UNITED STATES v. COMSTOCK
130 S. Ct. 1949 (2010)

Justice Breyer delivered the opinion of the Court.

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. 18 U. S. C. § 4248. 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. Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government "of enumerated powers." McCulloch v. Maryland, 4 Wheat. 316, 405 (1819). We conclude that the Constitution grants Congress the authority to enact § 4248 as "necessary and proper for carrying into Execution" the powers "vested by" the "Constitution in the Government of the United States." Art. I, § 8, cl. 18.

I

The federal statute before us allows a district court to order the civil commitment of an individual who is currently "in the custody of the [Federal] Bureau of Prisons," § 4248, if that individual (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." §§ 4247(a)(5)-(6).

In order to detain such a person, the Government must certify to a federal district judge that the prisoner meets the conditions just described. § 4248(a). When such a certification is filed, the statute automatically stays the individual's release from prison, thereby giving the Government an opportunity to prove its claims at a hearing through psychiatric (or other) evidence. If the Government proves its claims by, the court will order the prisoner's continued commitment in "the custody of the Attorney General," who must "make all reasonable efforts to cause" the State where that person was tried, or the State where he is domiciled, to "assume responsibility for his custody, care, and treatment." If either State is willing to assume that responsibility, the Attorney General "shall release" the individual "to the appropriate official" of that State. But if, "notwithstanding such efforts, neither such State will assume such responsibility," then "the Attorney General shall place the person for treatment in a suitable [federal] facility."

II

The question presented is whether the Necessary and Proper Clause, Art. I, §8, cl. 18, grants Congress authority sufficient to enact the statute before us. We conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal

legislation. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," McCulloch, 4 Wheat. at 405, which means that "[e]very law enacted by Congress must be based on one or more of" those powers. But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." McCulloch, 4 Wheat. at 408. Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the authority's "beneficial exercise." Chief Justice Marshall emphasized that the word "necessary" does not mean "absolutely necessary." In language that has come to define the scope of the Necessary and Proper Clause, he wrote:

"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."

We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. Gonzales v. Raich, 545 U. S. 1, 22 (2005) (holding that because "Congress had a rational basis" for concluding that a statute implements Commerce Clause power, the statute falls within the scope of congressional "authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States' " (ellipsis in original)). The relevant inquiry is simply "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power" or under other powers that the Constitution grants Congress the authority to implement. Gonzales, supra, at 37 (Scalia, J., concurring in judgment) (quoting United States v. Darby, 312 U. S. 100, 121 (1941)).

We have also recognized that the Constitution "addresse[s]" the "choice of means"

"primarily ... to the judgment of Congress. 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." Burroughs v. United States, 290 U. S. 534, 547-548 (1934). See also Lottery Case, 188 U. S. 321, 355 (1903) ("[T]he Constitution ... . leaves to Congress a large discretion as to the means that may be employed in executing a given power"); Morrison, supra, at 607 (applying a "presumption of constitutionality" when examining the scope of Congressional power); McCulloch, supra, at 410, 421.

Thus, the Constitution, which 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," Art. I, § 8, cls. 6, 10; Art. III, §3, nonetheless grants Congress broad authority to create such crimes. See McCulloch ("All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress"). And Congress routinely exercises its authority to enact criminal laws in

furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth.

Similarly, Congress, in order to help ensure the enforcement of federal criminal laws enacted in furtherance of its enumerated powers, "can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there." Moreover, Congress, having established a prison system, can enact laws that seek to ensure that system's safe and responsible administration by, for example, requiring prisoners to receive medical care and educational training, and can also ensure the safety of the prisoners, prison workers and visitors, and those in surrounding communities by, for example, creating further criminal laws governing entry, exit, and smuggling, and by employing prison guards to ensure discipline and security.

Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of "carrying into Execution" the enumerated powers, authority granted by the Necessary and Proper Clause.

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. A history of involvement, however, can nonetheless be "helpful in reviewing the substance of a congressional statutory scheme" and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests.

Here, Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment. In 1855 it established Saint Elizabeth's Hospital in the District of Columbia to provide treatment to "the insane of the army and navy . . . and of the District of Columbia." In 1857 it provided for confinement at Saint Elizabeth's of any person within the District of Columbia who had been "charged with [a] crime" and who was "insane" or later became "insane during the continuance of his or her sentence in the United States penitentiary." In 1874, expanding the geographic scope of its statutes, Congress provided for civil commitment in federal facilities (or in state facilities if a State so agreed) of "all persons who have been or shall be convicted of any offense in any court of the United States" and who are or "shall become" insane "during the term of their imprisonment." And in 1882 Congress provided for similar commitment of those "charged" with federal offenses who become "insane" while in the "custody" of the United States. Thus, over the span of three decades, Congress created a national, federal civil-commitment program under which any person who was either charged with or convicted of any federal offense in any federal court could be confined in a federal mental institution. These statutes did not raise the question presented here, for they all provided that commitment in a federal hospital would end upon the completion of the relevant "terms" of federal "imprisonment" as set forth in the underlying criminal sentence or

statute. But in the mid-1940's that proviso was eliminated.

In 1945 the Judicial Conference of the United States proposed legislative reforms of the federal civil-commitment system. Between 1948 and 1949, Congress modified the law. It provided for the civil commitment of individuals who are, or who become, mentally incompetent at any time after their arrest and before the expiration of their federal sentence if the mentally ill individual's release would "probably endanger the safety of the officers, the property, or other interests of the United States." In 1984, Congress altered the language so as to authorize civil commitment if, in addition to the other conditions, the prisoner's "release would create a substantial risk of bodily injury to another person or serious damage to the property of another."

In 2006, Congress enacted the particular statute before us. It differs from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. Notably, many of these individuals were likely already subject to civil commitment. Aside from its specific focus on sexually dangerous persons, § 4248 is similar to the provisions first enacted in 1949. In that respect, it is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. If a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, §8, cl. 3). And if confinement of such an individual is a "necessary and proper" thing to do, then how could it not be similarly "necessary and proper" to confine an individual whose mental illness threatens others to the same degree?

Moreover, § 4248 is "reasonably adapted" to Congress' power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority). Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct" would pose an especially high danger to the public if released. And Congress could also have reasonably concluded (as detailed in the Judicial Conference's report) that a reasonable number of such individuals would likely not be detained by the States if released from federal custody. H. R. Rep. No. 1319, at 2; Committee Report 7-11. Here Congress' desire to address the specific challenges identified in the Reports cited above, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies "review for means-end rationality," i.e., that it satisfies the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority.

Fourth, the statute properly accounts for state interests. Respondents and the dissent contend that § 4248 violates the Tenth Amendment because it "invades the province of state sovereignty" in an area typically left to state control. But the Tenth Amendment's text is clear: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." 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."

Nor does this statute invade state sovereignty or otherwise improperly limit the scope of "powers that remain with the States." To the contrary, it requires accommodation of state interests: The Attorney General must inform the State in which the federal prisoner "is domiciled or was tried" that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual.

Fifth, the links between § 4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not "pile inference upon inference" in order to sustain congressional action under Article I, Lopez, 514 U. S. at 567, respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. But this argument is irreconcilable with our precedents. Take Greenwood as an example. In that case we upheld the (likely indefinite) civil commitment of a mentally incompetent federal defendant who was accused of robbing a United States Post Office. The underlying enumerated Article I power was the power to "Establish Post Offices and Post Roads." Art. I, § 8, cl. 7. But, as Chief Justice Marshall recognized in McCulloch,

"the power 'to establish post offices and post roads' ... is executed by the single act of making the establishment... . [F]rom this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail."

And, as we have explained, from the implied power to punish we have further inferred both the power to imprison and, in Greenwood, the federal civil-commitment power. Our necessary and proper jurisprudence contains multiple examples of similar reasoning.

Indeed even the dissent acknowledges that 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. Of course, each of those powers is ultimately "derived from" an enumerated power. And, as the dissent agrees, that enumerated power is "the enumerated power that justifies the defendant's statute of conviction." Neither we nor the dissent can point to a single specific enumerated power "that justifies a criminal defendant's arrest or conviction" in all cases because Congress relies on different

enumerated powers (often, but not exclusively, its Commerce Clause power) to enact its various federal criminal statutes. But every such statute must itself be legitimately predicated on an enumerated power. And the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well. Thus, we must reject respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.

Nor need we fear that our holding today confers on Congress a general "police power, which the Founders denied the National Government and reposed in the States." Morrison, 529 U. S. at 618. As the Solicitor General repeatedly confirmed at oral argument, § 4248 is narrow in scope. It has been applied to only a small fraction of federal prisoners. Thus, far from a "general police power," § 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest in the responsible administration of its prison system.

To be sure, as we have previously acknowledged,

"The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. 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." New York, 505 U. S. at 157.

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." McCulloch.

We take these five considerations together. They include: (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. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.

Justice Kennedy, concurring in the judgment.

The Court concludes that, when determining whether Congress has the authority to enact a

specific law under the Necessary and Proper Clause, we look "to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." The terms "rationally related" and "rational basis" must be employed with care, particularly if either is to be used as a stand-alone test. The phrase "rational basis" most often is employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause. The phrase, then, should not be extended uncritically to the issue before us.

The operative constitutional provision in this case is the Necessary and Proper Clause. This Court has not held that the Lee Optical test, asking if "it might be thought that the particular legislative measure was a rational way to correct" an evil, is the proper test in this context. Rather, under the Necessary and Proper Clause, application of a "rational basis" test should be at least as exacting as it has been in the Commerce Clause cases, if not more so. Indeed, the cases the Court cites in the portion of its opinion referring to "rational basis" are predominantly Commerce Clause cases, and none are due process cases.

There is an important difference between the two questions, but the Court does not make this distinction clear. Raich, Lopez, and Hodel were all Commerce Clause cases. Those precedents require a tangible link to commerce, not a mere conceivable rational relation, as in Lee Optical. " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " Lopez, supra, at 557, n. 2. The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. While undoubtedly deferential, this may well be different from the rational-basis test as Lee Optical described it.

A separate concern stems from the Court's explanation of the Tenth Amendment. I had thought it a basic principle that the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government. The Constitution delegates limited powers to the National Government and then reserves the remainder for the States (or the people), not the other way around, as the Court's analysis suggests. And the powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.

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. See Lopez, 514 U. S., at 580-581 (Kennedy, J., concurring); see also McCulloch, supra, at 421 (powers "consist[ent] with the letter and spirit of the constitution, are constitutional"). 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.

The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions. 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.

These remarks explain why the Court ignores important limitations stemming from federalism principles. Those principles are essential to an understanding of the function and province of the States in our constitutional structure.

As stated at the outset, in this case Congress has acted within its powers to ensure that an abrupt end to the federal detention of prisoners does not endanger third parties. Federal prisoners often lack a single home State to take charge of them due to their lengthy prison stays, so it is incumbent on the National Government to act. 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.

I would note, as the Court's opinion does, that § 4248 does not supersede the right and responsibility of the States to identify persons who ought to be subject to civil confinement. The federal program in question applies only to those in federal custody and thus involves little intrusion upon the ordinary processes and powers of the States. Importantly, §4248(d) requires the Attorney General to release any civil detainee "to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment," providing a strong assurance that the proffered reason for the legislation's necessity is not a mere artifice. With these observations, I concur in the judgment of the Court.

Justice Alito, concurring in the judgment.

I am concerned about the breadth of the Court's language and the ambiguity of the standard that the Court applies, but I am persuaded, on narrow grounds, that it was "necessary and proper" for Congress to enact the statute at issue in this case in order to "carr[y] into Execution" powers specifically conferred on Congress by the Constitution.

I entirely agree with the dissent that "[t]he Necessary and Proper Clause empowers Congress to enact only those laws that 'carr[y] into Execution' one or more of the federal powers enumerated in the Constitution," but § 4248 satisfies that requirement because it 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. The First Congress enacted federal criminal laws, created federal law enforcement and prosecutorial positions, established a federal court system, provided for the imprisonment of persons convicted of federal crimes, and gave United States marshals the responsibility of securing federal prisoners.

The only additional question presented here is whether, in order to carry into execution the enumerated powers on which the federal criminal laws rest, it is also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems. In my view, the answer to that question is "yes." Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.

The Necessary and Proper Clause does not give Congress carte blanche. Although the term "necessary" does not mean "absolutely necessary" or indispensable, the term requires an "appropriate" link between a power conferred by the Constitution and the law enacted by Congress. See McCulloch v. Maryland, 4 Wheat. 316, 415 (1819). And it is an obligation of this Court to enforce compliance with that limitation.

The law in question here satisfies that requirement. This is not 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. For this reason, I concur in the judgment.

Justice Thomas, with whom Justice Scalia joins in all but Part III-A-1-b, dissenting.

Chief Justice Marshall famously summarized Congress' authority under the Necessary and Proper Clause in McCulloch, which has stood for nearly 200 years as this Court's definitive interpretation of that text: "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." McCulloch's summation is descriptive of the Clause itself, providing that federal legislation is a valid exercise of Congress' authority under the Clause if it satisfies a two-part test: 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) it is designed to serve. McCulloch accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry. The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit."

Critically, however, McCulloch underscores the linear relationship the Clause establishes between the two inquiries: 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.

This limitation was of utmost importance to the Framers. During the State ratification debates, Anti-Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power. Federalist supporters of the Constitution swiftly refuted that charge, explaining that the Clause did not grant Congress any freestanding authority, but instead made explicit what was already implicit in the grant of each enumerated power. Statements by delegates to the ratification conventions indicate that this understanding was widely held by the founding generation. Roughly 30 years after ratification, McCulloch firmly established this understanding in our constitutional jurisprudence. Since then, our precedents uniformly have maintained that the Necessary and Proper Clause is not an independent fount of congressional authority, but rather "a caveat that Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.' "

Section 4248 establishes a federal civil-commitment regime for certain persons in the custody of the Federal Bureau of Prisons. No enumerated power in Article I, § 8, expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Accordingly, § 4248 can be a valid exercise of congressional authority only if it is "necessary and proper for carrying into Execution" one or more of those federal powers actually enumerated in the Constitution.

Section 4248 does not fall within any of those powers. The Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable. Indeed, not even the Commerce Clause can justify federal civil detention of sex offenders. Under the Court's precedents, Congress may not regulate noneconomic activity (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce. That limitation forecloses any claim that § 4248 carries into execution Congress' Commerce Clause power, and the Government has never argued otherwise. This Court, moreover, consistently has recognized that the power to care for the mentally ill and, where necessary, the power "to protect the community from the dangerous tendencies of some" mentally ill persons, are among the numerous powers that remain with the States.

Section 4248 closely resembles the involuntary civil-commitment laws that States have enacted under their parens patriae and general police powers. Indeed, it is clear that § 4248 is aimed at protecting society from acts of sexual violence, not toward "carrying into Execution" any enumerated power or powers of the Federal Government. To be sure, protecting society from violent sexual offenders is certainly an important end. But the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.

In my view, this should decide the question. Section 4248 runs afoul of our settled understanding of Congress' power under the Necessary and Proper Clause. Congress may act under that Clause only when its legislation "carr[ies] into Execution" one of the Federal Government's enumerated powers. Section 4248 does not execute any enumerated power. Section 4248 is therefore unconstitutional.

The Court perfunctorily genuflects to McCulloch's framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that § 4248 is a " 'necessary and proper' " adjunct to a jumble of unenumerated "authorit[ies]." The Court's newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers. 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 why McCulloch is no longer good enough and 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.

Not long ago, this Court described the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action." Regrettably, today's opinion breathes new life into that Clause, and--the Court's protestations to the contrary notwithstanding--comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that "we always have rejected," Lopez, 514 U. S. at 584 (Thomas, J., concurring). In so doing, 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." I respectfully dissent.