For Carrying into Execution the Foregoing Powers: Interpretative Theories of the Necessary and Proper Clause in Light of United States v. Comstock

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“FOR CARRYING INTO EXECUTION THE FOREGOING POWERS”
INTERPRETATIVE THEORIES OF THE NECESSARY AND PROPER CLAUSE
IN LIGHT OF UNITED STATES V. COMSTOCK

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INTRODUCTION

The Necessary and Proper Clause, also known as the Sweeping Clause, is the last of the eighteen enumerated powers granted to Congress under Article I, Section 8 of the Constitution. The clause provides Congress with the ability to make laws necessary and proper to carry out the exercise of its powers.

Contrary to what is often believed, the New Deal’s expansion of Congressional powers was not the product of the Supreme Court directly extending the scope of the Commerce Clause. Instead, it was the Court’s liberal interpretation of the Necessary and Proper Clause that enabled the Court to uphold laws as being “necessary and proper” to carry out Congress’s other enumerated powers. Therefore, its meaning is of vital importance in constitutional law.

The lack of attention given to the Necessary and Proper Clause at the Philadelphia Convention, in addition to its vague language, has opened the door to a wide variety of interpretative theories that attempt to discern the Clause’s original meaning. Among these, and the focus of this paper, are Randy Barnett’s original public meaning approach, Gary U.S CONSTITUTION. Art. I, § 8.

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1 U.S. CONST. art. I, § 8.
2 The clause also grants Congress the “horizontal” power to make laws to assist the Executive and Judiciary branches in carrying out their enumerated powers. This paper will focus on Congress’s “vertical” power, that is, Congress’s power to pass laws to implement its own enumerated powers. For an examination of the horizontal powers granted to Congress under the Necessary and Proper Clause, see William Van Alstyne, The Role of Congress in Determining Incidental Power of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 LAW & CONTEMP. PROBS., (1976).
4 See Mark A. Graber, Unnecessary and Unintelligible, 12 CONST. COMMENT. 167, 167 (1995).
5 Id.
6 See infra Parts II-V.
7 Barnett, supra note 3.
Lawson and Patricia Granger’s theory focusing on the propriety element of the clause,\(^8\) Robert Natelson analyzing the origins of the clause from an agency-law perspective,\(^9\) and Robert Cooter and Neil Siegel’s general but related theory interpreting congressional powers of Article I, Section 8 under collective-action federalism.\(^{10}\)

In order to discuss and analyze the foregoing theories, it will be necessary to apply their methodology to a specific case, *United States v. Comstock*,\(^{11}\) a recently decided Supreme Court case interpreting the Clause. Part I provides the factual and procedural history of the case, and summaries of the majority, concurring, and dissenting opinions. Parts II, III, IV and V summarize the four interpretative theories, each being followed by its application to the facts of *Comstock*. In applying the theories, the following central questions involved in the case will be considered: what the standard of review applicable to laws enacted under the Clause should be, whether the often-ignored propriety element of the clause has independent significance, and whether there are prudential considerations that may justify implying Congressional powers from the structure and penumbras of the Constitution. The paper will end with a brief conclusion.

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\(^{11}\) 130 S. Ct. 1949 (2010).
I. UNITED STATES V. COMSTOCK

A. Factual and Procedural History

Decided in May 2010, United States v. Comstock involved the constitutionality of Section 424812 of the Adam Walsh Child Protection and Safety Act.13 Section 4248 authorizes the civil commitment of federal prisoners beyond the date of their original release if the government proves by clear and convincing evidence that a federal prisoner: (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.”14 In November and December, 2006, five individuals, including Graydon Comstock, were indicted for sex crimes related to minors.15 Four of them pleaded guilty to the crimes, while the fifth was unable to stand trial due to mental incompetence.16 Prior to their release from prison, the government filed certifications in the Federal District Court for the Eastern District of North Carolina requesting their civil commitment under Section 4248.17

All five respondents filed motions to dismiss the civil commitment proceedings arguing that the law was unconstitutional as it violated the Necessary and Proper Clause for not being related to a specific enumerated power. In addition, they argued that the law was unconstitutional under the ex post facto clause, the double jeopardy clause, the Sixth and Eighth

14 Comstock, 130 S. Ct. at 1954 (citing 18 U.S.C. §§ 4247(a)(5)-(6)).
15 Id. at 1955.
16 Id.
17 Id.
amendments, and the Fifth Amendment’s due process and equal protection clauses.\textsuperscript{18} The district court granted respondents’ motions to dismiss for two reasons.\textsuperscript{19} First, the court found that because they could be deprived of their liberty indefinitely, the “clear and convincing” standard was insufficient and the heightened standard of beyond a reasonable doubt would have to apply instead. Second, it found that Congress did not have the power to enact Section 4248 as it did not execute any of the powers enumerated in Article I, Section 8.\textsuperscript{20} On appeal, the Court of Appeals for the Fourth Circuit affirmed the lower court’s decision, but only on the grounds related to the Necessary and Proper Clause.\textsuperscript{21} Unlike the lower court, no findings were made regarding the respondents’ individual rights challenges.\textsuperscript{22} In July, 2009, the Supreme Court granted certiorari.\textsuperscript{23}

B. \textit{The Majority Opinion of the Court}

In a 7-2 decision, the constitutionality of Section 4248 was upheld. Justice Stephen Breyer, writing for the majority, “assumed” without deciding that respondents’ individual rights had not been violated,\textsuperscript{24} making the sole issue before the Court whether Section 4248 was necessary and proper to carry into execution an enumerated congressional power. More specifically, the issue was whether Section 4248 “constitute[d] a means that is \textit{rationally related} to the implementation of a constitutionally enumerated power.”\textsuperscript{25} Although the majority

\begin{itemize}
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id. at 1956.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id. at 1956-57.}
\end{itemize}
acknowledged their inability to identify the specific enumerated power being executed by means of Section 4248, they found that Section 4248 was 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.

In other words, because the power of making law naturally involves the power to punish and enforce such laws, the majority found that the civil commitment of federal prisoners was “necessary and proper” to carry out Congress’s authority to create and run a penal system. The justification for this holding was based on five considerations.

First, the Court pointed to the “broad authority” that the Necessary and Proper Clause grants Congress to pass laws. Quoting Chief Justice John Marshall in *McCulloch v. Maryland*, the Court stated that Congress may “legislate on that vast mass of incidental powers which must be involved in the constitution.” This broad authority also justified the majority’s employment of a rational-basis review.

Second, the Court determined that because there was a “longstanding history” of federal statutes regulating the mental health of prisoners, the civil commitment provided for in Section 4248 was only “a modest addition to a longstanding federal statutory framework,” and provided helpful information in reviewing the “reasonableness of the relation between the new statute and

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26 Id. at 1964 (“Neither we nor the dissent can point to a single specific enumerated power ‘that justifies a criminal defendant’s arrest or conviction.’”).
27 Id. at 1965.
28 See infra notes 29-48 and accompanying text.
29 Comstock, 130 S. Ct. at 1956.
30 17 U.S. (4 Wheat.) 316 (1819).
31 Comstock, 130 S. Ct. at 1956 (quoting McCulloch, 4 Wheat., at 405).
32 See id.
preexisting federal interests.”

Third, the Court found that because the federal government is the custodian of its prisoners, it has the power to detain them beyond the end of their original prison terms in order to protect the community. Congress’s role as “custodian,” according to the Court, made reasonable Congress’s conclusion that “federal inmates who suffer from a mental illness would pose an especially high danger to the public if released.”

Fourth, the Court determined that the civil commitment statute furthered the interests of the states and did not infringe upon their retained powers under the Tenth Amendment. The Court stated that when powers are delegated to the federal government, the Tenth Amendment does not apply. However, the Court did not identify the specific enumerated power under which Section 4248 was enacted. The Court also decided that the statute did not invade the states’ sovereign powers because after a prisoner was deemed dangerous and subjected to civil commitment, the Attorney General was required to take reasonable steps in encouraging either the state where the crime occurred, or the state where the defendant’s domicile was, to assume custody over the individual. Only in the situation that either state declined to take custody would the federal government retain custody over the individual.

Fifth, the Court found that the link between the civil commitment statute and “an enumerated power” in Article I was not too attenuated, that is, that the statute was “narrow [in] scope.” In doing so, the Court rejected respondents’ argument that a law enacted under the

33 Id. at 1958-61 (discussing the “longstanding history” of “federal prison-related mental-health statutes”).
34 Id. at 1961.
35 Id.
36 Id. at 1962-63.
37 Id. at 1962.
38 See id. at 1962-63.
39 Id. at 1962-63; see also, 18 U.S.C. § 4248(d) (2006).
40 Id.
41 Id. at 1963-65 (emphasis added).
Necessary and Proper Clause cannot be more than one step removed from an enumerated power. In support of this proposition, the Court offered several examples of cases where Congress used similar powers in furtherance of its enumerated ends. In *Greenwood v. United States*,\(^4^2\) for example, the Court upheld a statute under the Necessary and Proper Clause providing for the civil commitment of a mentally incompetent federal defendant who was charged with robbing a United States Post Office.\(^4^3\) In *Sabri v. United States*,\(^4^4\) the Court upheld a statute under the Necessary and Proper Clause that allowed Congress to prevent corrupt public officers from stealing taxpayer dollars in furtherance of the spending clause.\(^4^5\) Also, using the Necessary and Proper Clause, the Court in *United States v. Hall*\(^4^6\) found that Congress had the power to “award ‘pensions to the wounded and disabled’ soldiers” and to “punish anyone who fraudulently appropriated such pensions” in furtherance of Congress’s enumerated power to declare war, to raise and support armies, and to provide and maintain a Navy.\(^4^7\) Based on these cases, the Court rejected the respondents’ argument that there can be only one step between a legislative enactment and an enumerated power.\(^4^8\)

\(^4^2\) 350 U. S. 366 (1956).
\(^4^3\) Id. at 369, 375.
\(^4^4\) 541 U.S. 600 (2004).
\(^4^5\) Id. at 605.
\(^4^6\) 98 U. S. 343 (1879).
\(^4^7\) Id. at 351.
\(^4^8\) *United States v. Comstock*, 130 S. Ct. 1949, 1964 (2010) (“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.”).
C. The Concurring Opinion of Justice Anthony Kennedy

Justice Kennedy concurred with the majority’s central holding that Section 4248 was necessary and proper for Congress to execute its enumerated powers.\footnote{Id. at 1665 (Kennedy, J., concurring).} He also agreed with the majority that a federal law can be more than one step removed from an enumerated power.\footnote{Id. at 1666.}

Justice Kennedy, however, wrote separately to warn about the use of the terms “rational basis” and “rationally related.”\footnote{Id.} The phrase “rational basis,” he explained, is usually utilized in the context of due process cases involving non-fundamental liberties.\footnote{Id.} This test is ultra-deferential and does not require that the law be legally consistent with its aims in every respect.\footnote{Id.}

According to Justice Kennedy, this test should not be applied to laws enacted under the Necessary and Proper Clause.\footnote{Id. at 1667} On the other hand, the more stringent form of rational-basis review usually involved in Commerce Clause cases should be used to review legislation enacted under the Clause.\footnote{Id.} Under this standard of review, although deference is owed to legislation, there is a requirement for a “demonstrated link in fact, based on empirical demonstration.”\footnote{Id.}

Justice Kennedy also wrote separately to clarify the majority’s explanation of the Tenth Amendment.\footnote{Id.} He stated that “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.”\footnote{Id.}
D. The Concurring Opinion of Justice Samuel Alito

Justice Alito expressed his agreement with the dissent that the Necessary and Proper clause only allows legislation that carries into execution the powers enumerated in Article I, Section 8.\textsuperscript{59} However, he found that Section 4248 met this requirement on “narrow grounds.”\textsuperscript{60} Because committing federal prisoners is necessary and proper to carry into execution “the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted,” it passed constitutional muster.\textsuperscript{61} In other words, because Congress has the power to legislate and criminalize, it must also be allowed to provide for the operation of a federal criminal justice system.

Justice Alito also pointed out that Section 4248 had been enacted as response to the several states’ unwillingness and/or inability to take responsibility for the “custody, care, and treatment” of former federal prisoners.\textsuperscript{62} He explained that at the expiration of their sentences, particularly lengthy ones, many former prisoners find themselves without substantial ties to either the state where they used to domicile or the state where they had been convicted.\textsuperscript{63} Due to the high costs involved in taking custody over these individuals, coupled with the lack of ties between the individual and the state, many states were discouraged to create civil commitment programs to rehabilitate these individuals.\textsuperscript{64}

Justice Alito also wrote separately to clarify that Congress did not have “carte blanche” in enacting laws.\textsuperscript{65} He found that there must be an “appropriate ‘link’” between a delegated power and any piece of legislation, rejecting the majority’s employment of an ultra-deferential rational

\begin{itemize}
\item \textsuperscript{59} Id. at 1669 (Alito, J., concurring).
\item \textsuperscript{60} Id. at 1668-69.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id. at 1670.
\item \textsuperscript{65} Id.
\end{itemize}
basis review. He concluded by stating that this was not a law that merely rationally related to an enumerated power, but one that had a “substantial link” to one or more of Congress’s enumerated powers.

E. The Dissenting Opinion of Justice Clarence Thomas, joined by Justice Antonin Scalia

Throughout his dissenting opinion, Justice Thomas, joined by Justice Scalia, emphasized his position that Congress may legislate only in order to carry out one or more of its enumerated powers. Because no enumerated power allows Congress to enact civil commitment programs, nor is Section 4248 necessary to carry into execution one or more congressional enumerated powers, Justice Thomas found it to be unconstitutional.

Justice Thomas’s dissenting opinion was based on his disagreement with the majority’s reliance on the five considerations that justified the constitutionality of Section 4248. Justice Thomas pointed to the ambiguity created by the “novel five-factor test,” in particular because the majority failed to specify how many factors out of the list of five considerations must be present in order for a law to pass constitutional muster. Justice Thomas also found that the five-factor test was incompatible with Chief Justice Marshall’s seminal test in *McCulloch*, which had been consistently used by the Court for two centuries in interpreting the Necessary and Proper clause. Before beginning his criticism of the majority’s rationale, Justice Thomas laid down the two-prong *McCulloch* test in order to further emphasize the manner in which the majority had departed from it. *McCulloch* requires for (1) a law to “be directed toward a ‘legitimate’ end” (one expressly delegated to the federal government), and (2) for there to be “a necessary and 

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66 Id.
67 Id.
68 Id. at 1970-83 (Thomas, J., dissenting).
69 Id. at 1973.
70 Id. at 1974-75.
71 Id.
proper fit between the ‘means’ and the ‘end.’” For it to be “necessary” under the *McCulloch* test, Justice Thomas explained, the law must be “plainly adapted” to the legitimate end. For it to be “proper,” it must not be prohibited by nor go against the spirit of the Constitution. Justice Thomas clarified that the order of the test is of vital importance. First, as required by the first prong, it must be determined that there is a legitimate end to be pursued (i.e., an expressly delegated power). If no legitimate end can be identified, then the second prong focusing on the necessity and propriety of the law is irrelevant.

Justice Thomas continued his opinion by discussing the first and last considerations reviewed by the Court in upholding the statute; namely, the consideration that Congress’s authority under the Clause was “broad” and the consideration that the degree of connection between Section 4248 and an enumerated power was not too attenuated.

In discussing the majority’s first consideration, Justice Thomas first recognized that Congress is allowed “a certain degree of deference” in defining what constitutes necessary and proper means to carry out enumerated powers. However, he found that by beginning its analysis with the determination that Congress’s authority was “broad” and that the standard of review applicable to Section 4248 was rational-basis review, the majority had “bypasse[d] *McCulloch’s* first step.” The correct inquiry under *McCulloch*, according to Justice Thomas, would have been to ask the “simple question” of “what enumerated power [Section] 4248 ‘carr[ies] into execution.’” In a footnote, Justice Thomas stated that he was not going to reach a determination concerning the standard of review applicable to Section 4248 because such a

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72 *Id.* at 1971-72.
73 *Id.* at 1972.
74 *Id.*
75 *Id.* at 1972.
76 *Id.* at 1975.
77 *Id.*
78 *Id.*
79 *Id.*
finding would concern *McCulloch*’s second step.\(^80\) Nevertheless, Justice Thomas pointed to his dissenting opinion in *Gonzales v. Raich*, where he determined that “for a law to be within the Necessary and Proper Clause it must bear an ‘obvious, simple’ and direct relation’” to an enumerated power.\(^81\)

Justice Thomas next criticized the majority’s last consideration, under which it was concluded that the link between Section 4248 and an enumerated power was not too attenuated because Section 4248 was rationally related to Congress’s authority to criminalize conduct, imprison individuals, enact laws governing prisons and act as custodian of prisoners.\(^82\) Justice Thomas noted that the Constitution does not give Congress the power to pass laws in furtherance of other laws, but only allows Congress to legislate in order to carry out an expressly delegated power.\(^83\) He further explained that those laws criminalizing conduct and imprisoning individuals were constitutional because they “help[ed] to ‘carr[y] into Execution’ the enumerated powers that justify a criminal defendant’s arrest or conviction.”\(^84\) He further stated that the majority’s assertion that Section 4248 carried into execution “the enumerated power that justified that person’s arrest or conviction,” was erroneous on three grounds.\(^85\) First, the statute did not require a connection between civil commitment and the enumerated power under which the law criminalizing the individual’s underlying offense was enacted.\(^86\) In other words, while the purpose of the statute was to prevent “sexually dangerous” from endangering the community, it did not require that the individual had actually been convicted of a sexual offense.\(^87\) Justice Thomas noted that 20% of individuals subjected to civil commitment proceedings under Section

\(^{80}\) *Id.* n.7.
\(^{81}\) *Id.*
\(^{82}\) *Id.* at 1976.
\(^{83}\) *Id.*
\(^{84}\) *Id.* at 1977.
\(^{85}\) *Id.*
\(^{86}\) *Id.*
\(^{87}\) *Id.*
4248, for example, had never been charged or convicted of a sexual offense. Second, he pointed out that Section 4248 allows the government to civilly commit individuals beyond the date of the expiration of their original sentence. Finally, Justice Thomas found that because the requirement that an individual be a “sexually dangerous person” under the statute required no evidence that the individual would likely violate a law carrying out an expressly delegated power, it was unconstitutional.

Justice Thomas continued his opinion by briefly discussing the three other factors considered by the majority in upholding the statute. He began with the majority’s reliance on the Second Restatement of Torts which led to the conclusion that just as a common-law custodian has the duty to ensure that a person under his care does not injure others, the federal government, as custodian of federal prisoners, has the duty to protect the community from any dangers that these prisoners may impose. To rebut the majority’s finding, Justice Thomas simply stated that “federal authority derives from the Constitution, not the common law.” Justice Thomas also criticized the majority’s determination that the long historical involvement of Congress in the area of civil commitment supported legislation in this area. Justice Thomas analyzed the historical evidence employed by the majority and found that it had been misinterpreted. For example, much of the historical evidence related to instances where Congress had legislated in furtherance of specifically enumerated powers. Other instances were related to regulations in the District of Columbia, where Congress has “plenary

\[88\] Id.
\[89\] Id.
\[90\] Id. at 1978.
\[91\] Id.
\[92\] Id. at 1978-79.
\[93\] Id. at 1979.
\[94\] Id.
\[95\] Id. at 1979-80.
\[96\] Id. (discussing the establishment of St. Elizabeth's Hospital to provide treatment to insane persons in the military and the District of Columbia in 1855).
authority.” In addition, the majority’s heavy reliance on Greenwood v. United States was irrelevant, since that case had upheld civil commitment of federal prisoners in cases where indictments were pending (i.e., while the federal government still had custody over individuals). In addition, the Greenwood Court had made clear that its holding was narrow and specifically related to “the context of [that] case.” Finally, Justice Thomas discussed the majority’s arguments that Section 4248 serves to accommodate the interests of the states and does not alter the principles of federalism. Justice Thomas found that the majority had erred in assuming that without Section 4248 a state would take no action in rehabilitating sexually-dangerous former prisoners. In support of this proposition, he pointed to the fact that all fifty states have enacted rehabilitation systems for former prisoners. Justice Thomas also responded to the fact that twenty-nine states had submitted amicus curiae briefs in support of the government arguing that the financial cost of maintaining civil commitment programs was substantial and that they would rather have the federal government incurring the burden of paying for such programs. Justice Thomas stated that “Congress’ power . . . is fixed by the Constitution [and] . . . does not expand merely to suit the States’ policy preferences.”

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97 Id.
100 Id. (quoting Greenwood, 350 U.S. at 375).
101 Id. at 1981-82.
102 Id.
103 Id. at 1981 n.15.
104 Id. at 1982.
105 Id.
II. RANDY BARNETT’S ORIGINAL MEANING APPROACH

Prominent Libertarian scholar Randy Barnett sought to discern the original meaning of the Necessary and Proper clause by examining records of “the most hotly contested constitutional conflict of the early years of the Constitution,” the debate over the First National Bank. The dispute principally involved two groups: the first, composed of James Madison, Thomas Jefferson, and Edmund Randolph, argued that “necessary” meant really necessary, and the second, composed by Alexander Hamilton and John Marshall, equated necessity with convenience. Although both parties to the debate agreed that absolute necessity was not required, they disagreed on the means-ends fit requirement. Barnett focused his analysis on the means-ends fit requirement and the proper level of scrutiny courts should employ when reviewing legislation enacted as necessary and proper to carry out an enumerated power. In evaluating both parties’ arguments, Barnett concluded that the “diverging” positions of both sides to the debate had more in common than is usually appreciated in current understanding. In reconciling the views of Madison, Jefferson, and Randolph with those of Hamilton and Marshall, Barnett concluded that because the original public meaning of “necessary” lies somewhere in between indispensable necessity and mere convenience, courts must apply intermediate scrutiny in reviewing legislation enacted pursuant to the Necessary and Proper Clause.

106 Barnett, supra note 3.
107 Id. at 188.
108 Id.
109 Id. at 196.
110 Id. at 206.
111 Id. at 183-221.
112 Id. at 184, 206-09, 221.
113 Id. at 206-07 (“[A] showing of necessity should neither be so “strict” that no statute can pass muster nor so lenient that any statute can pass. The appropriate “level of scrutiny” of a measure’s necessity must lie somewhere in
Barnett reached these conclusions after evaluating legal statements by both parties to the debate.\footnote{114} First, Barnett clarified the misconception of Madison as requiring absolute or indispensable necessity.\footnote{115} Although through his speeches Madison stressed the importance of a government of enumerated powers\footnote{116} and warned against the doctrine of implications,\footnote{117} he recognized that “very few acts of the legislature could be proved essentially necessary to the absolute existence of government,”\footnote{118} and therefore provided for a more liberal construction.\footnote{119} According to Madison, Congress had to adopt those measures “best calculated to attain the ends of government, and produce the greatest quantum of public utility.”\footnote{120} While Madison’s views were undoubtedly narrower than those proposed by Hamilton and Marshall, Barnett clarified the extreme position commonly associated with him.

Hamilton, on the other hand, argued for a more liberal concept of necessity. According to him, necessity meant “no more than needful, requisite, incidental, useful, or conducive to”
Congress’s enumerated powers.121 Responding to the argument that a broad interpretation of necessity would undermine the operation of a government of enumerated powers, he asserted that every exercise of incidental power, whether arising from absolutely necessity or convenience, carries with it the chance of abuse, but that these “inherent” risks in the “nature of the federal constitution” were worth taking in order for the national government to properly function.122 Barnett also clarified the incorrect portrayal of Hamilton as requiring a very lenient showing of necessity. In what Barnett deems a “passage of his opinion . . . that is not usually emphasized,” Hamilton expressed his view that a showing of necessity should not be too restrictive nor too lenient.123

Barnett also discussed Chief Justice Marshall’s conception of “necessity” in *McCulloch v. Maryland*, 124 and expressed disagreement with Marshall’s position having been distorted as extremely lenient.125 Using textualist and functional arguments, Marshall had found that “necessity” did not mean absolute necessity.126 To support his position, Marshall contrasted the text of Article I, Section 10, which requires absolute necessity,127 to the language of the

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121 *Id.* at 196 (quoting Opinion of Alexander Hamilton, on the Constitutionality of a National Bank (Feb. 13, 1791)), reprinted in Legislative and Documentary History of the Bank of the United States, at 97-98 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967) (1832)).

122 *Id.* at 206.

123 *Id.*

As Hamilton stated in a passage of his opinion to Washington that is not usually emphasized, “the relation between the measure and the end; between the nature of the mean employed towards the execution of a power, and the object of that power; must be the criterion of constitutionality; not the more or less of necessity or utility.” In modern terms, a showing of necessity should neither be so “strict” that no statute can pass muster nor so lenient that any statute can pass. The appropriate “level of scrutiny” of a measure's necessity must lie somewhere in between.


126 *Id.* at 199-200.

127 See U.S. Const. art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be *absolutely necessary* for executing it's inspection Laws. . . . ”)(emphasis added).
Necessary and Proper Clause.\textsuperscript{128} Functionally, he argued that the legislature would be deprived of its ability to enact legislation if it were not allowed to “adopt any [choice of means] which might be appropriate. . . .”\textsuperscript{129} To support the view that Marshall’s opinion in \textit{McCulloch} is not as lenient as it is often construed, Barnett compared Marshall’s opinion in \textit{McCulloch} with his opinion in \textit{United States v. Fisher},\textsuperscript{130} the first case interpreting the Necessary and Proper Clause, and where Marshall gave Congress open-ended discretion to the choice of means.\textsuperscript{131} In light of \textit{Fisher}, Barnett determined that Marshall’s narrower view of incidental powers in \textit{McCulloch} demonstrated that he did not believe Congress’s powers were unlimited.\textsuperscript{132} In addition, Barnett pointed to Marshall’s response to a criticism that his opinion in \textit{McCulloch} was too liberal:

\begin{quote}
In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court expressly says, "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 . . . to say that such an act was not the law of the land."
\end{quote}

Additionally, Barnett noted a possible explanation for the misinterpretation of Marshall’s conception of necessity: Although Marshall set forth a test to determine the necessity and propriety of legislation he failed to apply it to the facts of the case before him. This indicated that “the limits he had laid down should not be taken seriously,”\textsuperscript{134} and “became an open invitation for future generations to do the same” in liberally applying \textit{McCulloch}’s test.\textsuperscript{135}

\begin{footnotes}
\footnote{128}{Barnett, \textit{supra} note 3, at 199.}
\footnote{129}{\textit{Id.} at 200 (quoting \textit{McCulloch}, 17 U.S. at 415).}
\footnote{130}{6 U.S. (2 Cranch) 358 (1805).}
\footnote{131}{\textit{Id.} at 396.}
\footnote{132}{Barnett, \textit{supra} note 3, at 207.}
\footnote{134}{\textit{Id.} at 208.}
\footnote{135}{\textit{Id.}}
\end{footnotes}
After reconciling the views of the parties to the debate, Barnett discussed significant
evidence demonstrating that the Necessary and Proper Clause, as all limits on Congressional
power, should be justifiable. First, the use of the word “shall” in the clause suggests that the
framers intended for a legislative determination of necessity and propriety to be subject to review
by other branches of government. Second, several clauses in the Constitution expressly grant
unreviewable discretion to actors. This not being the case with the Necessary and Proper Clause
suggests that the use of “shall” was intentional. Third, statements by legal actors in several
state ratification conventions point to the justiciability of the clause. In discussing the clause in
the Virginia ratification convention, for example, George Nicholas stated that “the same power
which, in all well-regulated communities, determines the extent of legislative powers” should
determine the extent of the clause. He further stated that if the legislature were to exceed its
powers “the judiciary will declare it void . . . .” Madison also raised the issue in a speech to
Congress: “[W]e are told, for our comfort, that the Judges will rectify our mistakes.”

Barnett briefly discussed the meaning of “proper,” but accepted Gary Lawson and
Patricia Granger’s interpretation, discussed below, which proposes that the term was inserted
to ensure that Congress would not violate principles of separation of powers, federalism, or
individual rights. Importantly, and using contract and agency-law principles, Barnett
determined that a necessary law can still be improper if it infringes upon individual rights.

136 Id. at 208-215.
137 Id. at 209.
138 Id. at 210.
139 Id. at 211 (quoting The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as
Recommanded by the General Convention at Philadelphia, in 1787, at 443 (Jonathan Elliot ed., rev. 2d ed. 1941)
(1836).
140 Id.
141 Id. at 211 (quoting Annals of Cong. 2010 (Joseph Gales ed., 1791)).
142 See, Lawson and Granger, supra note 8.
143 Barnett, supra note 3, at 216 (discussing Lawson and Granger’s interpretation of the Necessary and Proper
Clause).
144 Id. at 218.
Barnett concluded that in order to place the Necessary and Proper Clause under the scope of judicial review, one must adopt the view attributed to Madison, Jefferson, and even Hamilton that requires (1) a means-end fit requiring more than mere convenience to be reviewed under intermediate scrutiny, (2) a showing that the means chosen do not infringe upon people’s retained rights or violate federalism or separation of powers, and (3) a showing that Congress’s assertion to be pursuing an enumerated end is not pretext for pursuing other ends outside of Congressional authority. On the other hand, if one accepts “necessity” as requiring mere convenience, this would make the Court unqualified to second-guess legislative determinations. Due to Barnett’s focus on the first of the above-listed elements as well as the controversial employment of rational-basis review by the majority in Comstock, the following analysis will focus on the necessity element and the applicable standard of review to legislation enacted under the Necessary and Proper Clause.

1. Application to Comstock

According to Barnett, each time Congress enacts legislation under the Necessary and Proper Clause, the question is raised concerning how much deference should be afforded to Congressional determinations of what constitutes necessary and proper means. Barnett seems to be correct, since one of the main issues of dispute among the Justices in Comstock revolved around what standard of review applies to the Necessary and Proper Clause. The majority expressly adopted rational-basis review, requiring a mere rational relation between the selected means and an enumerated end. Justice Kennedy and Justice Alito concurred with

\[145\] Id. at 220-21.
\[146\] Id.
\[147\] Barnett, supra note 113, at 751.
the majority’s holding but disagreed with the employment of an ultra-deferential standard. Justice Thomas and Justice Scalia did not reach a determination on the applicable standard of review, 

but made clear that a more stringent standard than that proposed by the majority and concurring opinions should apply. Barnett, on the other hand, would have applied intermediate scrutiny. This analysis will seek to determine the proper standard of review that should apply to legislation enacted under the Necessary and Proper Clause by not only considering the alternatives mentioned, but also others proposed by scholars interpreting the Clause.

The applicable standard of review to legislation enacted under the Clause has been the subject of debate among scholars. District of Columbia Circuit Judge Douglas Ginsburg and Professor Steven Menashi have argued that legislation enacted under the Clause should be reviewed under strict scrutiny. According to them, Chief Justice Marshall’s test in McCulloch v. Maryland did “violence . . . to the text” of the Clause by “transform[ing] [it] into a species of rational basis review . . . .” when in reality, “‘Necessary and Proper’ is the language of strict scrutiny.”

If strict scrutiny were appropriate under the clause, the issue before the Court in Comstock would have been whether Section 4248 was absolutely necessary for Congress to carry out an enumerated power. This means that if other available means by which Congress may have accomplished the enumerated ends were available, the law would have been unconstitutional. The Adam Walsh Act was enacted in order to “protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, [and]
to promote Internet Safety . . .”156 Likewise, its legislative history indicates that the statute was intended to “address the growing epidemic of sexual violence against children” and to “address the loopholes and deficiencies in existing laws.”157 Undoubtedly, these are compelling interests, but they all relate to public safety, which is not among Congress’s enumerated powers, and without pointing to an enumerated power to which the statute is tied, it is difficult to establish any sort of compelling interest relation that would be absolutely necessary under Ginsburg and Menashi’s very stringent approach. But even assuming that the interest of Congress in enacting Section 4248 were necessary to carry out the congressional power of creating and maintaining a criminal justice system, it is clearly not absolutely necessary to do so, since there are other ways by which that end can be furthered (e.g., provide for harsher penalties for federal sexually-related crimes, limit civil commitment or rehabilitation programs to the time during which the federal government continues to exercise custody over the prisoners, among others).

While the application of strict scrutiny would ensure that Congress’s powers are directly related to its enumerated power and that the balance of federalism be maintained, serious difficulties would arise with regard to its practical application. First, it would require going against two centuries of precedent during which the Clause has been interpreted under the McCulloch test.158 This test undoubtedly requires less than strict scrutiny in evaluating a particular statute’s necessity. Courts and other branches of government have historically relied on this test substantially. As explained by Stephen Gardbaum,

[McCulloch has become] one of the handful of foundational decisions of the Supreme Court that are automatically cited as original sources for the

propositions of constitutional law that they contain. But *McCulloch* has the further (and even rarer) distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch* . . .

Second, as representative of the people, Congress is usually best-positioned to make policy judgments and decisions concerning the necessity of a particular piece of legislation. As recognized by Judge Ginsburg and Professor Menashi, “[i]t would take some nerve for an unelected judge . . . to tell the people that a law duly adopted by a majority of both chambers of the legislature and signed by the executive will not be given effect because it is not, in the judge’s opinion, ‘necessary’ . . . .” Not even Justice Thomas’s dissent argues for such a stringent interpretation of the clause. Instead, he acknowledges that Congress is allowed “a certain degree of latitude in selecting the means for ‘carrying into Execution’ an end that is ‘legitimate.’” Although he expressly stated that he would not reach the issue of the applicable standard of review, he noted in a footnote that in previous cases he has argued that “for a law to be within the Necessary and Proper Clause, it must bear an ‘obvious, simple, and direct relation’ to an enumerated power.” Third, strict scrutiny would only allow for absolutely necessary means to be adopted. This would inevitably impose a heavy burden on Congress resulting in its inability to legislate in areas where federal intervention is required. What would happen if Congress has two options to achieve an enumerated end? Under strict scrutiny, neither option would be constitutional as neither would be absolutely necessary to achieve the end. In the words of Barnett, “[a] standard of review that no statute can pass is as

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159 Gardbaum, *supra* note 3, at 814.
161 *Comstock*, 130 S. Ct. at 1975 (Thomas, J., dissenting).
162 *Id.* n.7.
hypocritical as a standard of review that every statute can pass.”

On the other extreme, scholars like Professor Thomas McAfee argue that Congress is afforded broad powers by the Clause and is therefore entitled to rational basis review. Reflective of this view is Justice Breyer’s majority opinion in *Comstock*, in which he stated that the appropriate inquiry before the Court was “whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power.”

Supporters of rational-basis review of legislation enacted under the Clause often invoke Chief Justice Marshall’s test in *McCulloch* for the proposition that Congress is given broad authority to elect the means necessary to pursue the enumerated end. In the words of Chief Justice Marshall,

> [i]t must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end . . . .

The application of rational-basis review, however, did not begin with *McCulloch*. The employment of this standard by the Court has historical roots dating to the first decades of the United States, during which the Court showed unwillingness to second-guess legislative enactments. In the 1811 case of *Commonwealth v. Smith*, Chief Justice Tilghman explained

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that as a principle of “constitutional construction,” the Supreme Court was not entitled to declare an act of the legislature unconstitutional “unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.”  

James Thayer attempted to discern the motives behind the Court’s inclination to defer to legislative judgment in his 1893 Harvard Law Review article *The Origin and Scope of the American Doctrine of Constitutional Law.*  

Thayer found that the motive behind the Court’s reluctance to overrule legislation was the idea that what may “seem unconstitutional to one man, or body of men, may reasonably not seem so to another.”  

In other words, because the Constitution “admits different interpretations” and “a range of choice and judgment,” the Court felt it was not entitled to overstep legislative policy determinations unless there was a manifest violation of the Constitution. This approach changed during the *Lochner* era, which, although notable for scrutinizing state’s legislative enactments, was also very active in second-guessing federal legislation.  

This era came to an end when the Supreme Court, through Justice Brandeis, accepted the “presumption of constitutionality” principle invoked by Thayer.  

The New Deal continued to adopt this presumption, particularly in relation to the commerce power.  

As mentioned in the introduction, however, the New Deal’s justification for the expansion of congressional federal powers was not found in the Commerce Clause itself, but rather in the Necessary and Proper Clause.  

The “substantial effects” doctrine created in *United States v. Darby,* for example, was not a product of an expansion of the

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168 4 Binn. 117 (1811).
170 Thayer, supra note 169.
171 Id. at 750.
174 Id. at 768.
175 See supra note 3.
176 312 U.S. 100 (1941).
commerce power.\textsuperscript{177} Instead, the Court relied on \textit{McCulloch v. Maryland}\textsuperscript{178} to determine that it was necessary and proper to regulate intrastate activities in order to carry out Congress’s commerce power.\textsuperscript{179} This interpretation of the Necessary and Proper Clause continued to be employed in cases such as \textit{Wickard v. Filburn,}\textsuperscript{180} \textit{Heart of Atlanta Motel v. United States,}\textsuperscript{181} and \textit{Katzenbach v. McClung.}\textsuperscript{182}

As noted, the application of rational-basis review in Necessary and Proper Clause jurisprudence has doctrinal and historical basis.\textsuperscript{183} However, its employment in \textit{Comstock} raises several concerns. First, the majority does not employ a traditional rational-basis test. In addition to asking the sole question of whether Section 4248 was rationally related to an enumerated power, the majority also considered five factors which were “taken all together” in order to determine the constitutionality of Section 4248.\textsuperscript{184} This dual approach raises serious implications. As Justice Thomas pointed out in his dissent, the majority does not make clear whether each of the five considerations must be present before a court may uphold a particular

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\item\textsuperscript{177} \textit{Id.} at 121 (emphasis added).
\item\textsuperscript{178} But ignored Marshall’s pretext qualifier. \textit{See McCulloch v. Maryland,} 17 U.S. (4 Wheat.) 316, 423 (1819). ("[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it should become the painful duty of this tribunal . . . to say that such an act was not the law of the land.").
\item\textsuperscript{179} \textit{Darby,} 312 U.S. at 121.
\item\textsuperscript{180} 317 U.S. 111 (1942).
\item\textsuperscript{181} 379 U.S. 241 (1964).
\item\textsuperscript{182} 379 U.S. 294 (1964).
\item\textsuperscript{183} \textit{See supra} notes 167-182.
\item\textsuperscript{184} \textit{United States v. Comstock,} 130 S. Ct. 1949, 1956 (2010).
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statute or if less than five factors suffice. In addition, the five-factor “test” seems to be in conflict with a traditional rational-basis review. Under rational basis, a high degree of deference is owed to the legislature and the statute at issue is presumed valid. This high degree of deference seems to be compromised by the Court’s five considerations. If for every law enacted under the Necessary and Proper Clause there must be evidence pointing to a long history of federal involvement in the arena being legislated, a showing that Congress has a custodial interest in safeguarding the public from dangers, and proof that the statute does not infringe upon state powers and that the statute is narrow in scope, the Court would not be granting Congress the deference that rational-basis review typically affords. Even if less than five factors are enough for a law to pass constitutional muster, this would still undermine the traditional nature of rational-basis review.

Second, although many lower courts’ decisions, and most recently the Comstock Court, have heavily relied on McCulloch for the proposition that the Clause requires a mere rational relation between the means and the enumerated power, this reliance is misguided. While it is true that Chief Justice Marshall rejected the view that necessity meant absolute necessity, he also adopted a test requiring that a law be “appropriate” and “plainly adapted” to an enumerated end. Clearly, these requirements do not give Congress open-ended discretion and require more than a mere rational relation. At the minimum, the requirement that a law be “plainly adapted” to an end, requires that an established link exists between the means and the enumerated end. This particular point relates to Justice Kennedy’s concurring opinion. Justice Kennedy argued that the majority had incorrectly employed the terms “rationally related” and

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185 Id. at 1974-75 (Thomas, J., dissenting).
186 Brief of The CATO Institute as Amicus Curiae Supporting Petitioners at 16, Sabri v. United States, 541 U.S. 600 (2003)(No. 08-44) (“Fairly considered, McCulloch represents a generous view of congressional power to determine which laws are “necessary” for executing federal powers, but not the rational basis standard with which it is often (mis)credited.”).
“rational basis.”  He explained that the use of the phrase “rational basis” is often used in due process cases not involving fundamental liberties where the Court will uphold laws that are considered to be rational means to correct an evil at hand, even if they are not “logical[ly] consistent with its aims.” On the other hand, the rational-basis test used to review commerce clause cases is not as deferential. Under these cases, the Court will require “a demonstrated link in fact, based on empirical demonstration.” Kennedy suggested that the latter approach should guide the Court’s determinations under the Necessary and Proper Clause, and not the ultra-deferential standard employed by the majority. Thus, it is plausible to argue that the “plainly adapted” requirement of the McCulloch test requires at least a “demonstrated link in fact” as suggested by Justice Kennedy.

Third, while there are a number of cases applying rational basis to legislation enacted under the Clause, there are also a number of cases that suggest that the “necessity” element of the Necessary and Proper Clause requires a more stringent standard of review than mere rational basis. In Jinks v. Richland County, South Carolina, the Court carefully analyzed the constitutionality of the statute at issue, without presuming its constitutionality. The concurring opinion of Justice Thomas in Sabri v. United States also demonstrates that the application of rational basis is not accepted unanimously by the Court. In Sabri, the Court held that 18 U. S. C. § 666(a)(2), “proscribing bribery of state, local, and tribal officials of entities that receive at least

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188 Comstock, 130 S. Ct. at 1966-67 (Kennedy, J., concurring).
189 Id. at 1966.
190 Id. at 1967.
191 Id.
192 Id. at 1966.
195 Id. at 464 (Where the Court upheld the constitutionality of 28 U. S. C. §1367(d) only after carefully concluding that the statute was plainly adapted to Congress’s power to constitute Tribunals inferior to the Supreme Court).
$10,000 in federal funds” was constitutional as a valid exercise of congressional power under Article I Section 8.\textsuperscript{197} Justice Thomas concurred, but made clear that merely requiring a rational basis between the means and ends was insufficient and not a correct interpretation of \textit{McCulloch}.\textsuperscript{198} According to Justice Thomas, for a statute to be “plainly adapted” to an end as required by \textit{McCulloch}, it must “show some obvious, simple, and direct relation between the statute and the enumerated power.”\textsuperscript{199} His interpretation of \textit{McCulloch} would require more than Justice Kennedy’s standard. As noted in \textit{Comstock}, for a law to be “direct” under Justice Thomas’s approach, the means and the enumerated end may not be more than one step removed.\textsuperscript{200} Justice Kennedy, on the other hand, acknowledged that the means and the end can be more than one step removed.\textsuperscript{201} In his opinion, “the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.”\textsuperscript{202}

Finally, and most importantly, if courts were to continue to apply rational basis to legislation such as Section 4248, which does not further a specific enumerated end but instead relates to other federal laws, the scheme of enumerated powers and the balance of federalism would be clearly undermined. As some scholars have observed, the fact that Congress has been allowed to enact legislation subjecting former federal prisoners to civil commitment is “minor

\textsuperscript{197} \textit{Id.} at 602.
\textsuperscript{198} \textit{Id.} at 611 (Thomas, J., concurring).
\textsuperscript{199} \textit{Id.} at 613.
\textsuperscript{201} \textit{Id.} at 1965-66 (Kennedy, J., concurring).
\textsuperscript{202} \textit{Id.} at 1966.
The real problem is the Court’s employment of rational basis to Necessary and Proper Clause jurisprudence, since this will inevitably result in an open-ended grant of powers to Congress. Although Comstock is a relatively recent opinion, some scholars have already adopted its extremely broad conception of congressional powers, in particular to support the individual mandate provision of the healthcare legislation. In his recent op-ed, for example, Harvard Law professor Charles Fried has stated that

\[\text{Comstock}\] has the surprising effect of showing just how far-fetched are the constitutional objections to the new health care legislation. . . . [Comstock] added that the power to imprison implies an obligation to protect the public from dangerous people even after they had served their sentences. . . . For the health regulation to work . . . it is “necessary and proper” — the clause explicitly in play in Comstock — to nudge (with the $700 penalty) the young and healthy to enter the insurance pool, and not to wait until they are old and infirm. Insurance just won’t work if you could wait until your house is on fire to buy it.

Considering the weaknesses of strict scrutiny and rational-basis review as applied to legislation enacted under the Necessary and Proper Clause, Barnett’s theory seems to correctly interpret the original meaning of the Clause and to provide a plausible alternative for review of legislation enacted under the Clause. As previously discussed, Barnett concluded that because the term “necessary” does not require absolute necessity, strict scrutiny should not apply. Nor should rational-basis review apply, since mere convenience is insufficient to enact legislation under the Necessary and Proper Clause. Barnett suggests that the appropriate level of scrutiny should be intermediate scrutiny, “a showing of necessity . . . neither . . . so ‘strict’ that no statute

\[204\] Id.
\[206\] Barnett, supra note 3, at 206-07.
\[207\] Id.
can pass muster, nor so lenient that any statute can pass.”

Thus, the government’s task in *Comstock* would have been to demonstrate that civilly committing former federal prisoners who have engaged or attempted to engage in sex crimes substantially related to some enumerated power. Without doubt, Barnett would have disagreed with the outcome in *Comstock*, because there is no enumerated power in the Constitution allowing Congress to civilly commit former prisoners nor is there an enumerated end that would justify such legislation. Assuming arguendo that Congress has the constitutional authority to establish a federal penal system inferred from the penumbras of Article I, Section 8, the argument comes closer to meeting Barnett’s standard. This was the position of Justice Alito who criticized the majority’s use of rational basis review in his concurring opinion. While he did not specify whether he would adopt Justice Kennedy’s more stringent “rationally related” test, the language he employed implies that he is willing to apply intermediate scrutiny to legislation enacted under the Necessary and Proper Clause. In the last paragraph of his brief opinion, he stated: “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 [enumerated power and civil commitment]. Here, there is a substantial link to Congress’s constitutional powers.” As discussed above, the “substantial” language has been commonly associated with intermediate scrutiny review. It seems that Alito believes that because the authority to create and run a penal system is constitutional, it is substantially related to the penal system to civilly commit the dangerous felons upon completion of their sentence. Barnett would likely differ, in that he would require a substantial relation to an enumerated power, not to a power that is inferred, as Alito seems to do.

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208 Id.
210 See id.
211 Id.
In conclusion, Barnett’s theory would likely be a hybrid of Justice Alito’s and Justice Thomas’s approaches, and ultimately find the law unconstitutional for its lack of substantial relation to an enumerated power. If Comstock’s holding were to allow future legislation to be enacted in furtherance of other federal laws as opposed to enumerated powers, intermediate scrutiny would be a possible alternative that the Court may choose to employ in order to limit the expansion of federal powers and to ensure the legitimacy of legislative judgment. Regardless of what standard of review one deems should apply to legislation enacted under the Necessary and Proper Clause, it is of vital importance to emphasize that this inquiry only relates to the “necessity” of the particular piece of legislation. In other words, even if one decides that only a rational relation is required between the enumerated power and the means chosen by Congress, the propriety of the law will still have to be analyzed to ensure that `the law is valid under both prongs of the Necessary and Proper Clause.  

III. ROBERT NATelson’S AGENCY LAW APPROACH

Robert G. Natelson’s work, The Agency Law Origins of the Necessary and Proper Clause, traces the original meaning of the Necessary and Proper Clause to agency law and the doctrine of incidental powers. To determine the scope of incidental authority under agency law during the founding era, Natelson examined the history and development of agency law in England. English agency law developed primarily from the Roman law of mandate, which concerned gratuitous consensual relationships by which a principal gave powers to an agent to

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213 The propriety element of the Clause will be discussed infra Part IV.
214 Natelson, supra note 9.
215 Id. at 277.
carry out specific duties.\textsuperscript{216} Under mandate law, unless expressly prohibited, an agent was also granted implied powers to execute the assigned duties.\textsuperscript{217} The English adopted this system of implied powers and incorporated it into English law via its system of principals and incidents.\textsuperscript{218} Under this system, an incident was a “right or power” that derived from its principal as “a necessary consequent.”\textsuperscript{219} Based on legal writings by Blackstone and Coke, as well as case law from this era, Natelson identified the following three circumstances under which an incident was a “necessary consequent” to its principal: (1) if it was indispensable (absolutely necessary) to the principal, (2) if without it the principal would suffer great harm, and (3) when even if low in necessity, custom and common practice justified the incidental power as implied by usage.\textsuperscript{220} According to Natelson, this doctrine of implied incidental powers continued to be widely accepted during the founding era.\textsuperscript{221} Therefore, Congress as the agent of the people (the principal) was allowed to carry out its enumerated powers in the Constitution by exercising the implied powers under any of the three categories of incidental powers (absolute necessity, reasonable necessity, and implication by usage).

Natelson made an important determination regarding the role of the term “necessary” in the Necessary and Proper Clause. Contrary to the opposing view that the clause either grants or restricts powers, he concluded that the Clause merely serves as a rule of construction. In other words, the Clause’s purpose was to clarify and emphasize what was already implicit in the Constitution: that Congress has implicit powers to carry out its enumerated powers.\textsuperscript{222}

The general reliance on the doctrine of incidental powers to determine the “necessity” of

\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 278.
\textsuperscript{219} Id. at 278-79.
\textsuperscript{220} Id. at 279-80.
\textsuperscript{221} Id. at 282 (“[W]hen the constitutional convention met in 1787, the doctrine of implied incidental powers allowed an agent to exercise considerable discretion.”).
\textsuperscript{222} Id. at 317-18.
a particular course of action led Natelson to conclude that the original meaning of the term “proper” could also be found in agency law principles.223 Natelson suggests that the term “proper” was inserted to subject Congress to the fiduciary duties of the time.224 Among these were the duty to act within the scope of one’s authority, to act in good faith, to maintain undivided loyalty to the principal, to account to the principal, and to use due care and diligence.225 Natelson reconciles his conclusion that the “necessary” portion of the Clause is a mere rule of construction with his determination that the term “proper” substantively limits Congressional powers by noting that during the founding era it was widely accepted that under natural law the government, acting as “agent and trustee of the people, had no legitimate authority to betray its principals.”226 Therefore, without this Clause, Congress would still have “necessary powers but could not legitimately violate fiduciary norms by adopting improper laws.”227 In other words, the term “proper,” according to the framers, was “a mere reflection of underlying natural law.”228

Natelson’s agency-law interpretation views the Necessary and Proper Clause as a rule of construction, and gives Congress broad discretion. Under his test, Congress may pass legislation that is (1) a good faith effort to pursue at least one of the enumerated powers, rather than a pretext to exercise a power not granted, (2) necessary (which connotes a very broad concept of incidental powers that includes absolute necessity, reasonable necessary, or implication by custom), and (3) proper (in compliance with fiduciary duties).

223 Id. at 321.
224 Id.
225 Id.
226 Id.
227 Id.
228 Id.
1. Application to Comstock

The first prong of Natelson’s interpretation of the clause requires a good faith attempt to pursue one or more of Congress’s enumerated powers. Although the enactment of Section 4248 is based on a good faith attempt by Congress to “protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography[,]” at first impression it appears to fail due to the fact that it does not carry out one or more of Congress’s enumerated powers. Construing the clause as a mere rule of construction, as Natelson suggests, may support Comstock’s outcome. This point merits further discussion.

A rule of construction in constitutional law is a “redundant” clause that “illuminate[s] and clarif[ies] what was otherwise merely implicit.” In the context of the Necessary and Proper Clause, this means that the clause does not restrict nor does it expand congressional powers. Instead, the clause serves the purpose of declaring and clarifying what was implicit prior to its adoption. The question rests, therefore, on the character of powers implicit prior to the adoption of the clause. The answer, according to Akhil Amar, may be found in Chief Justice Marshall’s opinion in \textit{McCulloch v. Maryland}. Contrary to what it is often believed Marshall did not interpret the clause as giving broad powers to Congress. Neither did Marshall restrict legislative powers. What Marshall did was to clarify that, even in the absence of the Necessary and Proper Clause, Congress would be empowered to legislate under its enumerated powers and, in the words of Amar, “their implicit territorial seas.” Marshall expressly stated his interpretation of the clause as a rule of construction: “If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to

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\item \footnote{Akhil Reed Amar, \textit{Constitutional Redundancies and Clarifying Clauses}, 33 VAL U. L. REV. 1, 4 (1998).}
\item \textit{Id.} at 8-9.
\item \textit{Id.}
\item \textit{Id.} at 9.
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legislate on that vast mass of incidental powers which must be involved in the constitution, if
that instrument be not a splendid bauble.” Although Amar emphasizes that Marshall merely
expressed his view of what was already implicit without giving a broad grant of powers to
Congress, he did not specify the character of “what was otherwise merely implicit.” The
language employed in the quoted portion of Marshall’s opinion seems to indicate that, even as a
rule of construction, the implied powers of Congress prior to the clause were “vast” and
incidental. In the context of Comstock, these “vast” incidental powers would include Congress’s
power to “protect the public from dangers created by the federal criminal justice and prison
systems” in order to “carry into execution the enumerated powers on which the federal criminal
laws rest[.]. . .” It is only under this interpretation of the clause as a rule of construction that
the first prong of Natelson’s test can be met.

The second prong of Natelson’s agency-law theory requires that Section 4248 be
necessary to carry out the enumerated powers underlying Congress’s authority to enact federal
criminal laws. The enactment of laws providing for civil commitment, although not
“absolutely necessary” for Congress’s power to create and run a penal system, could fall under
the categories of reasonable necessity and implication by custom. The majority emphasized the
latter. In the second factor of their five-factor analysis, the majority recognized that there has
been a longstanding history of civil commitment laws in the United States dating to 1855 making
these programs “established practice.” The use of custom to support the “necessity”
requirement of a particular piece of legislation pursuant to the Necessary and Proper Clause is
not novel. For example, during the debates over the constitutionality of the First National Bank,

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233 Id. at 9 (quoting **McCulloch v. Maryland**, 17 U.S. (4 Wheat.) at 420-21 (1819) (emphasis added)). See also id.
(quoting **THE FEDERALIST** NO. 33, at 202-03 (Clinton Rossiter, ed. 1961)).
235 Natelson, supra note 9, at 318.
236 **Comstock**, 130 S. Ct at 1958-61 (majority opinion).
proponents of the bank argued that because many governments used national banks, the necessity of creating a national bank should be implied by custom.\textsuperscript{237}

The final prong of Natelson’s test requires that Section 4248 be proper.\textsuperscript{238} According to Natelson, the term “proper” subjects Congress to fiduciary norms among which are good faith, reasonable care, impartiality, loyalty to its constituents, and to remain within its scope of authority.\textsuperscript{239} According to Natelson, these “fiduciary-style restriction[s]” were regarded by the founders as “a mere reflection of underlying natural law.”\textsuperscript{240} This last prong of the test raises moral implications as applied to Comstock. Congress, acting as agent of the people and fiduciary, may have a conflict of interest considering both its interest in promoting the public good by enacting legislation protecting the public from harm and its duty not to infringe upon the people’s natural rights.\textsuperscript{241} If the case were proven that civilly committing individuals for an indefinite period of time with what many consider improper procedural safeguards, the natural law philosophy adopted by the framers would dictate that securing individual rights prevails over the public good.\textsuperscript{242}

In conclusion, if one takes the approach that the Necessary and Proper Clause merely clarifies that Congress has “vast” incidental powers deriving from its enumerated powers, it is plausible that the requirement that Congress legislated in pursuance of one or more of its enumerated powers has been met. If this is the case, the “necessity” requirement may be easily

\textsuperscript{237} Natelson \textit{supra} note 9, at 316-17.
\textsuperscript{238} \textit{Id.} at 318.
\textsuperscript{239} \textit{Id.} at 321.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{See infra} ‘The Individual Rights Approach’ (considering the possible violation of Comstock respondents’ individual rights).
\textsuperscript{242} \textit{See} SCOTT D. GERBER, \textit{TO SECURE THESE RIGHTS} 62 (New York University Press) (1995) (“While the Framers sometimes distinguished between private rights on one hand and the public good on the other, it must be remembered that the principal (i.e., the foremost, but not the sole) purpose of government in the American regime is to secure the people’s natural rights . . . .”); \textit{id.} at 77 (explaining that in Federalist No. 10, James Madison decided that if the choice had to be made between the public good and individual natural rights, the choice would be in favor of the latter).
satisfied under either reasonable necessity or implication by usage. Whether the law is proper, would depend on whether respondents have been deprived of individual rights, something that the Court did not decide.

IV. LAWSON AND GRANGER’S “FEDERALISM AND INDIVIDUAL RIGHTS” APPROACH

Between 1789 and 1791, there was no Bill of Rights. For this two-year period, the rights of the states and the people were unenumerated and the only safeguard against the violation of individual rights was the propriety element of the Necessary and Proper Clause. Proponents of this theory, Gary Lawson and Patricia Granger, argue that the meaning of the term “proper” has been often ignored by the Court and constitutional scholars. They attribute the lack of attention given to the term to Marshall’s decision in *McCulloch*, and his focus on the necessity portion of the clause. In analyzing statements by 18th and 19th century legal actors, the language and structure of the Constitution, and other state constitutions, Lawson and Granger attempted to discern the original meaning of the term “proper.” They concluded that the Framers had intended for the propriety requirement to stand as an enumerated limitation to legislative power by requiring that a law: (1) respect the “proper” allocation of authority within the national government (separation of powers), (2) conform with the “proper” scope of the federal government’s limited jurisdiction regarding the states (federalism), and (3) be within the “proper” scope of the federal government’s limited jurisdiction with respect to the people’s

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243 Lawson and Granger also concluded that the term “proper” requires Congress to respect principles of separation of powers. Lawson & Granger, *supra* note 8, at 287 n.131.
244 *Id.* at 272 n.16.
246 Lawson & Granger, *supra* note 8, at 271.
247 *Id.* (“Chief Justice Marshall’s discussion, however, focused almost exclusively on the word ‘necessary’.”).
248 *Id.* at 273.
retained rights. This summary will focus on the first and second limitations, as these closely relate to *United States v. Comstock*.

Lawson and Granger established that the propriety element in the clause served as a restriction on Congress’s ability to infringe upon states’ retained powers. To reach this conclusion, they first looked at dictionary definitions. A widely accepted definition of the term was “peculiar; not belonging to more; not common.” This definition suggested that a “proper” law was “one that [was] within the peculiar jurisdiction or responsibility of the relevant governmental actor.” In order to support this proposition, Lawson and Granger examined legal statements made during the Founding era. For example, in discussing the term “proper” in the Federalist, Alexander Hamilton stated

> The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any state, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?  

Similar statements were made by various actors during the founding era. In his response to a criticism of his opinion in *McCulloch*, Chief Justice Marshall emphasized the propriety element of the Clause by stating that a piece of legislation would be unconstitutional if “such an act [was] an attempt on the part of Congress, ‘under the pretext of executing its powers,’ to pass laws for the accomplishment of objects not intrusted to the government.”

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249 Id. at 297.
250 Id. at 291.
251 Id.
252 Id. at 299.
253 Id. at 306.
carry passengers on hire through states that had an exclusive right to carry passengers for hire,

Representative Niles stated:

[T]he whole powers vested in Congress by the Constitution will be found in the magic word proper; and the States might have spared, as nugatory, all their deliberations on the Constitution, and have constituted a Congress, with general authority to legislate on every subject, and in any manner it might think proper. What rights, then, remain to the States? None, sir, but the empty denomination of Republican Governments.254

Lawson and Granger also determined that the term “proper” was included in the clause to prevent Congress from violating individual rights. The Framers of the Constitution did not include a Bill of Rights in the original Constitution. Lawson and Granger assert that the Framers were correct when they maintained that a Bill of Rights was unnecessary to protect the people’s rights, because those rights were already protected by the propriety element of the Necessary and Proper Clause.255 This position was supported by statements of legal actors during the Founding era. For example, a year before the ratification of the Bill of Rights, Representative Ames referred to the Necessary and Proper Clause by stating:

Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves. . . That construction may be maintained to be a safe one which promotes the good of the society . . . without impairing the rights of any man, or the powers of any State.256

Likewise, Lawson and Granger found support for this interpretation in an argument made to the Supreme Court in United States v. Bryan & Woodcock.257 At issue was a law that would apply

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254 Id. at 301.
255 Id. at 325-26.
256 Id. at 300.
257 13 U.S. (9 Cranch) 374, 376 (1815).
retroactively. Arguing against the constitutionality of the law, counsel for the affected party argued:

[I]t cannot be ‘necessary and proper,’ nor will it ‘establish justice,’ to transfer to other the consequences of their own improvidence . . . It would not be ‘proper,’ because it would impair the obligation of contracts between citizen and citizen, [and] because it would be lessening the security for private ‘property,’ if not taking away by undue ‘process’ of law . . . .

In addition, several statements made during the ratification debates support the view that propriety was intended to prevent Congress from violating individual rights. Alexander Hamilton in Federalist No. 29, for example, asserted that “[i]t would be absurd . . . to believe that a right to enact laws necessary and proper for the imposition and collection of taxes would involve that of . . . abolishing the trial by jury in cases relating to it.” Similar arguments were made with respect to the right to exercise one’s religion, to be free from general warrants, and not be subjected to unusual punishments. These arguments were summarized in the Massachusetts ratifying convention, where it was stated that “no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution and should they attempt it without constitutional authority the act would be a nullity and could not be enforced.” With respect to the Ninth Amendment, Lawson and Granger concluded that it was merely a “declaration” of what the Necessary and Proper Clause already made implicit: Congress could not violate written or unwritten individual rights.

258 Lawson & Granger, supra note 8, at 304.
259 Id. at 320 n.219.
260 Id. at 320-21 (citing THE FEDERALIST NO. 29).
261 Id. at 321.
262 Id. at 329-30.
1. Application to Comstock

Lawson and Granger emphasize what is explicit in the Constitution: a law must not only be necessary, but must also be proper.\textsuperscript{263} According to this interpretation, the propriety element requires Congress to pass laws that respect principles of federalism and individual rights.\textsuperscript{264} The majority in \textit{Comstock} blatantly ignored the propriety element of Section 4248 by focusing entirely on the “necessity” requirement of the Necessary and Proper Clause.\textsuperscript{265} Although the Court acknowledged that in order for legislation to be proper, it must “not [be] prohibited by the Constitution,”\textsuperscript{266} no inquiry was made as to whether Section 4248 violated other provisions of the Constitution, in particular those in the Bill of Rights. Even more perplexing was the Court’s assumption that the statute did not violate other constitutional provisions. At the beginning of the opinion Justice Breyer stated: “[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.”\textsuperscript{267} While the Court did touch upon federalism issues, it did so very briefly and as part of a five-factor test that focused on the “necessity” element of the clause.\textsuperscript{268}

The unwillingness of the Court to analyze the propriety element of the Clause can be criticized for several reasons. First, as Granger and Lawson’s work demonstrates, historical evidence suggests that the framers intended for the term “proper” to act as a limitation to congressional powers. Second, the independent significance of the term is consistent with Chief Justice Marshall’s test in \textit{McCulloch}: “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, \textit{which

\textsuperscript{263} U.S. CONST. art. I, § 8, cl. 18.
\textsuperscript{264} Lawson & Granger, supra note 8, at 297.
\textsuperscript{265} See generally, United States v. Comstock, 130 S. Ct. 1949 (2010).
\textsuperscript{266} Id. at 1957.
\textsuperscript{267} Id. at 1956.
\textsuperscript{268} Id. at 1962-63.
are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . .

While not novel, Lawson and Granger’s interpretation of propriety clarifies what the Supreme Court has not: A law must not only be necessary, but must also be proper. It is important to note that the vast majority of cases interpreting the Clause have not considered the propriety element as an independent prong but have instead treated it in conjunction with the necessity requirement. Nevertheless, there is important case-law establishing that the term “proper” has independent significance. Although it is beyond the scope of this paper to determine whether any constitutional provisions were in fact violated in *Comstock*, it is important to note some of the issues that could have been considered if the Court had analyzed the propriety of the law under the approach proposed by Lawson and Granger.

2. Federalism

In their brief to the Supreme Court, counsel for Respondents in *Comstock* argued that Section 4248 was not “necessary” as required by the Constitution. Citing Lawson and Granger’s work, they also argued that Section 4248 did not meet the “proper” element of the Clause because it encroached on traditional state police and *parens patriae* powers. The majority, however, did not consider the issue of the propriety of the law as a separate issue. Instead, the principles of federalism were only briefly discussed under the majority’s fourth consideration which was part of the evaluation of the “necessity” of the law.

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269 Id. at 304 (quoting *McCulloch v. Maryland*, 17 (U.S. (4 Wheat.) 316 (1819)).
Under its fourth consideration, the majority found that Section 4248 did not violate the Tenth Amendment because it accounted for state interests.\(^273\) The majority’s interpretation of the Tenth Amendment puts in question the basic principle under the Constitution that the federal government is one of enumerated powers, leaving the states free to regulate in “numerous and indefinite” areas.\(^274\) Ignoring the structure of dual federalism embodied in the Constitution, the majority found that because those powers listed in Article I also include all those powers granted by the Necessary and Proper Clause, the Tenth Amendment requires an initial determination of Congressional powers. In support of this point, the majority cited *New York v. United States*,\(^275\) where the Court determined that “it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.”\(^276\) This interpretation of the Tenth Amendment also left much to be said because it ignored the idea that states have traditionally exercised the power to regulate security matters and criminal activity, as well as the power to take care of the mentally ill. Fortunately, Justice Kennedy in his concurring opinion clarified some of the vagueness created by the majority’s discussion.\(^277\) Also referring to the propriety element of the Clause as a limitation to federal action, he stated,

> [i]t 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

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\(^{273}\) *Id.* at 1662.  
\(^{274}\) THE FEDERALIST NO. 45 (James Madison).  
\(^{275}\) 505 U.S. 144 (1992).  
\(^{276}\) *Id.* (quoting *New York*, 505 U.S. at 156, 159).  
\(^{277}\) *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring).
and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.\textsuperscript{278}

According to one scholar, Kennedy’s concurring opinion is particularly significant, because usually he is a “swing voter on important ideologically charged issues.”\textsuperscript{279}

Another reason offered by the majority supporting its determination that Section 4248 did not violate the Tenth Amendment was that the statute accommodated states interests by requiring the Attorney General to encourage either the state where the crime occurred or the state of the individual’s domicile to take custody of such an individual.\textsuperscript{280} There are several problems with this argument. First, respondents argued that this “accommodation” was not a good faith effort to give options to the states, but that it instead imposed a Morton’s fork, forcing states to either “indefinitely detain” citizens of their state “that the federal government has deemed dangerous” or allow the federal government to “indefinitely detain them itself.”\textsuperscript{281} Also, as Justice Thomas pointed out when discussing the fact that twenty-nine states submitted briefs as amicus curiae expressing their agreement with Section 4248, the “states accommodation” argument fails because “Congress’ power . . . is fixed by the Constitution; it does not stand merely to suit the States’ policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds.”\textsuperscript{282} Although a non-textualist perspective coupled with prudential considerations would give the federal government in this case a heightened role as regulator in areas of national concern, this result-oriented approach would clearly ignore the text of the Tenth Amendment.\textsuperscript{283} A second reason why the majority’s argument fails is their improper reliance on

\textsuperscript{278} Id. at 1968-69.


\textsuperscript{280} Comstock, 130 S. Ct. at 1962 (majority opinion).


\textsuperscript{282} Comstock, 130 S. Ct. at 1982 (Thomas, J., dissenting).

\textsuperscript{283} This argument will be discussed below under the Collective Action Federalism section.
United States v. Greenwood. In Greenwood, the Court held that federal civil commitment of a mentally incompetent individual was constitutional. Justice Breyer argued that because the statute at issue in Greenwood was less protective of state interests than Section 4248, civil commitment under Section 4248 was constitutional. The differences between Greenwood and Comstock, however, are striking. First, Greenwood had been charged with robbing a United States Post Office. Undoubtedly, Congress has the authority under the Necessary and Proper Clause to criminalize carrying out its enumerated power to “establish post offices and post roads” explicit in Article I, Section 8. Second, the statute at issue in Greenwood only allowed Congress to civilly commit individuals before the end of their trials. Specifically, the civil commitment at issue in Greenwood applied to mentally ill individuals who had been charged with a federal crime and who had been found incompetent to stand trial and thus remained under the custody of the federal government. In the words of Justice Frankfurter, the petitioner in Greenwood remained under federal custody because “the power that put him into such custody . . . [was] not exhausted.” In other words, the narrow holding of Greenwood only applied to those individuals for whom the power to prosecute had not ceased to exist. In fact, the District Court in Comstock was not able to locate a single Supreme Court case dealing specifically with “the general commitment of mentally ill and dangerous prisoners whose sentences are about to expire.” Therefore, the civil commitment of Greenwood was proper in that it did not violate principles of federalism. Moreover, the broad inclusion of three different categories of individuals under Section 4248 merited further attention by the Court. Section 4248’s civil

285 Id. at 376.
286 Id. at 369.
287 U.S. CONST. art. I, § 8, cl. 7.
288 350 U.S. at 369.
289 Id. at 375.
commitment applies to (a) “prisoners whose sentences are about to expire at the time of certification, such as Comstock”, (b) individuals who were committed to federal custody due to their incompetence to stand trial, and (c) “individuals against whom all criminal charges have been dropped as a result of their mental condition.” While there is no doubt that the second category resembles the type of civil commitment at issue in Greenwood, the first and third categories clearly apply to individuals for whom the power to prosecute has been exhausted, as they have been already charged, convicted, and sentenced. Thus, the interest of the federal government in these individuals is exhausted.

The majority’s approach to the issue of federalism also ignored recently-decided Supreme Court cases giving the propriety element of the Clause the independent significance that Lawson and Granger propose. In Printz v. United States, Congress used its commerce power to require that local state officials run background checks on prospective gun buyers. Justice Scalia, writing for the majority of the Court, held the statute unconstitutional under the anticommandeering principle. Unlike New York v. United States, where the Court used historical, structural, and doctrinal arguments as the basis for the anticommandeering principle, Printz also added the Necessary and Proper Clause as another source for that principle. In responding to the dissent, Justice Scalia responded,

What destroys the dissent’s Necessary and Proper Clause argument . . . is not the Tenth Amendment, but the Necessary and Proper Clause itself. When a “La[w] . . . for carrying into Execution” the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a “La[w] . . . proper for carrying into execution the Commerce Clause. . . .”

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291 Id. at 528 (discussing the three categories of individuals).
293 Id. at 902-903.
294 Id. at 935.
296 Printz, 521 U.S. 898 at 923-24 (emphasis added).
According to one scholar, Printz “opened a new chapter in Necessary and Proper Clause jurisprudence with its conclusion that commandeering of state officials is not a “proper” means of executing an enumerated power.”\textsuperscript{297} In fact, Printz was followed by \textit{Alden v. Maine},\textsuperscript{298} where the Court acknowledged the independent significance of the term “proper.”\textsuperscript{299} The issue before the Court in \textit{Alden} was whether “provisions of the [Fair Labor Standards Act of 1938] purporting to authorize private actions against States in their own courts without regard for consent” were constitutional.\textsuperscript{300} The Court found that “laws violating state sovereignty are not ’proper’ means for carrying enumerated powers into execution.”\textsuperscript{301} Lower courts have also followed this method of interpretation. At the district court level in \textit{Comstock}, for example, it was explicitly recognized that “[n]ecessary and proper and not synonymous.”\textsuperscript{302} The court divided its analysis of the Clause in two parts, the first analyzing the “necessary” element, and the second analyzing the Section 4248’s propriety.\textsuperscript{303} Considering the acknowledgement of the Supreme Court that the term “proper” conveys independent significance, the \textit{Comstock} majority clearly did not give the propriety element the attention it merited.

3. \textit{Individual Rights}

The circumstances under which the respondents in \textit{Comstock} were subjected to civil commitment raise important issues with respect to their individual rights. Six days prior to his scheduled release from prison, Graydon Comstock was certified as a sexually dangerous person

\begin{itemize}
\item \textsuperscript{298} 527 U.S. 706 (1999).
\item \textsuperscript{299} Id. at 732-33 (“When a ‘Law . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in various constitutional provisions . . . it is not a ‘Law . . . proper for carrying into Execution the Commerce Clause’” (quoting \textit{Printz}, 521 U.S. at 923-34).
\item \textsuperscript{300} Id. at 711.
\item \textsuperscript{301} Id. at 732-33.
\item \textsuperscript{302} \textit{United States v. Comstock}, 507 F. Supp. 2d 522, 540 (E.D.N.C. 2007).
\item \textsuperscript{303} Id. at 540-41.
\end{itemize}
under Section 4248 and subjected to civil commitment for an indefinite period of time.\textsuperscript{304} Since
then, he has remained in prison and will continue to be held until it is demonstrated that he is not
a threat to society.\textsuperscript{305} The most important constitutional challenges concerning the propriety of
Section 4248 relate to equal protection and due process.\textsuperscript{306}

In considering the issue of equal protection under the Fifth Amendment’s due process
clause,\textsuperscript{307} the Court could have considered whether the statute’s classification was over-
inclusive.\textsuperscript{308} Although under or over inclusion is not enough for a law to be struck down as
unconstitutional, it is still an important factor.\textsuperscript{309} The intended purpose of the statute at issue in
this case was to “protect children from sexual exploitation and violent crime, to prevent child
abuse and child pornography, [and] to promote Internet Safety.”\textsuperscript{310} However, the civil
commitment provision makes \textit{all persons} who are in federal custody eligible for civil
commitment, not just those charged or convicted of sex crimes.\textsuperscript{311} As the District Court for the
Eastern District of North Carolina put it: “individuals convicted of and serving time for bank
robbery, mail fraud, tax evasion, drug dealing, and sexual abuse of a child in the special maritime
or territorial jurisdiction of the United States are all equally subject to certification and
commitment [under Section 4248].”\textsuperscript{312} Although the Court has not established what standard of
review applies to civil commitment equal protection challenges due to the fact that prisoners are

\begin{itemize}
  \item \textsuperscript{304} Bill Mears, \textit{Supreme Court: Sex Offenders can be held Indefinitely}, CNN, May 17, 2010,
  \item \textsuperscript{306} Other constitutional challenges were raised in the lower courts, among them the imposition of cruel and unusual punishment, double jeopardy, ex post facto legislation, and deprivation of the right to a jury trial.
  \item \textsuperscript{307} U.S. Const. amend. V; Bolling v. Sharpe, 347 U.S. 497 (1954).
  \item \textsuperscript{308} \textit{CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES} 608-10 (Aspen Editors) (3rd ed. 2009).
  \item \textsuperscript{309} \textit{Id.} at 610.
  \item \textsuperscript{311} \textit{United States v. Comstock}, 507 F. Supp. 2d 522, 556 (E.D.N.C. 2007).
  \item \textsuperscript{312} \textit{Id.} at 556.
\end{itemize}
not a suspect classification, for purposes of argument it will be assumed that a rational basis applies. Under this standard, the law is presumed valid and the challenger has the burden of proving that (1) the classification does not rationally advance a legitimate governmental objective, or (2) that no matter how well the classification serves the objective, the objective is not legitimate.\textsuperscript{313} Evidence was presented in the lower courts to demonstrate that the classification of \textit{all} federal prisoners was not rationally related to the purpose of preventing sex crimes. For example, it was argued that individuals detained for “rape and sexual assault” accounted for only 1\% of the total number of individuals serving in federal prison.\textsuperscript{314} Also, the hearings in which sexual dangerousness was determined focused on group patterns as opposed to individual patterns, making the determinations speculative and risking committing former prisoners who do not pose threats to society, while not committing those who would be in need of rehabilitation.\textsuperscript{315} Nevertheless, it is likely that respondents would not have been able to meet their burden, considering that there was an “evil at hand”\textsuperscript{316} for correction. However, respondents could have still argued that the classification did not further a legitimate objective.

The second issue the Court would have had to consider is whether the “clear and convincing” standard of proof required to civilly commit prisoners violated due process. This would have been an especially important issue considering that former prisoners subjected to civil commitment under Section 4248 may remain detained for an indefinite period of time.\textsuperscript{317} Section 4248 specifically states that a person may be released only when it is demonstrated that he or she “is no longer sexually dangerous to others, or will not be sexually dangerous to others.”

\begin{footnotes}
\footnote{Massey, \textit{supra} note 308, at 608-09.}
\footnote{Id. at 558 n.28.}
\footnote{Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Respondents at 8, \textit{United States v. Comstock}, 130 S. Ct. 1949 (2010) (No. 08-1224).}
\end{footnotes}
defendants is flexible and depends upon the circumstances of each case, the clear and convincing standard seems to be very low, considering that an individual may be deprived of his liberty for an indefinite period of time. Moreover, one of the requirements for a person to be classified as being sexually dangerous is that the Bureau of Prisons demonstrate by clear and convincing evidence that an individual “has engaged or attempted to engage in sexually violent conduct or child molestation,” making this a very factual determination that seems to require more than mere clear and convincing evidence. It should be noted that the Supreme Court has stated that “[i]n cases involving individual rights, whether criminal or civil, ‘[t]he standard of proof reflects the value society places on individual liberty.’” Deprivation of liberty for an indefinite period of time after one has already completed a sentence should therefore be an important consideration in determining the standard of proof that applies.

It is important to mention that although the Court did “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,” it indicated that respondents were “free to pursue those claims on remand, and any others they have preserved.” This raises important questions such as whether Lawson and Granger’s approach requires courts to evaluate possible violations of individual rights even if not brought during proceedings. This and other issues that are raised by Lawson and Granger’s approach will be discussed below.

322 It should be noted that the ex post facto clause does not apply in this case because the Supreme Court has held that civil commitment programs are not criminal. See Kansas v. Hendricks, 521 U.S. 346, 361-63; Allen v. Illinois, 478 U.S. 364, 373-74.
4. *Implications*

Lawson and Granger’s approach to interpreting the propriety element of the Necessary and Proper Clause raises several questions. First, it does not clarify whether federalism and individual rights’ issues should always be considered by courts when deciding the propriety element of the Necessary and Proper Clause, or if instead these issues must be specifically pled by its challengers. In *Comstock*, for example, the lower court concluded that Section 4248 violated principles of federalism even though respondents had not raised “any specific Tenth Amendment claim.” Nevertheless, the court “examine[d] the Tenth Amendment because it necessarily limits operation of the necessary and proper powers of the government and because, as a constitutional provision, it is pertinent to the characterization of any act of Congress as necessary or proper.” On the other hand, Justice Scalia in his concurring opinion in *Gonzales v. Raich*, while reaffirming his position in *Printz* that the propriety element of the Clause has independent significance and stands as a limitation for Congress’s intrusion in a matters of state concern, declined to consider whether the statute at issue violated federalism because “neither respondents nor the dissenters suggest[ed] any violation of state sovereignty of the sort that would render this regulation ‘inappropriate’ . . .” Second, the approach seems somewhat unrealistic as it allows courts to consider whether unenumerated rights have been violated. Despite the strong evidence that the Ninth Amendment has an actual substantive meaning, historically courts have feared employing it as means to identify unenumerated rights. Related to this point is Professor Randy Beck’s “counter-majoritarian” criticism to Granger and Lawson’s

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324 *Id.*
325 *Id.*
326 545 U.S. 1 (2005).
327 *Id.* at 41.
approach. He argues that “[a]bsent a neutral and principled methodology for defining the content of the term ‘proper,’ the word constitutes an empty glass into which one may pour whatever social, economic or political theory one desires.”

Professor Beck offers three additional difficulties that may arise if Lawson and Granger’s approach were adopted. First, the “proper” interpretation of Lawson and Granger would only bind the federal Congress and not state legislatures. Thus, the rights protected under the propriety element of the Clause “would not bind the states absent some additional theory.” Second, Lawson and Granger’s interpretation of “proper” would not apply when Congress is exercising its enumerated powers without relying on the Necessary and Proper Clause, creating an “odd dichotomy” that would give more rights to states and individuals when Congress enacts laws under the Necessary and Proper Clause, and less rights if Congress legislates exclusively under an enumerated power. Third, the limitations imposed by the term “proper” would only apply to Congress, and not to the Executive and Judicial branches.

Despite these valid criticisms, Lawson and Granger’s theory sheds light onto the often-ignored propriety element of the Clause and proposes that courts should consider this issue more seriously. Their theory is particularly relevant if courts were to continue to require a mere rational relation between the means and an enumerated power under the “necessary” element of the clause. The propriety element of the Clause would act as an external limitation to Congress’s expansive powers. This seems as a reasonable interpretation of the Clause since determining the “necessity” of a law often requires a policy judgment for which Congress is better positioned, while defining the “propriety” of a law requires a more objective examination of whether other

328 Beck, supra note 297, at 640.
329 Id.
330 Id. at 639.
331 Id.
332 Id.
333 Id.
constitutional principles embodied in the Constitution have been violated, better suited for courts.

V. THE “COLLECTIVE ACTION FEDERALISM” APPROACH

The collective action federalism approach offers an interesting interpretation of Article I, Section 8. Although the focus of this approach is not on the Necessary and Proper Clause itself, it has important implications that can be closely related to the facts and majority opinion in *Comstock*, due to the prudential and structural factors underlying its methodology.

Proponents of this theory argue that Congress must have the power to regulate activities that pose collective action problems for the states. In other words, this theory proposes that Congress should be allowed to enact legislation to provide for the general welfare of the country as a whole in cases where there is a substantial national problem that requires attention that would traditionally be resolved by the states, but which the states are incapable of resolving due to the high transaction costs and externalities involved in cooperating with each other. This theory, however, is not unlimited. Legislative action would only be justified in cases where the states are incapable of cooperating with each other in order to resolve serious issues.

The collective action federalism approach finds historical support in the Articles of Confederation. Although the Articles of Confederation allowed Congress to legislate for the general welfare of the nation in matters where the central government would be best equipped to do so, the very narrow nature of enumerated powers under the Articles resulted in Congress

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334 Cooter & Seigel supra note 10.
335 See generally id.
336 Id. at 144, 152, 164, 170-83.
337 Id. at 183-84.
338 Id. at 121-25.
being unable to legislate for the general welfare.\textsuperscript{339} Having this in mind, the framers intended to adopt a more liberal scheme of legislative powers in order to allow Congress to enact legislation to promote the general welfare in those areas where states were not well-positioned to do so.\textsuperscript{340} As a result, Resolution VI was proposed at the Philadelphia Convention as the predecessor to the enumerated powers’ scheme of Article I, Section 8.\textsuperscript{341} This resolution allowed Congress “to legislate in all Cases for the general interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the Exercise of individual legislation.”\textsuperscript{342} In an attempt to clarify the “indefinite language” of the resolution, the Committee on Detail transformed it into the scheme of enumerated powers in Article I, Section 8.\textsuperscript{343} The language providing for the “general interests” of the Union, however, was retained by including the general welfare clause in the Constitution.\textsuperscript{344}

The theory of collective action federalism takes into account structural and prudential arguments deriving from changes in history, economy and society, social science, and current problems facing the United States to justify legislative enactments promoting the general welfare.\textsuperscript{345} Undoubtedly, it is settled law that Congress is empowered to spend and tax, as opposed to regulate, for the general welfare only. This leads proponents of this theory to suggest that “it is time to revisit the Butler Court’s rejection of the possibility for the General Welfare Clause [to] allow some federal regulation in addition to taxation and spending.”\textsuperscript{346} Regardless of its focus on the general welfare clause, the theory offers significant lessons that can be applied in

\textsuperscript{339} Id. at 121.  
\textsuperscript{340} Id. at 117-18.  
\textsuperscript{341} Id. at 123-24.  
\textsuperscript{342} Id. at 123 (quoting The Records of the Federal Convention of 1787, at 131-32 (Max Farrand ed., rev. ed. 1966).  
\textsuperscript{343} Id. at 123-24.  
\textsuperscript{344} See U.S CONST. art. I, § 8.  
\textsuperscript{345} Cooter & Seigel supra note 10, at 156-57.  
\textsuperscript{346} Id. at 170.
the context of the Necessary and Proper Clause, especially in light of the unique circumstances present in Comstock.

1. Application to Comstock

Under the interpretation of Article I, Section 8, advanced by the proponents of collective action federalism, the outcome in Comstock would be proper. The collective action problem at issue was the inability of states to afford the cost of taking custody of federal prisoners after the completion of their sentences, especially in those cases where a former prisoner still posed a threat to the community and was in need of rehabilitation.\textsuperscript{347} In the words of Justice Alito, “in many cases, no State will assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of lengthy federal incarceration, no longer has any substantial ties to any State.”\textsuperscript{348} Under the collective action federalism approach, therefore, Congress would be justified in enacting civil commitment laws necessary and proper to carrying out its independent power to provide for the general welfare.

The facts of the case and the legislative history of Section 4248 would support such an outcome. The underlying reason for the federal government to enact Section 4248 was that after dangerous individuals who had engaged or attempted to engage in sex crimes finished their federal sentences, no state would take custody of them due to the high costs involved.\textsuperscript{349} Twenty-nine states submitted amicus curiae briefs in support of the United States in Comstock.\textsuperscript{350} Although they recognized the importance of civil commitment programs and the need to rehabilitate former prisoners before their release to society, the twenty-nine states stressed their

\textsuperscript{348} \textit{Id.} at 1959.
\textsuperscript{350} Comstock, 130 S. Ct. at 1982 (Thomas, J., dissenting) (“29 States appear as amici and argue that § 4248 is constitutional.”).
inability to achieve such goals since doing so would impose a substantial burden upon them.\textsuperscript{351} The reasons advanced by the states in support of their position were significant, and mostly related to the high cost of maintaining state civil commitment programs. As of December 2004, for example, almost 3,500 individuals had been civilly committed at a nationwide cost of $224 million ($64,000 per individual).\textsuperscript{352} These expenses were attributed to (1) the need to establish secure facilities to provide for treatment, (2) the long-term and potential indefinite period required for treatment, and (3) the need to provide behavioral and cognitive treatment as opposed to merely drug or prescription treatments.\textsuperscript{353} Besides these considerations, however, the states recognized the importance of civil commitment programs and the need to rehabilitate former prisoners before their release into communities.\textsuperscript{354}

The application of the collective action federalism approach raises important issues. First, this would significantly expand the reach of the Necessary and Proper Clause—as well as federal government authority in general—and pose a serious threat to the principles of federalism embodied in the Constitution. Even if the states themselves have voiced their position that the law at issue does not infringe upon their police powers, accepting mere policy determinations based on economic factors as allowing for the expansion of federal powers at the expense of state sovereignty may be dangerous for the balance of federalism. In the words of Justice Thomas:

\begin{quote}
Congress’ power . . . is fixed by the Constitution; it does not expand merely to suit the States’ policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds. By assigning the Federal Government power over “certain enumerated objects only,” the Constitution “leaves to the several States a residuary
\end{quote}

\textsuperscript{352} \textit{Id.} at 2.
\textsuperscript{353} \textit{Id.}
\textsuperscript{354} \textit{Id.} at 1.
and inviolable sovereignty over all other objects.\footnote{Comstock, 130 S. Ct. at 1982 (Thomas, J., dissenting).}

Alternatively, the collective action theory could do exactly the opposite: undermine the Necessary and Proper Clause and convert it in constitutional surplus. Since both the general welfare and the Necessary and Proper Clauses involve subjective determinations, Congress would be granted two sources of ambiguous power, providing for nearly unbridled expansion of federal powers. For example, in addition to being allowed to pass legislation requiring sex offender registration as necessary and proper to carry out the regulation of interstate commerce, Congress would be free to pass such legislation under the pretense of regulating for the general welfare. Although this particular legislation has been found constitutional under the Necessary and Proper Clause, issues may arise in cases where a statute would not pass muster under the Necessary and Proper Clause but would under the general welfare clause.

Although the collective action federalism theory does not focus on the Necessary and Proper Clause, it sheds light on important prudential considerations that as \textit{Comstock} illustrates, may become relevant in the Necessary and Proper Clause context. Instead of viewing it as an additional source of congressional expansion, this theory should instead be regarded as a mechanism under which the already broad federal powers could be limited. If this approach is compared to the open-ended grant of powers that the \textit{Comstock} Court has afforded Congress, it may serve the purpose of putting limits on the already-expansive legislative powers.
CONCLUSION

The Necessary and Proper Clause states that only those means necessary and proper to carry into execution the enumerated powers of Article I, Section 8 are constitutional. From a textual perspective, *Comstock*’s holding that Congress is allowed to legislate in furtherance of other federal laws, as opposed to expressly enumerated powers, has no basis in the Constitution and will undoubtedly result in the continuing expansion of congressional powers having serious implications in future cases, particularly those related to the individual mandate of the healthcare legislation. With respect to the “necessity” requirement, the debate among textualists would still exist as to whether a mere rational relation or a direct fit is needed between the chosen means and the enumerated power. History, doctrinal, and prudential sources suggest that Congress is entitled to rational-basis review when enacting laws in furtherance of one or more *identifiable* enumerated powers. The evidence presented by the four theories, however, demonstrate that the type of rational-basis to be afforded to Congress is not as ultra-deferential as the *Comstock* majority suggests. Instead, the standard should resemble Justice Kennedy’s approach, under which there must be a “demonstrated link in fact” between the chosen means and the enumerated power. This will not only ensure that Congress as representative of the people and policy-maker is not deprived of its legislative authority, but will also prevent it from enacting laws under pretext.

On the other hand, if one departs from a textual approach and adopts the prudential and structural considerations supporting *Comstock*’s holding that Congress is allowed to legislate in furtherance of other laws, one must also establish certain limitations to congressional power in order to ensure that the structure of dual federalism is not completely undermined. The four theories discussed offer some alternatives. Barnett’s theory proposing intermediate scrutiny, for
example, would act as an internal limit on Congressional discretion even if no specific enumerated power can be easily identified. Also, as the collective action federalism approach suggests, Congress’s powers may be limited by allowing it to legislate in furtherance of other federal laws only when the matter at issue is of substantial national concern and whenever the states are incapable of fixing the problem themselves.

Regardless of the view one takes regarding the “necessity” element of the Clause (i.e., whether one requires a direct means-ends connection or a mere rational relation), the four theories discussed above have emphasized that “necessity” is only the first requirement under the Clause. Either in the form of fiduciary duties, natural law, or as a check upon Congress’s interference in areas traditionally regulated by the states or individual rights, the theories demonstrate that the term “proper” has independent legal significance and deserves the same degree of attention given to the “necessity” requirement. While there have been a few cases treating the term “proper” as a separate element, none has given the term the attention it merits. A case defining the role of the propriety element of the Clause will be required in order for courts to be able to analyze the constitutionality of laws enacted under the Necessary and Proper Clause as it was originally intended.

356 Barnett would require the identification of an enumerated power. His theory, however, can be used as a limitation on congressional expansion.
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