggestion to the contrary is doubly misleading: it implies that § 4248 might have been more questionable if it had applied to a larger percentage of federal prisoners or if it had struck the majority Justices as too sweeping or too loosely tailored. Doing so invites future legal wrangles over arguments couched in those terms and is strangely out of accord with *McCulloch*.

The inconsistency between *McCulloch* and Justice Breyer’s opinion runs deeper than the particulars of the two opinions. Chief Justice Marshall’s 1819 opinion, taken as a whole, is an emphatic statement that Congress has “ample means” to make the most beneficial use of its “ample [enumerated] powers, on the due execution of which the happiness and prosperity of the nation so vitally depends,” and to do so without the judiciary engaging in second-guessing legislative decisions about how best to serve the nation.<sup>80</sup> Chief Justice Marshall thought it as much a “waste [of] time and argument” to prove the existence under the Constitution of “this useful and necessary right of the legislature to select its means” as to prove that Congress can legislate at all.<sup>81</sup> “As little can it be required to prove . . . [that Congress] might employ those which, in its judgment, would most advantageously effect the object to be accomplished.”<sup>82</sup>

It was the critics of *McCulloch*, not the Marshall Court, who wanted to parse with a suspicious eye Congress’s exercises of power, using what Chief Justice Marshall later termed “well-digested, but refined and metaphysical reasoning” that he thought made sense only on the “postulates, that the powers expressly granted to the government of the Union, are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them.”<sup>83</sup> It would be absurd to suspect Justice Breyer of harboring strict-construction views of Congress’s powers, but “taken together,” to borrow his phrase, the five-considerations analysis is open to Justice Thomas’s accusation that it is unfaithful to *McCulloch*. “At a minimum,” as Justice Thomas commented, “this shift

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79. See *McCulloch*, 17 U.S. (4 Wheat.) at 407–08 (“It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced.”).

80. *Id.* at 408.

81. *Id.* at 419.

82. *Id.*

83. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 220 (1824).

from the two-step *McCulloch* framework to this five-consideration approach warrants an explanation as to why *McCulloch* is no longer good enough.”<sup>84</sup> The opinion of the Court neither notes nor explains its departures from *McCulloch*.

### 3. *A Second Real Problem: The Creation of Confusion*

Justice Thomas lodged a second, equally powerful complaint about Justice Breyer’s five-considerations discussion: “It also raises more questions than it answers.”<sup>85</sup>

Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress’ Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, *which* three or four are imperative? At a minimum, this shift from the two-step *McCulloch* framework to this five-consideration approach warrants an explanation as to . . . which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions.<sup>86</sup>

Justice Thomas is right: Justice Breyer’s insistence that all five considerations, taken together, ground the Court’s decision leaves the reader with no sense of how the factors relate.

The first consideration—“the Necessary and Proper Clause grants Congress broad authority”<sup>87</sup>—is an abstract observation about the Constitution; it is far from meaningless—at base it repeats a central theme in *McCulloch*—but it does very little to advance analysis when it is combined with the other considerations, all of which relate to the specific statute under review in *Comstock*. The other considerations, and Justice Breyer’s explication of them, emphasize the modesty in innovation, narrowness of scope, and lack of intrusion on state interests that the Court found to characterize § 4248. There is no indication whatever of how far the general consideration’s broad view of the implied powers can carry an argument for a different federal statute’s validity in the absence of these restrictive considerations. Justice Breyer may not have intended the five considerations as a doctrinal test to be

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84. *United States v. Comstock*, 130 S. Ct. 1949, 1975 (2010) (Thomas, J., dissenting).

85. *Id.*

86. *Id.*

87. *Id.* at 1956 (majority opinion).

applied mechanically in later cases, but he must have realized that many advocates and lower court judges would treat them as some sort of test or framework, so we must assume that he is content for them to do so.

This was, I think, a mistake and plainly one. It is less clear after *Comstock* than it was before how a member of Congress considering a bill, a lawyer writing a brief, or a lower court judge deciding a case ought to analyze the constitutionality of congressional measures that go beyond the letter of Article I. Chief Justice Marshall long ago warned of the subtle danger in construing Congress's powers in an overly legalistic, hairsplitting fashion that "may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived."<sup>88</sup> The opinion of the Court in *Comstock*, regrettably, substituted perplexity and doubt for the clarity that is the legacy of *McCulloch*.

*B. Argument by Slogan: Justice Kennedy's Opinion  
Concurring in the Judgment*

Justice Anthony Kennedy agreed with the majority, without significant elaboration, that § 4248 is constitutional as an incident to Congress's powers to enact criminal statutes.<sup>89</sup> He wrote separately not to elaborate on what he thought was the correct Necessary and Proper Clause analysis but to indicate certain errors in the opinion of the Court: "[T]o withhold assent from certain statements and propositions of the Court's opinion. . . [and] to caution that the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances."<sup>90</sup> Justice Kennedy's first stated concern was with Justice Breyer's claim that pursuant to *McCulloch*, the Court looks "to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."<sup>91</sup> Justice Kennedy made several observations about Justice Breyer's assertion, all

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88. *Gibbons*, 22 U.S. (9 Wheat.) at 220.

89. Justice Kennedy apparently rested the validity of § 4248 solely on the need "to ensure that an abrupt end to the federal detention of prisoners does not endanger third parties." *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring). His explanation of why this "obligation, parallel in some respects to duties defined in tort law," gives rise to congressional legislative power is extremely brief: "Having acted within its constitutional authority to detain the person, the National Government can acknowledge a duty to ensure that an abrupt end to the detention does not prejudice the States and their citizens." *Id.*

90. *Id.* at 1966.

91. *Id.* at 1956 (majority opinion).



of them correct: (1) although the Court has used the language of rational relationship or basis in due process and Commerce Clause analysis, the terminology has not played a role in guiding judicial review under the Necessary and Proper Clause; (2) the case Justice Breyer cited for the assertion, *United States v. Sabri*, addressed an area, the spending power, where constitutional analysis is underdeveloped; (3) it is unclear that rational basis talk carries the same meaning in both of the contexts where it is familiar; and (4) in any event, these are all separate areas of constitutional inquiry in which the proper judicial concerns may be different.<sup>92</sup> This is good, close judicial reasoning, presumably intended to prevent Justice Breyer's use of rational relationship language from hardening into Necessary and Proper Clause dogma without further consideration.

When Justice Kennedy turned to his second concern, the Court's apparently inadequate "explanation of the Tenth Amendment," however, the clarity of his opinion faltered.<sup>93</sup> After a puzzling paragraph suggesting that the majority had denied that "[r]esidual power, sometimes referred to . . . as the police power, belongs to the States and the States alone,"<sup>94</sup> Justice Kennedy presented his own, presumably superior explanation of the constitutional issues:

It is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place. It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under 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.<sup>95</sup>

This paragraph is as analytically confusing as Justice Kennedy's earlier discussion of the applicability of rational basis was precise. It is *not* correct "*in one sense*" to say that if Congress has the power to do something under the Necessary and Proper Clause, the power is not one

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92. *Id.* at 1966–67 (Kennedy, J., concurring); see *Sabri v. United States*, 541 U.S. 600, 605 (2004) (citing *McCulloch* generally as "establishing review for means-ends rationality under the Necessary and Proper Clause").

93. *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring).

94. *Id.* I can see nothing in Justice Breyer's opinion that justifies the suggestion. See *id.* at 1964 (majority opinion) (noting that the Founders denied the federal government "a general 'police power . . . and reposed [it] in the States'").

95. *Id.* at 1967–68 (Kennedy, J., concurring) (citations omitted).

of those reserved to the states: it is correct to say so, period. Congress’s implied powers pursuant to that clause are just as fully powers “delegated to the United States by the Constitution”<sup>96</sup> as the specific enumerated powers, and consequently the Tenth Amendment’s reservation of nondelegated powers to the states is irrelevant once it is established that a given federal law is a valid exercise of Necessary and Proper Clause authority.<sup>97</sup> The proposition in the second sentence that the federal structure of American government is relevant to the correct interpretation of Congress’s powers—including its implied powers—is sound, but it is hard to imagine, unfortunately, what to make of the following sentence about “state sovereignty.” The opinion gives no clear indication of what the “essential attributes of state sovereignty” are, or how a judge ought to deal with an act of Congress that compromises them—such an intrusion is only a suggestive factor, and we are not told what the other factors might be or how to weigh them.<sup>98</sup>

Justice Kennedy’s opinion continues this almost studied ambiguity in its next paragraph, where the reader is told:

The Court’s discussion of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government’s power, as it proceeds by first asking whether the power is within the National Government’s reach, and if so it discards federalism concerns entirely.<sup>99</sup>

The syntax of this sentence is overloaded, but Justice Kennedy’s point seems to be that (1) because the majority analyzed the issue of congressional power “by first asking whether the power [to enact

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96. *Id.* at 1962 (majority opinion) (emphasis omitted) (quoting U.S. CONST. amend. X).

97. *See, e.g.,* *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710, 2731–32 (2009) (Thomas, J., concurring in part and dissenting in part) (noting that “[t]he Tenth Amendment . . . is not implicated” when legislation is enacted “under the Commerce and Necessary and Proper Clauses” (quoting *Watters v. Wachovia Bank*, 550 U.S. 1, 22 (2007) (Stevens, J., dissenting) (internal quotation marks omitted))). The state autonomy principles discussed below, *see infra* note 98, rest on a different logic than the Tenth Amendment’s reminder that Congress does not possess all conceivable legislative authority: rather than shielding specific substantive areas of state law from congressional intrusion, those principles prohibit Congress from adopting certain means of executing powers it fully enjoys. Such state autonomy principles are parallel to the limiting effect of constitutional provisions such as the First Amendment.

98. The term *attributes of state sovereignty* could refer on its own to the anticommandeering and state sovereign immunity principles that the Court has recognized as imposing prohibitions on Congress’s use of its Article I powers. *See, e.g.,* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78–79 (2000) (state sovereign immunity); *Printz v. United States*, 521 U.S. 898, 935 (1997) (anticommandeering principle). As the Court has construed those principles, however, they impose absolute rules rather than subject federal laws to multifactor analysis, so Justice Kennedy’s language would be a strangely inexact way of referring to them.

99. *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring).

§ 4248] is within” Congress’s authority, (2) the Court invited the inference that federalism restrictions are “of no import” in defining congressional power, and (3) therefore it “discards federalism concerns entirely.” The proposition is as difficult to follow as the sentence is to parse. It is quite unclear how one ought to determine whether the power to enact a law is within Congress’s “reach” other than by “first asking whether” it is. It would be possible in theory to begin a review of the constitutionality of an act of Congress by working through a list of the presumptive prohibitions on its exercise of its powers—the First Amendment, the anticommandeering principle, the nondelegation doctrine, and so on—but as the reader knows, no issues involving such prohibitions were before the Court in *Comstock*, and so the complaint about the Court’s starting point is mysterious if not bootless.

Nor is it at all obvious why beginning with the question “does this law under review appear to be within the ostensible scope of Congress’s authority?” should interfere conceptually with asking whether what one might otherwise think is the scope of Congress’s power ought to be interpreted more narrowly out of federalism concerns. In fact, of course, Justice Breyer spent considerable energy exploring § 4248’s solicitude for “federalism concerns,” indeed in ways that I have argued gave improper latitude to those concerns as a matter of constitutional law.<sup>100</sup> There is as a result considerable irony in Justice Kennedy’s complaint that Justice Breyer’s opinion dismissed “the function and province of the States” too cavalierly.<sup>101</sup> The real problem with Justice Kennedy’s opinion, however, is not his arguable misreading of Justice Breyer’s opinion. It lies rather in Justice Kennedy’s assumption that he has “*explain[ed]*” why the Court ignores important limitations stemming from federalism principles.<sup>102</sup> Justice Kennedy’s discussion of federalism is opaque, at best; at points it is either confused or clearly erroneous; and it is one-sided as well: the supremacy of national power within its delegated sphere is as much a part of American federalism and “our constitutional structure” as is the “province of the States.”<sup>103</sup> It is quite unclear what Justice Kennedy would have courts do in Necessary and Proper Clause analysis to achieve the right balance between national authority and state autonomy, and it is similarly unclear in what way the Court has gotten

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100. See *supra* notes 66–70 and accompanying text.

101. See *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring).

102. See *id.*

103. *Id.*

this balance wrong. Federalism in this opinion is a slogan, without unambiguous content or analytical bite.

*C. Argument by Adjective: Justice Alito’s Opinion  
Concurring in the Judgment*

In the first paragraph of his opinion, Justice Samuel Alito explained that he agreed with the Court’s conclusion but declined to join its opinion because he was “concerned about the breadth of the Court’s language, and the ambiguity of the standard that the Court applies.”<sup>104</sup> Despite these concerns, Justice Alito concluded that § 4248 is a constitutional exercise of Congress’s authority under the Necessary and Proper Clause “on narrow grounds.”<sup>105</sup>

Justice Alito spent the next few pages laying out a lucid, succinct version of what I have called the obvious justification for § 4248.<sup>106</sup> As his first paragraph implies was his aim, he achieved a clarity that escaped the Court’s five-considerations discussion. There is, however, one puzzle about his discussion, stemming from his introduction to it: in what sense did Justice Alito believe his grounds for upholding the provision “narrow[er]” than the Court’s, and why did he think the problem with Justice Breyer’s language was its “breadth”? It is true that Justice Breyer referred several times to the breadth of Congress’s implied powers,<sup>107</sup> whereas Justice Alito warned the reader that “[t]he

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104. *Id.* (Alito, J., concurring) (citation omitted).

105. *Id.* at 1968–69.

106. *See id.* at 1969–70.

107. *See id.* at 1956 (majority opinion) (stating that the Necessary and Proper Clause confers “broad authority”); *id.* at 1958 (“Congress nonetheless possesses broad authority to [enact criminal statutes and laws governing prisons and prisoners] in the course of ‘carrying into Execution’ the enumerated powers.”); *id.* at 1965 (referring to “the breadth of the Necessary and Proper Clause”). Justice Breyer also quoted remarks from an earlier opinion of the Court that stress the flexibility and breadth of the Constitution’s delegations of power to Congress: “The Federal Government undertakes activities today that would have been unimaginable to the Framers . . . . Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.” *Id.* at 1965 (quoting *New York v. United States*, 505 U.S. 144, 157 (1992)) (internal quotation marks omitted). The plausibility of treating this quotation as telltale evidence that Justice Breyer is a dangerous centralizer diminishes considerably when one realizes that the original author of the words was Justice Sandra Day O’Connor, one of the Justices in recent history most concerned to ensure that the Court respects the constitutional role of the states. *See* Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 50 (2000) (“Justice O’Connor . . . has long been the Court’s most outspoken advocate for state autonomy.”); M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a “Conservative” Court: Currents and Cross-Currents from Justices O’Connor and Scalia*, 64 TUL. L. REV. 1443, 1449 (1990) (“Of the current Justices, O’Connor has expressed perhaps the strongest and most consistent commitment to judicial defense of state governments against federal interference.”).

Necessary and Proper Clause does not give Congress *carte blanche*. . . . And it is an obligation of this Court to enforce compliance with that limitation.”<sup>108</sup> It is also true that it took Justice Alito fewer pages than Justice Breyer needed to lay out a legal rationale for the Court’s judgment, but surely Alito’s criticism is not directed toward Breyer’s prolixity. Justice Breyer’s opinion, as we have seen, analyzes the Necessary and Proper Clause issue through a set of considerations that appear to build in *more* concern for state autonomy and *more extensive* judicially enforceable limits on Congress’s legislative discretion than Chief Justice Marshall allowed for in *McCulloch*. Justice Alito’s sparser analysis, if anything, suggests that it is Justice Breyer rather than Alito who has adopted a narrower view of congressional power.

The reader may wish to look again at Justice Alito’s spare—and I think convincing—demonstration, quoted above, that § 4248 is a proper means of “carry[ing] into execution the enumerated powers on which the federal criminal laws rest.”<sup>109</sup> Nothing in it, or in the slightly longer discussion in which it is embedded, invites courts to take into consideration their views on whether a statute resting on the Necessary and Proper Clause provision comes from a sufficiently long enough history of federal involvement in the issue, displays an adequate degree of federal accommodation to state interests, or is narrowly tailored enough to achieve its end. Although Justice Breyer apparently thought the Justices’ views on these issues matter constitutionally, Justice Alito, in contrast, did little more than register the “congressional judgment” that each link in the connection between the enumerated powers and § 4248 is “necessary and proper” and assert, almost entirely by implication, that Congress’s judgment is, as to each link, constitutionally acceptable.<sup>110</sup> Justice Breyer’s opinion thus appears to incorporate into the Necessary and Proper Clause analysis *more* concern for state autonomy and *more extensive* judicially enforceable

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108. *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring) (citation omitted).

109. *Id.*

110. *Id.* at 1969. Justice Alito did include a paragraph on a Judicial Conference report that Justice Breyer also discussed, *id.* at 1959–60 (majority opinion), which provided an empirical basis for the fear that because of state inaction “a disturbing number of cases” existed in which released federal prisoners “would present a danger to any communities in which they chose to live or visit.” *Id.* at 1970 (Alito, J., concurring). Justice Alito does not comment on the precise legal significance of the report’s existence. Perhaps the most natural reading of his opinion is that the report serves simply to indicate the sort of concern that moved Congress to enact § 4248.

limits on Congress’s legislative discretion than does Justice Alito’s sparser analysis. Justice Alito’s approach, I think, is demonstrably closer to *McCulloch* than Justice Breyer’s opinion, but by the same token his reasoning surely takes a less restrictive view of Congress’s authority under the clause and a less expansive view of the latitude a court has in second-guessing the “congressional judgment.” I write this not to criticize but to praise Justice Alito’s opinion and also to register puzzlement over Alito’s criticism of Justice Breyer’s “breadth” of language.

Regrettably, in the last substantive paragraph in his opinion, Justice Alito retreated to the rhetorical ambiguity of his introductory comments. After restating *McCulloch*’s gloss on the Necessary and Proper Clause as “requir[ing] an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress” and restating § 4248’s conformity with that requirement, Justice Alito distinguished *Comstock* from

a case in which it is merely possible for a court to think of a rational basis on which Congress might have perceived an *attenuated* link between the powers underlying the federal criminal statutes and the challenged civil commitment provision. Here, there is a *substantial* link to Congress’ constitutional powers.<sup>111</sup>

As a summary of Justice Alito’s reasoning, this is almost empty, an announcement of the adjectival labels to be used when a law fails or satisfies, respectively, a standard of judgment that the labels do not explain. What is it about the link between § 4248 and Congress’s enumerated powers that makes it “substantial” instead of “attenuated”? Apparently it is not simply the rationality of the presumed “congressional judgment” that each step in the chain is necessary and proper—or appropriate.<sup>112</sup> But if Congress’s own judgment is not a sufficient constitutional basis, standing alone, to justify judicial validation of an implied-power law—and recall that Justice Alito does not invoke any other basis on which to rest his approval of Congress’s imputed judgments—what other aspect of his argument for § 4248’s validity shows that its link to the enumerated powers was “substantial”? We are given no answer other than the logical but surely unimaginable possibility that Justice Alito thinks it proper for a judge to rely on an unarticulated and intuitive response to the question of appropriateness under the clause as the basis for upholding or striking down an act of Congress. Adopting “I know it when I see it” as the standard for implementing the Necessary and Proper Clause would make the Court’s five considerations look like a model of precision, and it would be ironic

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111. *Id.* at 1970 (Alito, J., concurring) (emphases added).

112. *Id.* at 1969 (emphasis added).

indeed if Justice Alito's opinion had in fact adopted this as a standard of review in light of his criticism of the Court's ambiguity.<sup>113</sup>

By using terms such as *attenuated* and *substantial*, Justice Alito strongly implies that his labels have precise conceptual content despite the absence of any indication as to that content in the rest of his opinion. Constitutional history affords other examples of Justices' using paired antonyms in constitutional decisionmaking; the direct/indirect distinction in Commerce Clause adjudication is perhaps the most famous.<sup>114</sup> These earlier ventures in explaining conclusions by applying adjectives do not breed confidence in the value of another such exercise. Justice Alito's otherwise admirable opinion will turn out to exercise a regrettable influence if it inspires lawyers and judges to think that the legitimacy of implied-power legislation turns on whether someone thinks the law's connection to the enumerated powers is better termed attenuated or substantial.

#### *D. Argument by Obfuscation: Justice Thomas's Dissent*

Justice Thomas's dissent, as we have already seen, registered several persuasive criticisms of Justice Breyer's opinion for the Court.<sup>115</sup> The dissent, furthermore, ultimately invokes a constitutional vision that has deep roots in our history. I will take up the question of what to make of that vision later. As is true of the other opinions filed in *Comstock*, however, there is an aspect of the dissent that reflects, I think, a failure in craftsmanship. In Justice Thomas's case, the fault lies in his use of question-begging assertions—assumptions that tend to misstate the constitutional issue before the Court and obfuscate the real arguments for and against his views.

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113. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (adopting the "I know it when I see it" test, despite its vagueness). I intend no disparagement of Justice Stewart's famous description of "hard-core" pornography as he used it in a discussion of the First Amendment category of obscenity. Justice Stewart was, I think, making the entirely plausible claim that limiting constitutional obscenity to hardcore pornography would produce a workable judicial standard even if hardcore pornography cannot be reduced to algorithmic form.

114. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 307–10 (1936).

115. See *supra* Part III.A.

Consider the second paragraph in Justice Thomas’s opinion, with which he opened his legal analysis.<sup>116</sup>

“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”<sup>117</sup> In our system, the Federal Government’s powers are enumerated, and hence limited.<sup>118</sup> Thus, Congress has no power to act unless the Constitution authorizes it to do so.<sup>119</sup> The States, in turn, are free to exercise all powers that the Constitution does not withhold from them.<sup>120</sup> This constitutional structure establishes different default rules for Congress and the States: Congress’ powers are “few and defined,” while those that belong to the States “remain . . . numerous and indefinite.”<sup>121</sup>

At first glance this paragraph might seem a rather harmless bit of purple prose, perhaps even slightly reminiscent of Chief Justice Marshall’s famously grand—or grandiloquent, if you do not like it—opinion in *McCulloch*, although of course Chief Justice Marshall in *McCulloch* was freely composing, whereas Justice Thomas followed the unfortunate practice in recent decades of constructing his paragraph out of a skein of quotations from other authorities. Justice Thomas’s language in this opening paragraph, however, is very like Chief Justice Marshall’s in that there is far more going on than a judge’s indulging a taste for sweeping statements.<sup>122</sup>

Justice Thomas’s first sentence, quoted from an opinion written by Justice Sandra Day O’Connor, implies that it is uncontroversial to describe the federal system created by the Constitution as one of “dual sovereignty.” One can perhaps accept Justice O’Connor’s language as stating a generally shared proposition, but only at the cost of draining the

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116. For the following quotation from Justice Thomas’s dissent in *Comstock*, see 130 S. Ct. at 1970–71 (Thomas, J., dissenting), the citations have been omitted and footnotes added for ease of reference.

117. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

118. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers.”)).

119. *Id.* (citing *United States v. Morrison*, 529 U.S. 598, 607 (2000)).

120. *Id.* (citing U.S. CONST. amend. X).

121. *Id.* (quoting THE FEDERALIST NO. 45 (James Madison)).

122. Spencer Roane, one of the severest contemporaneous critics of *McCulloch*, repeatedly attacked what he viewed as Chief Justice Marshall’s deliberate rhetorical excesses. See, e.g., Spencer Roane, “*Hampden*” *Essay No. III*, RICHMOND ENQUIRER (June 18, 1819) (“The supreme court has also claimed such enlargement [of congressional authority] on the ground, that our constitution is one of a vast republic, whose limits they have pompously swelled, and greatly exaggerated.”), reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 127 (Gerald Gunther ed., 1969); *McCulloch*, 17 U.S. (4 Wheat.) at 408 (“Throughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported.”). One need not accept Roane’s narrow views of federal power to agree with him that Chief Justice Marshall was using his pen in the *McCulloch* opinion to make his constitutional views seem inescapable.



sentence of any analytically useful meaning. *Sovereignty* is a notoriously protean term in American constitutional law. “The Court seems to employ [sovereignty language in relation to the states] in a number of ways, not all of which are easy to relate to one another. The consequence is that general assertions about ‘state sovereignty’ are without clear meaning.”<sup>123</sup> The same is true of the specific term *dual sovereignty*. Justice Thomas quoted from *Gregory*: “For the most part, references to a *principle of dual sovereignty* are colorful ways of saying that federalism exists.”<sup>124</sup> Justice Thomas’s next few sentences might seem to point in that direction: no one on the Court, indeed no one in the constitutional mainstream in history, has doubted that Congress’s powers are enumerated and limited, or that as a result Congress must have a constitutional basis for action while the legislative competence of the states does not depend on, although it is limited by, the United States Constitution. All of this is incontestable, uncontested by anyone in *Comstock*, and by itself of no value whatever in deciding the issue actually contested before the Court. All harmless platitudes, one might think.

Platitudes these propositions might be in themselves, but in the context of Justice Thomas’s quotation of Justice O’Connor, they play a different role. When Justice Stone in *United States v. Darby* wrote that the Tenth Amendment states nothing beyond the circularity that “all is retained which has not been surrendered,” his comment that the Tenth Amendment is a “truism” was literally true, and indeed undeniable, but he clearly was driving home a highly debatable point: Justice Stone was denying, unmistakably, that the Tenth Amendment carries with it any suggestion that federalism might put legal limits on Congress’s authority beyond the limits inherent in the Constitution’s enumeration of powers.<sup>125</sup> Only a few years before *Darby*, that proposition had commanded majority support on the Court, and *Darby* itself was the case in which the Court announced its repudiation of federalism as an independent limitation on the scope of congressional power. There were

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123. H. Jefferson Powell & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645, 646 (2000).

124. *Id.* at 658 (referring to Justice Thomas’s use of the term *dual sovereignty* in *Comstock*). This Article attempts to catalogue exhaustively and analyze the different uses to which the Supreme Court has put the language of state sovereignty.

125. *United States v. Darby*, 312 U.S. 100, 124 (1941).

no published dissents in *Darby*, but Justice Stone’s “truism” comment was a means of advocating a controversial position, not the statement of a jurisprudential fact.<sup>126</sup>

Justice O’Connor’s “every schoolchild” assertion in *Gregory* involved exactly the same type of skillful rhetorical move, even if she aimed it in almost exactly the opposite direction from Justice Stone’s views on federalism. Justice O’Connor was a principled advocate of one of the most robust views of state autonomy from federal interference that any Justice has espoused in recent decades, but her understanding of what she called our “federalist structure of joint sovereigns” is hotly disputed on the current Court and indeed has never been the consensus view, on or off the Court.<sup>127</sup> The implication that the vision of federalism she intended in writing about dual sovereignty is settled constitutional law was advocacy rather than fact.<sup>128</sup> By quoting Justice O’Connor, Justice Thomas’s opinion implied that accepting the genuinely uncontroversial statements that followed the quotation entails accepting Thomas’s highly controversial views on federalism, and of almost equal importance that it is Thomas’s position on how to approach an issue of congressional authority that is truly consistent with *McCulloch*. The final sentence in the paragraph, quoting *The Federalist*, serves the same purpose. James Madison is unnecessary to prove that questions of federal and state power require different analyses in light of their different sources; what *The Federalist*’s virtually undeniable authority does is support and further develop a vision of federalism in which the scope of national legislative competence must be policed in order to safeguard the sovereign autonomy of the states—in which, contrary to any realistic description of modern American government, Congress’s exercised powers really are “few and [narrowly] defined.” In this paragraph, Justice Thomas presented his platitudes skillfully, and with purpose, so as to render more plausible his debatable constitutional perspective and to frame his analysis of § 4248 within an implicit presumption against its validity.

It would prolong this Article unnecessarily to discuss in detail Justice Thomas’s subsequent use in his dissent of this same technique of subtly advancing a contestable argument through ostensibly incontestable

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126. *See id.* Chief Justice Hughes privately expressed serious concern about the constitutionality of the Fair Labor Standards Act that *Darby* upheld, although he chose not to write separately. *See* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 209 (1998). Justice McReynolds, who almost certainly thought the Act invalid, did not vote at the Court’s conference on *Darby* and retired before the decision was announced. *See id.* at 208.

127. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

128. In *Gregory*, Justice O’Connor’s opinion provoked sharp dissents from four Justices on the very issue of federalism that she was addressing in the “every schoolchild” sentence that Justice Thomas quoted in *Comstock*.

propositions. We are told, for example, that the opponents of the Constitution feared the Necessary and Proper Clause and that it was the supporters who explained that the clause would do no damage to the principle of enumerated congressional powers—as if anyone on or before the *Comstock* Court proposed that the Court act on that tendentious Antifederalist interpretation;<sup>129</sup> that the Constitution does not vest in Congress plenary authority to prevent social harms—as if anyone were arguing that the principle of enumerated powers ought to be discarded;<sup>130</sup> and that American federalism is intended to protect liberty—as if that in itself indicates whether a particular act of Congress is within its powers, powers that were also meant to protect liberty.<sup>131</sup> By appearing to shoulder the burden of defending these unassailed positions, the dissent repeatedly implied that the defenders of § 4248 flout them. The unwary reader may well succumb to the invitation, which is surely being extended, to evaluate the dissent’s specific arguments in a context of suspicion that the majority Justices simply do not understand, or are deliberately ignoring, constitutional first principles.

As a specimen of forensic prose, Justice Thomas’s dissent has a certain undeniable force, but its power derives in large measure from its repeated obfuscation of the issue actually before the Court—whether § 4248 properly carries into execution the enumerated powers that authorize the criminal statutes under which the defendants were charged. Because Justice Thomas agreed with the majority that the Necessary and Proper Clause authorizes laws that “establish prisons . . . and set rules for the care and treatment of prisoners awaiting trial or serving a criminal sentence” under laws enacted pursuant to any enumerated power,<sup>132</sup> his real point of disagreement with the Court could easily seem

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129. See *United States v. Comstock*, 130 S. Ct. 1949, 1972 (2010) (Thomas, J., dissenting).

130. See *id.*

131. *Id.* at 1982 (“The purpose of [the federalism protection of state sovereignty] is to preserve the ‘balance of power between the States and the Federal Government . . . [that] protect[s] our fundamental liberties.’” (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting))). Describing the relationship between federal and state authority as a “balance of power” is quite odd in light of the Supremacy Clause. Federal and state powers are constitutionally asymmetric: although Congress’s powers are constitutionally defined and limited in scope, Congress’s exercise of those powers is invariably superior to state power within the constitutional sphere of national authority. The balance of power metaphor, it should be further noted, comes from a dissent.

132. *Id.* at 1976–77.

constitutionally insubstantial, a question of how comprehensive Congress’s regulations about “the care and treatment of prisoners” ought to be. Justice Thomas’s skillful redirection of the reader’s attention away from questions about the specifics of the law under review and toward broad propositions about constitutional structure resembles Chief Justice Marshall’s rhetorical strategy in *McCulloch*, but for a purpose diametrically opposed to Marshall’s. In *McCulloch*, Chief Justice Marshall argued that our constitutional structure requires the Court to refrain from entertaining fine-tuned distinctions about the relationship between the details of the National Bank Act and the powers enumerated in Article I, as generations of law students have found as they puzzled about exactly which power the bank is supposed to be carrying into effect. Chief Justice Marshall’s rhetoric was fundamentally consonant with his substantive constitutional views. In contrast, Justice Thomas’s insistence that the Court can and should parse with care the analytical connections between § 4248 and Article I is at the very heart of his argument that the Court is in error and the statute is unconstitutional. His heavy reliance on general propositions obscures, rather than illuminates, his substantive views.

The last paragraph in the main body of the *Comstock* dissent’s analysis, which is located immediately before Justice Thomas’s lament over the regrettable resuscitation of the Necessary and Proper Clause, nicely epitomizes his dissent’s overall argumentative strategy: “Absent congressional action that is in accordance with, or necessary and proper to, an enumerated power, the duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States.”<sup>133</sup> Of course, no one doubts that “the duty to protect citizens from violent crime” is the responsibility of the states *absent congressional action* properly based on Congress’s enumerated powers.<sup>134</sup> That is what it means to say that the Constitution leaves the “police power” to the states—legislative responsibility always lies with the states, if anywhere in the American system, unless the Constitution has conferred it on Congress. Because Article I delegates to Congress no general power to suppress violent crime or punish murder, the responsibility of doing so is

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133. *Id.* at 1982–83 (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821)).

134. Certainly not the majority. *See, e.g., id.* at 1956 (majority opinion) (acknowledging that “[e]very law enacted by Congress must be based on one or more” of the enumerated powers (alteration in original) (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000) (internal quotation marks omitted))); *id.* at 1964 (denying that the Court’s decision “confers on Congress a general ‘police power, which the Founders denied the National Government and reposed in the States’” (quoting *Morrison*, 529 U.S. at 618)).

the states' unless and until Congress addresses such criminal behavior as a means of executing one of its enumerated powers. When Congress does so, it is misleading at best to imply that the power of addressing violent crime belongs "solely" to the states or was "denied" by the Founders to the national government. What the Constitution does not give Congress—and thus reserves to the states—is the plenary power to punish violent crime predicated on nothing beyond the social desirability of doing so. Section 4248, as we have seen, does not rest on the exercise of such a plenary power, and as Justice Thomas himself properly admits at one point, the Necessary and Proper Clause "empowers Congress to enact laws . . . that are not within its authority to enact in isolation" when such laws are "in effectuation of [Congress's] enumerated powers."<sup>135</sup> What was at issue in *Comstock* was § 4248's legitimacy as an "effectuation" of the enumerated powers, and the dissent's many reiterations of the principle that Congress is a legislature of enumerated powers do nothing to address that issue. Justice Thomas's analysis ends, as it began, with propositions that are incontestable in themselves, presented as if they were dispositive of the case and yet irrelevant to the question actually before the Court.

#### IV. *COMSTOCK* AS THE JEFFERSONIAN *MCCULLOCH*

##### A. *Making Sense of the Comstock Opinions: McCulloch and the Concept of Pretext*

Far from heralding "an unwarranted expansion of federal power" as Justice Thomas fears,<sup>136</sup> *Comstock* reads more like a warning that the Court is prepared to subject congressional legislation resting on the Necessary and Proper Clause to novel and potentially restrictive constitutional scrutiny, even if the Justices have not yet agreed on precisely what doctrinal form that scrutiny will take. *No* Justice, the reader will recall, wrote or joined an opinion confining itself to what I have argued is the obvious answer to the question presented in *Comstock*.

If in fact the courts apply a *Comstock*-style skepticism in subsequent Necessary and Proper Clause cases, this doctrinal development may turn out to have great practical significance: much federal legislation

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135. *Id.* at 1973 (Thomas, J., dissenting) (quoting *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring)).

136. *Id.* at 1976.

customarily thought of as based on a specific power—the Commerce Clause in particular—must actually depend on the Necessary and Proper Clause as a matter of constitutional logic.<sup>137</sup> The adoption of a more skeptical judicial attitude toward Congress’s exercise of its Necessary and Proper powers would put in question a broader range of federal laws than the Court’s forays into limiting the Commerce Clause have as yet. In doing so, such a doctrinal change would also, of necessity, broaden the scope of the Court’s authority and discretion at the expense of Congress’s. In making any of the various judgment calls the several *Comstock* opinions require or suggest, a court would necessarily exercise a discretion in judgment that a more straightforward approach to implied-power analysis would leave to Congress. Think, for example, of Justice Alito’s express and Justice Breyer’s somewhat more implicit assumption that the Court should determine whether the link between an enumerated end and a Necessary and Proper Clause means is *too* attenuated.<sup>138</sup> If *Comstock* is an indication of the future, the judiciary’s currently rather minimal role in determining the scope of national legislative power will change sharply, with unpredictable results in practice.

Whether *Comstock* turns out to be a seminal case or a sport depends on a variety of factors, some of them with no essential connection to the substance of constitutional law. But as a decision of law, *Comstock* should be judged by, and its capacity to generate further decisions may well rest on, its compatibility with constitutional law as a whole, and above all by the relationship readers come to see between *Comstock* and *McCulloch*, a decision whose relevance and iconic status no Justice in *Comstock* questioned. On that score, our discussion so far might suggest that *Comstock* is likely to fare poorly in the court of hindsight, for in many ways *Comstock* seems quite irreconcilable with *McCulloch*. As we have seen, *McCulloch* provides no support at all for the idea broached by Justices Breyer and Kennedy that the scope of congressional implied powers is contingent on Congress’s accommodation of state interest, or for the sort of judicial second-guessing of Congress’s decisions about legislative means that Justice Alito’s concurrence hints at and Justice Thomas’s dissent practices. The opinions in *Comstock*, from Justice Breyer’s to Justice Thomas’s, all evince a belief in the constitutional propriety of subjecting congressional choices to close judicial examination

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137. This is an important analytical point that Justice Scalia reminded us of recently. See *Gonzales*, 545 U.S. at 34 (Scalia, J., concurring) (observing that the power to regulate “activities that substantially affect interstate commerce . . . cannot come from the Commerce Clause alone. . . . [but] derives from the Necessary and Proper Clause”).

138. See *supra* notes 78–79, 111–14 and accompanying text.

that is fundamentally alien to the Marshall Court's insistence that "the selection of . . . means must rest with the general government," in other words, with Congress.<sup>139</sup> When the *Comstock* Justices make their own judgments about whether the relationship between § 4248 and Article I is "too attenuated,"<sup>140</sup> sufficiently "substantial,"<sup>141</sup> or dependent on too weak "a causal chain of federal powers,"<sup>142</sup> their views of the Constitution and the role of the judiciary sound much closer to those of *McCulloch*'s Jeffersonian critics than of Chief Justice Marshall and his colleagues.<sup>143</sup>

There is, however, another aspect to *McCulloch*, one that only Justice Thomas expressly invokes, although in doing so, I think he inadvertently obscures the real point of his own argument. In his initial discussion of Chief Justice Marshall's opinion, Justice Thomas describes *McCulloch* as ordaining "a two-part test" for evaluating Necessary and Proper Clause legislation.<sup>144</sup> Justice Thomas, of course, has in mind Justice Breyer's novel and amorphous five considerations.

First, the law must be directed toward a "legitimate" end, which *McCulloch* defines as one "within the scope of the [C]onstitution"—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve.<sup>145</sup>

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139. See Johnson, *supra* note 33, at 325.

140. *Comstock*, 130 S. Ct. at 1963 (majority opinion).

141. *Id.* at 1970 (Alito, J., concurring).

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

143. This is true even if we assume that the *Comstock* Justices who voted to uphold § 4248 reached a substantive conclusion—being twenty-first century, post-New Deal judges—that the Marshall Court Justices might have rejected because, as early nineteenth-century judges, they would not have expected Congress even to consider enacting such legislation. There is an important historical issue here about the nature of the Marshall Court's vision that we cannot and need not address. G. Edward White in particular has interpreted the Marshall Court's "nationalism" more as a commitment to resisting the centrifugal political effects of Jeffersonian states' rights thinking than as an affirmative endorsement of broad congressional power understood in what he thinks is an anachronistic, New Deal fashion. See, e.g., 3–4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 1–2 (1988). Even if Professor White is correct on this score, there is no reason to think—and he does not claim—that Chief Justice Marshall and his colleagues meant to countenance legalistic, judicially enforced limits on Congress's exercise of implied power in the form the *Comstock* Justices seem unanimously to think appropriate.

144. *Comstock*, 130 S. Ct. at 1971 (Thomas, J., dissenting).

145. *Id.* (alteration in original).

Justice Thomas continues by insisting, quite correctly, that these two inquiries stand in a “linear relationship”<sup>146</sup>:

Unless the end itself is “legitimate,” the fit between means and end is irrelevant. In other words, no matter how “necessary” or “proper” an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than “carrying into Execution” one or more of the Federal Government’s enumerated powers.<sup>147</sup>

It is the first part of the *McCulloch* test that § 4248 fails, in Justice Thomas’s view, and he therefore declined to decide how the Court should apply the second, means-end fit part of the test “because . . . the Court’s decision today errs by skipping the first” part of the *McCulloch* test.<sup>148</sup>

This formulation of his approach is, I believe, a misstep on Justice Thomas’s part. Justice Breyer does in fact identify the enumerated powers that § 4248 carries into execution—the Article I powers that Congress’s various criminal laws carry out—as Justice Thomas himself eventually acknowledges.<sup>149</sup> Justice Thomas’s explanation of why Justice Breyer’s answer is insufficient to satisfy the first part of his *McCulloch* test is rather obscure and seems to rest, at least in part, on the due process concerns that the Court did not grant certiorari to address.<sup>150</sup> In the end the reader is left unsure whether Justice Thomas is saying anything more than that in *his* judgment, the sort of comprehensive approach to federal prisoners who meet the criteria of § 4248 ordained by that section is not *really* a necessary part of an overall federal penal system—just the type of issue that under any reading of *McCulloch* clearly is a matter exclusively for Congress.<sup>151</sup>

There is a better way for Justice Thomas to frame his objection to Justice Breyer’s claim that § 4248 executes the enumerated powers that support the criminal laws under which the *Comstock* defendants were

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146. *Id.* at 1972.

147. *Id.* (citing U.S. CONST. art. I, § 8, cl. 18).

148. *Id.* at 1975 n.7 (“I find that debate [of whether there is a proper fit between means and end] beside the point here . . .”).

149. *Id.* at 1977.

150. *See id.* at 1977–78 (“[Section] 4248 allows a court to civilly commit an individual without finding that he was ever charged with or convicted of a federal crime involving sexual violence. . . . [Section] 4248 permits the term of federal civil commitment to continue beyond the date on which a convicted prisoner’s sentence expires or the date on which the statute of limitations on an untried defendant’s crime has run. . . . [Section] 4248 does not require the court to find that the person is likely to violate a law executing an enumerated power in the future.”). Justice Thomas gives no clear explanation for why the Necessary and Proper Clause requires § 4248, unlike other coercive laws governing federal prisoners, to show these sorts of connections to the original charging offense.

151. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (“[T]he degree of [the statute’s] necessity, as has been very justly observed, is to be discussed in another place.”).



charged; however, it emerges only in the penultimate sentence in his opinion: “In [upholding § 4248], the Court endorses the precise abuse of power Article I is designed to prevent—the use of a limited grant of authority as a ‘pretext . . . for the accomplishment of objects not intrusted to the government.’”<sup>152</sup> The language Justice Thomas quoted is from *McCulloch*, from a sentence in the paragraph in which Chief Justice Marshall emphatically rejected any judicial second-guessing as to how necessary Congress’s chosen means are to its execution of its enumerated powers:

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.<sup>153</sup>

The real constitutional problem Justice Thomas perceives in § 4248, I think, lies here, in the conviction that in enacting the provision Congress in fact was not at all concerned with carrying into full, beneficial execution its power over interstate commerce or any other enumerated power by criminalizing violations of its rules. Nor, indeed, was Congress actually interested in creating and administering a federal prison system adequate to provide for the punishment and care of those convicted of violating its criminal laws. Its purpose, in Justice Thomas’s view, was to deal with sexually violent persons, period, and the only substantive role that its enumerated powers-based criminal laws played in its scheme was to provide the federal government with a plausible excuse to exercise coercive jurisdiction over that subset of sexually dangerous persons who also happen to run afoul of some federal criminal statute. The pretext for congressional action was supplied by those statutes and the prison system that exists to make them enforceable, but the true object of § 4248 is “to protect the community from the dangerous tendencies” of sexually dangerous persons<sup>154</sup>—and thus the provision is a law “for the accomplishment of objects not intrusted to the government.”

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152. *Comstock*, 130 S. Ct. at 1983 (Thomas, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423).

153. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

154. *Comstock*, 130 S. Ct. at 1974 (Thomas, J., dissenting) (quoting *Addington v. Texas*, 441 U.S. 418, 426 (1979)).

Under *McCulloch*, therefore, it was the Court’s “painful duty” to invalidate the statute.

There are, of course, well-known difficulties with requiring judges to identify legislative purpose in determining the constitutionality of legislation.<sup>155</sup> Justice Thomas’s main discussion of the purpose of § 4248 cites “the face of the Act and . . . the Government’s arguments” in its brief in concluding that “§ 4248 is aimed at protecting society from acts of sexual violence [rather than] toward ‘carrying into Execution’ any enumerated power or powers of the Federal Government.”<sup>156</sup> Reliance on congressional statements of purpose and executive branch briefs has its obvious limitations, and a critic of Justice Thomas’s assertion that Congress acted pretextually in enacting § 4248 might respond that judicial review is not a constitutional law exam in which the Court checks to see if Congress gave the right answers—and that making it into one invites genuinely pretextual behavior on the part of the legislative branch. These and other problems acknowledged, it is fair to note that (1) it was Chief Justice Marshall in *McCulloch* who identified the significance of legislative purpose and pretext in Necessary and Proper Clause analysis, (2) the Court investigates legislative purpose and attempts to “smoke out” legislative pretext in other constitutional contexts,<sup>157</sup> and (3) it is plausible to think that Congress’s goal in enacting § 4248 had everything to do with the object of protecting society from sexual violence and little to do with regulating commerce or even constructing a comprehensive and reasonable federal prison system. The conclusion that this goal was so clearly Congress’s primary purpose is a contestable judgment, of course, but it is no essential feature of a constitutional doctrine that the doctrinal formula eliminate the exercise of judgment. Justice Thomas’s approach to the question in *Comstock* cannot fairly be rejected on the ground that it is unworkable or unduly subjective.

This then is a doctrinally cogent statement of Justice Thomas’s objection to § 4248, one that roots his argument squarely in *McCulloch*: the Necessary and Proper Clause is not to be used, as all would agree, to legitimate congressional legislation that is addressed to constitutionally

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155. The argument that legislative purpose is an illusion is, I think, wildly overblown. See RICHARD A. POSNER, *HOW JUDGES THINK* 191–96 (2008). On the distinction between the ideas of legislative intent and purpose, see FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 158–63 (2009).

156. See *Comstock*, 130 S. Ct. at 1974 (Thomas, J., dissenting).

157. See, e.g., *Johnson v. California*, 543 U.S. 499, 506 (2005) (using strict scrutiny to “smoke out” illegitimate racial purposes); *Miller v. Johnson*, 515 U.S. 900, 917 (1995) (finding that the necessary element of an unconstitutional racial gerrymander is that race be the “predominant factor” among the purposes for which the legislature drew up the districting plan).

improper ends—“Let the end be legitimate,” as Chief Justice Marshall put it—and it is the Court’s duty, and the proper function of judicial review, to maintain this principle. There is substantial reason, furthermore, to infer that the Justices in the *Comstock* majority share Justice Thomas’s uneasiness over simply validating an act of Congress that is addressed so unabashedly to the “accomplishment” of an object “not intrusted to the [federal] government.”<sup>158</sup> The underlying point of disagreement between the majority Justices and the dissenters is, on this reading, a difference over whether § 4248’s non-Article I purpose is so dominant that the Court should treat the Article I rationale as a makeweight, unentitled to constitutional force under the pretext aspect of *McCulloch*’s reasoning. The convoluted ways in which Justices Breyer, Kennedy and Alito present their reasoning may then be a product of their varying attempts to formulate a constitutional standard that explains their rejection of Justice Thomas’s judgment about how to state the purpose of § 4248 while indicating their agreement with the dissent that uses of the Necessary and Proper Clause power that are in fact pretextual cannot stand.

*B. Putting Comstock in Context: The Historical  
Debate over Congress’s Ends*

Justice Thomas’s adoption of the *McCulloch* pretext inquiry, and its arguable echoes in the other opinions, are important for raising an even more fundamental issue. We cannot identify when Congress is acting pretextually unless we know what the illegitimate ends are that it might want to conceal. Turning the inquiry around, what is the universe of legitimate federal ends that Congress may pursue in using its delegated powers, including its power under the clause? This is a very old question indeed in American constitutional history. In the early Republic, it was most commonly debated either in relation to the issue in *McCulloch*, the

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158. *Comstock*, 130 S. Ct. at 1983 (Thomas, J., dissenting); *see, e.g., id.* at 1961 (majority opinion) (“Congress’ power to act as a responsible federal custodian . . . rests . . . upon federal criminal statutes that *legitimately seek* to implement constitutionally enumerated authority.” (emphasis added)); *id.* at 1968 (Kennedy, J., concurring) (stating that § 4248 “provid[es] a strong assurance that the proffered reason for the legislation’s necessity is not a mere artifice”); *id.* at 1969 (Alito, J., concurring) (stating that the Necessary and Proper Clause authorizes federal criminal statutes and the statutory creation of the concomitant prison system based on the “congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper” to enact such laws).

validity of a national bank, or in discussing the interpretive difficulty posed by Article I, Section 8's reference to "the common Defence and general Welfare."<sup>159</sup> Most early constitutionalists agreed that this latter phrase specifically related to the scope of Congress's spending power, but everyone recognized that there was a more general issue. The Jeffersonian Republican position was that Congress is necessarily limited to employing its delegated powers, including its powers under the Spending and Necessary and Proper Clauses, to achieve those purposes designated by or inherent in Article I's expressly enumerated powers. As Jefferson wrote two years before *McCulloch*, "our tenet ever was . . . that Congress had not unlimited powers to provide for the general welfare" and that "the specification of powers [in Article I] is a limitation of the purposes" of federal legislation.<sup>160</sup> Congress's legitimate ends are limited by "the special and careful enumeration of powers" because a Congress empowered to pursue any end it thought for the common good would possess "a general power of legislation," and the Constitution's enumeration of powers would be "nugatory and improper."<sup>161</sup> Article I's list of powers,

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159. The first clause of Article I, Section 8 states that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Reading this language to grant Congress a freestanding power to provide for the common defense and general welfare, as Jefferson and Madison pointed out in the first national bank debates, "would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States." Jefferson, *supra* note 5, at 42; *cf.* Madison, *supra* note 5, at 38 (explaining that such an interpretation "would give to Congress an unlimited power [and] render nugatory the enumeration of particular powers"). Most constitutionalists therefore construed the phrase to designate the ends for which Congress may tax and spend and divided between those who agreed with Madison, who thought that Congress's fiscal powers were limited to expenditures related to Article I's enumerated regulatory powers, and the allies of Hamilton, who insisted that Congress can spend for any proper governmental purpose without regard to the enumeration of its regulatory powers. *Compare id.* (explaining that "the general purposes" for which Congress could spend "were limited and explained by the particular enumeration subjoined"), with Alexander Hamilton, Opinion on the Constitutionality of an Act To Establish a Bank (Feb. 23, 1791), in LANGUAGES OF POWER, *supra* note 5, at 43, 49 (explaining that Congress has "as large a discretion in relation to the application of money as any legislature whatever," with the single caveat that Congress "cannot rightfully apply the money they raise to any purpose merely or purely local").

160. See Thomas Jefferson, Letter to Albert Gallatin (June 16, 1817), in LANGUAGES OF POWER, *supra* note 5, at 314, 314. Jefferson's specific reference in the second phrase was to the spending power, but the paragraph as a whole makes it quite clear that he thought the limitation of congressional purposes by the enumeration of powers applies to all congressional legislation.

161. James Madison, Message to the U.S. House of Representatives (Mar. 3, 1817), in LANGUAGES OF POWER, *supra* note 5, at 313, 313–14. Madison brushed aside the argument that Congress's ends are unlimited with respect to spending only rather than with respect to commerce regulation as a difference without substance: such a "restriction . . . would still leave within the legislative power of Congress all the great

in other words, states and thereby limits the goals for which Congress can make laws: Congress has no constitutional authority to legislate “for purposes which the enumeration did not place under their action.”<sup>162</sup> Early nationalists, in contrast, insisted that Article I delegates to Congress a set of legislative means by which it may pursue the essentially unlimited end of the “advancement of the public good.”<sup>163</sup> The Constitution having created a government for the purpose of providing for the common defense and promoting the general welfare, as the Preamble announces, Congress may use its powers to achieve whatever “promotes the good of the society, and the ends for which the Government was adopted,”<sup>164</sup> to the end that “national exigencies are . . . provided for, national inconveniencies obviated, national prosperity promoted.”<sup>165</sup> Nationalists such as Hamilton routinely conceded that federal legislation had to be directed toward genuinely national—as opposed to purely local—concerns, but in the absence of strong sectional conflict, this limitation was more of theoretical than practical significance.<sup>166</sup>

Read carefully against the backdrop of the Jeffersonian-nationalist debate over Congress’s authorized goals, Chief Justice Marshall’s opinion in *McCulloch* displays a studied ambiguity on the question. The overall tenor of Chief Justice Marshall’s language is unmistakably nationalistic: the Constitution delegates to Congress “great powers . . . vast powers . . . on the due execution of which the happiness and prosperity of the nation so vitally depend” and “[t]he exigencies of the nation” are to be addressed.<sup>167</sup> The Constitution, Chief Justice Marshall repeatedly asserted, must be read to permit “the beneficial exercise of the power”<sup>168</sup> it grants Congress, so “that body [may] perform the high duties assigned to it, in

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and most important measures of Government, money being the ordinary and necessary means of carrying them into execution.” *Id.* at 314.

162. Jefferson, *supra* note 160, at 314.

163. Hamilton, *supra* note 159, at 46–47. Hamilton’s discussion of the scope of congressional purposes, it should be noted, was more nuanced than that of many other nationalists.

164. Fisher Ames, Speech in the U.S. House of Representatives (Feb. 3, 1791), in *LANGUAGES OF POWER*, *supra* note 5, at 40, 41. Ames was Madison’s greatest intellectual foe in the 1791 House debate over the first bank bill.

165. Hamilton, *supra* note 159, at 47.

166. See, e.g., *id.* at 49 (stating that the spending power cannot be employed for “any purpose *merely* or purely local”).

167. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407–08 (1819).

168. *Id.* at 409.

the manner most beneficial to the people,”<sup>169</sup> which sounds very unlike Jefferson’s or Madison’s insisting that the principle of enumerated powers entails a rule of enumerated and limited purposes. But these general propositions strongly suggest a nationalistic predisposition without expressly rejecting the Jeffersonian rule, and Chief Justice Marshall’s statement that the Court would strike down acts of Congress passed “under the pretext of executing its powers [but intended] for the accomplishment of objects not intrusted to the government”<sup>170</sup> sits uneasily with the nationalist argument that Article I “gives to Congress power over the means, and imposes the duty of providing for the general welfare in all cases whatever.”<sup>171</sup> “Let the end be legitimate,” Chief Justice Marshall wrote, but he continued with the injunction that Congress’s purpose must be “within the scope of the constitution.”<sup>172</sup> On its face, the opinion in *McCulloch* is compatible with the Jeffersonian view of the scope of Congress’s ends.<sup>173</sup>

The debate over whether the Article I powers are simply an enumeration of permitted legislative means or an exclusive list of legitimate congressional purposes as well did not end with *McCulloch*. The familiar twentieth-century history of Commerce Clause and spending power case law was in large measure a debate between Justices who read *McCulloch* as the Court’s imprimatur on Hamiltonian nationalism and those who insisted that *McCulloch*’s enduring lesson is that when Congress’s “purpose” is to address “matters not within any power conferred upon Congress by the Constitution,” it cannot employ its enumerated powers as the “means to force compliance” with its

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169. *Id.* at 421.

170. *Id.* at 423.

171. Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly, in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 1055, 1066 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

172. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

173. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 66 (2005) (Thomas, J., dissenting) (criticizing the majority for “convert[ing] the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a ‘pretext . . . for the accomplishment of objects not intrusted to the government’” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423)); *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) (“Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. . . . Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed.” (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421)); *Champion v. Ames*, 188 U.S. 321, 372, 375 (1903) (Fuller, C.J., dissenting) (criticizing the Court’s decision upholding the Federal Lottery Act “as inconsistent with the views of the framers of the Constitution, and of Marshall, its great expounder,” and quoting “the same great magistrate in *McCulloch v. Maryland*” about the Court’s duty to invalidate pretextual uses of the enumerated powers).

extraconstitutional goals.<sup>174</sup> The Court lurched between nationalist decisions such as *Champion v. Ames*,<sup>175</sup> which upheld a federal prohibition on the interstate shipment of lottery tickets despite the obvious fact that Congress's interest was in public morality rather than interstate trade, and Jeffersonian outcomes like those in *Hammer v. Dagenhart*<sup>176</sup> and *Bailey v. Drexel Furniture Co.*,<sup>177</sup> holding that Congress could address the practice of underage labor neither by the regulation of interstate commerce nor by the imposition of a tax.

But surely that is history. During the New Deal era, the Court unequivocally adopted the nationalist position. *United States v. Butler* announced that it was Hamilton rather than Madison who had correctly interpreted the scope of the general welfare for which Congress may tax and spend,<sup>178</sup> and for decades the Court has adhered to the view that “objectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power.”<sup>179</sup> *Darby* expressly overruled *Hammer* and endorsed what the Court termed “the powerful and now classic dissent of Mr. Justice Holmes.”<sup>180</sup> For Justice Holmes, questions about Congress’s purposes in passing a law are beside the point constitutionally as long as the legislation falls within the scope of its powers as a matter of form.<sup>181</sup> Congress “may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. . . . It seems to me entirely constitutional for Congress to enforce its understanding [of the national welfare] by all the means at its command.”<sup>182</sup> For Justice Holmes, and for the Court after *Darby*, or so it has often seemed, Congress’s powers, enumerated and implied alike, are instruments that

174. *United States v. Butler*, 297 U.S. 1, 70 (1936).

175. *See Champion*, 188 U.S. 321.

176. *See Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941).

177. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

178. *See Butler*, 297 U.S. at 65–66. Nicely having it both ways, *Butler* nonetheless struck down the taxing and spending power legislation before it on the ground that the federal statute was in effect a regulation of agricultural production and thus a usurpation of power pointing to “the destruction of local self-government in the states.” *Butler*, 297 U.S. at 77. That aspect of *Butler* fell away after *Darby*.

179. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Butler*, 297 U.S. at 65).

180. *Darby*, 312 U.S. at 115–17.

181. *See Hammer*, 247 U.S. at 281 (Holmes, J., dissenting).

182. *Id.*

Congress can employ to implement its views of what is in the public interest regardless of whether there is a specific connection between Congress's public interest goal and the delegated power it uses to accomplish that goal. Even if *McCulloch* can be read as a Jeffersonian opinion, that reading was repudiated long ago, or so one might think.

If the Justices who voted in *Comstock* to uphold § 4248 had all joined an opinion reaching that conclusion by what I have termed the obvious line of argument—one that we might now also call the nationalist rationale for *Comstock*—Justice Thomas's dissent and his attempt to revitalize the long-dormant pretext inquiry of *McCulloch* might seem academic, an almost whimsical gesture toward an untenable position. From the Holmesian perspective, it would not matter if Congress's real purpose in enacting the provision was to impose its preferred policies on dealing with sexually violent people, as far as possible within the limits imposed by the enumeration of powers, rather than to create a better system of dealing with people who transgress the federal statutory norms governing interstate commerce. Leaving aside the due process and other individual rights issues not before the Court in *Comstock*, Congress having determined to act on "its views of public policy" with respect to sexual violence, it was "entirely constitutional for Congress to enforce its understanding [of the national welfare] by all the means at its command," including the federal prison system and its custodianship of violators of federal criminal laws.

As we have seen, however, none of the opinions in *Comstock* took the Holmesian nationalist approach. Whether for their own reasons or because Justice Thomas's opinion pushed them part of the way toward his position without bringing them entirely to it, the Justices in the majority hedged their bets on the scope of congressional authority, introducing qualifications and suggesting hesitations that leave it unclear whether any of them fully agree with Justice Holmes. Each of the opinions in *Comstock* invoked *McCulloch*, but in contrast to *McCulloch*'s robust affirmation of national legislative competence, they treated the question of § 4248's validity in a captious, almost begrudging manner. The citations are to Chief Justice Marshall, but the tone is more that of Secretary Jefferson's bank opinion, with his warning that the Constitution "was intended to lace [Congress] up straitly within the enumerated powers."<sup>183</sup> *Comstock* is a Jeffersonian *McCulloch* in which Chief Justice Marshall's conviction that Congress's "power being given, it is the interest of the nation to facilitate its execution"<sup>184</sup> has been partially subordinated to Jefferson's insistence that "[t]o take a single step beyond

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183. Jefferson, *supra* note 5, at 43.

184. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).



the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power . . . to do whatever evil they please.”<sup>185</sup>

#### V. THE FUNDAMENTAL PROBLEM WITH *COMSTOCK*

The opinions filed in *Comstock* are vulnerable to criticism for lapses in clarity and craftsmanship, but if any objection is to be made for the Justices’ reopening of the old Jeffersonian-nationalist debate, it must lie on other grounds. The Jeffersonian theme of suspicion of governmental power, and above all the power of the national government with its almost endless capacity to do evil, is an authentically American impulse, and one with deep roots in our constitutional tradition. Constitutional issues rooted in the tension between Jeffersonian fear of and nationalist confidence in federal power go to the very heart of American constitutional thought. As a consequence, in a certain sense, the question of how to understand the constitutional scope of Congress’s ends has no right or wrong answer. Resolving it involves judgment and requires a choice between answers each of which can lay historical claim to legitimacy.<sup>186</sup> The existence of judgment and choice, on the other hand, does not render attempts to answer a question of law impossible or merely an exercise in articulating one’s extralegal preferences. There are better and worse answers in law, even in constitutional law. I believe this statement is true even with respect to the very old and quite basic question of law about the scope of Congress’s purposes that *Comstock* has put on the table. The better answer, I further believe, is that the nationalist rationale for the outcome in *Comstock* is correct, and

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185. Jefferson, *supra* note 5, at 42.

186. The “inherently elastic, dynamic, and underdetermined” nature of the federal structure created by the Constitution is a central theme in the recent, brilliant work of Professor Edward A. Purcell Jr., and from these characteristics he concludes that “American federalism [is] incapable of either reaching permanent equilibrium or serving as a determinative constitutional norm.” See EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 189, 193 (2007). Purcell’s book is thoroughly persuasive as to its central claims. However, I do not think that Purcell’s argument that “the Constitution provides no single and true conception of the federal structure and that all such conceptions are rooted in complex political, social, and ideological sources,” *id.* at 201, precludes the attempt to show that either the nationalist or the Jeffersonian position on Congress’s permissible ends is more persuasive in terms of our legal and political tradition or of the existing norms of legal argument.

the Justices' varying paths toward reaching or rejecting that outcome, with their echoes of Jeffersonian thought, are mistaken detours.

A. *The Nationalism of American Political Practice*

Any constitutional question that finds James Madison and John Marshall potentially in disagreement is a difficult one. In this conclusion, I can only sketch out the three chief reasons why I disagree with the *Comstock* Justices and the Jeffersonian perspective that they represent with varying degrees of clarity. First, the arc of American political and constitutional history, viewed broadly and over time, has moved decisively in the nationalist direction. My point is not that the extent of federal domestic legislative activity has continuously increased, although with some significant exceptions in the late nineteenth century, this is broadly true. The nationalist constitutional perspective, as I am using the adjective, is that the Constitution allows Congress to address the indefinite range of legitimate governmental concerns, not that it should or must do so. What is most significant legally is that over time, principled opposition to this view of congressional authority, which was never uniform, has waned. There is no inconsistency between adhering to a strong constitutional nationalism, in my sense, while exhibiting a policy-based skepticism about expansive national regulation: Justice Holmes is a good example of someone holding both views.

Since the beginning, then, Congress has in fact been treating its delegated powers as tools for the accomplishment of ends that are not limited to the terms of the powers themselves, and all three branches of the federal government have generally treated this as legitimate, and increasingly so over time. In the early twenty-first century, the American Republic possesses a national government that regulates a vast array of domestic concerns without regard to whether the reasons for regulating them have anything to do with the terms of Article I, Section 8, but this is no modern innovation. As the great constitutional lawyer Charles Black once wrote, the modern federal government emerged through “a process never fully reversed, and but infrequently and then very little checked since our beginnings.”<sup>187</sup> In 1789, for example, the First Congress enacted a tariff law that had as one of its main goals “the encouragement and protection of manufactures” and that accordingly provided indirect federal financial assistance to areas of agriculture and industry that Congress thought it in the public interest to foster, despite the patent

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187. CHARLES L. BLACK, JR., *On Worrying About the Constitution*, in *THE HUMANE IMAGINATION* 118, 126 (1986).

absence of any specific Article I power addressing agriculture or industry.<sup>188</sup> The Jeffersonian limitation on Congress's proper ends was never an unchallenged orthodoxy and has now long been in abeyance.<sup>189</sup> The result has not been, as Jefferson himself feared, a legally unfettered Congress, however broad the authority it wields may be<sup>190</sup>: the enumerated powers, and the implied powers connected to them through the Necessary and Proper Clause, remain the tools Congress must use in carrying out its views of national policy, but the substance of that policy encompasses any legislative end that is not precluded by the Constitution's prohibitions.

The course of political precedent cannot, alone and of its own force, establish the constitutionality of a political practice it embodies,<sup>191</sup> but in this case we are dealing not with a single governmental action but an overall course of legislative activity—one often undertaken in the teeth of constitutional challenge in the legislature and subsequently upheld by the judiciary. As *McCulloch* observed,

a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.<sup>192</sup>

What Chief Justice Marshall thought a powerful consideration with respect to the particular question of the national bank must be even weightier in evaluating the legitimacy of the nationalist answer to the question of which ends are legitimate ones for Congress to pursue. Chief

188. Act of July 4, 1789, ch. 2, 1 Stat. 24, 24 (repealed 1790); see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 56–60 (1997) (discussing the absence of any suggestion that Congress could not “impose tariffs in order to stimulate domestic production” and the widespread assumption that “it [was] appropriate to use the tax power itself for the promotion of goals unrelated to revenue”).

189. See PURCELL, *supra* note 186, at 153 (explaining that the Court “expanded federal executive power” and “extended the powers of Congress dramatically” in the 1930s).

190. See Jefferson, *supra* note 5, at 42 (“[I]nstituting a Congress with power to do whatever would be for the good of the United States . . . would be also a power to do whatever evil they please.”).

191. See *United States v. Comstock*, 130 S. Ct. 1949, 1958 (2010) (“[N]o one acquires a vested or protected right in violation of the Constitution by long use.” (alteration in original) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970))); *id.* at 1979 (Thomas, J., dissenting) (“[T]he antiquity of a practice [cannot] serve as a substitute for its constitutionality . . .”).

192. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

Justice Marshall's ancillary point that in 1819 there were substantial, reasonable reliance interests that would have been thwarted if the national bank were invalidated is also relevant and indeed of immeasurably greater practical import in deciding whether the Jeffersonian view of congressional ends ought to be allowed to put into question the modern national regulatory state.<sup>193</sup> Given the founding-era disagreements, I think it impossible to deny, fairly, that the debate over Congress's legitimate ends is "a doubtful question, one on which human reason may pause, and the human judgment be suspended." That being so, the political history seems almost conclusive, especially in light of the principle, long recognized by the Supreme Court, that "in determining . . . the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."<sup>194</sup>

### B. *The Supreme Court's Adherence to the Nationalist Position*

Second, it is the nationalist position, not the Jeffersonian one, that makes better overall sense of the history of judicial interpretation of Congress's powers.<sup>195</sup> As we have seen, the first part of the twentieth century saw the Supreme Court swing back and forth on several occasions between the two perspectives, and only then, between 1936 and 1941, endorse the nationalist position decisively and, at least before *Comstock*, with impressive consistency.<sup>196</sup> Before and even during the seesaw period, however, as Justice Holmes sarcastically noted in dissenting from the Jeffersonian decision in *Hammer*, the Court's default position was in fact the nationalist one.<sup>197</sup> Congress, the Court concluded long before the New Deal, has the constitutional authority to use its enumerated

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193. *Id.* ("An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.")

194. *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915). As the Court there observed, the Supreme Court first applied this principle in one of the Marshall Court's earliest constitutional decisions, *Stuart v. Laird*, 5 U.S. (1 Cranch) 298 (1803), which upheld the constitutionality of Congress's repeal of the Judiciary Act of 1801. *Midwest Oil Co.*, 236 U.S. at 473.

195. See PURCELL, *supra* note 186, at 153 (summarizing the Court's role in expanding national authority).

196. See *supra* notes 174–84 and accompanying text.

197. See *Hammer v. Dagenhart*, 247 U.S. 251, 278 (1918) (Holmes, J., dissenting) ("I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State."). Justice Holmes's subsequent discussion of the many roughly contemporaneous decisions rejecting the Jeffersonian position was succinct but, I believe, unanswerable. See *id.* at 278–81.

powers “to promote the general welfare, material and moral. . . [by addressing] the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, [and] the systematic enticement to . . . prostitution and debauchery of women”;<sup>198</sup> to employ the taxing power “to protect the consumer” with regulations “caring for the health or safety of citizens or others who buy articles” of commerce;<sup>199</sup> to enact postal regulations to protect “the public morals” and in doing so “exercise [its own] sound discretion” as to what is “criminal or immoral”;<sup>200</sup> “to enhance the respect and love of the citizen for the institutions of his country” by erecting monuments and managing battlefields to provide “a great object lesson to all [and] show a proper recognition of the great things that were done there”;<sup>201</sup> to implement a treaty for the purpose of preventing damage to “a food supply” and to “the [natural] protectors of our forests and our crops”;<sup>202</sup> and to preclude inequitable legal decisions, poverty on the part of those who have served the nation, the evils of alcoholic beverages, and inflation and housing shortages, where any of these were the consequences of war.<sup>203</sup> The war power decisions are of particular

198. *Hoke v. United States*, 227 U.S. 308, 322 (1913).

199. *Felsenheld v. United States*, 186 U.S. 126, 131, 132 (1902).

200. *In re Rapier*, 143 U.S. 110, 132, 134 (1892).

201. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681, 682 (1896).

The provision comes within the rule laid down by Chief Justice Marshall in *McCulloch v. Maryland*, in these words: ‘Let the end be legitimate’ . . . .

. . . Such a [law] seems . . . so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country.

*Id.* at 681–82 (citation omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

202. *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

203. See *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870) (upholding a Civil War era act of Congress suspending statutes of limitations in state courts during the period the war prevented prosecution of civil actions because Congress’s use of the “war power” to “promote[] justice and honesty” is “within the canons of construction laid down by Chief Justice Marshall” in *McCulloch*); *United States v. Hall*, 98 U.S. 343, 351 (1878) (stating that Congress may grant pensions to those “wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out”); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 155–56 (1919) (upholding a wartime prohibition law, including its continuance during the period following the end of hostilities, even after conceding that Congress lacks the police power authority to set alcohol policy); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947) (stating that the war power “is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them” and upholding enforcement

relevance to *Comstock* in that they consistently upheld the legitimacy of Congress's using the "implied war powers" to address a perceived social problem even after the end of the circumstance—military hostilities—that gave rise to Congress's authority to use the powers in the first place.<sup>204</sup>

In some of these cases, with sufficient ingenuity, it is possible to shoehorn Congress's clearly extra-Article I goals into the ends apparent on the face of one or the other of its enumerated powers, but taken as a whole, the decisions only make sense on the assumption that the legitimacy of Congress's purposes in enacting legislation is not limited by the terms of Article I, including the Necessary and Proper Clause, even though the means it rightly may use are. The great majority of the Court's comments on the scope of Congress's legitimate purposes, even before the Court formally rejected the Jeffersonian position during the New Deal, came to the nationalist conclusion that an "act [of Congress] may not be declared unconstitutional because its effect may be to accomplish another purpose as well as" that implicit in the language of the enumerated power Congress is carrying into execution.<sup>205</sup> Justice Thomas's suggestion that § 4248 is unconstitutional because Congress clearly wished to address sexual violence—a goal he rightly identifies as within the states' police power<sup>206</sup>—and that the provision pursues that intention by using the tool of civil commitment—an exercise of the police power when undertaken by a state—is flatly contrary to the Court's longstanding and repeated insistence that

when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.<sup>207</sup>

The Court has also repeatedly insisted that it is constitutionally immaterial that "ends other than [the purpose related to the enumerated

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provisions of a price control act); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948) (upholding a rent control law enacted after the end of hostilities because Congress's "war power does not necessarily end with the cessation of hostilities").

204. *Hamilton*, 251 U.S. at 155. The parallel to *Comstock* is clear: the constitutional concern over § 4248 is in part that the provision employs implied powers—to enact criminal laws and create a federal prison system—in order to exercise federal legislative jurisdiction over a federal prisoner "even after the Government loses the authority to prosecute him for a federal crime." *United States v. Comstock*, 130 S. Ct. 1949, 1978 (Thomas, J., dissenting).

205. *United States v. Doremus*, 249 U.S. 86, 94 (1919).

206. See *Comstock*, 130 S. Ct. at 1982 (Thomas, J., dissenting) ("Absent congressional action that is in accordance with, or necessary and proper to, an enumerated power, the duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States.").

207. *Hamilton*, 251 U.S. at 156.

power being executed] will also be served, or [even that the enumerated-power end] may be relatively of lesser importance.”<sup>208</sup> The old Jeffersonian decisions such as *Hammer*, to the contrary, do support Justice Thomas’s argument, but they were aberrational when they were decided and now, of course, are altogether discredited—unless *Comstock* has set that in question.<sup>209</sup>

But what about *McCulloch*, which the *Comstock* opinions agreed is the wellspring of sound judicial reasoning about the Necessary and Proper Clause? As we saw above, the text of Chief Justice Marshall’s opinion is not logically inconsistent with a Jeffersonian understanding of the ends of Congress, and his announcement that the Court would strike down pretextual use of Congress’s powers “for the accomplishment of objects not intrusted to the government” fits comfortably within the Jeffersonian model. The tone of Chief Justice Marshall’s language, however, seems unmistakably hostile to the enterprise of cutting down the reach of Congress’s authority through technical verbal arguments or judicial reevaluations of Congress’s judgments. We have, furthermore, an interpretation of *McCulloch*’s implications for the Jeffersonian-nationalist dispute over the scope of Congress’s constitutional ends written by Chief Justice Marshall himself, in a newspaper essay that he published in the summer of 1819 under a *nom de plume*. Echoing his assertion in *McCulloch* that “we must never forget, that it is a *constitution* we are expounding,”<sup>210</sup> Chief Justice Marshall wrote:

The object of the instrument is not a single one which can be minutely described, with all its circumstances [but] . . . a general system for all future times, to be adapted by those who administer it, to all future occasions that may come within its own view. From its nature, such an instrument can describe only the great objects it is intended to accomplish, and state in general terms, the specific powers which are deemed necessary for those objects. To direct the manner in which these powers are to be exercised, the means by which the objects of the government are to be effected, a legislature is granted.<sup>211</sup>

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208. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).

209. *See United States v. Darby*, 312 U.S. 100 (1941). Referring specifically to *Hammer*, Professor Black noted that “[n]o ancient ramparts were being manned here. The ancient ramparts were and are imaginary.” BLACK, *supra* note 187, at 126.

210. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

211. John Marshall, “*A Friend of the Constitution*” *Essay No. III*, ALEXANDRIA GAZETTE, July 2, 1819 (signing his essay originally under the name *A Friend of the Constitution*), reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 122, at 167, 170–71.

In this passage, Chief Justice Marshall clearly distinguished “the great objects” that the Constitution “describe[s]” as the goals of the federal government it creates from “the specific powers which are deemed necessary for those objects” and those powers in turn from “the means” Congress is empowered to select in order to effect “the objects of the government.” The “specific powers” must be the powers enumerated in Article I, and “the means” obviously are the actual legislative choices Congress may make pursuant to the enumerated powers and the Necessary and Proper Clause so that the Constitution’s “principles [may] be applied to particulars.”<sup>212</sup> The constitutional description of the great objects of the federal government, which Chief Justice Marshall’s syntax clearly distinguishes from its specification of federal powers, can only be the Preamble or the reference in Article I, Section 8 to “provid[ing] for the common Defence and general Welfare”<sup>213</sup> if it is not the entirely indefinite range of legitimate legislative objectives open to the legislature in a republic.<sup>214</sup> Whatever we are to make of the pretext passage in *McCulloch*,<sup>215</sup> Chief Justice Marshall clearly did not think that Congress, or the Court, is supposed to determine the legitimacy of Congress’s ends by the sort of textual exegesis the Jeffersonians required.<sup>216</sup> I would count *McCulloch*, too, in the long list of judicial opinions acting on the nationalist view of Congress’s legitimate ends.

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212. *See id.*

213. U.S. CONST. art. I, § 8.

214. The differences between these three possibilities are purely semantic. As Madison had observed two years earlier, “the terms ‘common defense and general welfare’ embrac[e] every object and act within the purview of a legislative trust.” Madison, *supra* note 161, at 313. This interpretation of Chief Justice Marshall’s views is confirmed by his opinion in *Cohens v. Virginia*, where he carefully distinguished the “ample powers” the people “confided” in the “supreme government” from “the great purposes for which they were so confided,” which Marshall explained by quoting the Preamble. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 381 (1821). Immediately thereafter, Marshall again drew a distinction between the government’s “ample powers” and “these interesting purposes.” *Id.* at 382.

215. *McCulloch*, 17 U.S. (4 Wheat.) at 423 (“Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”).

216. Chief Justice Marshall’s essay gave as an example of a federal law enacted “fraudulently . . . to the destruction of the fair land marks of the constitution” an act of Congress “alter[ing] the law of descents” as a supposed exercise of the taxing power or of the Article IV duty to guarantee a republican form of government. He did not explain how the Court would recognize that Congress was acting fraudulently. Marshall, *supra* note 211, at 173.



*C. The Proper Role of Judicial Review*

James Madison's chief objection to the opinion of the Court in *McCulloch* was that he feared that in practice its reasoning would "break down the landmarks intended by a specification of the Powers of Congress," and in particular that it would "relinquish . . . all [judicial] controul on the Legislative exercise of unconstitutional powers."<sup>217</sup> "[S]uppose Congress should, as would doubtless happen, pass unconstitutional laws . . . as means expedient, convenient or conducive to the accomplishment of objects entrusted to the Government; by what handle could the Court take hold of the case?"<sup>218</sup> Madison's worry seems to me unanswerable, in the terms he framed it, and as a consequence I do not think that the pretext inquiry Chief Justice Marshall posited in *McCulloch*, and that Justice Thomas applied in *Comstock*, is workable without a judicial revolution that would fly in the face of the considerations of political practice and longstanding Court precedent discussed above. It does not follow, however, that we must accept the inevitable "exclu[sion of] the judicial authority of the United States from its participation in guarding the boundary" of congressional power that Madison wanted to avert.<sup>219</sup>

The fundamental role of judicial review in the American system is not to hold the balance between national and state power, or to serve as the tribune of the people against congressional tyranny; it is to uphold the rule of law by determining, in cases where the issue is properly presented, whether federal legislation executes one of the enumerated powers, either directly or through the mediation of the Necessary and Proper Clause. The Court fully executes *that* enumerated Article III power and duty when it applies whatever the relevant constitutional doctrine may be: a unanimous opinion in *Comstock* that § 4248 is constitutional on the basis of what I have called the obvious rationale would have upheld the rule of law just as thoroughly as an opinion invalidating it on cogent grounds—far more so, of course, if my legal argument in defense of the provision is persuasive—and either would have upheld the rule of law more clearly than the muddled opinions that

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217. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 359, 359–60 (Marvin Meyers ed., rev. ed. 1981).

218. *Id.* at 360.

219. Madison, *supra* note 161, at 313.

were actually filed in the case. Judicial review directed at ensuring that federal legislation meets the legal test of derivation from the enumerated powers is both possible under the nationalist view and necessary to maintain its legitimacy.

It is true that modern constitutional doctrine, far more often than not, leads to a decision in favor of Congress's legislative authority, but that is troubling only on the assumption that we ought to read the Constitution to limit the Republic to a significantly weaker national government than the Republic's political processes have created over time. In an unduly neglected paragraph in *McCulloch*, Chief Justice Marshall affirmed that "a bold and daring usurpation [of illegitimate legislative power] might be resisted, after an acquiescence still longer and more complete than this," and he qualified the precedential force of practice by limiting it to questions "in the decision of which the great principles of liberty are not concerned."<sup>220</sup> But it is difficult to see as a usurpation a view of national power that has repeatedly been endorsed "by every authority that could conceivably be thought competent"—the two houses of Congress, the President, the Supreme Court, the electorate—under conditions of political freedom that have generally only become more robust because of the exercise of national authority.<sup>221</sup> Unlike the Jeffersonian constitutional view, which would require the judicial imposition of decentralizing results on the country, the nationalist view is permissive, recognizing Congress's legislative prerogative to come to politically Jeffersonian as well as more centralizing practical outcomes. The political process is perfectly capable, if there is the political will so to use it, of reversing the historical growth of national power and reducing the reach and responsibilities of the federal government.

There is no sound justification, in contrast, for seeing such a reduction of federal responsibility as the duty of the judiciary, and there are serious reasons to doubt that it is within the rightful power of the courts. *McCulloch* was a case about the proper scope of Article III and not merely Article I, and Chief Justice Marshall's opinion embodies his deep concern that judicial review must not lead the Supreme Court inadvertently "to pass the line which circumscribes the judicial department and to tread on legislative ground."<sup>222</sup> The Jeffersonian concern that the modern federal government has become a clumsy as well as an oppressive Leviathan that must be restrained may well be right, but addressing it in any effective manner—short of a wholesale repudiation of the last century and a half of federal legislation—would require the exercise of legislative

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220. *McCulloch*, 17 U.S. (4 Wheat.) at 401.

221. BLACK, *supra* note 187, at 130.

222. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

judgment. If Jeffersonian “strict construction” of congressional power was ever a feasible rule for *courts* to apply—a view Chief Justice Marshall emphatically rejected—it is no longer. And in any event, we need not abandon Jefferson’s basic constitutional concern with freedom when we recognize that it is impossible to reconstitute his views on the legal scope of national authority. “[I]t is not allowable to assume as a postulate,” Chief Justice Marshall wrote in defense of *McCulloch*, “that the cause of liberty must be promoted by deciding the question [of congressional power] against the government of the union.”<sup>223</sup> The American experience has often been that freedom is better guarded by national rather than local power; as a practical matter, Chief Justice Marshall’s nationalism has proven the ally of the cause of liberty for which Jefferson spoke so eloquently.

## VI. CONCLUSION: *COMSTOCK* AND THE FEAR OF POWER

The Necessary and Proper Clause is, as Chief Justice John Marshall and James Madison agreed, essentially redundant: by necessary implication Congress’s legitimate powers would be just as broad if the clause were not part of the constitutional text.<sup>224</sup> For that very reason, questions involving the interpretation of the clause unavoidably present the issue of how we are to understand more generally the scope of legislative power under the Constitution. The better interpretation of the Constitution is that any legislative end is legitimate for *Congress* to pursue if it is legitimate for *any* American legislative body to address. This is broad power indeed, and in this respect—though not of course with regard to the definition of Congress’s enumerated-power tools or the Constitution’s prohibitions—it is beyond the judiciary’s competence to delimit. Justice Holmes once wrote that “[w]e fear to grant power and are unwilling to recognize it when it exists.”<sup>225</sup> The opinions in *Comstock*, and not just the dissent, reveal a Court frightened of democratic power and deeply

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223. John Marshall, “*A Friend of the Constitution*” *Essay No. I*, ALEXANDRIA GAZETTE, June 30, 1819 (signing his essay originally under the name *A Friend of the Constitution*), reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 122, at 155, 159.

224. See *McCulloch*, 17 U.S. (4 Wheat.) at 420 (stating that the clause “does not enlarge [or] restrain” Congress’s powers); Madison, *supra* note 5, at 38 (stating that the clause “is in fact merely declaratory of what would have resulted by unavoidable implication”).

225. *Tyson & Bro. United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting).

reluctant to acknowledge that on some issues, the law of the Constitution requires judges to recognize the exercise of a congressional power that the judges may not second-guess. The Necessary and Proper Clause, as Chief Justice Marshall wrote, does not undercut the principle that “the powers of the government are limited,” but neither does it “impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.”<sup>226</sup> The courts have no proper role in determining which otherwise legitimate governmental concerns Congress should address.

This is not a new issue in American constitutional law. In one of the Supreme Court’s first important decisions, *Calder v. Bull*, Justice James Iredell conceded that when the Court declines to recognize the existence of a proposed constitutional constraint on legislative power, it necessarily allows for the possibility that the legislature will abuse its power in ways that inferring the constraint might have prevented.<sup>227</sup> But the Constitution does not ordain every constraint that some might think advisable, and some constraints on the legislature would deny it powers without which “the operations of Government would often be obstructed, and society itself would be endangered.”<sup>228</sup> In such situations,

[i]t is not sufficient to urge, that the power may be abused, for, such is the nature of all power, such is the tendency of every human institution . . . . We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence.<sup>229</sup>

“[T]he public policy of the United States . . . is for Congress to express”<sup>230</sup> and extends to “every object . . . within the purview of a legislative trust.”<sup>231</sup> Congress surely can abuse the power that this principle recognizes, but if it does, the remedy is, or ought to be, political. To the extent that the Court’s treatment of *Comstock* has obscured that truth about our system, the case—though not the Necessary and Proper Clause—is truly regrettable.

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226. *McCulloch*, 17 U.S. (4 Wheat.) at 420–21.

227. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.).

228. *Id.* at 400.

229. *Id.* The issue before the Court was the applicability of the Ex Post Facto Clause of Article I, Section 10 to state civil legislation, but Justice Iredell was expressly addressing the interpretation of Article I, Section 9’s parallel clause, which applies to Congress, as well in the quoted discussion.

230. *Hammer v. Dagenhart*, 247 U.S. 251, 281 (Holmes, J., dissenting).

231. Madison, *supra* note 161, at 313.