Sotomayor would also impose a "heavy burden" on challengers to the application of disclosure requirements to specific petitions.[92] Had these Justices, let alone the Court, buttressed such impositions with the full weight of the informational interest, they would have better guarded against the likelihood that lower courts will improvidently grant exemptions not only out of concern for the indirect chilling effect of disclosure on anonymous political participation, but also out of unwitting disregard for the direct chilling effect of exemptions on deliberative political participation.

E. Necessary and Proper Clause

Civil Commitment. — The Adam Walsh Child Protection and Safety Act of 2006[1] has been described as "the most comprehensive child crimes and protection bill in our Nation's history."[2] Section 4248 of the Act authorizes the civil commitment of certain federal prisoners beyond the conclusion of their criminal sentences if they have "engaged or attempted to engage in sexually violent conduct or child molestation"[3] and suffer from a mental illness that makes it difficult to refrain from such conduct.[4] If the state in which such a prisoner is domiciled or was tried will not assume responsibility for him, "the Attorney General shall place the person for treatment in a suitable facility, until (1) such a State will assume such responsibility; or (2) the person's condition is such that he is no longer sexually dangerous to others," including while under treatment.[5] Last Term, in *United States v. Comstock*,[6] the Supreme Court held that section 4248 falls within congressional power under the Necessary and Proper Clause.[7] The Court reached the correct result, but its reasoning rests on the flawed assertion that the federal government has custodial power over prisoners past their terms of imprisonment. A better justification of section 4248 is that it furthers two purposes of punishment — namely, incapacitation and rehabilitation — that remain unfulfilled when the affected prisoners' sentences expire.

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[92] *Id.* at 2829 (Sotomayor, J., concurring).

[1] Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 10, 18, 21, 28, and 42 U.S.C.).

[2] 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statement of Sen. Orrin Hatch).

[3] 18 U.S.C. § 4247(a)(5) (2006) (defining "sexually dangerous person").

[4] *Id.* § 4247(a)(6) (defining "sexually dangerous to others"). Section 4248 covers prisoners who have been convicted of a federal crime or who have been charged with a federal crime and either determined incompetent to stand trial or released from the charges because of their mental condition. *See id.* §§ 4241(d), 4248(a).

[5] *Id.* § 4248(d).

[6] 130 S. Ct. 1949 (2010).

[7] *Id.* at 1954.

The Court's decision resolved five consolidated cases. Four defendants had served or were serving federal sentences — three for possession of child pornography[8] and one for sexual abuse of a minor[9] — and one defendant had been found incompetent to stand trial for aggravated sexual abuse of a minor and abusive sexual conduct.[10] The federal government petitioned for a civil commitment hearing for each defendant, and the defendants moved to dismiss the petitions on the ground that section 4248 is unconstitutional.[11]

The trial court granted the defendants' motions to dismiss,[12] ruling that section 4248 exceeds Congress's powers under the Necessary and Proper Clause.[13] The court rejected the government's claim that civil commitment is authorized by Congress's power to prevent criminal conduct.[14] Section 4248 would need to further an enumerated power because Congress lacks "broad power generally to criminalize sexually dangerous conduct."[15] But because the provision does not target "a specific harm . . . proscribed by . . . federal laws," it cannot be justified by the enumerated powers such laws pursue.[16] Moreover, the court reasoned that even if section 4248 pursued an acceptable end, it would not be a necessary and proper means to that end because it intrudes on traditional state powers.[17]

The Court of Appeals for the Fourth Circuit affirmed.[18] The court noted that "a specific enumerated power [must] support every [federal]

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[8] *See* 18 U.S.C. § 2252. These defendants were Graydon Comstock, Thomas Matherly, and Markis Revland. United States v. Comstock, 507 F. Supp. 2d 522, 526 & n.2 (E.D.N.C. 2007).

[9] *See* 18 U.S.C. § 2242. This defendant was Marvin Vigil. *Comstock*, 507 F. Supp. 2d at 527 n.2.

[10] This defendant was Shane Catron. *Comstock*, 507 F. Supp. 2d at 526 n.2.

[11] *Id.* at 526–28. Specifically, the defendants argued that section 4248 violates the Double Jeopardy Clause, the Ex Post Facto Clause, the Eighth Amendment prohibition on cruel and unusual punishment, and the right to jury trial under the Sixth Amendment; exceeds Congress's authority under the Commerce Clause; violates procedural due process; and violates substantive due process and equal protection under the Fifth Amendment. *Id.* at 528.

[12] *Id.* at 560.

[13] *Id.* at 551.

[14] *See id.* at 536–40.

[15] *Id.* at 538. Whereas congressional action must rest on specific jurisdictional bases, states may regulate "sexually violent conduct *underlying* various federal sex crimes" in furtherance of "the general welfare of the community." *Id.*

[16] *Id.* The court also rejected the arguments that section 4248 is justified by the power to prosecute, *see id.* at 532–34, or by the power to regulate interstate commerce, *see id.* at 534–36.

[17] *See id.* at 540–51. The court also found that section 4248's clear and convincing evidence standard violated due process. *See id.* at 551–59. The court found that the double jeopardy, ex post facto, cruel and unusual punishment, and jury trial claims were not relevant to the civil scheme section 4248 created, *id.* at 530, and declined to address the defendants' remaining arguments, which rested on substantive due process and equal protection, *id.* at 560.

[18] United States v. Comstock, 551 F.3d 274, 285 (4th Cir. 2009).

statute."[19] However, the court concluded that neither the Commerce Clause[20] nor the Necessary and Proper Clause[21] justified section 4248.

The Supreme Court reversed and remanded.[22] Writing for the Court, Justice Breyer[23] limited the inquiry to whether the Necessary and Proper Clause authorizes the civil commitment scheme.[24] For five reasons, the Court concluded it does.[25]

First, "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation."[26] The Court invoked Chief Justice John Marshall: "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."[27] Subsequent decisions, the Court observed, have interpreted this test to require only that federal statutes be "rationally related to the implementation of a constitutionally enumerated power."[28] Notably, although the Constitution explicitly grants the power to punish federal crimes in only a few cases,[29] the Necessary and Proper Clause authorizes Congress "to criminalize conduct, . . . to imprison individuals who engage in that conduct, . . . [and] to enact laws governing prisons and prisoners . . . in the course of 'carrying into Execution' the enumerated powers."[30]

Second, section 4248 "constitutes a modest addition" to an established practice of federal civil commitment.[31] Although "even a longstanding history of related federal action does not demonstrate a statute's constitutionality,"[32] "[a] history of involvement . . . can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests."[33] Here,

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19 *Id.* at 278 (citing United States v. Morrison, 529 U.S. 598, 607 (2000)).

20 *Id.* at 280.

21 *See id.* at 280–84. Having held that section 4248 exceeds Congress's constitutional authority, the court declined to address any other challenges to the scheme. *Id.* at 276 & n.1.

22 *Comstock*, 130 S. Ct. at 1965.

23 Justice Breyer was joined by Chief Justice Roberts and Justices Stevens, Ginsburg, and Sotomayor.

24 *Comstock*, 130 S. Ct. at 1956.

25 *Id.*

26 *Id.*

27 *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)) (internal quotation marks omitted).

28 *Id.* (citing Sabri v. United States, 541 U.S. 600, 605 (2004)).

29 Specifically, enumerated federal crimes include "those related to 'counterfeiting,' 'treason,' or 'Piracies and Felonies committed on the high Seas' or 'against the Law of Nations.'" *Id.* at 1957 (quoting U.S. CONST. art. I, § 8, cls. 6, 10; *id.* art. III, § 3).

30 *Id.* at 1958 (quoting U.S. CONST. art. I, § 8, cl. 18).

31 *Id.*

32 *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)).

33 *Id.* (quoting Gonzales v. Raich, 545 U.S. 1, 21 (2005)) (citations omitted).

federal civil commitment has existed since 1855,[34] including a law authorizing civil commitment of any person "whose sentence is about to expire" and whose "mental disease or defect" would cause his release to significantly threaten others.[35]

Third, the civil commitment scheme is necessary and proper for implementing the enumerated powers.[36] As the custodian of federal prisoners — a role "that rests . . . upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority"[37] — the federal government may "protect nearby (and other) communities from the danger federal prisoners may pose."[38] Section 4248 is "reasonably adapted" to Congress's custodial power[39] because Congress could have reasonably concluded that affected prisoners would be dangerous and would likely not be detained by the states.[40]

Fourth, the scheme "properly accounts for state interests."[41] "[I]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States,"[42] and the power to civilly commit federal prisoners is delegated to Congress by the Necessary and Proper Clause.[43] Moreover, section 4248 explicitly "requires *accommodation* of state interests."[44]

Finally, "the links between [section] 4248 and an enumerated Article I power are not too attenuated," and the scheme is not "too sweeping" in scope.[45] "[T]he enumerated power[s] that justif[y] [each] defendant's statute of conviction" also justify his federal imprisonment and his civil commitment.[46] Moreover, the scheme is "narrow in scope," having "been applied to only a small fraction of federal prison-

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[34] *Id.* at 1958–59.

[35] 18 U.S.C. § 4246(a) (2006); *see also Comstock*, 130 S. Ct. at 1960.

[36] *See Comstock*, 130 S. Ct. at 1961–62.

[37] *Id.* at 1961.

[38] *Id.* The Court appealed to common law tort principles, *see id.* (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1965)), and analogized section 4248 to the federal government's assertedly undeniable power not to release from prison a person "infected with a communicable disease that threatens others," *id.*

[39] *Id.* (quoting United States v. Darby, 312 U.S. 100, 121 (1941)) (internal quotation marks omitted).

[40] *Id.*

[41] *Id.* at 1962.

[42] *Id.* (alteration in original) (quoting New York v. United States, 505 U.S. 144, 156 (1992)) (internal quotation mark omitted).

[43] *See id.* at 1961–62.

[44] *Id.* at 1962.

[45] *Id.* at 1963.

[46] *Id.* at 1964 (quoting *id.* at 1979 n.12 (Thomas, J., dissenting)).

ers."[47] Considering all five factors together, the Court concluded, "[t]he Constitution . . . authorizes Congress to enact [section 4248]."[48]

Justice Kennedy concurred in the judgment.[49] He began by criticizing the majority's expansive reading of the Necessary and Proper Clause. The rational basis test in the context of the Necessary and Proper Clause requires at least "a demonstrated link in fact, based on empirical demonstration," not merely the "conceivable rational relation" required in the Due Process Clause context.[50] Further, the majority erred in dismissing the defendants' arguments based on the Tenth Amendment, as "the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government."[51] Justice Kennedy concluded by cautioning that there remain many traditional areas of state sovereignty into which the federal government may not intrude.[52]

Justice Alito also concurred in the judgment.[53] He agreed with Justice Kennedy that the Necessary and Proper Clause requires more than a potential rational relationship between enumerated powers and federal statutes.[54] He reasoned that section 4248 has "a substantial link to Congress['s] constitutional powers"[55]: prisoners subject to section 4248 would otherwise "escape civil commitment as a result of federal imprisonment,"[56] and "Congress [may] protect the public from dangers created by the federal criminal justice and prison systems."[57]

Justice Thomas dissented.[58] He charged the majority with "invert[ing]" Chief Justice Marshall's test by addressing congressional discretion in the choice of means toward enumerated ends before analyzing whether section 4248 pursues a legitimate end at all.[59]

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47 *Id.*

48 *Id.* at 1965. The Court did not address the defendants' arguments that section 4248 "denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution," leaving the defendants "free to pursue those claims on remand." *Id.*

49 *Id.* (Kennedy, J., concurring in the judgment).

50 *Id.* at 1967.

51 *Id.*

52 *See id.* at 1968 (citing, for example, United States v. Morrison, 529 U.S. 598 (2000)).

53 *Id.* (Alito, J., concurring in the judgment).

54 *See id.* at 1970.

55 *Id.*

56 *Id.* ("[F]ederal prisoners, having been held for years in a federal prison, often [have] few ties to any State; it [is] a matter of speculation where they [will] choose to go upon release; and accordingly no State [is] enthusiastic about volunteering to shoulder the burden of civil commitment.").

57 *Id.*

58 *Id.* (Thomas, J., dissenting). Justice Scalia joined Justice Thomas in all of the dissent except Part III-A-I-b, the section that insisted on a direct link between federal statutes and an enumerated power and that criticized the majority's reasoning that section 4248 is constitutional because it furthers Congress's custodial power over federal prisoners. *See id.* at 1975–77.

59 *Id.* at 1975.

Additionally, Justice Thomas argued, the Court "misapplie[d]"[60] the test by asking whether section 4248 furthers "other laws" rather than "enumerated powers."[61] Section 4248 does not further an enumerated power because it requires no connection between the reasons for civil commitment and the federal crime committed, allows commitment after a prisoner's sentence expires, and does not require that a person be likely to commit a federal crime if released.[62] Finally, Justice Thomas argued that the federal government is not the custodian of persons whose sentences have ended,[63] that the majority overstated the history of federal civil commitment,[64] and that the claim that section 4248 merely compensates for states' shortcomings is empirically dubious[65] and constitutionally irrelevant.[66]

The *Comstock* Court correctly upheld section 4248, but its appeal to the federal government's custodial power is questionable. The Court could have reached its result more convincingly by recognizing that civil commitment furthers the legitimate goals of incapacitation and rehabilitation and that the scheme, although potentially unconstitutional as applied to some defendants, is within Congress's power as applied to the defendants here.

The majority's core holding — that the federal government's custodial power over federal prisoners justifies section 4248[67] — rests on uncertain ground. As the dissent noted, the government is not the custodian of persons after their terms of imprisonment expire.[68] One

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[60] *Id.*

[61] *Id.* at 1976.

[62] *See id.* at 1977–78.

[63] *See id.* at 1978–79.

[64] *See id.* at 1979–80.

[65] *See id.* at 1980–81.

[66] *See id.* at 1981–83.

[67] *Id.* at 1961–62 (majority opinion). Although the Court provided five reasons for its decision, the holding about custodial power is necessary for the Court's disposition of the case. "Every law enacted by Congress must be based on one or more of its [enumerated] powers . . . ." United States v. Morrison, 529 U.S. 598, 607 (2000). Even conceding that Congress generally has broad power under the Necessary and Proper Clause, *Comstock*, 130 S. Ct. at 1956, that there is a long history of federal civil commitment, *id.* at 1958, that section 4248 does not intrude on the states' reserved powers, *id.* at 1962, and that section 4248 is neither "too sweeping in its scope" nor justified by links to enumerated powers that are "too attenuated," *id.* at 1963, Congress still would not have authority to enact section 4248 if the statute were not grounded in an enumerated power. The Court's third argument, dealing with Congress's custodial power, is the crucial move that links section 4248 to Congress's enumerated powers through the criminal statutes under which the defendants were convicted.

[68] *Comstock*, 130 S. Ct. at 1978–79 (Thomas, J., dissenting). The Supreme Court had explicitly limited its approval of a predecessor civil commitment statute, 18 U.S.C. § 4246 (2006), to cases in which federal power "is not exhausted." Greenwood v. United States, 350 U.S. 366, 375 (1956). The power to punish persons who violate federal criminal law, asserted in the form of a criminal sentence that consigns persons to the federal government's custody, would seem to be "exhausted" when the sentence expires. *See* United States v. Dowell, No. CIV-06-1216-D, 2007 WL 5361304,

might argue that section 4248 furthers Congress's custodial powers because the commitment decision is made during the defendant's term of imprisonment, but the relevant question is whether the government may commit the defendant after his term ends. Importantly, Congress's custodial power is based on legal custody, not mere physical control, so the government would need to show that it "ha[s] ultimate legal authority over the [defendant]'s detention" after the criminal sentence expires.[69] This legal authority can derive neither from the expired sentence nor from the commitment decision, whose authorization depends on the custodial powers derived from the criminal sentence.

One might counter that in other contexts, the federal government exercises control over persons after their terms of imprisonment have expired. For instance, the Sex Offender Registration and Notification Act[70] (SORNA), enacted as part of the same bill as section 4248,[71] is a civil regulatory scheme[72] that requires state and federal sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides, . . . is an employee, and . . . is a student."[73] However, courts considering congressional power to enact SORNA have not invoked Congress's custodial authority over sex offenders who are required to register, but rather have appealed to the Commerce Clause power "to prevent [sex offenders] from disappearing,"[74] or to "Congress's superseding power to assign consequences for violations of federal law."[75] Finally, the fact that section 4248 arguably responds to the states' failure to exercise their police powers to provide adequately for sexually dangerous persons cannot justify the provision as an exercise of Congress's custodial powers.[76]

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at *3 (W.D. Okla. Dec. 5, 2007); United States v. Shields, 522 F. Supp. 2d 317, 325 (D. Mass. 2007). A similar conclusion was reached by the district court, United States v. Comstock, 507 F. Supp. 2d 522, 549–51 (E.D.N.C. 2007), and the Fourth Circuit, United States v. Comstock, 551 F.3d 274, 281–82 (4th Cir. 2009), and the Court was unable to cite any Supreme Court precedent justifying civil commitment by appeal to the federal government's custodial powers, *see Comstock*, 130 S. Ct. at 1961–62. In contrast, Congress's custodial powers would probably justify, for instance, a law barring parole for sexually dangerous prisoners.

[69] United States v. Joshua, 607 F.3d 379, 388 (4th Cir. 2010); *see also* United States v. Hernandez-Arenado, 571 F.3d 662, 666–67 (7th Cir. 2009).

[70] Pub. L. No. 109-248, §§ 101–155, 120 Stat. 587, 590–611 (2006) (codified at 42 U.S.C. §§ 16901–16962 (2006) and 18 U.S.C. § 2250 (2006)).

[71] Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 10, 18, 21, 28, and 42 U.S.C.).

[72] *See* United States v. Mason, 510 F. Supp. 2d 923, 929–30 (M.D. Fla. 2007).

[73] 42 U.S.C. § 16913(a) (2006).

[74] United States v. Senogles, 570 F. Supp. 2d 1134, 1147 (D. Minn. 2008); *see also* United States v. Torres, 573 F. Supp. 2d 925, 940 (W.D. Tex. 2008); United States v. Gould, 526 F. Supp. 2d 538, 547 (D. Md. 2007).

[75] *Torres*, 573 F. Supp. 2d at 935.

[76] *Cf.* United States v. Morrison, 529 U.S. 598, 653 (2000) (Souter, J., dissenting) (noting that the majority overturned a section of the Violence Against Women Act of 1994 even though the

A more compelling way for the Court to reach its outcome would have been to recognize that civil commitment pursues the goals of incapacitation and rehabilitation — two ends that the federal government is authorized to pursue as part of its power to enforce criminal law.[77] The determination that a person's mental illness would make it difficult for him to refrain from sexually violent conduct if released[78] is tantamount to a determination that the person still needs rehabilitation (in the form of treatment) and incapacitation. The constitutional justification for the federal government's civil commitment authority, therefore, involves disaggregating the powers to pursue various goals that together compose the federal government's power to enforce criminal laws and pursuing a limited subset of those powers as a civil regulatory scheme.[79] Notably, while the power to punish the violation of criminal law — asserted in a criminal sentence and invoking all of the purposes of punishment together — is exhausted in these cases, the powers to incapacitate and rehabilitate may nonetheless be asserted separately from the criminal sentence in the form of civil, nonpunitive commitment. Courts have recognized Congress's authority, once its criminal law powers are triggered by a criminal charge or conviction, to pursue a subset of the goals of criminal law in several other civil regulatory contexts, including commitment of defendants found incompetent to stand trial,[80] defendants found not guilty by reason of insanity,[81] and defendants whose mental illness might cause them to en-

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law responded to Congress's determination that state courts had proved "inadequate to stop gender-biased violence"); United States v. Darby, 312 U.S. 100, 114 (1941) ("[Congress's Commerce Clause power] can neither be enlarged nor diminished by the exercise or non-exercise of state power." (citation omitted)).

77 *See* Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) ("[T]he goals of penal sanctions that have been recognized as legitimate [are] retribution, deterrence, incapacitation, and rehabilitation . . . ."); United States v. Brown, 381 U.S. 437, 458 (1965); Georgia Lee Sims, Note, *The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System*, 62 VAND. L. REV. 1053, 1059 (2009). *But cf.* Mistretta v. United States, 488 U.S. 361, 366 (1989) ("[T]he efforts of the criminal justice system to achieve rehabilitation of offenders ha[ve] failed." (citing S. Rep. No. 98-225, at 38 (1983))); John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U. L. REV. 271 (1988) (questioning the efficacy and wisdom of certain types of incapacitation).

78 *See* 18 U.S.C. § 4247(a)(6) (2006).

79 Courts have acknowledged the overlap between the purposes of criminal and civil commitment, *see, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring), and have distinguished between the types of commitment by reasoning that only criminal (punitive) commitment pursues retribution and deterrence, *see* Kansas v. Crane, 534 U.S. 407, 412 (2002); Allen v. Illinois, 478 U.S. 364, 370 (1986).

80 *See, e.g.*, United States v. Sahhar, 56 F.3d 1026, 1029 (9th Cir. 1995) (grounding the civil commitment of a defendant found incompetent to stand trial in the government's interest in "treating [the defendant]'s mental illness and protecting him and society from his potential dangerousness").

81 *See* 18 U.S.C. § 4243(e) (providing that the Attorney General may hospitalize "for treatment" persons found not guilty by reason of insanity until their mental condition is such that their

danger others if released.[82] The requirement that Congress's criminal powers be triggered prior to civil commitment,[83] together with more general due process[84] and federalism[85] imperatives, provides a backstop for the reasoning propounded here and prevents the government from simply detaining anyone suspected of being dangerous.[86]

This justification for section 4248 is limited to persons who have been charged with or convicted of a crime of sexual misconduct. Unlike the pretrial civil commitment scheme upheld in *United States v. Perry*,[87] section 4248 does not require that a person be likely to commit any federal offense.[88] The district court in *Comstock* reasoned that the scheme therefore targets "sexually violent conduct stripped of [neces-

release "would not create a substantial risk of bodily injury to another person or serious damage to property of another"); Jones v. United States, 463 U.S. 354, 368 (1983) ("The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness."); *cf.* United States v. Weed, 389 F.3d 1060, 1074 (10th Cir. 2004) (upholding § 4243(d) under the Due Process and Equal Protection Clauses).

[82] *See, e.g.*, United States v. S.A., 129 F.3d 995, 999 (8th Cir. 1997) (reasoning that such commitment is justified as "a mechanism intended to provide a safeguard to the general public and to ensure that mentally ill and dangerous individuals receive proper treatment").

[83] Although courts sometimes use language that could be read to justify civil commitment completely apart from the government's exercise of its criminal powers, *see, e.g.*, United States v. Perry, 788 F.2d 100, 109 (3d Cir. 1986) ("[C]ivil commitment for 'the safety of the community' must be analyzed independently of the criminal charge."), it is important that courts generally have upheld federal civil commitment only when the federal government's criminal powers have been triggered by a criminal charge or conviction, *see, e.g.*, *id.* at 110–11. Indeed, the Seventh Circuit has noted that "applying [section 4248] to persons such as material witnesses or those under civil contempt orders would be difficult to defend." United States v. Hernandez-Arenado, 571 F.3d 662, 666 (7th Cir. 2009).

[84] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 749 (1987) (conceding that, other than in "special circumstances," there is a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial"); United States v. Melendez-Carrion, 790 F.2d 984, 1000 (2d Cir. 1986) ("It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.").

[85] Even if section 4248 pursues enumerated powers, the Necessary and Proper Clause arguably still requires it to cohere with principles of federalism. *Cf.* Gonzales v. Raich, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) ("[A] law is not '"*proper* for carrying into Execution the Commerce Clause"' '[w]hen [it] violates [a constitutional] principle of state sovereignty.'" (second, third, and fourth alterations in original) (quoting Printz v. United States, 521 U.S. 898, 923–24 (1997))). Not only is the "care of insane persons . . . essentially the function of the several states," United States v. Shawar, 865 F.2d 856, 859 (7th Cir. 1989), but "the suppression of violent crime and vindication of its victims" is also a paradigmatic example of the states' reserved police powers, United States v. Morrison, 529 U.S. 598, 618 (2000).

[86] Although civil commitment is generally justified only when the government's criminal powers have been triggered, the authority to incapacitate and rehabilitate notably is not *justified by* the power to enforce criminal law, but rather is *part of* that power and directly furthers the enumerated powers.

[87] 788 F.2d at 110–11.

[88] United States v. Comstock, 507 F. Supp. 2d 522, 538 (E.D.N.C. 2007).

sary] jurisdictional bases" and is an impermissible intrusion on the states' reserved police powers.[89]

It is correct that section 4248 lacks an explicit jurisdictional hook,[90] but this deficiency is not fatal.[91] Although the requisite connection to an enumerated power might be absent with regard to an abstract defendant charged with an undefined federal offense, such a connection exists with regard to actual persons charged with or convicted of federal sexual offenses.[92] The federal government has constitutional authority to incapacitate persons charged with federal sex crimes[93] and both to incapacitate and rehabilitate persons convicted of such crimes.[94] If a person qualifies for civil commitment under section 4248, the incapacitative and rehabilitative components of that person's prior detention are incomplete.[95] For such a person, civil commitment is merely a continuation of the government's constitutional power to incapacitate or rehabilitate him. Section 4248 would thus seem to meet the rational basis test endorsed by the *Comstock* majority.[96]

The Court, of course, did not employ the approach advocated here. But it came close. Custodianship of persons subject to civil commitment generates duties to prevent such persons from harming third

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[89] *Id.* Similarly, Justice Thomas objected that section 4248 does not require a showing that the defendant will "violate a law executing an enumerated power in the future." *Comstock*, 130 S. Ct. at 1978 (Thomas, J., dissenting).

[90] *See* 18 U.S.C. § 4247(a)(6) (2006).

[91] *Cf.* Sabri v. United States, 541 U.S. 600, 605 (2004) ("We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook . . . .").

[92] Indeed, all of the defendants here were charged with or convicted of sexual crimes. *See Comstock*, 507 F. Supp. 2d at 526 & n.2.

[93] *See* United States v. Schenberger, 498 F. Supp. 2d 738, 742 (D.N.J. 2007) (denying bail to a defendant charged with receiving and distributing child pornography because "no condition or combination of conditions exist that will reasonably assure the safety of the community if [the] defendant is released").

[94] *See* United States v. Huff, 232 F. App'x 832, 837 (10th Cir. 2007) (approving of a district court's sentencing of a defendant for online enticement of a child in part because "[t]he sentence reflect[ed] a proper concern for . . . recidivism and rehabilitation"); United States v. White Face, 383 F.3d 733, 740 (8th Cir. 2004) (affirming a district court's sentencing of a defendant who was convicted of sexual abuse of a minor and had violated the conditions of his supervised release, in part because the court "[was] satisfied that the district court adequately considered . . . the sentencing objectives of . . . incapacitation[] and rehabilitation").

[95] Section 4248 admittedly does not differentiate between the propensities to commit federal versus nonfederal sexual crimes, but the similarity of the underlying conduct indicates that section 4248's criteria for civil commitment nonetheless determine when the incapacitation and rehabilitation authorized with regard to the defendant are incomplete.

[96] *Comstock*, 130 S. Ct. at 1956 (citing *Sabri*, 541 U.S. at 605). Specifically, civil commitment would be rationally related to implementing Congress's enumerated powers because it would incapacitate and rehabilitate the defendant, and these actions are part of Congress's power to enforce criminal laws and thus further Congress's enumerated powers.

parties[97] and to provide such persons with necessary treatment.[98] The Court's reasoning therefore generates the powers to incapacitate and rehabilitate, but derives them from custodianship. Additionally, the approach advanced here arguably resolves the principal disagreement between *Comstock*'s majority and dissent. Whereas the majority justified section 4248 by taking several steps away from Congress's enumerated powers,[99] Justice Thomas rejected section 4248 because he insisted that every federal statute be directly related to — no more than one step away from — an enumerated power.[100] The suggested approach charts a third course: it achieves the majority's outcome by invoking the government's authority to incapacitate and rehabilitate prisoners, which is, per the dissent's requirements, directly related to the enumerated powers justifying the prisoners' original detention.

F. Separation of Powers

Removal Power. — The Supreme Court's separation-of-powers precedents have upheld the constitutionality of "independent agencies" whose officers are protected from removal except for cause.[1] These decisions have remained controversial,[2] however, to those who believe that the power to remove officers at will is essential to the President's vested control over the government's executive functions[3] and his constitutional duty to "take Care that the Laws be faithfully executed."[4] Last Term, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[5] the Supreme Court held that inferior officers must be removable at will if their agency head is herself removable only for cause: "two levels of protection from removal" violate the Constitution's separation of powers.[6] The particular statute that the Court invalidated, however, also granted extensive oversight powers to the Securities and Exchange Commission to overrule and curtail the powers of the officials on the Public Company Accounting Oversight Board. Because these comprehensive oversight provisions allowed the Com-

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97 *See* United States v. Volungus, 595 F.3d 1, 8 (1st Cir. 2010); RESTATEMENT (SECOND) OF TORTS § 319 (1965).

98 *See Volungus*, 595 F.3d at 8; RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965).

99 *Comstock*, 130 S. Ct. at 1961–65.

100 *Id.* at 1975–77 (Thomas, J., dissenting).

1 *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

2 *See, e.g.*, *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994) ("If the President is to have effective control of his constitutionally granted powers, he must be able to remove those who he believes will not follow his administrative agenda and philosophy.").

3 U.S. CONST. art. II, § 1, cl. 1.

4 *Id.* art. II, § 3.

5 130 S. Ct. 3138 (2010).

6 *Id.* at 3164.