AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Powers of the National Government

---

U.S. v. Kebodeaux, ___ U.S. ___ (2013)

In 1999, Anthony Kebodeaux was convicted by a military court of a sex offense. He served his sentence and then received a bad conduct discharge from the Air Force. Under the Sex Offender Registration and Notification Act of 2006 (SORNA), Kebodeaux was required to register with local authorities wherever he resided or worked. In 2007, Kebodeaux moved to San Antonio, Texas, but did not register. He was subsequently convicted in a lower federal court for violating SORNA. That conviction was sustained by a panel of judges on the Court of Appeals for the Fifth Circuit, but later reversed by the Fifth Circuit in an en banc proceeding. By a 10–6 vote, the judges declared that Congress had no power under Article I to require a sex offender to register after the sex offender served his sentence. The United States appealed to the Supreme Court.

The Supreme Court by a 7–2 vote ruled that Kebodeaux was required to register as a sex offender. Justice Breyer's majority opinion held that SORNA was a constitutional exercise of federal power under the necessary and proper clause because that measure was related to the congressional power to "regulate the land and naval forces." Why did he reach this conclusion? Why did Chief Justice Roberts and Justice Alito think SORNA constitutional? Why did Justice Thomas disagree? Who has the better constitutional argument? After Kebodeaux, *may Congress constitutionally require all sex offenders to register whenever they change residences? What congressional powers, if any, do you think best justify such a law?*

JUSTICE BREYER delivered the opinion of the Court.

. . . .

We do not agree with the Circuit's conclusion. And, in explaining our reasons, we need not go much further than the Circuit's critical assumption that Kebodeaux's release was "unconditional," i.e., that after Kebodeaux's release, he was not in "any . . . special relationship with the federal government." To the contrary, the Solicitor General, tracing through a complex set of statutory cross-references, has pointed out that at the time of his offense and conviction Kebodeaux was subject to the federal Wetterling Act, an Act that imposed upon him registration requirements very similar to those that SORNA later mandated.

. . . .

Both the Court of Appeals and Kebodeaux come close to conceding that if, as of the time of Kebodeaux's offense, he was subject to a federal registration requirement, then the Necessary and Proper Clause authorized Congress to modify the requirement as in SORNA and to apply the modified requirement to Kebodeaux. And we believe they would be right to make this concession.

No one here claims that the Wetterling Act, as applied to military sex offenders like Kebodeaux, falls outside the scope of the Necessary and Proper Clause. And it is difficult to see how anyone could persuasively do so. The Constitution explicitly grants Congress the power to "make Rules for the . . . Regulation of the land and naval Forces." And, in the Necessary and Proper Clause itself, it grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" and "all other Powers" that the Constitution vests "in the Government of the United States, or in any Department or Officer thereof."

The scope of the Necessary and Proper Clause is broad. In words that have come to define that scope Chief Justice Marshall long ago 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. *McCulloch v. Maryland* (1819).

As we have come to understand these words and the provision they explain, they "leav[e] to Congress a large discretion as to the means that may be employed in executing a given power." . . .

Here, under the authority granted to it by the Military Regulation and Necessary and Proper Clauses, Congress could promulgate the Uniform Code of Military Justice. It could specify that the sex offense of which Kebodeaux was convicted was a military crime under that Code. It could punish that crime through imprisonment and by placing conditions upon Kebodeaux's release. And it could make the civil registration requirement at issue here a consequence of Kebodeaux's offense and conviction. This civil requirement, while not a specific condition of Kebodeaux's release, was in place at the time Kebodeaux committed his offense, and was a consequence of his violation of federal law.

And Congress' decision to impose such a civil requirement that would apply upon the release of an offender like Kebodeaux is eminently reasonable. Congress could reasonably conclude that registration requirements applied to federal sex offenders after their release can help protect the public from those federal sex offenders and alleviate public safety concerns. . . .

. . . .

The upshot is that here Congress did not apply SORNA to an individual who had, prior to SORNA's enactment, been "unconditionally released," i.e., a person who was not in "any . . . special relationship with the federal government," but rather to an individual already subject to federal registration requirements that were themselves a valid exercise of federal power under the Military Regulation and Necessary and Proper Clauses.

. . . .

SORNA's general changes were designed to make more uniform what had remained "a patchwork of federal and 50 individual state registration systems." . . . SORNA's more specific changes reflect Congress' determination that the statute, changed in respect to frequency, penalties, and other details, will keep track of more offenders and will encourage States themselves to adopt its uniform standards. No one here claims that these changes are unreasonable or that Congress could not reasonably have found them "necessary and proper" means for furthering its pre-existing registration ends.

. . . .

CHIEF JUSTICE ROBERTS, concurring in the judgment.

. . . .

The Constitution gives Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." And, under the Necessary and Proper Clause, Congress can give those rules force by imposing consequences on members of the military who disobey them. A servicemember will be less likely to violate a relevant military regulation if he knows that, having done so, he will be required to register as a sex offender years into the future.

It is this power, the power to regulate the conduct of members of the military by imposing consequences for their violations of military law, that supports application of the federal registration obligation to Kebodeaux. . . .

. . . .

. . . . Public safety benefits are neither necessary nor sufficient to a proper exercise of the power to regulate the military. What matters—all that matters—is that Congress could have rationally determined that "mak[ing] the civil registration requirement at issue here a consequence of Kebodeaux's offense"

would give force to the Uniform Code of Military Justice adopted pursuant to Congress's power to regulate the Armed Forces.

I worry that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: a federal police power. . . . I write separately to stress not only that a federal police power is immaterial to the result in this case, but also that such a power could not be material to the result in this case—because it does not exist.

Our resistance to congressional assertions of such a power has deep roots. From the first, we have recognized that "the powers of the government are limited, and that its limits are not to be transcended." *McCulloch*. Thus, while the Necessary and Proper Clause authorizes congressional action "incidental to [an enumerated] power, and conducive to its beneficial exercise," Chief Justice Marshall was emphatic that no "great substantive and independent power" can be "implied as incidental to other powers, or used as a means of executing them."

It is difficult to imagine a clearer example of such a "great substantive and independent power" than the power to "help protect the public . . . and alleviate public safety concerns." I find it implausible to suppose—and impossible to support—that the Framers intended to confer such authority by implication rather than expression. A power of that magnitude vested in the Federal Government is not "consist[ent] with the letter and spirit of the constitution" and thus not a "proper [means] for carrying into Execution" the enumerated powers of the Federal Government.

It makes no difference that the Federal Government would be policing people previously convicted of a federal crime—even a federal sex crime. The fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's purely intrastate conduct.

. . . .

JUSTICE ALITO, concurring in the judgment.

I concur in the judgment solely on the ground that the registration requirement at issue is necessary and proper to execute Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces." Exercising this power, Congress has enacted provisions of the Uniform Code of Military Justice (UCMJ) that authorize members of the military to be tried before a military tribunal, rather than a state court, for ordinary criminal offenses, including sex crimes, that are committed both within and outside the boundaries of a military installation. States usually have concurrent jurisdiction over such crimes when they are committed off base and sometimes possess jurisdiction over such offenses when committed on base. These offenses, however, are rarely prosecuted in both a military and a state court, and therefore when a servicemember is court-martialed for a sex offense over which the State had jurisdiction, this is usually because the State has deferred to the military. Where the offense in question is a sex crime, a consequence of this handling of the case is that the offender, if convicted, may fall through the cracks of a state registration system. . . . When a servicemember is convicted by a military tribunal, however, the State has no authority to require that tribunal to notify the state registry, nor does it have the authority to require the officials at a military prison to notify state or local police when the servicemember is released from custody. Because the exercise of military jurisdiction may have this effect—in other words, may create a gap in the laws intended to maximize the registration of sex offenders—it is necessary and proper for Congress to require the registration of members of the military who are convicted of a qualifying sex offense in a military court. When Congress, in validly exercising a power expressly conferred by the Constitution, creates or exacerbates a dangerous situation (here, the possibility that a convicted sex offender may escape registration), Congress has the power to try to eliminate or at least diminish that danger.

JUSTICE SCALIA, dissenting.

I join [most] of Justice THOMAS's dissent. . . . I do not agree that what is necessary and proper to enforce a statute validly enacted pursuant to an enumerated power is not itself necessary and proper to

the execution of an enumerated power. It is my view that if "Congress has the authority" to act, then it also "'possesses every power needed'" to make that action "'effective.'" If I thought that SORNA's registration requirement were "'reasonably adapted'" to carrying into execution some other, valid enactment, I would sustain it.

. . . .

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Parts I, II, and III–B, dissenting.

. . . .

The Constitution creates a Federal Government with limited powers. Congress has no powers except those specified in the Constitution. . . . A different default rule applies to the States. As the Tenth Amendment makes clear, the States enjoy all powers that the Constitution does not withhold from them. While the powers of Congress are "few and defined," the powers that "remain in the State governments are numerous and indefinite."

. . . . [T]he Necessary and Proper Clause is not a freestanding grant of congressional power, but rather an authorization to makes laws that are necessary to execute both the powers vested in Congress by the preceding clauses of § 8, and the powers vested in Congress and the other branches by other provisions of the Constitution.

In *McCulloch v. Maryland*, Chief Justice Marshall famously set forth the Court's interpretation of the Necessary and Proper Clause:

> 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[ent] with the letter and spirit of the constitution, are constitutional.

Under this formulation, a federal law is a valid exercise of Congress' power under the Clause if it satisfies a two-part test. "First, the law must be directed toward a 'legitimate' end, which McCulloch defines as one 'within the scope of the [C]onstitution.'" . . . "Second, there must be a necessary and proper fit between the 'means' (the federal law) and the 'end' (the enumerated power or powers) it is designed to serve." "The means Congress selects will be deemed 'necessary' if they are 'appropriate' and 'plainly adapted' to the exercise of an enumerated power, and 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'"

. . . .

It is undisputed that no enumerated power in Article I, § 8, gives Congress the power to punish sex offenders who fail to register, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Thus, SORNA is a valid exercise of congressional authority only if it is "necessary and proper for carrying into Execution" one or more of those federal powers enumerated in the Constitution.

. . . .

Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces" does not support Kebodeaux's conviction. Kebodeaux had long since fully served his criminal sentence for violating Article 120(b) of the UCMJ and was no longer in the military when Congress enacted SORNA. Congress does not retain a general police power over every person who has ever served in the military. Accordingly, Kebodeaux's conviction . . . cannot be sustained based on Congress' power over the military.

. . . .

Protecting society from sex offenders and violent child predators is an important and laudable endeavor. But "the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it." The power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or the people.

. . . .

[T]he enumerated power that justified Kebodeaux's conviction does not justify requiring him to register as a sex offender now that he is a civilian. If Kebodeaux were required to register as part of his criminal sentence, then registration would help execute the power that justifies his conviction. The court-martial here, however, did not impose registration requirements at Kebodeaux's sentencing. Enacted long after Kebodeaux had completed his sentence, SORNA cannot be justified as a punishment for the offense Kebodeaux committed while in the military because retroactively increasing his punishment would violate the Ex Post Facto Clause. The only justification for SORNA that the Government has advanced is protection of the public, but that justification has nothing to do with Congress' power to regulate the armed forces.

Justice ALITO contends that, by trying members of the military in a military court, Congress exacerbated "the possibility that a convicted sex offender may escape [the state] registration [system]," and that SORNA is necessary and proper to correct this problem. But Justice ALITO has not identified any enumerated power that gives Congress authority to address this supposed problem, and there is no evidence that such a problem exists. Indeed, Texas has indicated that SORNA undermines its registration system, rather than making it more effective.

. . . .