

## Sec. 8—Powers of Congress

## Cl. 18—Necessary and Proper Clause

federal prisoner past the term of his imprisonment<sup>1745</sup> 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 its enforcement. 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 statute was too attenuated from Article I powers.<sup>1746</sup>

In evaluating these factors, the Court noted that 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.<sup>1747</sup> The Court further found that 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.

<sup>1745</sup> Where an ex-convict is still subject to legal requirements related to his previous conviction, the Court has found little difficulty in those requirements being varied after his release. In *United States v. Kebodeaux*, 570 U.S. \_\_\_, No. 12–418, slip op. (2013), the Court found that a sex offender, convicted by the Air Force in a special court-martial, had, upon his release, been subject to state sex offender registration laws, violation of which was prohibited under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No., 103–322, 108 Stat. 2038–2042. When he was later convicted of failing to register under the “very similar” provisions of the later-enacted Sex Offender Registration and Notification Act (SORNA), Public Law 109–24, Title I, 120 Stat. 590, 42 U.S.C. §16901 et seq., the Court found congress was well within its authority under the Necessary and Proper Clause to have modified the registration requirements.

<sup>1746</sup> 560 U.S. \_\_\_, No. 08–1224, slip op. at 22.

<sup>1747</sup> Justice Kennedy, in concurrence, expressed concern that whether a statute is “rationally related” to the implementation of a power, see *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955) (Due Process Clause), is too deferential a standard to be used as regards the Necessary and Proper Clause. Justice Kennedy would use a more rigorous “rational basis” standard, found in Commerce Clause cases, where there must be shown a “demonstrated link in fact, based on empirical demonstration.” See *Comstock*, 560 U.S. \_\_\_, No. 08–1224, slip op. at 3 (Kennedy, J., concurring).