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The Revival of the “Sweeping Clause”: An Analysis of Why the Supreme Court Had to “Breathe New Life” into the Necessary and Proper Clause in *United States v. Comstock*

BY LAUREN E. MARSH

INTRODUCTION

The protection of our nation’s children against the dangers of sex offenders has become a growing concern of our society. Child victims, such as Adam Walsh, whose death drew national attention and prompted the creation of “American’s Most Wanted,”¹ have increased society’s attention to sexual offenders. Statistics have demonstrated that one in five girls and one in ten boys will be sexually exploited before they reach adulthood, and over two-thirds of all sexual assault victims are children.² Additional research indicates that sex offenses are less likely to be reported than any other offense, making it nearly impossible to accurately measure the frequency of these incidents in any given year.³

Perhaps even more alarming is the recidivism rate of sex offenders. A Department of Justice report examining recidivism rates in fifteen states indicates that 5.3% of male offenders were rearrested for another sex-related crime within three years of their prison release.⁴ These numbers may fail to expose the true extent of the problem: a 2001 report revealed that re-offenses take place more than twice as often as are officially recorded.⁵

In response to this discomfiting recidivism rate, numerous states have enacted legislation allowing for the civil commitment of “sexually violent predators,” in hopes of curbing re-offending rates for such offenders.⁶ In 2006, Congress decided to follow suit.

Congress passed the Adam Walsh Child Protection and Safety Act (“Adam Walsh Act” or “the Act”) in July of 2006.⁷ The Act aimed to create more explicit and uniform registration requirements for sex offenders and to amend federal law and procedure regarding the civil commitment of sex offenders.⁸ Title III, Section 301 of the Act, 18 U.S.C. § 4248, authorizes

the Attorney General or the Director of the Bureau of Prisons to certify a sex offender as “sexually dangerous” and order that person to be civilly committed to the custody of the Attorney General.⁹

This portion of the Adam Walsh Act has been challenged on the premise that it is an unconstitutional exercise of Congressional authority.¹⁰ A number of district courts,¹¹ as well as the First, Fourth and Eighth Circuits,¹² were in disagreement as to the Act’s constitutionality. In June 2009, the Supreme Court of the United States granted certiorari to *United States v. Comstock*.¹³ On May 17, 2010, by a 7-2 vote, the Supreme Court reversed the Fourth Circuit and held that Congress had the constitutional authority to enact § 4248 under the Necessary and Proper Clause.¹⁴

The Court’s decision drew a lot of attention; if not for the holding itself, then at least for the analysis the Court implemented in reaching its conclusion.¹⁵ In every other recent decision addressing the federal government’s authority to enact legislation, the Supreme Court has applied an analysis under the Commerce Clause,¹⁶ rather than the Necessary and Proper Clause alone, to determine whether the law at issue was a constitutional exercise of congressional authority.¹⁷ Each of these cases applied a three-prong test created in a 1995 decision, *United States v. Lopez*,¹⁸ establishing that Congress only has the authority under the Commerce Clause to enact legislation if the act (1) regulates channels of interstate commerce, (2) regulates instrumentalities or persons or things within interstate commerce, or (3) substantially effects interstate commerce.¹⁹

The basis for relying on the Commerce Clause in these cases was that the Necessary and Proper Clause, absent a sufficient link to a power expressly granted to Congress in Article I, did not grant Congress the authority on its own to enact legislation.²⁰ However, the Rehnquist Court’s Commerce Clause juris-



prudence itself created a very narrow standard, greatly limiting the federal government's ability to enact legislation through its commerce power.²¹ Rather than applying the rigid three-prong commerce power analysis in *Comstock*, the Supreme Court created a new five-factor standard,²² concluding that the Necessary and Proper Clause granted Congress the authority to enact § 4248.²³

Regardless of whether this decision, as some have criticized, is a demonstration of the Court adopting policy over law,²⁴ one thing is certain: if the Supreme Court wanted to uphold § 4248, it had no choice but to adopt a new analysis under the Necessary and Proper Clause in order to do so. This Comment will argue that, had the Supreme Court treated *Comstock* as a commerce power case, the precedent established by the Rehnquist Court would have prevented it from upholding § 4248. Specifically, it will demonstrate that § 4248 would not have survived the stringent three-prong *Lopez* standard, and even in light the Supreme Court's arguable expansion of commerce clause in its most recent Commerce Clause decision, *Gonzales v. Raich*,²⁵ the Court would not have been able to validate the enactment of § 4248 on Commerce Clause grounds.

Part I of this Comment will provide a background of the constitutional provisions relevant to the issues presented in *Comstock*. Part II will provide a background of the Adam Walsh Act, § 4248 specifically, challenges to the provision, and a brief discussion of the Supreme Court's decision in *Comstock*. Part III will demonstrate that in light of the recent Supreme Court decisions that have limited the scope of Congress' power, the government could not rely on the Commerce Clause to justify the validity of § 4248, and the Supreme Court had to adopt a new approach in order to validate the law. Part IV will describe the five-step approach that the Court decided to take and discuss the concerns that the concurring and dissenting Justices had with this framework. Part V will conclude with a brief discussion of the implications of the Court's decision.

I. SOURCES OF, AND LIMITATIONS ON, CONGRESS' AUTHORITY TO ENACT LEGISLATION

Article I, Section 8 of the United States Constitution presents and defines the depth and breadth of Congressional authority.²⁶ Congress' powers include the power to lay and collect taxes, the power to regulate commerce with foreign nations and among the states, the power to coin money, the power to declare war, and the power to organize and provide for a military.²⁷ Congress also has the authority to enact any law that is "necessary and proper" to execute either its enumerated powers or any powers the Constitution vests in the United States Government.²⁸ The Tenth Amendment limits the scope of Congressional authority and maintains that the powers not granted to the

United States government are reserved "to the states" or "to the people."²⁹

This section will first discuss the Supreme Court's interpretation of the Necessary and Proper Clause and the constitutional authority that this clause provides Congress. It will then describe the Supreme Court's evolving interpretation of the Commerce Clause,³⁰ and how the Court has expanded, and later limited, Congress's power to enact legislation. Finally, it will address the implications of the Tenth Amendment as applied to state police powers.

A. THE NECESSARY AND PROPER CLAUSE

In *McCulloch v. Maryland*,³¹ the Supreme Court established the meaning of the terms "necessary" and "proper" as interpreted in the Necessary and Proper Clause.³² The Court held that in this context "necessary" does not imply "an absolute, physical necessity" but simply requires "that one thing is convenient, or useful, or essential to another."³³ Furthermore, the Court held that "proper" entails "all means which are appropriate, which are plainly adapted" to an end that is already within the realm of Congress' Constitutional authority.³⁴ The Court maintained that the term "proper" modifies "necessary," and that if the Framers intended *strict* necessity, it would have excluded the term "proper" altogether.³⁵ Thus, for a law to be "necessary and proper" to the execution of powers enumerated to Congress, it does not have to be "necessary" in an essential or crucial sense, but rather, must be suitably tailored to the furtherance of a power that is within Congress' realm of authority.³⁶

In general, Congress must use the Necessary and Proper Clause in conjunction with another constitutionally-enumerated power in order to have the authority to enact legislation.³⁷ In other words, Congress cannot enact legislation simply under the premise that it is "necessary and proper" on its own; instead, the legislation must be necessary and proper to the *furtherance* of a power that Congress already possesses.³⁸ For example, in *McCulloch v. Maryland*, the Court upheld Congress' establishment of a National Bank, deeming it "necessary and proper" to the execution of Congress' powers to lay and collect taxes, coin and borrow money, regulate commerce, conduct war, and to raise and support an army and a navy.³⁹ The Necessary and Proper clause serves as an "adjunct" to Congressional authority rather than an independent source of power.⁴⁰

B. THE COMMERCE CLAUSE

Congress often invokes its authority under the Commerce Clause in order to enact legislation.⁴¹ The Commerce Clause grants Congress the authority to regulate commerce "with foreign nations, and among the states, and with the Indian Tribes."⁴² In the Supreme Court's landmark Commerce Clause case, *Gibbons v. Ogden*,⁴³ Chief Justice John Marshall established that "commerce amongst the states" entails commerce that intermin-

gles between states, but does not extend to commerce that stays strictly with the internal boundaries of one state.⁴⁴

Between *Gibbons* and the New Deal,⁴⁵ the Court continued to refine its definition of Congress' commerce power through a number of cases. In *United States v. E.C. Knight, Co.*,⁴⁶ the Court overturned a provision of the Sherman Anti-Trust Act that made illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states."⁴⁷ The Court reasoned that the enactment was not within Congress' constitutional authority because it only affected commerce "indirectly" and "incidentally."⁴⁸

However, after *E.C. Knight*, the Court began to expand its definition of interstate commerce. In the *Shreveport Rate Case*,⁴⁹ the Court held that Congressional authority over the regulation of interstate commerce extends to interstate "carriers" that serve as "instruments of interstate commerce."⁵⁰ In *Swift & Co. v. United States*,⁵¹ the Court held that when the *target* of Congress' regulation will enter the stream of interstate commerce, Congress has the authority to regulate activity related to that target, even if such regulation only occurs within one state.⁵²

This expansion of Commerce Power came to a sudden halt during the New Deal, when the Court overturned a number of legislative acts, maintaining that a bright-line distinction existed between manufacturing and commerce.⁵³ However, almost as quickly as the Court began overturning New Deal legislation, it turned a new course and abandoned the distinction between manufacturing and commerce in *NLRB v. Jones & Laughlin Steel Co.*⁵⁴ In this case, the Court upheld the National Labor Relations Act, reasoning that the intrastate activity that it regulated had a "close and substantial relation" to interstate commerce.⁵⁵ Furthermore, in *United States v. Darby*,⁵⁶ the Court established that Congress has the power to regulate any intrastate activities that are "so commingled with or related to" interstate commerce that the regulation of interstate commerce requires the regulation of these activities.⁵⁷ In *Wickard v. Filburn*,⁵⁸ the Court held that Congress' authority to regulate may even reach entirely local activity if the aggregate effect of such activity has a "substantial effect" on interstate commerce.⁵⁹

For about fifty years Congress had seemingly free reign to enact legislation invoking its authority under the Commerce Clause.⁶⁰ However, the expansion of Commerce authority came to an end in 1995 when the Rehnquist Court decided *United States v. Lopez*,⁶¹ a case challenging Congress' constitutional authority to enact the Gun-Free School Zone Act (GFSZA) under the Commerce Clause.⁶² The Court held that the act "exceed[ed]

the authority of Congress," as it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."⁶³

Chief Justice Rehnquist identified three types of activities Congress may regulate under the commerce clause.⁶⁴ Under the *Lopez* test, Congress may regulate (1) "channels" of interstate commerce,⁶⁵ (2) "instrumentalities," or persons or things in interstate commerce,⁶⁶ and (3) activities that "substantially affect" interstate commerce.⁶⁷

The Court quickly determined that the Gun Free School Zones Act was neither a channel nor an instrumentality of interstate commerce.⁶⁸ It, however, went into more detail when addressing the third prong, recognizing that the law "has not been clear" on the type of activities that may "substantially affect" interstate commerce.⁶⁹ The Court held that either the target of the regulation must be a commercial activity or the activity must be an "essential part of a larger regulation of economic activity."⁷⁰ In analyzing the Gun Free School Zones Act under this third prong, the Court ultimately found three shortcomings: that it was a "criminal statute that by its terms ha[d] nothing to do with 'commerce,'" that it "contain[ed] no jurisdictional element" that could "ensure" that it affected interstate commerce, and that it did not con-

tain any "express congressional findings" as to the effect the law had on interstate commerce.⁷¹ The Court ultimately overturned the Act under the "substantial effects" prong, asserting that ruling otherwise would require the Court to "pile inference upon inference" in such a way that would ultimately give Congress having a "general police power of the sort retained by the States"—something that it was "unwilling to do."⁷²

The Rehnquist Court applied *Lopez* again five years later. In *United States v. Morrison*,⁷³ the Court struck down a provision of the Violence Against Women Act (VAWA) that provided that offenders of gender-motivated sexual violence could be held civilly liable for damages against the person they injured.⁷⁴ In *Morrison*, the Court emphasized that its decision in *Lopez* relied on the fact that the targeted activity was of "non-economic, criminal nature" and that the link between possessing a gun and its "substantial effect on interstate commerce was attenuated."⁷⁵ Contrary to the case in *Lopez*, the government in *Morrison* put forth findings in support of their argument that gender-motivated violence has an impact on interstate commerce.⁷⁶ Nonetheless, the Court still overturned this provision of the Act, reasoning that such findings were "weakened by the fact that they rel[ied] so heavily on a method of reasoning" that the Court had already deemed "unworkable."⁷⁷

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As with the statute at issue in *Lopez*, the Court in *Morrison* expressed concern that accepting the government’s argument would “obliterate the Constitution’s distinction between national and local authority.”⁷⁸ The Court found the same shortcomings in this provision of the Violence Against Women Act, and accordingly, found the provision to be an unconstitutional exercise of Congress’ authority.⁷⁹ In doing so, the Court demonstrated its commitment to maintaining a distinction between violence that impacts interstate commerce, and violence that is entirely intra-state and meant to be within “the province of the states.”⁸⁰

Though the Rehnquist Court indicated that Congress did not have unlimited authority to enact legislation,⁸¹ it took a new direction soon after in *Gonzales v. Raich*,⁸² upholding a regulation that, as it was applied, did not have a direct connection to interstate commerce.⁸³ In a 6-3 decision, the Court upheld the Controlled Substances Act (CSA), which “[made] it unlawful to manufacture, distribute, dispense, or possess any controlled substance,” except as allowed by the Act itself.⁸⁴ The respondents did not challenge the constitutionality of the Act on its face but rather asserted that the law’s “prohibition of the manufacture and possession of marijuana,” as applied to their use of it for medicinal purposes, exceeded Congress’ Commerce Clause authority.⁸⁵

In upholding the CSA, the Court likened this case to *Wickard*, reasoning that “failure to regulate” the controlled substance market, even for home consumption, would “affect price and market conditions.”⁸⁶ Ultimately, because the CSA regulated activities that were “quintessentially economic,” and affected the “production, distribution, and consumption of commodities,” the Court concluded that Congress had acted within its authority in enacting the CSA.⁸⁷

Justice Scalia authored a concurring opinion in *Raich*, asserting that he had a more “nuanced” understanding of the “doctrinal foundation” on which the Court’s holding should rest.⁸⁸ Unlike the majority, Justice Scalia relied on the Necessary and Proper Clause as the constitutional source of Congress’ authority to regulate the home consumption of marijuana.⁸⁹ In doing so, he recognized that the objective of the CSA was to “extinguish the interstate market in Schedule I controlled substances, including marijuana,” and insisted Congress’ authority to enact a prohibition of *intrastate* consumption of marijuana depended on whether it was an “appropriate means of achieving the legitimate end of [eliminating] Schedule I substances from interstate commerce.”⁹⁰ In finding that the CSA was, in fact, an appropriate means of obtaining Congress’ objective, Scalia agreed with the Court majority that the regulation should be sustained.⁹¹

Raich was the last major Commerce Clause case that the Court has decided. By upholding legislation that, at least in that instance, regulated wholly intrastate activity, *Raich* has arguably departed from Chief Justice Rehnquist’s original limita-

tions on commerce power. As a result, the Court made it unclear whether *Raich* marked a departure from the *Lopez* framework altogether or rather provides an example of an intrastate activity that survives *Lopez*’s “substantially affects” test.⁹² Moving forward, it was unclear whether *Raich* will be recognized as the direction the Court would take in the future or whether the Court will continue to apply *Lopez*’s three-part framework when issues of congressional authority arose.⁹³

C. THE TENTH AMENDMENT AND THE “POWERS RESERVED TO THE STATES”

The Tenth Amendment of the United States Constitution states that “the 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.”⁹⁴ The Supreme Court has read this amendment to imply that any power not conferred to the federal legislative branch was intended to be left to the states.⁹⁵ Included in these powers is the state police power—the power to regulate the internal matters of a state, including, for example, the power to enact “[i]nspection laws, quarantine laws, [and] health laws,” as well as the “power of a State to regulate its police, its domestic trade, and to govern its own citizens.”⁹⁶ The Supreme Court has read into the Tenth Amendment that, coinciding with Article I’s exclusion of a general federal police power, the framers intended to reserve police powers for the states to regulate.⁹⁷ The Court thus recognizes that the Constitution intended to “withhold[] from Congress a plenary police power” and that legislation that cuts into this power without the support of one of Congress’ enumerated powers is unconstitutional.⁹⁸

II. THE ADAM WALSH ACT AND THE CIRCUIT SPLIT CREATED OVER § 4248

A. DESCRIPTION OF THE ACT AND ITS CIVIL COMMITMENT PROVISION

Congress enacted the Adam Walsh Child Protection and Safety Act⁹⁹ (Adam Walsh Act) in 2006.¹⁰⁰ The Adam Walsh Act aimed to create more stringent and uniform requirements for sex offenders, new definitions and classifications of sex offenders, and a civil commitment program for those offenders that are deemed to pose a threat of committing sexually violent crimes in the future.¹⁰¹ Title III of the Act, 18 U.S.C. § 4248, authorizes the Attorney General, or any person authorized by the Attorney General or the Bureau of Prisons (BOP), to certify a person who (1) is in custody of the Bureau of Prisons, (2) is in the custody of the Attorney General as a result of his or her incompetence to stand trial, or (3) has had all criminal charges dropped for mental health reasons, as a “sexually dangerous person.”¹⁰²

As defined by the Adam Walsh Act, a “sexually dangerous person” is a person who “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others” or a person who “suffers from serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation.”¹⁰³ Upon certifying a person as “sexually dangerous,” the Attorney General or Director of the BOP must transmit the certification to the clerk of the court of the district in which that person is confined.¹⁰⁴

Under the Act, if the district court determines based on clear and convincing evidence that the person is “sexually dangerous,” it shall then commit that person to the custody of the Attorney General.¹⁰⁵ The Attorney General then must attempt to release that person to an official of the State of that individual’s domicile, if the state chooses to assume responsibility for the individual’s “custody, care, and treatment.”¹⁰⁶ However, if the state does not assume responsibility for the individual, the Attorney General shall then place the person in a treatment facility until (1) the state chooses to assume responsibility, or (2) the person’s condition improves so that he is no longer sexually dangerous if released and prescribed medical, psychiatric, or psychological treatment.¹⁰⁷

Although numerous states have implemented legislation providing for the civil commitment of sexually violent predators,¹⁰⁸ § 4248 is the first federal provision calling for a federal program to civilly commit sexually dangerous persons.¹⁰⁹ Unlike many of these state provisions, § 4248 allows for the civil commitment of *any* federal sex offender, regardless of the severity of the crime or his likelihood to re-commit.¹¹⁰ The government can have an offender civilly committed after he has completed his prison sentence, and may wait until the person’s sentence has expired to determine the risk he poses.¹¹¹ This makes § 4248 different from other federal civil commitment programs, which generally call for civil commitment *prior* to court proceedings or sentence completion.¹¹²

B. CHALLENGES TO § 4248

Petitioners across the country have challenged this civil commitment provision of the Adam Walsh Act in federal court, and circuits had split on the question of whether Congress had the constitutional authority to enact this portion of the legislation. In *United States v. Comstock*,¹¹³ the Fourth Circuit invalidated § 4248 and held that neither the Commerce Clause nor the Necessary and Proper clause conferred upon Congress the authority to enact this civil commitment provision.¹¹⁴ The court found that § 4248 did not target channels of interstate commerce or persons or things in interstate commerce.¹¹⁵ Moreover, it held that target of the § 4248, “sexual dangerousness,” does not substantially affect interstate commerce.¹¹⁶

The court also rejected the government’s argument that § 4248 is necessary and proper to the government’s ability to “establish and maintain” the federal criminal justice and penal systems and to its authority to prevent “sex-related crimes,” and that § 4248 fit squarely with the government’s power to prosecute under the Necessary and Proper Clause.¹¹⁷ Emphasizing that the Necessary and Proper Clause merely allows Congress to enact laws that are necessary to the execution powers vested by the Constitution, the Fourth Circuit held that the constitutional provision, on its own, “creates *no* constitutional power.”¹¹⁸ Furthermore, the court emphasized that control over the mentally ill is a police power that is generally reserved to the states.¹¹⁹

Although the Fourth Circuit invalidated § 4248, the Eighth Circuit upheld this provision of the Adam Walsh Act several months later in *United States v. Tom*.¹²⁰ As in *Comstock*, the Eighth Circuit in *Tom* acknowledged that Congress did not identify the source of its authority to enact § 4248.¹²¹ Nonetheless, the Eighth Circuit found that Congress had the “ancillary authority” under the Necessary and Proper Clause to enact § 4248; this provision aimed to prevent the commission of sex offenses for which Congress *did* possess the authority to enact.¹²² In other words, the court reasoned that because the prisoners affected by § 4248 were incarcerated pursuant to federal sex offense statutes for which Congress had the constitutional authority to enact, § 4248 was a “rational and appropriate,” and thus necessary and proper, means of effectuating federal sex crime legislation.¹²³

While the Fourth Circuit relied heavily on the Supreme Court’s commerce power analyses in *Lopez* and *Morrison* to invalidate § 4248, the Eighth Circuit in *Tom* applied Justice Scalia’s concurring opinion in *Raich*.¹²⁴ In applying this rationale, the Eighth Circuit concluded that Congress can regulate intrastate activities that do not substantially affect interstate commerce when such regulation is necessary to make its regulation of interstate commerce, as a whole, effective.¹²⁵ The court maintained that prior commission of a sexually violent crime was indicative of one’s “propensity” to engage in other federally prohibited sexual conduct in the future.¹²⁶ Because § 4248 aimed to prevent the further commission of federal crime, the court therefore viewed this potential crime prevention as a necessary means to make federal sex offense laws effective.¹²⁷

Several months after *Tom*, the First Circuit also concluded that § 4248 was not an unconstitutional exercise of Congressional authority.¹²⁸ In *United States v. Volungus*, the First Circuit relied heavily on an earlier Supreme Court decision, *Greenwood v. United States*,¹²⁹ to conclude that § 4248 was “within the scope of Congress’s constitutional authority under the Necessary and Proper Clause.”¹³⁰ In *Greenwood*, the Supreme Court held that Congress had the authority to enact a similar provision that granted the federal government the authority to civilly commit individuals that were found to be incompetent to stand trial

due to their mental illness.¹³¹ Because the Supreme Court found that Congress had the “auxiliary” authority to enact that provision in *Greenwood*, the First Circuit determined that Congress similarly had such authority to enact § 4248 in *Volungus*.¹³²

Although only three circuits have addressed the constitutionality of § 4248, this issue has created a divide among district courts throughout the nation.¹³³ Districts addressing § 4248 have upheld the provision, finding Congressional authority in the Necessary and Proper and Commerce Clauses to enact this provision.¹³⁴ However, several district courts have adopted arguments similar to those of the Fourth Circuit in *Comstock*, finding § 4248 invalid.¹³⁵ The decisions in *Comstock* and *Tom* created a circuit split over the constitutionality of § 4248. The Supreme Court resolved this split in the current term, holding that the Necessary and Proper Clause granted Congress the authority to enact § 4248.¹³⁶

III. THE SUPREME COURT HAD TO CREATE A NEW STANDARD IN *COMSTOCK* TO UPHOLD § 4248 BECAUSE THE ACT WOULD NOT HAVE SURVIVED AN ANALYSIS UNDER THE *LOPEZ* TEST, AND BECAUSE THE COURT HAD ONLY ESTABLISHED LIMITED PRECEDENT USING THE NECESSARY AND PROPER CLAUSE AS A STAND-ALONE TO ENACT LEGISLATION.

In light of the Supreme Court’s reliance on the implementation of a commerce power analysis in other recent federalism cases, it would not have been unreasonable to assume that, in order to remain consistent with the Rehnquist Court’s approach, the Roberts Court would have applied the three-part framework created in *Lopez*, and applied in *Morrison* and *Raich*, to reach a decision in *Comstock*. However, had the Court done so, § 4248 would have been doomed; the Court simply could not have found § 4248 to be Constitutional under a Commerce Clause analysis without departing from the stringent *Lopez* framework. Moreover, simply turning to precedent addressing the scope of the Necessary and Proper Clause, on its own, would not have yielded the Court a sufficient basis uphold the validity of § 4248.

This section will argue that the Court had no choice but to create a new standard in order to justify its decision that § 4248 was a constitutional exercise of Congressional authority. First, it will demonstrate that the Commerce Clause did not provide Congress with sufficient authority to enact this provision under

the *Lopez* test, and, even if the Court had analyzed the provision under the arguably less stringent standard created in *Raich*, it would not have been able to find that § 4248 “substantially affects” interstate commerce. Next, this section will explain why Necessary and Proper jurisprudence that was established prior to *Comstock* did not provide a sufficient basis for the Court to justify upholding § 4248, and that, consequently, the Court had to refine its Necessary and Proper Clause analysis by creating its new five-part standard.

A. IN APPLYING THE THREE-PRONG TEST IMPLEMENTED IN *LOPEZ* AND *MORRISON*, CONGRESS DID NOT HAVE THE AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT § 4248.

While the government relied heavily on the Commerce Clause in the earlier stages of litigation to justify the enactment of § 4248,¹³⁷ it is an argument that it discarded once *Comstock* reached the high Court.¹³⁸ The government abandoned this argument with good reason: had it relied solely on the Commerce Clause, it would have presented the Court with a losing argument.

This subsection will argue that, regardless of which Commerce Clause standard the Court would have applied, the government’s Commerce Clause argument would not have prevailed in *United States v. Comstock*. First, it will demonstrate that although *Raich* was the Court’s most recent Commerce Clause decision, it would have been more appropriate for the

Court to apply the three-prong test established in *Lopez* to determine whether Congress had the authority to enact § 4248. It will then demonstrate that § 4248 would not have survived any of the three prongs of the *Lopez* test. Finally, it will show that, even if the Court had chosen to apply *Raich*, rather than *Lopez*, as the commerce power standard, the law still would not have passed constitutional muster, as it does not regulate activities that are “quintessentially economic” in nature.¹³⁹

had it [the government] relied solely on the Commerce Clause, it would have presented the Court with a losing argument.

- i. *Lopez and Morrison, rather than Raich, would have been controlling in United States v. Comstock.*

As discussed above, Congress enjoyed half a century of essentially unlimited power under the Court’s Commerce Clause interpretation until the Rehnquist Court halted its expansion in the mid-nineties in *Lopez*, and reaffirmed its commitment to strengthening federalism in *Morrison*.¹⁴⁰ *Raich*, however, raised speculation as to how far the Supreme Court was willing to

go in maintaining a divide between what the federal government has the authority to regulate and what should be left to the states.¹⁴¹ As *Raich* was the Supreme Court's most recent Commerce Clause case, one might expect that the Court would have turned to this decision for guidance if it had applied a Commerce Clause analysis to § 4248. When the ruling in *Raich* emerged, many scholars believed that this decision marked the end of the Rehnquist's federalism expansion.¹⁴² However, many scholars have suggested, and this comment asserts, that *Raich* merely demonstrates one circumstance in which the Court found it plausible to reconcile the regulation of wholly intrastate activity with the limitations that the Commerce Clause imposes on Congress' authority to enact legislation.¹⁴³ Accordingly, this subsection will demonstrate why the *Lopez* and *Morrison* framework would have been the more appropriate standard to apply to § 4248.

Raich is distinguishable from these other Rehnquist Court decisions in at least three respects. First, unlike *Lopez* and *Morrison*, *Raich* involved an "as-applied" challenge to an Act that, on its face, was a valid exercise of Congressional authority.¹⁴⁴ Unlike the petitioners in *Lopez* and *Morrison*, who contended that the Acts in question fell outside the scope of Congressional authority altogether,¹⁴⁵ the respondents in *Raich* merely challenged the Controlled Substances Act as it applied to their personal, intrastate consumption of marijuana.¹⁴⁶ The Court referred to this distinction between *Raich* and the previous cases as "pivotal" to its decision, asserting that where a regulated class of activities is "within the reach of federal power," courts cannot "excise, as trivial, individual instances of the class."¹⁴⁷ Because *Comstock* was a facial challenge to a statute, as opposed to an as-applied to challenge to an otherwise valid statute,¹⁴⁸ this case would have warranted an analysis under the *Lopez* standard.¹⁴⁹

Second, the more stringent *Lopez* standard would have been the more appropriate test to apply, given the similarities between § 4248 and the laws at issue in *Lopez*¹⁵⁰ and *Morrison*.¹⁵¹ Both the Gun-Free School Zone Act (GFSZA) and the Violence Against Women Act (VAWA) took on the role of a police power—a power that is generally left to the states to regulate.¹⁵² Because both Acts aimed to control the behavior of individuals within a state,¹⁵³ neither act demonstrated any specific attachment to the regulation of interstate commerce.¹⁵⁴ The Supreme Court has recognized such infringement on state police powers as grounds for overturning congressional statutes when such statutes have no connection to interstate commerce.¹⁵⁵

On the other hand, the Controlled Substances Act, which was at issue in *Raich*, was a "comprehensive regulatory statute" that regulated the "production, distribution, and possession" of a substance for which there was a substantial (although illegal) market.¹⁵⁶ In its decision in *Raich*, the Supreme Court emphasized the idea that the activities that CSA regulated, unlike those regulated by the GFSZA and the VAWA, were "commercial"

and "quintessentially economic."¹⁵⁷ Although the activities of the respondents' in *Raich* remained entirely within the confines of the state of California, the Court concluded that Congress had a "rational basis" for concluding that the respondents' consumption of marijuana, "taken in the aggregate," had the potential of "substantially affect[ing]" interstate commerce.¹⁵⁸

Of the legislation challenged in the three most recent Commerce Clause decisions, § 4248 more closely resembles the legislation at issue in *Lopez* and *Morrison* than the regulation challenged in *Raich*. As in *Lopez* and *Morrison*, the Court in *Comstock* addressed the constitutionality of an act that is "non-economic" and "criminal" in nature.¹⁵⁹ The VAWA provision at issue in *Morrison* sought to regulate individual acts of sexual violence against women generally;¹⁶⁰ the GFSZA at issue in *Lopez* aimed to regulate the conduct of individuals who might possess a gun while in a school zone.¹⁶¹ Similar to these laws, § 4248 aims to regulate the individual acts of sexually violent predators by preventing their release into the public until they are no longer deemed to be a threat to the safety of others.¹⁶²

Third, unlike the Controlled Substances Act, and much like the VAWA and the GFSZA, § 4248 does not target activity that is part of "comprehensive regulatory regime" which aims to control activities that are "quintessentially economic."¹⁶³ *Raich* applied an "aggregate effects" test due to the CSA's relation to the "production, distribution, and consumption of commodities."¹⁶⁴ Just as the "non-economic nature" of the VAWA provision and the GFSZA played an essential role in the Court's decision, so too would the non-economic nature of § 4248 have had a bearing in *Comstock*. Because § 4248 is lacking this economic tie, which was the key element in the *Raich*, the standard developed in *Raich* would not have been appropriate to apply in *Comstock*.

ii. *If the Court had applied the three-part framework established in Lopez, the Court would not have found that the Commerce Clause granted Congress the authority to enact § 4248.*

Assuming that the Court would have used *Lopez* as its guidepost, it would have applied the cases' three-part test to determine whether Congress had the authority to enact § 4248. In doing so, the Court would have found that § 4248 does not survive any of the tests three prongs, as it does not, (1) regulate the "channels" of interstate commerce, (2) regulate "instrumentalities" or persons or things within interstate commerce, or (3) have a substantial affect on interstate commerce as established in the Court's recent commerce clause jurisprudence.¹⁶⁵

As was the case in *Lopez*, the Court in *Comstock* would have quickly recognized that § 4248 does not satisfy the first prong of the *Lopez* test.¹⁶⁶ It is evident here that § 4248 does not regulate "channels" of interstate commerce, as the term "channels" refers to the means through which items in interstate

commerce might travel—such as a river or a roadway.¹⁶⁷ Section 4248, to the contrary, aims to regulate the placement and behavior of *people*, and the actions that the government and the Bureau of Prisons may take in order to ensure that these people do not pose a danger to others.¹⁶⁸

Furthermore, the Supreme Court would have found that § 4248 does not regulate “instrumentalities” of interstate commerce, nor necessarily persons or things within interstate commerce, just as it did in *Lopez* and *Morrison*.¹⁶⁹ The term “instrumentalities,” as applied to interstate commerce, refers to the types of mechanisms that might be used in order to ship or move goods throughout interstate commerce.¹⁷⁰ Again, § 4248 aims to regulate people—rather than things—and it does not require that the people it regulates have any connection to interstate commerce.¹⁷¹ Thus, the only way that § 4248 would have survived under the *Lopez* test would have been if the Court found that it otherwise has a substantial effect on interstate commerce.¹⁷²

Section 4248 would not have survived this third and final prong of the *Lopez* test. Like the Gun-Free School Zones Act and the Violence Against Women Act, the link between § 4248 and interstate commerce is, at best, “attenuated.”¹⁷³ As the Supreme Court in *Morrison* observed, in the cases in which the Court upheld federal legislation that regulated intrastate activity based on its “substantial effects on interstate commerce,” it did so because “the activity in question has been some sort of economic endeavor.”¹⁷⁴ Like the provisions in *Lopez* and *Morrison*, § 4248 is a criminal statute, aiming to regulate offenders of violent crimes, and having no relation to commerce or the economic market.¹⁷⁵

The Court would have recognized many of the same shortcomings of § 4248 that recognized the GFSZA and the VAWA provision to be lacking. The Court rejected the government’s argument in *Lopez* in large part because it did not provide any findings regarding the effect that gun possession in a school zone would have on interstate commerce.¹⁷⁶ As was the case in *Lopez*, Congress purported no findings as to the link between § 4248 and interstate commerce in several of the cases that challenged the Act’s constitutionality.¹⁷⁷ However, as demonstrated in *Morrison*, even the effects of such findings may not salvage a law that targets sexually violent crimes when, on its face, it has no direct tie to interstate commerce.¹⁷⁸

Furthermore, the concern the Court had in *Morrison* was one that may very well have come into play in *Comstock*: that if it were to accept the government’s argument regarding the law’s relation to interstate commerce, such a decision would allow Congress to regulate essentially *any* crime under the guise of its commerce power.¹⁷⁹ The aim of *Lopez* and *Morrison*, was to put an end to Congress’ free reign in enacting legislation by claiming such legislation regulated interstate commerce.¹⁸⁰ If the Court were to find that § 4248’s civil commitment provision

substantially affected interstate commerce, it would give Congress a whole new opportunity to assert its commerce power in ways that the Court deemed inappropriate in *Lopez* and *Morrison*.¹⁸¹ While the decision in *Comstock* certainly opened new doors through which Congress could regulate, the Court decided this case in a way that left intact the limitations that the Rehnquist Court placed on Congress’ commerce power.¹⁸²

iii. Even if the Court did apply Raich in United States v. Comstock, it would still have found that § 4248 falls outside the scope of congressional authority.

Assuming, *arguendo*, that the Court did find that *Raich* would have been controlling in *Comstock*, it would nonetheless have found that the Commerce Clause did not grant Congress the authority to enact § 4248. Essential to the Court’s holding in *Raich* was that the CSA regulated the “production, distribution, and consumption of commodities,” and thus, that the activities it regulated were “quintessentially economic” in nature.¹⁸³ Thus, even if the Court were to apply this “aggregate effects” test, rather than *Lopez*’s “substantially effects” test, it would have been quick to find that § 4248 does not aim to regulate any aspect of the market or activities that are in any way economic in nature.¹⁸⁴ Section 4248 is a regulation aimed at preventing *non-economic* violence,¹⁸⁵ and as such, could not possibly have the effect of altering the market in such a way that the Court found the CSA would in *Raich*.¹⁸⁶

Even the Court’s adoption of Justice Scalia’s concurring opinion in *Raich* would have placed § 4248 outside the realm of congressional authority.¹⁸⁷ In his opinion, Justice Scalia asserted that Congress’ power to regulate activities that substantially affect interstate commerce “cannot come from the Commerce Clause alone.”¹⁸⁸ Instead, Justice Scalia insisted that Congress’ authority over the regulation of intrastate activities extends to “even noneconomic local activity” in order to “take all measures necessary or appropriate to the effective regulation of the interstate market.”¹⁸⁹ However, even Justice Scalia emphasized the close tie the respondents’ home-consumption of marijuana had to the interstate market, sharing the majority’s concern that their use of the drug could “undercut” the interstate market.¹⁹⁰ Section 4248 lacks such ties. Thus, even if the Court had adopted Justice Scalia’s reasoning in *Comstock*, § 4248 would not have survived under a commerce power argument.¹⁹¹

In short, regardless of whether and how the Court applied *Lopez* or *Raich* as controlling law, it would have reached the conclusion that the Commerce Clause did not grant Congress the authority to enact § 4248. Apparently recognizing the shortcomings of applying a commerce power analysis to § 4248, the Court was clearly determined to find an alternate route to validate this provision. The Necessary and Proper Clause provided

the Court with this route, but the Court still had to create its own path to reach its conclusion.

B. NOTHING IN SUPREME COURT PRECEDENT PRIOR TO *COMSTOCK* WOULD SUGGEST THAT THE NECESSARY AND PROPER CLAUSE, AS A STANDALONE, GRANTED CONGRESS THE AUTHORITY TO ENACT § 4248.

Although the Supreme Court ultimately relied on the Necessary and Proper Clause to reach the conclusion that Congress had the authority to enact § 4248, it had to create a new standard, rather than rely on precedent, in order to do so. Nothing in Supreme Court precedent suggested that this provision could stand on its own without a direct link to an enumerated power of Congress, given that the Necessary and Proper Clause only explicitly grants Congress the authority to enact legislation that is necessary and proper to a power enumerated in the Constitution.¹⁹² In fact, the Fourth Circuit pointed out that the government failed to cite *any* precedent that directly supported its argument that § 4248 is a necessary and a proper exercise of its power to run a federal penal system,¹⁹³ and each of the district courts that upheld § 4248 heavily relied on the decisions of various circuits of the United States Courts of Appeals, rather than citing Supreme Court precedent.¹⁹⁴ This is because the government could not directly point to a specific enumerated power that § 4248 served to execute.¹⁹⁵

Although precedent on the issue of Necessary and Proper authority was sparse, the government did have one Supreme Court case strongly on its side. *Greenwood v. United States* was the only Supreme Court decision any of the federal courts have cited when upholding § 4248 on Necessary and Proper grounds.¹⁹⁶ In *Greenwood*, the Supreme Court upheld 18 U.S.C. §4246, a provision that allowed for the civil commitment of federal defendants found incompetent to stand trial, and who posed a threat of danger to the community or to themselves if released back into the public.¹⁹⁷ The Court found the statute necessary and proper because the defendant was under the legal custody of the United States and the federal government's power to prosecute had not been exhausted.¹⁹⁸

However, *Greenwood* alone could not be relied on to uphold the constitutionality of § 4248. The scope of § 4248 is broader than was that of § 4246, and, moreover, the decision in *Greenwood* was intended to be a narrow one.¹⁹⁹ In *Greenwood*,

the Court recognized that the legislature narrowly tailored § 4246 to only apply to individuals in the legal custody of the United States who had been charged with a federal crime but had not yet been tried for that crime.²⁰⁰ Comparatively, section 4248 applies to any individual in custody of the Attorney General who has been found incompetent to stand trial, any individual in the custody of the Bureau of Prisons, and any individual who had their charges dismissed for reasons concerning their lack of mental competency.²⁰¹ The statute in *Greenwood* only permitted the federal government to civilly commit offenders before the completion of their trial; Section § 4248 allows the

government to civilly commit offenders before or after criminal their proceedings.²⁰² Because § 4248 can apply to *anyone* in legal custody of the United States,²⁰³ the reach of § 4248 goes beyond the government's power to prosecute, and reaches into the point where this power has been exhausted.²⁰⁴

Moreover, § 4248 is more of a proactive provision than a reactive one, in essence giving Congress the authority to civilly commit those who may commit state offenses, rather than simply federal offenses.²⁰⁵ As opposed to the statute at issue in *Greenwood*, § 4248 aims to prevent the *future* commission of crime rather than to simply retain

those who have already been accused of committing one.²⁰⁶ In doing so, the provision makes no distinction between aiming to prevent the commission of federal crimes, and those actions prohibited by state law.²⁰⁷ This again demonstrates that the § 4248 has a broader reach than did the law at issue in *Greenwood*.

For all these reasons, *Greenwood* did not provide sufficient support for the proposition that § 4248 was a constitutional exercise of Congressional authority. While it provided useful guidance,²⁰⁸ the Court had to take its analysis beyond this precedent to reach the conclusion that § 4248 was valid.

§ 4248 is more of a proactive provision than a reactive one, in essence giving Congress the authority to civilly commit those who may commit state offenses, rather than simply federal offenses.

IV. RATHER THAN RELYING ON THE COMMERCE CLAUSE TO VALIDATE § 4248, THE COURT CREATED A NEW STANDARD UNDER THE NECESSARY AND PROPER CLAUSE TO UPHOLD THE VALIDITY OF THE LAW, CREATING A NEW AVENUE FOR CONGRESS TO JUSTIFY ITS ENACTMENT OF SWEEPING LEGISLATION.

Giving the Commerce Clause only very short shrift, the Supreme Court turned to the Necessary and Proper Clause to

justify the validity of § 4248 in *United States v. Comstock*. In his majority opinion, Justice Breyer took five factors into account to reach the conclusion that Congress had the authority to enact § 4248 as “necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States.”²⁰⁹ These factors included: (1) “the breadth of the Necessary and Proper Clause”; (2) the “long history of federal involvement” in the arena of civilly committing the mentally ill; (3) the “sound reasons” for the enactment of § 4248 in light of the federal government’s “custodial interest in safeguarding the public from dangers posed by those in federal custody”; (4) the fact that the statute took into account, and accommodated for, state interests; and (5) the narrow scope of § 4248.²¹⁰ Without providing further explanation or guidance as to the weight each of these factors must hold, or whether all of these factors must be satisfied in order for an act of Congress to suffice as necessary and proper, the majority simply established that in considering these five factors “taken together,” the necessary and proper clause provided the federal government with a sufficient basis to enact § 4248.²¹¹

The first consideration the majority opinion addressed was the “broad authority” that the Necessary and Proper Clause grants Congress to enact federal legislation.²¹² Justice Breyer emphasized that while the Federal Government is a government “of enumerated powers” and that every law it enacts must “be based on one or more of those powers,” the government must be provided “ample means” for the execution of these powers.²¹³ He further asserted that the Court had already made clear that in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact any particular statute, it looks to “see whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power” or “reasonably adapted” to the attainment of such a power.²¹⁴ While the Court’s majority did not speak directly to which specific enumerated power § 4248 was rationally to, it concluded that just as the federal government has the power to criminalize conduct, erect prisons, and ensure the safety of the prison system under the guise of the Necessary and Proper Clause, it has the “broad authority” to enact civil commitment provisions such as that contained in § 4248.²¹⁵

Second, the majority justified the validity of § 4248 under the Necessary and Proper Clause because it considered the provision a “modest addition to a set of prison-related mental-health statutes that have existed for many decades.”²¹⁶ The Court traced the history of such provisions back to the mid-Nineteenth Century, demonstrating Congress’ long involvement in the mental health care of its federal prisoners.²¹⁷ By the late 19th Century, the federal government had the authority to provide for civil commitment of anyone in a federal facility who had become “insane during the term of their imprisonment,” as well as those who had simply been charged with federal offenses that

were in the custody of the United States.²¹⁸ In 1948 and 1949, under the direction of the Judicial Conference of the United States, Congress enacted legislation providing for the civil commitment of individuals who are or become mentally ill at any point between their arrest and the expiration of their sentence, and even authorized the commitment of those whose sentences were about to expire if that individual’s release would “probably endanger the safety . . . interests of the United States.”²¹⁹ Congress further modified these statutes in 1984, clarifying that civil commitment was authorized if the release of the prisoner would “create a substantial risk of bodily injury to another person or serious damage to the property of another.”²²⁰ The Court considered this history to be a relevant factor in determining that Congress had the authority to enact § 4248, as it differs from these earlier statutes only in that it focuses on persons who are sexually dangerous due to mental illness.²²¹

The third factor the Court considered was whether it was reasonable for the federal government to extend its “longstanding civil-commitment system” to cover individuals in federal custody, even if it would result in detaining them beyond the expiration of their sentence.²²² The Court emphasized the role of the federal government as the “custodian” of federal prisoners, and the common law duty of a custodian to “exercise reasonable care to control” the person in its care from causing “bodily harm to others.”²²³ Justice Breyer analogized this situation to one in which a federal prisoner is infected with a communicable disease that would spread to others if the government were to release him.²²⁴ Certainly, he insisted, if the federal government can take action pursuant to the Necessary and Proper Clause to stay the release of such a person for the general welfare of the public, so too could the government stay the release of an individual whose mental illness poses a threat to the well-being of the general public.²²⁵ Ultimately, the Court found that § 4248 was “reasonably adapted” to the power of the federal government to act as a responsible federal custodian given the “high danger” inmates suffering from mental illness could cause to the public if they were released, especially in light of the low likelihood of states taking custody of such individuals upon their release.²²⁶

Next, the Court addressed another pressing concern that § 4248 raised: the potential infringement it imposes on the sovereignty of the states.²²⁷ The Court rejected the notion that § 4248 violated the rights of the states for two reasons. First, the Justice Breyer maintained that although the Tenth Amendment reserves powers not delegated to the United States through the Constitution are “reserved to the States,” the powers delegated to the United States include those powers granted to the federal government through the Necessary and Proper Clause.²²⁸ Second, he asserted that § 4248 does not impede on state sovereignty, because the statute in fact aims to accommodate state interests by requiring the Attorney General to inform the state in which

the prisoner was tried or domiciled that he intends to continue to detain the prisoner, and to encourage that state to assume the custody of that individual.²²⁹ If the state chooses to assume responsibility of that individual, the federal government must hand responsibility over to the state immediately.²³⁰ This willingness to accommodate state interests was therefore another factor the Court took into account in determining that Congress had the authority to enact § 4248.

Finally, the Court concluded that the connection between § 4248 and a power enumerated in Article I was “not too attenuated,” and that the provision itself was not “too sweeping” in scope to be justified under the Necessary and Proper Clause.²³¹ In reaching this conclusion, the majority rejected the notion that federal legislation can only be justified under the Necessary and Proper Clause if it is “no more than one step removed” from an enumerated power.²³² It explained that the power to punish is an implied (rather than expressly granted) power, and that the Court has already inferred from that implied power the power to imprison as well as the power to civilly commit prisoners.²³³ While conceding that it could not point to a single specific enumerated power that grants Congress the authority to arrest or convict a criminal, the Court asserted same enumerated power that gives Congress this authority further justifies its ability to create a civil commitment program for such criminals.²³⁴

Justice Kennedy took a slightly narrower approach than the majority to reach the conclusion that § 4248 was a constitutional exercise of Congressional authority. Emphasizing the importance of the “strength of the chain” that connects legislation to an enumerated power, Justice Kennedy expressed concern over the majority’s application of the terms “rationally related” and “rational basis” to its analysis under the Necessary and Proper Clause.²³⁵ While the majority opinion did not clarify how “rational” a rational basis must be in order to justify the enactment of legislation under the Necessary and Proper Clause, Justice Kennedy asserted that such an analysis should run “parallel” to the standard applied in Commerce Clause cases—one that requires a “link in fact” between the legislation enacted and the purported enumerated power.²³⁶

Similarly, Justice Alito concurred in the judgment, but expressed concern with the majority’s approach. Like Justice Kennedy, Justice Alito believed that § 4248 was necessary and proper, “on narrow grounds,” to the execution of Congress’ constitutional powers.²³⁷ However, Justice Alito was weary of the “breadth” of the majority opinion, as well as the ambiguity that its standard created.²³⁸ While maintaining that the Necessary and Proper Clause *only* grants Congress the authority to enact laws that carry an enumerated power into execution, Justice Alito believed that § 4248 was necessary and proper to executing “the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted.”²³⁹ Justice Alito noted that in order to exercise its exer-

cise its authority, it is a necessary and proper power of Congress to “criminalize certain conduct,” and moreover, that it is necessary and proper to “provide the operation of a federal criminal justice system and a federal prison system” in order to regulate such conduct.²⁴⁰ Thus, he approached § 4248 as a law that takes this system one step further, and posed the question at issue as whether it was *also* necessary and proper for Congress to “protect the public from dangers created by the federal criminal justice and prison systems” by enacting this civil commitment provision.²⁴¹ In his view, it was—and thus, he concurred with the judgment of the Court.²⁴²

Justice Thomas, joined by Justice Scalia, dissented. While the majority summarily stated that § 4248 was necessary and proper to the execution of an enumerated power, the dissent insisted that the provision “[e]xecutes *no* enumerated power.”²⁴³ Justice Thomas read a two-part test into *McCulloch*, maintaining that federal legislation is only valid under the Necessary and Proper clause if: 1) “it is directed toward a ‘legitimate’ end,” one that is within the scope of powers “expressly delegated” to Congress by the Constitution, and 2) there is a “fit” between federal law (what he describes as “the means”) and the enumerated power the law is designed to serve (what he describes as “the end”).²⁴⁴ Moreover, Justice Thomas insisted that the relationship between these two requirements is a “linear” one: if it is not directed toward a legitimate end within the scope of Congress’ enumerated powers, whether there is a “fit” between the means and the end is irrelevant, regardless of how “necessary” or “proper” the end may be.²⁴⁵

With this framework in mind, Justice Thomas had a number of criticisms of the standard that the majority created, as well as the conclusion that it reached. The majority’s greatest misstep, Justice Thomas believed, was focusing on the amount of deference the Court owed to Congress in selecting the *means* that it adopted, rather than focusing on whether the end itself was legitimate.²⁴⁶ This, he felt, led the Court to overlook carefully examining whether § 4248 even served to enact an enumerated power—something he believed the provision did not do.²⁴⁷

The dissent rejected the notion that § 4248 was necessary and proper to carry an enumerated power into execution for three reasons. First, the provision’s definition of a “sexually dangerous person” does not contain an element that links his purported dangerousness to the crime that he committed and thus allows a court to civilly commit an individual in federal custody even if he had never been charged with or committed a federal crime that related to sexual violence.²⁴⁸ Second, the provision allows for the civil commitment of an individual beyond the date that his sentence expires, thus extending the government’s authority over the individual to beyond its authority to prosecute.²⁴⁹ Finally, Justice Thomas criticized § 4248 for failing to require that the individual deemed “sexually dangerous” was likely to even violate a law that executed an enumerated

power in the future.²⁵⁰ In other words, while conceding that the Federal Government does have the authority to enact certain laws related to sexual violence when such laws are linked directly to an enumerated power, such as the commerce power, § 4248 contained no hook that tied it to such a power or limited its reach to jurisdictions in which Congress has “plenary authority.”²⁵¹ In short, while Justice Thomas recognized that the powers enumerated to Congress might justify an individual’s arrest, conviction, or imprisonment, he believed they could not also justify his civil commitment under § 4248.²⁵²

Justice Thomas similarly rejected the remaining factors that the majority considered in reaching its conclusion. He criticized the majority’s adoption of the Restatement’s definition of a custodian as a basis to justify the enactment of § 4248, sarcastically noting that he federal government’s power is derived from the Constitution, rather than from common law.²⁵³ Moreover, he asserted that the majority “overstate[d] the relevant history” of the federal government’s involvement in civil commitment, all the while asserting that a long-time historical practice cannot “serve as a substitute for its constitutionality.”²⁵⁴ Finally, Justice Thomas dismissed § 4248’s “accommodation” of state interests through its allowance for states to “assume responsibility” of a released individual as “mere window dressing,” and a mere “hollow assurance” that the provision would not disrupt the balance struck between federal and state powers.²⁵⁵

In short, over the objections of Justice Thomas and Justice Scalia, the Court held that Congress had the authority to enact § 4248, and that the Necessary and Proper Clause granted them such authority. While two members of the Court expressed reservations about the breadth of the Court’s opinion, and the lack of clarity in the standard that it created, a five-member majority concluded that in light of the breadth of the Necessary and Proper Clause, the Court’s long history of involvement in civil commitment, the government’s custodial interest at stake, the provision accommodation of state interests, and the narrow scope of § 4248, the Necessary and Proper Clause provided the federal government with sufficient authority to enact his piece of legislation.

V. CONCLUSION

Regardless of one’s opinion as to the authority that the federal government has to enact legislation under its Article I powers, there is no doubt that § 4248 aims to serve a significant and noble public policy purpose: to protect the safety of the public at

large from the dangers that sexual predators pose to our society. Whether or not this policy was in fact the driving motivation behind the Court’s decision in *Comstock*, it had no other option than to create a new standard under the Necessary and Proper Clause in order to uphold the validity of the provision. The Act would not have survived a Commerce Clause analysis under the stringent three-prong test created in *United States v. Lopez*, and even in light of *Gonzales v. Raich*’s arguable expansion of Congress’ commerce power, the Court would not have been able to find that the provision “substantially affects” interstate commerce without further expanding the scope of the *Lopez* test. Moreover, none of the established precedent created under the Necessary and Proper Clause provided the Court with sufficient support, on its own, to justify validating this legislation. While *McCulloch v. Maryland* created a base line standard—that the end must be “legitimate” and the means must be “appropriate”²⁵⁶—the Court spoke little else beyond this requirement, leaving clear how closely linked the legislation must be to an enumerated power in order for it to be within the scope of Congress’ powers.

In *Comstock*, the Court created a new standard under which issues of federalism and Congress’ authority to enact legislation can be analyzed. In doing so, it developed a set of five considerations that it may take into account when determining whether the Necessary and Proper Clause grants Congress the authority to enact legislation: (1) the breadth of the Necessary and Proper Clause itself; (2) whether there is a history of federal involvement in the arena being regulated by a legislative act, (3) whether a “sound reason” exists for the federal government to become involved in light of the federal interests at stake (4) whether the legislation takes into account, and accommodates for, state interests; and (5) the scope of the legislation at issue. While leaving unclear whether these factors might always be taken into account in the future, the Court concluded here that § 4248 fell within Congress authority in light of these considerations.

This decision may have profound implications on future litigation in this area. Up until now, it appeared that the Commerce Clause was the only real avenue for the federal government to take in order to justify legislation that might not appear, at first glance, to be within its enumerated powers.²⁵⁷ While the Supreme Court spoke very little of the Necessary and Proper Clause prior to this decision beyond mere iterations of the language in *McCulloch*,²⁵⁸ the five factor test that it established will now almost certainly come into play in future cases. For good or ill, this decision certainly “breathes new life”²⁵⁹ into the Necessary and Proper Clause, and only time will tell what limitations, if any, the Court will choose to place on this new standard in the future.

CLB

¹ Adam Walsh was a six-year-old child who was abducted from a department store in 1981. Anthony V. Salerno & Elana Goldstein, *Implementation of the Adam Walsh Act Raises Fundamental Questions of Constitutional Rights*, L.A. LAW., June 2009, at 32. His remains were found two weeks later. *Id.* His father now serves as the host for “America’s Most Wanted” and is an advocate for missing and exploited children. *Id.*

² H.R. Rep. No. 109-218, pt. 1, 28–29.

³ U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 9 (1997), available at <http://www.ncjrs.gov/pdffiles/163390.pdf>.

⁴ U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS: RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

⁵ H.R. Rep. No. 109-218, pt. 1, 28 (citing U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, CENTER FOR SEX OFFENDER MANAGEMENT, RECIDIVISM OF SEX OFFENDERS (2001), available at <http://www.csom.org/pubs/recidsexof.html>).

⁶ John Matthew Fabian, *To Catch a Predator, and then Commit Him for Life*, THE CHAMPION, Feb. 2009, at 45, available at <http://www.johnmatthewfabian.com/documents/to-catch-a-predator-and-then-commit-him-for-life-sexual-offender-risk-assessment-part-one.pdf>. In 2007, New York became the eighteenth state to enact legislation calling for the civil commitment—the involuntary, court-ordered commitment of a person to a psychiatric hospital or other mental health treatment—of sexual predators. *Id.* at 47.

⁷ The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006). The Adam Walsh Child Protection and Safety Act’s most significant provision is the Sex Offender Registration and Notification Act (SORNA). Salemo & Goldstein, *supra* note 11, at 32.

⁸ See 152 Cong. Rec. S8013-14, 1, 4, 6 (establishing that the purpose of the Act was to unite all fifty states “in common purpose and in league with one another” and that it “fully integrate[] and expand[] the State systems” so that communities throughout the country will know when high-risk sex offenders come to their neighborhoods); see also Salerno & Goldstein, *supra* note 1, at 32–33 (noting that the act aims to “standardize the various state sex offender registries” and contains provisions providing for the civil commitment of sexually dangerous offenders).

⁹ 18 U.S.C. § 4248 (2006). A “sexually dangerous person” is defined as “a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.” 18 U.S.C. § 4247(a)(5). A person is “sexually dangerous to others” when “the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(6).

¹⁰ See *United States v. Volungus*, 599 F. Supp. 2d 68, 71 (D. Mass. 2009) (opposing a court ordered civil commitment on the grounds that Congress exceeded its authority under the United States Constitution when it enacted 18 U.S.C §§ 4247 and 4248).

¹¹ Compare *id.* at 77–78 (overturning § 4248), *rev’d*, 595 F.3d 1 (1st Cir. 2010) with *United States v. Abregana*, 574 F. Supp. 2d 1123, 1139 (D. Haw. 2008) (upholding § 4248).

¹² See *United States v. Volungus*, 595 F.3d 1, 10 (1st. Cir. 2010) (upholding § 4248); *United States v. Tom*, 565 F.3d 497, 504 (8th Cir. 2009) (upholding § 4248); *United States v. Comstock*, 551 F.3d 274, 280 (4th Cir. 2009) (overturning § 4248).

¹³ 129 S.Ct. 2828 (2009).

¹⁴ No. 08-1224, 2010 WL 1946729, at *11 (May 17, 2010).

¹⁵ See, e.g., Posting of Roger Pilon to Cato @ Liberty, <http://www.cato-at-liberty.org/2010/05/17/u-s-v-comstock-is-about-policy-over-law/> (May 17, 2010, 12:12 EST), (expressing disgust at the conclusion the Court reached under the Necessary and Proper Clause standard); Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/2010/05/17/bad-news-for-federalism-preliminary-reflections-on-comstock/> (May 17, 2010, 15:00 EST) (asserting that the Court “got this one very badly wrong” by adopting a “rational basis test”); *The Mighty Sweeping Clause and Expansive Federal Power*, CONSTITUTIONAL LAW PROF BLOG, <http://lawprofessors.typepad.com/conlaw> (May 18, 2010) (demonstrating surprise at the Court’s revival of the Necessary and Proper Clause to reach its conclusion).

¹⁶ See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority “to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes”).

¹⁷ See *infra* notes 60–92 and accompanying text (discussing the Supreme Court’s application of a commerce power analysis in the three most recent federalism cases).

¹⁸ 514 U.S. 549 (1995).

¹⁹ *Id.* at 558–59.

²⁰ See *infra* notes 31–40 and accompanying text (discussing the limitations of the Necessary and Proper Clause).

²¹ See *infra* notes 60–72 and accompanying text for a discussion of the limitations the *Lopez* test placed on Congress’ commerce power.

²² The five factors the majority considered were: (1) “the breadth of the Necessary and Proper Clause, (2) the “long history of federal involvement” in the arena of civil commitment, (3) the “sound reasons” for the enactment of § 4248 in light of the federal government’s interest in acting as a custodian to safeguard the public from “the dangers posed by those in federal custody” (4) the fact that the provision accommodates state interest, and (5) “the statute’s narrow scope.” *United States v. Comstock*, 560 U.S. ___, No. 08-1224, 2010 WL 1946729 at *15 (May 17, 2010).

²³ *Id.*

²⁴ See Posting of Roger Pilon to Cato @ Liberty, <http://www.cato-at-liberty.org> (May 17, 2010, 12:12 EST) (criticizing *Comstock* as “a textbook example” of the Supreme Court trumping law with policy).

²⁵ 545 U.S. 1 (2005).

²⁶ U.S. CONST. art. I.

²⁷ U.S. CONST. art. I, § 8.

²⁸ U.S. CONST. art. I, § 8, cl. 18.

²⁹ U.S. CONST. amend. X.

³⁰ U.S. CONST. art. I, § 8, cl. 3.

³¹ 17 U.S. (4 Wheat.) 316 (1819).

³² *Id.* at 413–15.

³³ *Id.* at 413; see also Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272 (1993) (asserting that “necessary” refers to a “relationship” or “fit” between government action and an enumerated power).

³⁴ *McCulloch*, 17 U.S. (4 Wheat.) at 421. *But see* Lawson & Granger, *supra* note 22, at 305 (arguing that the Court’s interpretation of the word “proper” in *McCulloch* is “implausible,” and suggesting that the framers intended to use it to confer a “jurisdictional” limitation upon Congress’ authority to enact legislation).

³⁵ *McCulloch*, 17 U.S. (4 Wheat.) at 387–88.

³⁶ *Id.* at 413.

³⁷ See U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “[t]o make all laws be necessary and proper for carrying into execution” the powers listed above in Article I § 8). See generally Lawson & Granger,

supra note 22, at 330–33 (discussing the relationship between the Necessary and Proper Clause and the Tenth Amendment).

³⁸ See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (noting that the Necessary and Proper Clause is not a grant of power on its own but a “caveat that Congress possesses all the means necessary to carry out” its powers specifically enumerated in Article I § 8).

³⁹ *Id.* at 407–08.

⁴⁰ See Jeffrey P. Doss, *A Structural Criticism of the DNA Analysis Backlog Elimination Act*, 39 CUMB. L. REV. 511, 530 (1990) (discussing the limitations on Congress’ authority to enact federal legislation despite the leeway provided by the Necessary and Proper Clause); see also Kenton J. Skarin, *Not All Violence is Commerce: Noneconomic, Violent Criminal Activity, RICO, and Limitations on Congress Under the Post Raich Commerce Clause*, 13 TEX. REV. L. & POL. 187, 216 (2009) (asserting that the Necessary and Proper Clause “does not grant Congress any extra power and should not allow Congress to circumvent other Constitutional limitations”); Lawson & Granger, *supra* note 32, at 274–75 (clarifying that the Necessary and Proper Clause is “not a self-contained grant of power” and that its exercise “must always be tied to the exercise of some other identifiable constitutional power of the national government”).

⁴¹ “[The Commerce Clause] has been the authority for a broad array of federal legislation, ranging from criminal statutes to securities laws to civil rights laws to environmental laws.” ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 174 (Richard Epstein ed., Aspen L&B 1997).

⁴² U.S. CONST. art. I, § 8, cl. 3.

⁴³ 22 U.S. 1 (1821).

⁴⁴ *Id.* at 27. In *Gibbons*, the State of New York had granted a license to a ferry company, run by Ogden, the exclusive right to navigate certain waterways between New York and New Jersey. *Id.* at 8–9. However, *Gibbons*, the owner of another ferry company, navigated his boats on this same water pursuant to a federal statute that allowed for the deployment of ships in the “coasting trade” in these waters. *Id.* at 9–11. The Court invalidated the New York monopoly, as it was in “collision” with a valid exercise of the federal government’s constitutional authority. *Id.* at 87–88.

⁴⁵ The New Deal refers to United States economic reforms during the 1930’s. See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 201–202 (1994).

⁴⁶ 156 U.S. 1 (1895).

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 12. In doing so, the Court argued that the power to regulate commerce is independent of the “power to suppress monopoly” because the regulation of a monopoly “does not control” commerce. *Id.*

⁴⁹ *Houston E. & W. Tex. Ry. Co. v. United States (The Shreveport Rate Case)*, 234 U.S. 342 (1914).

⁵⁰ *Id.* at 351. In this case, the Court upheld a railroad carrier’s policy of setting lower rates for intrastate travel than it did for railway travel across state lines. *Id.* at 346.

⁵¹ 196 U.S. 375 (1905).

⁵² *Id.* at 398–99. In *Swift*, the target of Congress’ regulation was each state’s livestock market. *Id.* at 394. The Court upheld a law that made it illegal for meat dealers to monopolize and prevent competition. *Id.* at 394–95.

⁵³ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (overturning act aiming to regulate hours and wages on the grounds that the effect of the provision “primarily [fell] upon production and not commerce”); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (overturning wage, hours, and trade practice provisions of legislation because such legislation targeted manufacturing rather than commerce).

⁵⁴ 301 U.S. 1 (1937).

⁵⁵ *Id.* at 37. The NLRA created the National Labor Relations Board, which allowed for labor organization and collective bargaining practiced. *Id.* at 24.

⁵⁶ 312 U.S. 100 (1941).

⁵⁷ *Id.* at 121. The Court upheld the Fair Labor Standards Act, which prevented the interstate shipment of products and commodities produced under unfair working conditions. See *id.* at 125.

⁵⁸ 317 U.S. 111 (1942).

⁵⁹ *Id.* at 129 (upholding the Agricultural Adjustment Act, which set quotas for farmers’ wheat production in an attempt to regulate the market supply and demand of the product). The Court held that even the appellee’s personal consumption of wheat could be regulated, as the aggregate effect of many farmers growing wheat for personal consumption would lead to changes in supply and demand of the product as a whole. *Id.* at 129–30.

⁶⁰ See A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. PUB. POL’Y 101, 138 (2007) (noting that “the [Supreme] Court upheld every federal statute that regulated private conduct” that was challenged under Congress’ commerce power); Brandon J. Stoker, Comment, *Was Gonzales v. Raich the Death Knell of Federalism? Assessing Meaningful Limits on Federal Intrastate Regulation in Light of U.S. v. Nascimento*, 23 BYU J. PUB. L. 317, 325 (2009) (identifying the time between the New Deal and the Rehnquist federalism revival as a “half-century of nearly unquestioned judicial acquiescence”).

⁶¹ 514 U.S. 549 (1995).

⁶² *Id.* at 551.

⁶³ *Id.*

⁶⁴ *Id.* at 558.

⁶⁵ Examples of “channels” of interstate commerce include roads, rivers, railroad tracks, or any other medium through which goods might travel. See, e.g., *The Shreveport Rate Case*, 234 U.S. 342, 351 (1914) (recognizing the railroad system as a means of “commercial intercourse”); *Gibbons v. Ogden*, 22 U.S. 1, 22 (asserting that Congress has power over regulation of “the waters,” including lakes, rivers, and the “high seas”).

⁶⁶ Examples of “instrumentalities” of interstate commerce include anything that may transport or ship goods, including trucks, ships, trains, etc. See, e.g., *Perez v. United States*, 402 U.S. 146, 150 (1971) (citing aircrafts as an example of an instrumentality of interstate commerce); *The Shreveport Rate Case*, 234 U.S. at 351 (recognizing that trains are instruments of interstate commerce); *Gibbons*, 22 U.S. at 94 (referring to ships and vessels as “instruments” of commerce”).

⁶⁷ *Lopez*, 514 U.S. at 557.

⁶⁸ See *id.* at 559 (observing that the law did not regulate the channels of interstate commerce, nor could it “be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce”).

⁶⁹ *Id.* at 561.

⁷⁰ *Id.* at 561. However, scholars have criticized this decision for not adequately detailing guidelines as to what constitutes “substantial” or how to calculate this effect. See, e.g., Robert J. Pushaw, *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 895 (2005) (asserting that the majority simply stated that the possession of guns in school zones did not substantially affect interstate commerce, while the dissent insisted that it did).

⁷¹ *Lopez*, 514 U.S. at 561–62. In doing so, the Court rejected the government’s assertion that the possession of a firearm in a school zone has a substantial impact on interstate commerce because (1) “the costs of violent crime are substantial and . . . spread throughout the population,” (2) violent crimes discourage interstate travel, and (3) that the presence of guns “threaten[s] the learning environment” and, consequently, “would

have an adverse effect on the Nation's economic well-being." *Id.* at 563–64 (citations omitted). The Court expressed concern that adopting these arguments would give Congress the authority to regulate “not only violent crime, but all activities that might lead to violent crime,” regardless of how attenuated the link to commerce may be. *Id.* at 564.

⁷² *Id.* 567–68.

⁷³ 529 U.S. 598 (2000).

⁷⁴ *Id.* at 605.

⁷⁵ *Id.* at 610, 612.

⁷⁶ Compare *id.* at 599 (“§ 13981 . . . is supported by numerous findings regarding the serious impact that gender-motivated violence on victims and their families . . .”) (emphasis in original) with *Lopez*, 514 U.S. at 562 (pointing out that neither the act at issue, nor is legislative history, purported any finding as to the effect possession of a gun in a school zone had on interstate commerce). Specifically, the findings purported that gender-motivated violence affected interstate commerce “by deterring potential victims from traveling interstate, from engaging in employment in interstate business . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.” *Morrison*, 529 U.S. at 615 (citations omitted).

⁷⁷ *Morrison*, 529 U.S. at 614–15. The “method of reasoning” the Court was referring to here was Congress’ argument that gender-motivated violence had the effect of “deter[ring] potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . .” *Id.* at 615. This argument was similar to the “costs of crime” argument that the government put forth in *Lopez*, asserting that “violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.” *Lopez*, 514 U.S. at 564. The Court rejected this argument in *Lopez*. *Id.*

⁷⁸ *Morrison*, 529 U.S. at 615.

⁷⁹ *Id.* at 618.

⁸⁰ *Id.* at 618; see David M. Cromwell, Note, *Gonzales v. Raich and the Development of Commerce Clause Jurisprudence: Is the Necessary and Proper Clause the Perfect Drug?* 38 RUTGERS L.J. 251, 282 (2008) (suggesting that *Morrison* “solidified” the principles established in *Lopez* regarding the importance of an activity regulated by Congress being economic in nature).

⁸¹ See Pushaw, *supra* note 69, at 894 (stating that the decisions in *Lopez* and *Morrison* “built upon the logically assailable premise that . . . the Commerce Clause cannot be interpreted in a way that effectively leaves Congress with absolute discretion”).

⁸² 545 U.S. 1 (2005).

⁸³ *Id.* at 22.

⁸⁴ *Id.* at 13.

⁸⁵ *Id.* at 15.

⁸⁶ *Id.* at 18–19.

⁸⁷ *Id.* at 25–26. The Court asserted that all it had to determine was whether it had a “rational basis” for concluding that the respondent’s activities had a substantial effect on interstate commerce, which it found here. *Id.* at 22.

⁸⁸ *Id.* at 33 (Scalia, J., concurring).

⁸⁹ *Id.* at 39.

⁹⁰ *Id.* at 39–40.

⁹¹ *Id.* at 40. Justice Scalia reasoned that the CSA was an appropriate means to curb the existence of marijuana in interstate commerce because “marijuana that is grown at home and possessed for personal use is never more than in instant from the interstate market,” regardless of whether this home consumption was for medicinal or any other lawful use. *Id.* Moreover, he rejected the idea that state law would be “effective” in maintaining a divide between a “lawful” marijuana market for medicinal purposes and “the more general marijuana market.” *Id.* at 40–41.

⁹² See Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 3 (2007) (noting that while the Rehnquist Court was successful in implementing “substantive limits” on the scope of Congress’ commerce authority, it was not as successful in “developing a coherent normative theory that reconciled its new doctrinal limitations with the traditional broad scope of the post-New Deal Commerce Clause cases”).

⁹³ See Bryant, *supra* note 59, at 154–55 (observing that a dispute now exists among scholars as to whether *Raich* “marks the end of the Lopez Revolution” or instead is “merely a minor diversion from the course Lopez had launched”); see also Stearns, *supra* note 91, at 26 (noting that none of the Justice’s opinions in *Raich* puts forth a framework that reconcile the limitations imposed by the Supreme Court’s recent Commerce Clause decisions with the post-New Deal expansion of that power). See *infra*. Part III.b.ii for an argument that *Raich* will not necessarily be controlling in future Commerce Clause cases.

⁹⁴ U.S. CONST. amend. X.

⁹⁵ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (asserting that the principle that the federal government can only exercise its enumerated powers is “universally admitted”).

⁹⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 78–80 (1824).

⁹⁷ See Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 778 (2007) (asserting that the Tenth Amendment “functions as a principal constitutional basis of state police power”).

⁹⁸ *United States v. Lopez*, 519 U.S. 549, 566 (1995).

⁹⁹ Pub. L. No. 109-248, 120 Stat. 587 (2006).

¹⁰⁰ *Id.*

¹⁰¹ See 152 CONG. REC. S8013 (2006) (stating that the purpose of the bill was to prevent “lowlife[]” sex offenders from finding loopholes and “slipping through the cracks” by creating unity among the fifty states); H.R. REP. NO. 109-218, pt. 1, at 27 (describing the bill as one meant “to address loopholes and deficiencies in existing laws”). See generally Salerno & Goldstein, *supra* note 1, at 32–33 (laying out the key provisions of the Adam Walsh Act).

¹⁰² See 18 U.S.C. § 4248(a) (2006). Legislative history suggests that Congress enacted this provision in order to assure that “offenders with mental disorders who are clearly dangerous,” may be civilly committed, even if their disorder “do[es] not fall within the narrowly applied definition of mental illness.” H.R. REP. NO. 109-218, pt. 1, at 35 (2005). It applies to federal sex offenders with “serious mental illness, abnormality, or disorder.” *Id.* Prior to the enactment of § 4248, civil commitment provisions required an offender to be hospitalized while incarcerated, and be suffering from a “mental disease or defect.” *Id.* The apparent purpose, then, of § 4248 was to broaden the scope of those sex offenders who could be civilly committed. See *id.* (criticizing the then existing law for excluding offenders who were “clearly dangerous but . . . [did] not fall within the narrowly applied definition of mental illness”).

¹⁰³ 18 U.S.C. § 4247(a)(5)–(6) (2006). Although § 4247 does not define “sexually violent conduct” or “child molestation,” the Bureau of Prisons proposed regulations to provide for these definitions and to clarify the process that it will use to determine whether an individual in custody meets these definitions. Civil Commitment of a Sexually Dangerous Person, 72 Fed. Reg. 43205-06 (proposed Aug. 3, 2007) (to be codified at 28 C.F.R. pt. 549). The Bureau purported to define “sexually violent conduct” as “any unlawful conduct of a sexual nature with another person” that involved one of a number of enumerated violent actions. *Id.* at 43,207–08. It further purported to define “child molestation” as “any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.” *Id.* at 43,207. See generally Fabian, *supra* note 6, at 45–46 for a further discussion of “unresolved” issues surrounding § 4248.

¹⁰⁴ 18 U.S.C. § 4248(a).

¹⁰⁵ 18 U.S.C. § 4248(d). At the hearing, the person whose mental condition is being evaluated is represented by counsel, and has the opportunity to testify, present evidence, and to subpoena, confront, and cross-examine witnesses. 18 U.S.C. § 4247(d).

¹⁰⁶ 18 U.S.C. § 4248(d).

¹⁰⁷ 18 U.S.C. § 4248(e).

¹⁰⁸ See Fabian, *supra* note 6, 47–48 (pointing out that New York is now the eighteenth state to implement legislation providing for the civil commitment of sex offenders).

¹⁰⁹ Salerno & Goldstein, *supra* note 1, at 35.

¹¹⁰ *Id.*; see also Fabian, *supra* note 6, at 44 (expressing concern that because § 4248 lacks a “likely to reoffend” requirement, “low-risk” and “non-contact” offenders may end up civilly committed indefinitely).

¹¹¹ See Salerno & Goldstein, *supra* note 1, at 35 (indicating that an offender can remain in custody beyond the expiration of his or her sentence while awaiting the government’s determination as to the danger he or she poses).

¹¹² See, e.g., 18 U.S.C. § 4241 (2006) (allowing the Government to civilly commit a defendant “at any time after the commencement of a prosecution . . . and prior to the sentencing” if determined that the defendant is mentally incompetent to go through with the prosecution proceedings); see also Greenwood v. United States, 350 U.S. 366, 373 (1956) (upholding a statute that called for the civil commitment of those charged with federal crimes but incapable to stand trial due to mental incompetence).

¹¹³ 551 F.3d 274 (4th Cir. 2009).

¹¹⁴ *Id.* at 284.

¹¹⁵ *Id.* at 280.

¹¹⁶ *Id.* The Court maintained that § 4248 bears “striking resemblance” to the statute at issue in *Morrison* in that it “provides a civil remedy aimed at the prevention of noneconomic sexual violence.” *Id.* at 279. In so finding, the Court’s rationale in *Morrison* that the “regulation and punishment of intrastate violence . . . has always been the province of the States” applied here with “equal force.” *Id.* at 279–80 (quoting *United States v. Morrison*, 529 U.S. 598, 618–19 (2000)).

¹¹⁷ *Id.* at 281–84.

¹¹⁸ *Id.* at 279 (emphasis in original).

¹¹⁹ *Id.* at 278 (citing *United States v. Sahhar*, 56 F.3d 1026 (9th Cir.1995) (noting that in the exercise of their general police and *parens patriae* powers, the states have long controlled the civil commitment of the mentally ill)).

¹²⁰ 565 F.3d 497 (8th Cir. 2009) [hereinafter *Tom II*].

¹²¹ *Id.* at 501.

¹²² *Id.* at 505. The court maintained that prior commitment of a sexually violent crime was indicative of one’s “propensity” to engage in other federally prohibited sexual conduct in the future, and that the civil commitment provision was aimed at preventing further commitment of sexually violent crimes. *Id.* at 506. It thus viewed this potential prevention of future crime commitment as the necessary nexus between § 4248 and interstate commerce. *Id.* at 505–06.

¹²³ *Id.* at 503. The respondent in *Tom* was convicted of violating 18 U.S.C. § 2241(c), which made it a crime to cross state lines with the intent to engage in a sexual act with a minor. *Id.* at 504.

¹²⁴ *Tom II*, 565 F.3d at 504. In his concurring opinion in *Raich*, Justice Scalia maintained that Congress’ authority to regulate intrastate activities that are not a part of interstate commerce stems from the Necessary and Proper Clause, and that the authority to enact laws that are necessary and proper to Congress’ regulation of interstate commerce “is not limited to laws governing intrastate activities that substantially affect interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring). He insisted that Congress has the authority to “regulate even

noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce” so long as the “means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.” *Id.* at 37.

¹²⁵ *Tom II*, 565 F.3d at 504–05 (citing *Raich*, 545 U.S. at 35).

¹²⁶ *Id.* at 506.

¹²⁷ *Id.* at 505–06.

¹²⁸ *United States v. Volungus*, 595 F.3d 1, 10 (1st Cir. 2010).

¹²⁹ 350 U.S. 366 (1956).

¹³⁰ *Volungus*, 595 F.3d at 6.

¹³¹ *Greenwood*, 350 U.S. at 367–68.

¹³² *Volungus*, 595 F.3d at 7. *But see infra* notes 232–244 (distinguishing the law at issue in *Comstock* from the law at issue in *Greenwood*).

¹³³ *Compare* *United States v. Abregana*, 574 F. Supp. 2d 1123, 1133–34 (D. Haw. 2008) (upholding § 4248); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *7 (W.D. Okla. Dec. 5, 2007) (upholding § 4248); *United States v. Shields*, 522 F. Supp. 2d 317, 328 (D. Mass. 2007) (upholding § 4248); *United States v. Carta*, 503 F. Supp. 2d 405, 409, 410 (D. Mass. 2007) (upholding § 4248) *with* *United States v. Wilkinson*, 626 F. Supp. 2d 184 (D. Mass. 2009) (overturning § 4248); *United States v. Volungus*, 599 F. Supp. 2d 68, 80 (D. Mass. 2009) (overturning § 4248); *United States v. Tom*, 558 F. Supp. 2d 931, 941 (D. Minn. 2008) [hereinafter *Tom I*] (overturning § 4248), *rev’d*, 565 F.3d 497 (8th Cir. 2009); *United States v. Comstock*, 507 F. Supp. 2d 522, 559 (E.D.N.C. 2007) (overturning § 4248), *aff’d*, 551 F.3d 374 (4th Cir. 2009).

¹³⁴ See, e.g., *Abregana*, 574 F. Supp. 2d at 1129–30 (holding that Congress had the authority to enact § 4248 because “it has the power to criminalize certain conduct and to ‘make all laws which shall be necessary and proper’ to execute its enumerated power”); *Dowell*, 2007 WL 5361304, at *7 (concluding that Congress was authorized to enact § 4248, as it “is a necessary and proper exercise of the federal government’s power under the Commerce Clause to prevent the commission of federal sex crimes”); *Shields*, 522 F. Supp. 2d at 326 (“Section 4248 is a necessary and proper exercise of the federal government’s power under the Commerce Clause to prevent the commission of federal sex crimes.”); *Carta*, 503 F. Supp. 2d at 408 (determining that the scope of Congress’ “auxiliary power . . . extends so far as to allow Congress to prevent the release of those lawfully in custody”).

¹³⁵ See, e.g., *Wilkinson*, 626 F. Supp. 2d at 194 (holding the government reliance on the Necessary and Proper Clause “undermine[d] the historic distinction between state and federal authority” and that the enactment of § 4248 “exceeded Congress’s powers under the Commerce Clause and Necessary and Proper Clause”); *Volungus*, 599 F. Supp. 2d at 77–78 (concluding that because § 4248 “offers only remote and contingent support for the regulation of interstate commerce” and “encroaches on an area of law-making that has historically been . . . a matter of the exercise by the States,” it does not fall within the scope of congressional authority to enact legislation); *Tom I*, 558 F. Supp. 2d at 941 (ruling that because Congress had exceeded its authority in enacting § 4248, the court was “required to take the uncommon but necessary step of finding that the statute [was] unconstitutional”); *Comstock*, 507 F. Supp. 2d at 559 (finding that § 4248 is unconstitutional because § 4248 “is not sufficiently tied to the exercise of any enumerated or otherwise identifiable constitutional power of Congress”).

¹³⁶ *United States v. Comstock*, 560 U.S. ___, No. 08-1224, 2010 WL 1946729 at *15 (May 17, 2010).

¹³⁷ See, e.g., *United States v. Abregana*, 574 F. Supp. 2d 1123, 1131–32 (D. Haw. 2008) (arguing that Congress had the authority to enact § 4248, since it has the authority under the Commerce Clause “to criminalize and punish” the type of conduct that offenders to whom § 4248 applies to have committed); see also *United States v. Tom*, 565 F.3d 497, 595 (8th Cir. 2009) (holding that “Congress, having been empowered by the

Commerce Clause to criminalize and punish the conduct of which [the respondent] is guilty, has the ancillary authority under the Necessary and Proper Clause to provide for his civil commitment”); *United States v. Shields*, 522 F. Supp. 2d 317, 325-326 (D. Mass. 2007) (stating that “it is difficult to accept the proposition” that the government cannot prevent the release of an individual who has committed a crime for which the federal government has the power to enact under the Commerce Clause); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *5 (W.D. Okla. Dec. 5 2007) (noting that the government contended that “§ 4248 is a rational means of safeguarding Congress’s ability to prevent the future commissions of the acts which it is authorized to prohibit”).

¹³⁸ See Transcript of Oral Argument at 22, *United States v. Comstock*, 560 U.S. ___ (2010) (No. 08-1224) (Solicitor General Elena Kagan stating that the government was not arguing the Commerce Clause “because of . . . the *Morrison* precedent”).

¹³⁹ *Gonzalez v. Raich*, 545 U.S. 1, 26 (2005).

¹⁴⁰ See *supra* Part I.b for an in-depth discussion of how Congress’ Commerce Power expanded during most of the Twentieth Century. The Rehnquist Court overturned legislation on Commerce Power grounds for the first time in five decades in *United States v. Lopez*, limiting Congress’ ability to enact legislation that sought to protect the safety and well-being of our nation. 514 U.S. 549 (1995). The Court again overturned legislation on commerce power grounds five years later in *United States v. Morrison*. U.S. v. Morrison, 529 U.S. 598 (2000).

¹⁴¹ See *Bryant*, *supra* note 47, at 154-55 (observing that a debate among scholars has arisen as to whether *Raich* “mark[ed] the end of the *Lopez* revolution or merely a minor diversion from the course *Lopez* had launched”); Corey Rayburn Young, *One of these Laws is Not Like the Others: Why the Federal Sex Offender Registration And Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 409 (2009) (explaining that, because the Supreme Court has not reviewed any legislation under commerce clause jurisprudence since *Raich*, there remains “substantial uncertainty as to the precise meaning of *Raich* in relation to the prior decisions in *Lopez* and *Morrison*”); Skarin, *supra* note 29, at 206 (accusing the Court’s *Raich* decision of “muddying . . . commerce clause jurisprudence”).

¹⁴² See *Bryant*, *supra* note 47, at 155 (asserting that “history strongly suggests” that *Raich* will “prove fatal to [the] hope”) that *Lopez* and *Morrison* “held promise of a meaningful judicial enforcement of the enumerated powers scheme,” as *Raich* demonstrates that the Court cannot “stretch congressional powers to encompass plenary authority” over portions of a targeted regulation “while simultaneously preserving robust judicial enforcement of the enumerated powers scheme”;

¹⁴³ See *Pushaw*, *supra* note 58, at 908 (asserting that it would be “premature to pronounce *Raich* the death knell of the Rehnquist Court’s Commerce Clause revolution,” as the Court’s majority and concurring opinions reaffirmed *Morrison* and *Lopez* by applying those cases’ “imprecise standards on a case by case basis”); Skarin, *supra* note 29, at 212 (arguing that the “economic/non-economic” distinction applied in *Raich* was proper because it was “at least plausible” that Congress had the authority to regulate the respondents’ activities because they “involve[d] the economics of agricultural commodities”).

¹⁴⁴ See *Raich*, 545 U.S. at 23 (distinguishing itself by noting that the respondents were asking the Court to “excise individual applications of a *concededly valid* statutory schemes,” whereas *Lopez* and *Morrison* “fell outside Congress’ commerce power in its entirety”) (emphasis added). In fact, even the respondents in *Raich* conceded that the passage of the CSA was “well within Congress’ power,” and, consequently, challenged the law’s regulation of the manufacture and possession of marijuana as applied to their use of it for medical purposes. *Id.* at 15.

¹⁴⁵ See *United States v. Morrison*, 529 U.S. 598, 604 (2000) (stating that the petitioners moved to dismiss their case on grounds that the Act’s civil

remedy provision was unconstitutional); *United State v. Lopez*, 514 U.S. 549, 552 (1995) (noting that the respondent was challenging the GFSZA on grounds that it exceeded Congress’ authority to enact legislation under the commerce clause).

¹⁴⁶ *Raich*, 545 U.S. at 15.

¹⁴⁷ *Raich*, 545 U.S. at 23. (citations and internal quotations omitted).

¹⁴⁸ The respondents in *Raich* even conceded that the Controlled Substances Act was valid on its face. *Raich*, 545 U.S. at 15. They did not seek to invalidate the statute completely; they merely wanted it invalidated as applied to their particular use of marijuana for medicinal purposes. *Id.*

¹⁴⁹ See *Doss*, *supra* note 29, at 528 (suggesting that facial challenges to federal legislation “trigger[] application of the framework established in *Lopez* and refined in *Morrison*” while as-applied challenges “operate[] the more deferential and expansive *Raich* standards”).

¹⁵⁰ *Lopez* challenged the constitutionality of the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). *United States v. Lopez*, 514 U.S. 549, 552 (1995). This Act made it unlawful “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.” *Id.* at 551.

¹⁵¹ *Morrison* challenged the constitutionality of a provision 18 U.S.C. § 13981. *U.S. v. Morrison*, 529 U.S. 598, 601 (2000). This provision declared that “A person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.” *Id.* at 605 (quoting 18 U.S.C. § 13981(c)).

¹⁵² See *Morrison*, 529 U.S. at 617-18 (recognizing that the “regulation and punishment of intrastate violence” is the clear example of the type of police power that “the Founders denied the National Government and reposed in the States); *United State v. Lopez*, 514 U.S. 549, 567 (1995) (insisting that the federal government does not have a “general police power of the sort retained to the states).

¹⁵³ The Gun-Free School Zones Act at issue in *Lopez* sought to regulate an individual’s possession of a firearm while in a school zone by criminalizing such conduct. *Lopez*, 514 U.S. at 551. The provision of the Violence Against Women Act at issue in *Morrison* sought to regulate “violence motivated by gender” by making those who committed such violence liable for compensatory and punitive damages, as well as injunctive and declaratory relief, to the party that they injured. *Morrison*, 529 U.S. at 605.

¹⁵⁴ As discussed above, the Supreme Court cited this shortcoming as among the reasons for overturning each of these acts. See *supra* Part I.b for a more comprehensive discussion of the Court’s decision in each respective case.

¹⁵⁵ See *Morrison*, 529 U.S. at 609 (maintaining that the “regulation and punishment of intrastate violence” has generally always been in the realm of state authority); *Lopez*, 514 U.S. at 566 (1995) (insisting, in overturning the GFSZA, that the federal government does not have a general police power). See *supra* Part I.c for a general discussion of the powers that the Tenth Amendment reserves to the states and the types of police power legislation the federal government does have the authority to enact.

¹⁵⁶ *Gonzales v. Raich*, 545 U.S. 1, 24-25 (2005).

¹⁵⁷ *Id.* at 25-26. They recognized the activities as economic because they affected the “production, distribution, and consumption of commodities.” *Id.* at 25.

¹⁵⁸ *Id.* at 22. In particular, the Court reasoned that Congress had a rational basis for believing that the respondents’ home consumption of marijuana could influence the “supply and demand of controlled substances in both lawful and unlawful drug markets,” just as the farmer in *Wickard*’s home consumption of wheat could have “a substantial

influence on price and market conditions.” *Id.* at 18-19 (citing *Wickard v. Filburn*, 317 U.S. 311, 115 (1942)).

¹⁵⁹ *Morrison*, 529 U.S. at 610.

¹⁶⁰ *Id.* at 605.

¹⁶¹ *United State v. Lopez* 514 U.S. at 551.

¹⁶² See 18 U.S.C. 4248(e) (permitting the release of an offender under the civil commitment program when the director of the facility in which he is placed determines that he is “no longer sexually dangerous to others”).

¹⁶³ *Raich*, 545 U.S. at 25, 27.

¹⁶⁴ *Id.* at 26-27.

¹⁶⁵ *Lopez*, 514 U.S. at 558.

¹⁶⁶ The Court quickly dismissed the GFSZA under this first prong. See *id.* at 559 (observing that the first prong could be “quickly disposed of,” as the GFSZA was did not regulate the use of channels of interstate commerce).

¹⁶⁷ See *supra* note 54 for a discussion of what constitutes “channels” of interstate commerce.

¹⁶⁸ 18 U.S.C. § 4248.

¹⁶⁹ In *Lopez*, the Court dismissed the GFSZA under this second prong just as quickly as it dismissed the act under the first prong, merely asserting that it was not a regulation “by which Congress has sought to protect an instrumentality of interstate commerce. *Lopez*, 514 U.S. at 559. Similarly, the Court recognized in *Morrison* that Congress did not purport that the challenged VAWA provision fell under this category. *Morrison*, 529 U.S. at 609.

¹⁷⁰ See *supra* note 55 for examples of “instrumentalities” of interstate commerce.

¹⁷¹ One indication of whether an act of legislation regulates “instrumentalities” or persons or things within interstate commerce whether the statute invokes a requirement that the act or person sought to be regulated is either tied to interstate commerce of federal jurisdiction (jurisdictional element). See *Lopez*, 514 U.S. at 588, 561 (noting that if the act included a jurisdictional element, the second prong of the test might have been satisfied). Compare 18 U.S.C. § 4248 (lacking any jurisdictional requirements) with 18 U.S.C. § 1591 (conditioning the act upon the violator being “in or affecting interstate commerce or foreign commerce, or within the special maritime and territory”); 18 U.S.C. § 2242 (2007) (limiting the reach of the law to those “in the special maritime and territorial jurisdiction of the United States, or in any Federal prison”; 18 U.S.C. § 2252 (2008) (outlawing persons from transporting or shipping visual depictions of minors “in interstate or foreign commerce”). See *infra* Part V for a more thorough discussion as to the impact that including a jurisdictional element may have on the constitutionality of § 4248.

¹⁷² *Lopez*, 514 U.S. at 557.

¹⁷³ See *Morrison*, 529 U.S. at 612.

¹⁷⁴ *Id.* at 611.

¹⁷⁵ See *Id.* at 610 (noting that a “fair reading of *Lopez* shows that the non-economic, criminal nature of the conduct at issue was central” to its decision in that case that the GFSZA was unconstitutional).

¹⁷⁶ *Lopez*, 514 U.S. at 562-63. It also rejected the government’s argument that violent crime in school zones can have an effect on the national economy as a demonstration that the provision had a substantial effect on interstate commerce. *Id.* at 563-64.

¹⁷⁷ See *Comstock*, 551 F.3d at 280 (noting that the record in this case contained no legislative findings indicating that sexual dangerousness would have a substantial effect on interstate commerce); see also *Lopez*, 514 U.S. at 562-63 (proposing that legislative findings regarding a statute’s effect on interstate commerce might enable the Court to “evaluate the legislative judgment” that the activity being regulated affects interstate commerce). Though the Court conceded that such

findings are not normally required, it purported that such findings could be useful when “no such substantial effect [is] visible to the naked eye.” *Id.* at 562-63.

¹⁷⁸ See *Morrison*, 529 U.S. at 614, (asserting that “simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so”) (quoting *Lopez*, 514 U.S. at 557). In *Morrison*, the government did put forth findings concerning the “serious impact that gender-motivated violence has on victims and their families.” *Id.* at 599.

¹⁷⁹ See *id.* at 615 (“If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”).

¹⁸⁰ In both cases, the Court emphasized that Congress’ authority under the Commerce Clause is *not* without limit. *Morrison*, 529 U.S. at 607; *Lopez*, 514 U.S. at 567. In *Morrison*, the Court emphasized Chief Justice Marshall’s contention in *Marbury v. Madison* that “The powers of the legislature are defined and limited; and that those limits may not be mistake or forgotten, the constitution is written.” *Morrison*, 529 U.S. at 607 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). In *Lopez*, the Court noted that even modern Commerce Clause precedent that had expanded Congress’ commerce power “confirm[ed]. . .] that the scope of the interstate commerce power . . . may not be extended so as to embrace effects upon interstate commerce so indirect and remote” that adopting them would “obliterate the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 556-57 (citations and internal quotations omitted).

¹⁸¹ See *Morrison*, 529 U.S. at 615 (asserting that if the Court upheld the VAWA, it would allow Congress “to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption”).

¹⁸² See *The Mighty Sweeping Clause and Expansive Federal Power*, CONSTITUTIONAL LAW PROF BLOG, <http://lawprofessors.typepad.com/conlaw> (May 18, 2010).

¹⁸³ *Raich*, 545 U.S. at 25-26.

¹⁸⁴ As noted above, the Court in *Raich* maintained that “[e]conomics” refers to the “production, distribution, and consumption of commodities.” *Id.* at 26 (citation omitted).

¹⁸⁵ *Comstock*, 551 F.3d at 279.

¹⁸⁶ See *Raich*, 545 U.S. at 30 (finding that the personal consumption of marijuana, taken in aggregation, could “have a significant impact on both the supply and demand sides of the market for marijuana”).

¹⁸⁷ *Id.* at 34 (Scalia, J., concurring).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 35-37 (Scalia, J., concurring).

¹⁹⁰ *Id.* at 41-42.

¹⁹¹ The Eighth Circuit adopted Justice Scalia’s concurring opinion in *United States v. Tom*, in upholding § 4248. 565 F.3d 497, 502 (8th Cir. 2009). However, in the only other lower court opinion to address Justice Scalia’s concurrence, *United States v. Wilkinson*, the District of Massachusetts recognized that *Raich* did not apply because “there was no comprehensive scheme of regulation of interstate commerce threatened” by § 4248. 626 F. Supp. 2d 184, 191-92 (D. Mass. 2009).

¹⁹² U.S. CONST. art. I, § 8, cl. 18; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 356 (1819) (“To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to congress.”); Lawson & Granger, *supra* note 22, at 331 (observing that congressional laws “must respect the system of enumerated federal powers” and may not regulate activities that fall outside the scope of powers enumerated in the Constitution).

¹⁹³ *United States v. Comstock*, 551 F.3d 274, 281 (2009).

¹⁹⁴ For example, in *United States v. Dowell*, 2007 WL 5361304 at *5,

the Western District of Oklahoma based its decision to uphold § 4248 in large part on the Third Circuit's decision in *United States v. Perry*, 788 F.2d 100 (3d. Cir. 1986). In *Perry*, the Third Circuit upheld 18 U.S.C. § 3142(e), which authorizes the *pre*-trial detention of an accused person when nothing could reasonably assure that this person would appear for trial or that the community would be unsafe if such a person were released. *Id.* at 111, 103. The Third Circuit concluded that because Congress had the authority to enact the federal laws for which the defendant was accused of committing, it had “the auxiliary authority” through the Necessary and Proper Clause to civilly commit these persons to prevent the recurrence of crime. *Id.*

The district court in *Dowell* also based its argument on a Tenth Circuit case, *United States v. Plotts*, 347 F.3d 873 (10th Cir. 2003), which held that the Necessary and Proper Clause gives congress the power to enact laws “that bear a rational connection to any of its enumerated powers *United States v. Plotts*, 347 F.3d 873,878 (10th Cir. 2003) (quoting *United States v. Edgar*, 304 F.3d 1320, 1326 (11th Cir. 2002)). The Tenth Circuit relied on the fact that the respondent had committed a crime that Congress had the authority to enact through its commerce power, and concluded that the DNA Act, which was at issue in *Plotts*, was a “necessary and proper sanction” to this “valid criminal law.” *Id.* at 878-79. The Court also maintained that even if the DNA Act was viewed as a “law enforcement tool,” rather than a “sanction,” the law would then have been a necessary and proper exercise of the Executive branch's law enforcement powers. *Id.* The Court essentially applied the framework under this scenario as it did in construing the DNA Act as a sanction—that the law the respondent had violated was valid under Congress' commerce power, and that the Necessary and Proper Clause gives Congress the authority to enact laws that aid the executive branch in its “duty to take Care that the Laws be faithfully executed.” *Id.* at 779 (citations omitted)

Such heavy reliance on Courts of Appeals cases are indicative of the fact that the Courts who have upheld § 4248 under the Necessary and Proper Clause had no Supreme Court precedent to support their argument. That the Third and Tenth Circuits came to these conclusions on the application of the Necessary and Proper Clause did not indicate that the Supreme Court will adopt their arguments, as Appellate Court decisions have no binding authority over the Supreme Court. *See* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish.”) (emphasis added). *See generally* *United States v. Abregana*, 574 F. Supp. 2d 1123, 1131 (D. Haw. 2008) (relying on decisions in 9th and 10th Circuit in implementing its § 4248 rationale); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *5 (W.D. Okla. Dec. 5 2007) (citing 10th and 11th Circuit cases as its basis for its necessary and proper rationale).

¹⁹⁵ At oral arguments, Solicitor General Kagan summarily referred to Congress’ “power to run a criminal justice system that does not itself endanger the public” as the power “conferred upon the Federal Government by the Constitution” to enact § 4248. Transcript of Oral Argument at 7, *United States v. Comstock*, 560 U.S. ___ (2010) (No. 08-1224). Even in the *Comstock* majority opinion itself, Justice Breyer merely alluded to a number of powers the Constitution grants Congress, including the power to regulate interstate commerce, to enforce civil rights, and to expend funds for the welfare of the public, without pointing to precisely which power granted Congress the authority to enact § 4248. *United States v. Comstock*, 560 U.S. ___, No. 08-1224, 2010 WL 1946729 at *7 (May 17, 2010).

¹⁹⁶ 350 U.S. 366 (1956); *see, e.g.*, *United States v. Tom*, 565 F.3d 397, 504 (8th Cir. 2009) (maintaining that *Greenwood* was “dispositive” of the issue § 4248 presented); *United States v. Abregana*, 574 F. Supp. 2d 1123, 1130 (D. Haw. 2008) (recognizing that, while the decision in *Greenwood*

was limited to the facts of that case, “the basis of the decision [was] instructive”); *United States v. Shields*, 522 F. Supp. 2d 317, 325 (D. Mass. 2007) (observing that *Greenwood* reasoning at *least* applies to those who are in custody of the Attorney General based on their incompetency to stand trial under § 4248).

¹⁹⁷ *Greenwood v. United States*, 350 U.S. 366, 368 (1956).

¹⁹⁸ *Id.* at 375

¹⁹⁹ *See id.* (“We reach then the *narrow* constitutional issue raised by the order of commitment in the circumstances of this case.”) (emphasis added).

²⁰⁰ *Id.*

²⁰¹ 18 U.S.C. § 4248(a).

²⁰² *Id.*

²⁰³ *See* Salerno & Goldstein, *supra* note 1, at 32-33 (discussing the depth and breadth of the Act's reach); Fabian, *supra* note 66, at 44, 50 (expressing concerns that the act will result in the indefinite civil commitment of “low-risk” and “non-contact” sex offenders, as “sex offenders who suffer from any type of mental illness, disorder, or abnormality may be committed under the AWA”); Amy Baron-Evans and Sara Noonan, *Grid & Bear It*, CHAMPION, July 2008 at 58, 58 (calling to attention that the statute “does not require a current or prior sex-related conviction or even a sex-related charge,” but rather that anyone in the custody of the Bureau of Prisons may be civilly committed under this program).

²⁰⁴ *Greenwood*, 350 U.S. at 375; *see also* Salerno & Goldstein, *supra* note 1, at 32, 35 (noting that under the Act, the government can wait to determine the danger an offender poses until after his sentence has been completed).

²⁰⁵ *See Comstock*, 551 F.3d at 282 (noting that most violent sex offenses are state, rather than federal, offenses).

²⁰⁶ *See* CONG. REC. S8017, 2006 WL 2034117 (noting that before the enactment of the Adam Walsh Act, three-quarters of all violent sex offenders re-committed their original crime).

²⁰⁷ *See id.* (holding that because most sexually violent crimes are prohibited under state law, § 4248 “sweeps far too broadly,” as many of the civil commitments imposed under § 4248 would prevent the future commission of state law).

²⁰⁸ *See* *United States v. Comstock*, 560 U.S. ___, No. 08-1224, 2010 WL 1946729 at *13 (May 17, 2010) (citing *Greenwood* as an example of precedent that infers the power of the federal government to civilly commit prisoners).

²⁰⁹ *Comstock* at *3 (internal quotations omitted).

²¹⁰ *Id.* at *15.

²¹¹ *Id.* at *5.

²¹² *Id.*

²¹³ *Id.* at *6 (emphasis added) (quoting *Sabri v. United States*, 541 U.S. 600, 605 (2004).

²¹⁴ *Id.* at *8. Notably, although Justice Scalia dissented from the majority opinion, the language Justice Breyer here directly mirrors that of Justice Scalia in his concurring opinion in *Gonzales v. Raich*. *See* *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) (asserting that the proper inquiry under a Commerce Clause analysis is “whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power”) (internal quotations omitted); *see also supra* Notes 88–91 and accompanying text (discussing Justice Scalia's concurrence in *Raich*). Some scholar have suggested that Scalia's dissent in *Comstock* demonstrates “that he may be having second thoughts about the very broad view of the Necessary and Proper Clause” he adopted in his concurrence in *Raich*, while the *Comstock* decision itself demonstrates that the rest of the Court, with the exception of Justice Thomas, have accepted the approach that Justice Scalia took in *Raich*. Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/> (May 17, 2010, 15:00 EST);

Michael C. Dorf, *The Supreme Court's Decision About Sexually Dangerous Federal Prisoners: Could it Hold the Key to the Constitutionality of the Individual Mandate to Buy Health Insurance?*, FINDLAW, May 19, 2010, <http://writ.news.findlaw.com/dorf/20100519.html>.

²¹⁵ *Comstock*, 2010 WL at *8.

²¹⁶ *Id.*

²¹⁷ *Id.* at *8-9.

²¹⁸ *Id.* at *8 (internal quotations omitted).

²¹⁹ *Id.* at *9-10.

²²⁰ *Id.* at *10; see 18 U.S.C. § 4246 (d) (2006).

²²¹ *Comstock*, 2010 WL at *10. The Court further noted that many of the individuals subject to § 4248 would already have been subject to § 4246.

Id.

²²² *Id.* at *11.

²²³ *Id.* (quoting Restatement (Second) of Torts § 319).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* The Court noted that the Federal government “severed” the inmates claim to “legal residence in any state” once they held them in “remote federal prisons.” *Id.*

²²⁷ *Id.* at *11-12. See *infra* Part I.c for a discussion of the Tenth Amendment and the powers reserved to the states.

²²⁸ *Comstock*, 2010 WL at *11.

²²⁹ *Id.* at *12.

²³⁰ *Id.*

²³¹ *Id.* at *13.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at *14-15.

²³⁵ *Id.* at *16 (Kennedy, J., concurring). His concern was that “rational basis” creates different standards depending on what the Court is analyzing. *Id.* at *16-17. For example, Justice Kennedy demonstrated that the “rational basis” standard is more exacting in Commerce Clause cases (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)) than it is in due process cases (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483). *Id.* The former, he asserts, requires a “demonstrated link in fact” between an act of Congress and an enumerated power, while the latter does not. *Id.*

²³⁶ *Id.* at *17.

²³⁷ *Id.* at *18 (Alito, J., concurring).

²³⁸ *Id.*

²³⁹ *Id.* at 19.

²⁴⁰ *Id.* at *19-20.

²⁴¹ *Id.* at *20.

²⁴² *Id.* Justice Alito reasoned that “[j]ust as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.” *Id.*

²⁴³ *Id.* at 21 (Thomas, J., dissenting) (emphasis added).

²⁴⁴ *Id.* at *22 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

²⁴⁵ *Id.*

²⁴⁶ See *id.* at *25. Justice Thomas criticized the Court for “put[ting] the cart before the horse” in its opinion, as the “fit” between a statute and its aim only matters if the end itself is legitimate. *Id.* Because he believed that no enumerated power grants Congress the authority to have individuals civilly committed, it was of no matter to Justice Thomas that the ends and means here fit. *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at *27. And in fact, Justice Thomas noted that this concern was not one that was “merely hypothetical,” as almost one-fifth of the

individuals civilly committed under § 4248 had in fact never been charged with committing a crime that involved “sexual violence.” *Id.* at *27.

²⁴⁹ *Id.* at *27. In discussing this issue, Justice Thomas contrasted this case with *Greenwood*, where the law at issue limited the federal government’s authority over an individual to only when the individual was incompetent to stand trial or the charges against him had been dropped.

Id.; see *supra* notes 234–243 and accompanying text for a more in-depth discussion of *Greenwood* and its distinction from *Comstock*.

²⁵⁰ *Comstock*, 2010 WL at *27.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at *28.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at *30. Moreover, Justice Thomas emphasized that it did not matter that states *wanted* the federal government to assume responsibility here, as Congress’ power is “fixed by the constitution,” and not the preference of the states themselves. *Id.* at *31.

²⁵⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 421 (1819).

²⁵⁷ See *supra* Part I.b.

²⁵⁸ In fact, almost immediately following the release of the *Comstock* opinion, one blogger noted that the Court has only “examined or discussed” its *McCulloch* decision nine times in the past twenty years. Constitutional Law Prof Blog, <http://lawprofessors.typepad.com/conlaw/> (May 18, 2010).

²⁵⁹ *Comstock*, 2010 WL at *31 (Thomas, J., dissenting).

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