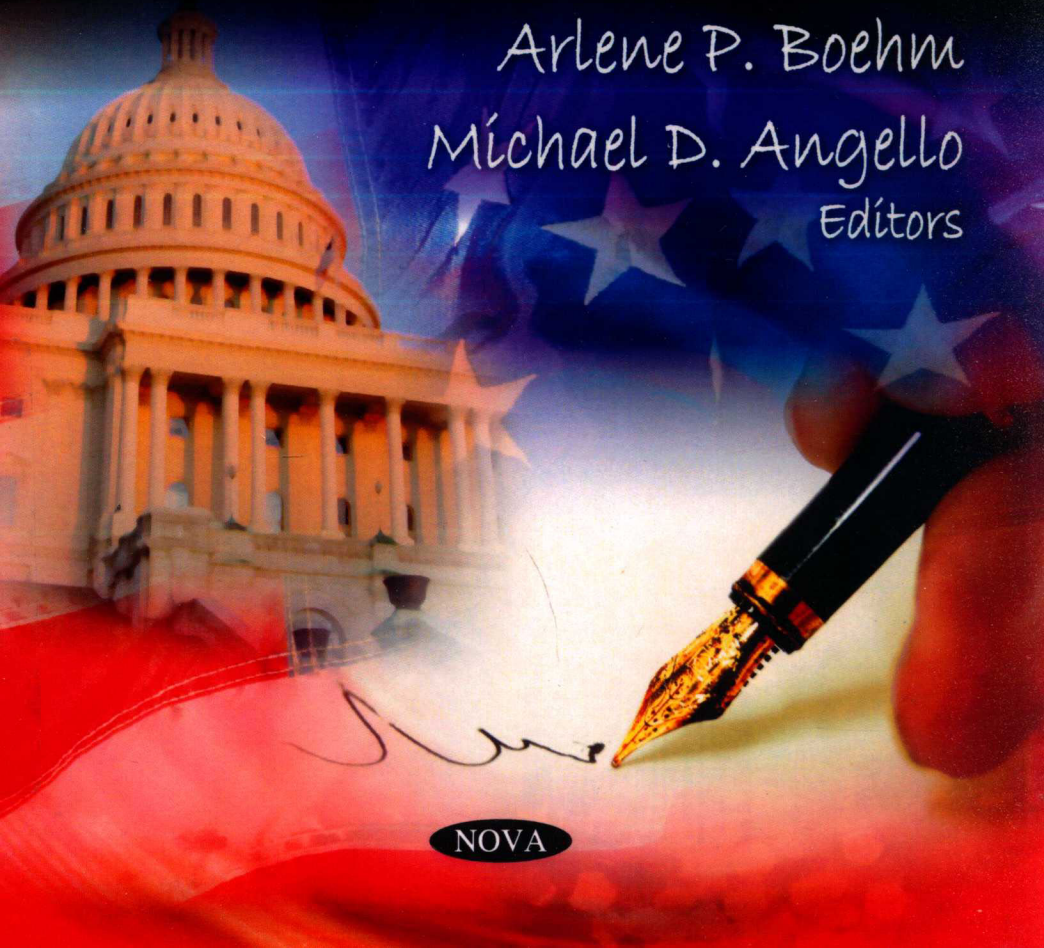


*Congressional Policies, Practices and Procedures*

# The Basis and Limitations of Congressional Power

Arlene P. Boehm  
Michael D. Angello  
Editors



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**CONGRESSIONAL POLICIES, PRACTICES AND PROCEDURES**

**THE BASIS AND LIMITATIONS  
OF CONGRESSIONAL POWER**

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## PREFACE

The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law. In recent years, however, the Supreme Court has decided a number of cases that would seem to reevaluate this historical relationship. This new book discusses the basis and limits of state and federal legislative power, focusing on a number of these "federalism" cases, state sovereignty and the Constitution.

Chapter 1- The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law. In recent years, however, the Supreme Court has decided a number of cases that would seem to reevaluate this historical relationship. This report discusses state and federal legislative power generally, focusing on a number of these "federalism" cases. The report does not, however, address the larger policy issue of when it is appropriate—as opposed to constitutionally permissible—to exercise federal powers.

Chapter 2- The Commerce Clause of the United States Constitution provides that the Congress shall have the power to regulate interstate and foreign commerce. The plain meaning of this language might indicate a limited power to regulate commercial trade between persons in one state and persons outside of that state. However, the Commerce Clause has never been construed quite so narrowly. Rather, the clause, along with the economy of the United States, has grown and become more complex. In addition, when Congress began to address national social problems, the Commerce Clause was often cited as the constitutional basis for such legislation. As a result, the Commerce Clause has become the constitutional basis for a significant portion of the laws passed by the Congress over the last fifty years, and it currently

represents one of the broadest bases for the exercise of congressional powers. The reliance of the Congress on the Commerce Clause, however, has been controversial, as was the case with the passage of the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148).

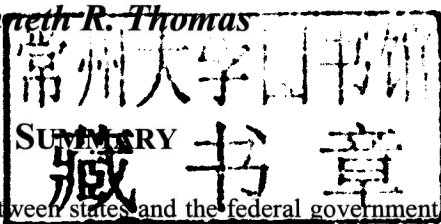
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*Chapter 1*

# FEDERALISM, STATE SOVEREIGNTY, AND THE CONSTITUTION: BASIS AND LIMITS OF CONGRESSIONAL POWER\*

*Kenneth R. Thomas*



The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law. In recent years, however, the Supreme Court has decided a number of cases that would seem to reevaluate this historical relationship. This report discusses state and federal legislative power generally, focusing on a number of these “federalism” cases. The report does not, however, address the larger policy issue of when it is appropriate—as opposed to constitutionally permissible—to exercise federal powers.

The U.S. Constitution provides that Congress shall have the power to regulate commerce with foreign nations and among the various states. This power has been cited as the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and, in conjunction with the Necessary and Proper Clause, it currently represents one of the broadest bases for the exercise of congressional powers. In *United States v. Lopez* and subsequent cases, however, the Supreme Court did bring into question the

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extent to which Congress can rely on the Commerce Clause as a basis for federal jurisdiction.

Another significant source of congressional power is the Fourteenth Amendment, specifically the Equal Protection and Due Process Clauses. Section 5 of that amendment provides that Congress has the power to enforce its provisions. In the case of *Flores v. City of Boerne*, however, the Court imposed limits on this power, requiring that there must be a “congruence and proportionality” between the injury to be remedied and the law adopted to that end.

The Tenth Amendment provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” While this language would appear to represent one of the most clear examples of a federalist principle in the Constitution, it has not had a significant impact in limiting federal powers. However, in *New York v. United States* and *Printz v. United States*, the Court did find that, under the Tenth Amendment, Congress cannot “commandeer” either the legislative process of a state or the services of state executive branch officials.

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State.” Although this text is limited to preventing citizens from bringing diversity cases against states in federal courts, the Supreme Court has expanded the concept of state sovereign immunity further to prohibit citizens generally from bringing suits against states under federal law generally. There are exceptions to this limitation, however, and Congress also has a limited ability to abrogate such state immunity.

Finally, Congress has the power under the Spending Clause to require states to undertake certain activities as a condition of receiving federal monies. Such conditions, however, must be related to the underlying grant, and the financial consequences of non-compliance cannot be coercive.

## INTRODUCTION

The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law. In recent years, however, the Supreme Court has decided a number of cases that would seem to be a reevaluation of this historical relationship. This report discusses state and federal legislative power generally and focuses on a number of these “federalism” cases. The report discusses state and federal legislative power generally, and focuses on a number of these “federalism” cases.<sup>1</sup> Issues addressed include congressional power under the Commerce Clause and the Fourteenth

Amendment; limits on congressional powers, such as the Tenth Amendment; and state sovereign immunity under the Eleventh Amendment. The report does not, however, address the much larger federalism issue of when it is appropriate—as opposed to constitutionally permissible—for federal powers to be exercised.

## **POWERS OF THE STATES**

States may generally legislate on all matters within their territorial jurisdiction. This “police power” does not arise from the Constitution, but is an inherent attribute of the states’ territorial sovereignty. The Constitution does, however, provide certain specific limitations on that power. For instance, a state is relatively limited in its authority regarding the regulation of foreign imports and exports<sup>2</sup> or the conduct of foreign affairs.<sup>3</sup> Further, states must respect the decisions of courts of other states,<sup>4</sup> and are limited in their ability to vary their territory without congressional permission.<sup>5</sup> In addition, the Supreme Court has found that states are limited in their ability to burden interstate commerce.<sup>6</sup>

## **POWERS OF THE FEDERAL GOVERNMENT**

The powers of the federal government, while limited to those enumerated in the Constitution,<sup>7</sup> have been interpreted broadly, so as to create a large potential overlap with state authority. For instance, Article I, § 8, cl. 18 provides that “[t]he Congress shall have power “...To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Early in the history of the Constitution, the Supreme Court found that this clause enlarges rather than narrows the powers of Congress.<sup>8</sup>

Congress has broad financial powers, including the power to tax and spend in order to pay debts and provide for the common defense and general welfare of the United States.<sup>9</sup> Congress also has the power to borrow money and to appropriate money from the United States Treasury.<sup>10</sup> The purposes for which Congress may tax and spend are very broad and are not limited by the scope of other enumerated powers under which Congress may regulate.<sup>11</sup> On the other hand, Congress has no power to regulate “for the general welfare,” but may only tax and spend for that purpose.

Congress also has broad authority over the commercial interests of the nation, including the power to regulate commerce,<sup>12</sup> to establish bankruptcy laws,<sup>13</sup> to coin money,<sup>14</sup> to punish counterfeiters,<sup>15</sup> to establish post offices and post roads,<sup>16</sup> and to grant patents and copyrights.<sup>17</sup> The Commerce Clause, discussed in more detail below, is one of the most far-reaching grants of power to Congress. Regulation of interstate commerce covers all movement of people and things across state lines, including communication and transportation.

Congress has broad powers over citizenship, including the power to define the circumstances under which immigrants may become citizens,<sup>18</sup> and to protect the rights of those persons who have citizenship. The Fourteenth Amendment gives Congress the power to enforce the guarantees of the Fourteenth Amendment, including the right to due process and equal protection.<sup>19</sup> This power extends specifically to the power of Congress to protect the rights of citizens who are at least 18<sup>20</sup> to vote regardless of race, color, previous condition of servitude,<sup>21</sup> or sex.<sup>22</sup> Congress may also regulate the time, place, and manner of federal elections,<sup>23</sup> and judge the result of such elections.<sup>24</sup> Congress also has a number of other powers relating to elections and appointments.<sup>25</sup>

Congress has the power and authority to purchase and administer property, and has power over those jurisdictions that are not controlled by states, such as the District of Columbia and the territories.<sup>26</sup> Congress is limited by the Fifth Amendment, however, in the taking of private property without compensation.<sup>27</sup> Congress has numerous powers related to war and the protection of the United States and its sovereign interests.<sup>28</sup>

## THE COMMERCE CLAUSE

As noted above, the U.S. Constitution provides that Congress shall have the power to regulate commerce with foreign nations and among the various states.<sup>29</sup> This power has been cited as the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers. In *United States v. Lopez*,<sup>30</sup> however, the Supreme Court brought into question the extent to which Congress can rely on the Commerce Clause as a basis for federal jurisdiction.

Under the Gun-Free School Zones Act of 1990, Congress made it a federal offense for “any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”<sup>31</sup> In *Lopez*, the Court held that, because the act neither regulated a commercial activity nor contained a requirement that the possession was connected to interstate

commerce, the act exceeded the authority of Congress under the Commerce Clause. Although the Court did not explicitly overrule any previous rulings upholding federal statutes passed under the authority of the Commerce Clause, the decision would appear to suggest new limits to Congress's legislative authority.

The scope and extent of the Commerce Clause does not appear to have been of particular concern to the framers of the Constitution.<sup>32</sup> There are indications that the founding fathers considered the federal regulation of commerce to be an important power of the new Constitution primarily as a means of facilitating trade and of raising revenue.<sup>33</sup> While the Anti-Federalists argued that the new Constitution gave too much power to the federal government, they apparently did not raise significant objections to the granting of power to regulate interstate commerce.<sup>34</sup>

The Supreme Court, however, developed an expansive view of the Commerce Clause relatively early in the history of judicial review. For instance, Chief Justice Marshall wrote in 1824 that "the power over commerce ... is vested in Congress as absolutely as it would be in a single government ..." and that "the influence which their constituents possess at elections, are ... the sole restraints" on this power.<sup>35</sup> However, the issue in most of the early Supreme Court Commerce Clause cases dealt not with the limits of congressional authority, but on the implied limitation of the Commerce Clause on a state's ability to regulate commerce.<sup>36</sup>

It has been suggested that the Commerce Clause should be restricted to the regulation of "selling, buying, bartering and transporting."<sup>37</sup> In fact, much of the federal legislation approved of by the Supreme Court early in the 20<sup>th</sup> century did relate to issues such as the regulation of lottery tickets,<sup>38</sup> the transporting of adulterated food,<sup>39</sup> and the interstate transportation of prostitutes.<sup>40</sup> Moreover, during the early 1900s, the Supreme Court struck down a series of federal statutes that attempted to extend commerce regulation to activities such as "production," "manufacturing,"<sup>41</sup> and "mining."<sup>42</sup>

Starting in 1937, however, with the decision in *NLRB v. Jones & Laughlin Steel Corporation*,<sup>43</sup> the Supreme Court held that Congress has the ability to protect interstate commerce from burdens and obstructions that "affect" commerce transactions. In the *NLRB* case, the court upheld the National Labor Relations Act, finding that by controlling industrial labor strife, Congress was preventing burdens from being placed on interstate commerce.<sup>44</sup> Thus, the Court rejected previous distinctions between the economic activities (such as manufacturing) that led up to interstate economic transactions, and the interstate transactions themselves. By allowing Congress to regulate activities that were in the "stream" of commerce, the Court also set the stage for the regulation of a variety of other activities that "affect" commerce.

Subsequent Court decisions found that Congress had considerable discretion in determining which activities “affect” interstate commerce, as long as the legislation was “reasonably” related to achieving its goals of regulating interstate commerce.<sup>45</sup> Thus the Court found that in some cases, events of purely local commerce (such as local working conditions) might, because of market forces, negatively affect the regulation of interstate commerce, and thus would be susceptible to regulation.<sup>46</sup> The Court has also held that an activity which in itself does not affect interstate commerce could be regulated if all such activities taken in the aggregate did affect interstate commerce.<sup>47</sup> Under the reasoning of these cases, the Court has upheld many diverse laws, including laws regulating production of wheat on farms,<sup>48</sup> racial discrimination by businesses,<sup>49</sup> and loan-sharking.<sup>50</sup>

The *Lopez* case was significant in that it is the first time since 1937 that the Supreme Court struck down a federal statute purely based on a finding that Congress had exceeded its powers under the Commerce Clause.<sup>51</sup> In doing so, the Court revisited its prior cases, sorted the commerce power into three categories, and asserted that Congress could not go beyond these three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities that “affect” commerce.<sup>52</sup>

Within the third category of activities that “affect commerce,” the Court determined that the power to regulate commerce applies to intrastate activities only when they “substantially” affect commerce.<sup>53</sup> Still, the Court in *Lopez* spoke approvingly of earlier cases upholding laws that regulated intrastate credit transactions, restaurants utilizing interstate supplies, and hotels catering to interstate guests. The Court also recognized that while some intrastate activities may by themselves have a trivial effect on commerce, regulation of these activities may be constitutional if their regulation is an essential part of a larger economic regulatory scheme. Thus, the Court even approved what has been perceived as one of its most expansive rulings, *Wickard v. Filburn*, which allowed the regulation of the production and consumption of wheat for home consumption.<sup>54</sup>

The Court in *Lopez* found, however, that the Gun-Free School Zones Act fell into none of the three categories set out above. It held that it is not a regulation of channels of commerce, nor does it protect an instrumentality of commerce. Finally, its effect on interstate commerce was found to be too removed to be “substantial.” The Court noted that the regulated activity, possessing guns in school, neither by itself nor in the aggregate affected commercial transactions.<sup>55</sup> Further, the statute contained no requirement that interstate commerce be affected, such as that the gun had been previously transported in interstate commerce.<sup>56</sup> Nor

was the criminalization of possession of a gun near a school part of a larger regulatory scheme that did regulate commerce.<sup>57</sup> Finally, the Court indicated that criminal law enforcement is an area of law traditionally reserved to the states.<sup>58</sup> Consequently, the Court found that Congress did not have the authority to pass the Gun-Free School Zone Act.

It should be noted that the *Lopez* Court purported to be limiting, but not overruling, prior case law that had supported an expansive interpretation of the commerce clause. Consequently, most existing federal laws, which have traditionally been drafted to be consistent with this case law,<sup>59</sup> would survive constitutional scrutiny even under *Lopez*. However, in at least one significant case, Congress passed a law, the Violence Against Women Act, that seemed to invoke the same concerns that the Court found in *Lopez*. Consequently, the relevant portion of that act was struck down in *United States v. Morrison*.<sup>60</sup>

In *Morrison*, the Court evaluated whether 42 U.S.C. § 13981, which provides a federal private right of action for victims of gender-motivated violence, was within the power of Congress to enact under the Commerce Clause. In *Morrison*, the victim of an alleged rape brought suit against the alleged rapist, arguing that this portion of the act was sustainable because it addressed activities that substantially affect interstate commerce.<sup>61</sup> The Court, however, noted that unlike traditional statutes based on the commerce clause, the activity in question had nothing to do with commerce or an economic enterprise. This point had been made previously in *Lopez*, and here the Court reaffirmed the holding that in order to fall under the acceptable category of laws that “substantially affect commerce,” the underlying activity itself must generally be economic or commercial.<sup>62</sup> As gender-motivated violence does not inherently relate to an economic activity, the Court held that it was beyond the authority of Congress to regulate.

In the case of *Gonzales v. Raich*,<sup>63</sup> the Court evaluated an “as applied” challenge to the Controlled Substances Act as regards obtaining, manufacturing, or possessing marijuana for medical purposes. The case was brought by two seriously ill residents of California who used marijuana in compliance with the California Compassionate Use Act of 1996.<sup>64</sup> The challenge was based on the argument that the narrow class of activity being engaged in—the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law—did not have a substantial impact on commerce, and thus could not be regulated under the Commerce Clause.<sup>65</sup>

In upholding the application of the Controlled Substances Act in the *Raich* case, the Court relied on its decision in *Wickard v. Filburn*,<sup>66</sup> which held that “even if appellee’s activity be local and though it may not be regarded as

commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”<sup>67</sup> The *Wickard* case upheld the application of the Agricultural Adjustment Act of 1938,<sup>68</sup> which was designed to control prices by regulating the volume of wheat moving in interstate commerce. The Court in *Wickard* held that Congress could regulate not only the wheat sold into commerce, but also wheat retained for consumption on a farm.<sup>69</sup> The Court did so on the theory that the while the impact of wheat consumed on the farm on interstate commerce might be trivial, it was significant when combined with wheat from other farmers similarly situated.<sup>70</sup>

Based on *Wickard*, the Court in *Raich* held that Congress could consider the aggregate effect that allowing the production and consumption of marijuana for medical purposes would have on the illegal market for marijuana.<sup>71</sup> Of even greater concern was that diversion of marijuana grown for medicinal purposes for other uses would frustrate the federal interest in eliminating commercial transactions in the interstate market.<sup>72</sup> In both cases, the Court found that the regulation was within Congress’s commerce power because Congress had a rational basis to determine that production of a commodity meant for home consumption, be it wheat or marijuana, could have a substantial effect on supply and demand. In addition, because exempting the use of medical marijuana could undercut enforcement of the Controlled Substances Act, the Court found that the application in this case was within Congress’s authority to “make all Laws which shall be necessary and proper” to effectuate its powers.

## THE NECESSARY AND PROPER CLAUSE

The Constitution provides Congress not only enumerated powers, but also the ability to pass laws to make such powers effective. While such a power might have been implied of necessity even without an explicit textual basis in the Constitution, the Founding Fathers specifically included congressional authority to “make all Laws which shall be necessary and proper”<sup>73</sup> to effectuate its powers. Although the extension of congressional power under this clause is not an independent basis for legislation, the provision has been integral to a broad interpretation of other congressional powers. For instance, as discussed below, the expansive nature of modern Commerce Clause doctrine may actually be a reflection of Necessary and Proper Clause jurisprudence.

Sometimes, the Court’s reliance on the Necessary and Proper Clause in a particular case is only briefly noted, or may even exist *sub silentio*. For instance, the majority opinion in the case of *Gonzales v. Raich* (discussed above)



emphasized that, in evaluating the scope of Congress's authority under the Commerce Clause to regulate medicinal marijuana, the Court need only find that Congress had a "rational basis" to find a link between the legislation and the Commerce Clause. The Court then went on to note that in such cases "Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'"<sup>74</sup> This language then served to allow the Court to approve the restriction of medical marijuana as one component of a larger economic regulatory scheme.

This passing reference to the Necessary and Proper Clause may obscure its historical significance to Commerce Clause litigation. Writing in concurrence in *Raich*, Justice Scalia argued that it is more accurate to characterize the expansive "substantial effects" prong of Commerce Clause analysis as predominantly based on the Necessary and Proper Clause. He noted that the current description of the "substantial effects" prong is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, "as this Court has acknowledged ...

Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."<sup>75</sup> In fact, Justice Scalia argues that, in some cases, the Necessary and Proper Clause can go beyond existing doctrines of the Commerce Clause, to regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Another area where the Court has provided a similarly broad interpretation of an Article I congressional power based on the Necessary and Proper Clause is the Spending Clause.<sup>76</sup> In *Sabri v. United States*,<sup>77</sup> the Court considered whether the federal government could punish the bribery of state, local, and tribal officials if the governmental entities that employed them received at least \$10,000 in federal funds. The defendant, who was convicted of attempting to bribe a city councilman to facilitate the building of a hotel and retail structure in Minneapolis, argued that the statute in question had no federal nexus. The Court rejected this argument, holding that Congress's authority under the Spending Clause, when supplemented by the Necessary and Proper Clause, allowed Congress to ensure that federal dollars not be diverted or undermined by corruption. The Court held that it was not important if the federal funds received by the governmental entity in question were not directly involved in a particular scheme, because "money is



fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.”<sup>78</sup>

An even more expansive interpretation of the Necessary and Proper Clause, in this case as applied to the entire federal criminal penal system (which derives from a variety of congressional powers), is found in the Court’s opinion in *United States v. Comstock*.<sup>79</sup> In *Comstock*, the Court evaluated a federal statute which allowed for the civil commitment of a federal prisoner past the term of his or her imprisonment, if that prisoner would have serious difficulty in refraining from sexually violent conduct or child molestation. The statute contained no requirement that the threatened future conduct would fall under federal jurisdiction, raising the question of what constitutional basis could be cited for the enforcement of the statute.

The majority opinion in *Comstock* upheld the statute after considering five factors: (1) the historic breadth of the Necessary and Proper Clause; (2) the history of federal involvement in this area; (3) the reason for the statute’s enactment; (4) the statute’s accommodation of state interests; and (5) whether the scope of the statute was too attenuated from Article I powers.<sup>80</sup> The Court noted that the breadth of the power was established by Justice Marshall in the case of *McCulloch v. Maryland*,<sup>81</sup> where the Chief Justice wrote:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.

Previous federal involvement in the area included not only the civil commitment of defendants who were incompetent to stand trial or who became insane during the course of their imprisonment, but, starting in 1949, the continued confinement of those adjudged incompetent or insane past the end of their prison term.

In ‘upholding the sex offender statute, the Court found that protection of the public and the probability that such prisoners would not be committed by the state represented a rational basis for the passage of such legislation. The Court further found that the state interests were protected by the legislation, as the statute provided for transfer of the committed individuals to state authorities willing to accept them. Finally, the Court found that the statute was not too attenuated from the Article I powers underlying the criminal laws which had been the basis for incarceration, as it related to the responsible administration of the United States prison system.