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Lauren E. Marsh
American University Washington College of Law

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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,” 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. 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.

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. 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.

In response to this discomforting 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. 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. 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. 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.

This portion of the Adam Walsh Act has been challenged on the premise that it is an unconstitutional exercise of Congressional authority. A number of district courts, as well the First, Fourth and Eighth Circuits, 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.* 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.

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. 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, rather than the Necessary and Proper Clause alone, to determine whether the law at issue was a constitutional exercise of congressional authority. Each of these cases applied a three-prong test created in a 1995 decision, *United States v. Lopez,* 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 affects interstate commerce.

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. 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.46

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.

For about fifty years Congress had seemingly free reign to enact legislation invoking its authority under the Commerce Clause. 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.”60

Chief Justice Rehnquist identified three types of activities Congress may regulate under the commerce clause.61 Under the Lopez test, Congress may regulate (1) “channels” of interstate commerce,62 (2) “instrumentalities,” or persons or things in interstate commerce,63 and (3) activities that “substantially affect” interstate commerce.64

The Court quickly determined that the Gun Free School Zones Act was neither a channel nor an instrumentality of interstate commerce.65 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.66 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.”67 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 contain any “express congressional findings” as to the effect the law had on interstate commerce.68 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.”69

The Rehnquist Court applied Lopez again five years later. In United States v. Morrison,70 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.71 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.”72 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.73 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.”74

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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.” 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. 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.”

Though the Rehnquist Court indicated that Congress did not have unlimited authority to enact legislation, it took a new direction soon after in *Gonzales v. Raich*, upholding a regulation that, as it was applied, did not have a direct connection to interstate commerce. 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. 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.

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.” 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.

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. 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. 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 *intrasate* consumption of marijuana depended on whether it was an “appropriate means of achieving the legitimate end of [eliminating] Schedule I substances from interstate commerce.” 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.

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 limitation 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. 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.

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.” 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. 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.” 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. 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.

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 Act (Adam Walsh Act) in 2006. 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. 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.”

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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.” 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.

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. 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.” 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.

Although numerous states have implemented legislation providing for the civil commitment of sexually violent predators, § 4248 is the first federal provision calling for a federal program to civilly commit sexually dangerous persons. 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. 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. This makes § 4248 different from other federal civil commitment programs, which generally call for civil commitment prior to court proceedings or sentence completion.

**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*, 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. The court found that § 4248 did not target channels of interstate commerce or persons or things in interstate commerce. Moreover, it held that target of the § 4248, “sexual dangerousness,” does not substantially affect interstate commerce.

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. 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.” Furthermore, the court emphasized that control over the mentally ill is a police power that is generally reserved to the states.

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*. As in *Comstock*, the Eighth Circuit in *Tom* acknowledged that Congress did not identify the source of its authority to enact § 4248. 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. 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.

While the Fourth Circuit relied heavily on the Supreme Court’s commerce power analyses in *Lopez* and *Morrison* to invalidate § 4248, the Eight Circuit in *Tom* applied Justice Scalia’s concurring opinion in *Raich*. 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. 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. 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.

Several months after *Tom*, the First Circuit also concluded that § 4248 was not an unconstitutional exercise of Congressional authority. In *United States v. Volungus*, the First Circuit relied heavily on an earlier Supreme Court decision, *Greenwood* v. United States, to conclude that § 4248 was “within the scope of Congress’s constitutional authority under the Necessary and Proper Clause.” 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. 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.

Although only three circuits have addressed the constitutionality of § 4248, this issue has created a divide among district courts throughout the nation. Districts addressing § 4248 have upheld the provision, finding Congressional authority in the Necessary and Proper and Commerce Clauses to enact this provision. However, several district courts have adopted arguments similar to those of the Fourth Circuit in finding § 4248 invalid. 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.

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 to enacting 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, it is an argument that it discarded once Comstock reached the high Court. 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.

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. 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.\textsuperscript{141} As \textit{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 \textit{Raich} emerged, many scholars believed that this decision marked the end of the Rehnquist’s federalism expansion.\textsuperscript{142} However, many scholars have suggested, and this comment asserts, that \textit{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.\textsuperscript{143} Accordingly, this subsection will demonstrate why the \textit{Lopez} and \textit{Morrison} framework would have been the more appropriate standard to apply to § 4248.

\textit{Raich} is distinguishable from these other Rehnquist Court decisions in at least three respects. First, unlike \textit{Lopez} and \textit{Morrison}, \textit{Raich} involved an “as-applied” challenge to an Act that, on its face, was a valid exercise of Congressional authority.\textsuperscript{144} Unlike the petitioners in \textit{Lopez} and \textit{Morrison}, who contended that the Acts in question fell outside the scope of Congressional authority altogether,\textsuperscript{145} the respondents in \textit{Raich} merely challenged the Controlled Substances Act as it applied to their personal, intrastate consumption of marijuana.\textsuperscript{146} The Court referred to this distinction between \textit{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.”\textsuperscript{147} Because \textit{Comstock} was a facial challenge to a statute, as opposed to an as-applied to challenge to an otherwise valid statute,\textsuperscript{148} this case would have warranted an analysis under the \textit{Lopez} standard.\textsuperscript{149}

Second, the more stringent \textit{Lopez} standard would have been the more appropriate test to apply, given the similarities between § 4248 and the laws at issue in \textit{Lopez}\textsuperscript{150} and \textit{Morrison}.\textsuperscript{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.\textsuperscript{152} Because both Acts aimed to control the behavior of individuals within a state,\textsuperscript{153} neither act demonstrated any specific attachment to the regulation of interstate commerce.\textsuperscript{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.\textsuperscript{155}

On the other hand, the Controlled Substances Act, which was at issue in \textit{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.\textsuperscript{156} In its decision in \textit{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.”\textsuperscript{157} Although the activities of the respondents’ in \textit{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.\textsuperscript{158}

Of the legislation challenged in the three most recent Commerce Clause decisions, § 4248 more closely resembles the legislation at issue in \textit{Lopez} and \textit{Morrison} than the regulation challenged in \textit{Raich}. As in \textit{Lopez} and \textit{Morrison}, the Court in \textit{Comstock} addressed the constitutionality of an act that is “non-economic” and “criminal” in nature.\textsuperscript{159} The VAWA provision at issue in \textit{Morrison} sought to regulate individual acts of sexual violence against women generally;\textsuperscript{160} the GFSZA at issue in \textit{Lopez} aimed to regulate the conduct of individuals who might possess a gun while in a school zone.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{163} \textit{Raich} applied an “aggregate effects” test due to the CSA’s relation to the “production, distribution, and consumption of commodities.”\textsuperscript{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 \textit{Comstock}. Because § 4248 is lacking this economic tie, which was the key element in the \textit{Raich}, the standard developed in \textit{Raich} would not have been appropriate to apply in \textit{Comstock}.

\textbf{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 \textit{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.\textsuperscript{165}

As was the case in \textit{Lopez}, the Court in \textit{Comstock} would have quickly recognized that § 4248 does not satisfy the first prong of the \textit{Lopez} test.\textsuperscript{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 move outside the state or between states.
commerce might travel—such as a river or a roadway. 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.

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. 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. 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. Thus, the only way that § 4248 would not require that the people it regulates have any connection to interstate commerce, just as it did in Lopez and Morrison, would have been if the Court found that it otherwise has a substantial effect on interstate commerce.

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.” 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.” 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.

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. 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. 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.

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. 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. 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. 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.

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. 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. Section 4248 is a regulation aimed at preventing non-economic violence, 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.

Even the Court’s adoption of Justice Scalia’s concurring opinion in Raich would have placed § 4248 outside the realm of congressional authority. In his opinion, Justice Scalia asserted that Congress’ power to regulate activities that substantially affect interstate commerce “cannot come from the Commerce Clause alone.” 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.” 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. 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.

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. 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, 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. This is because the government could not directly point to a specific enumerated power that § 4248 served to execute.

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. 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. 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.

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. 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. 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. 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. Because § 4248 can apply to anyone in legal custody of the United States, the reach of § 4248 goes beyond the government’s power to prosecute, and reaches into the point where this power has been exhausted.

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. 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. In doing so, the provision makes no distinction between aiming to prevent the commission of federal crimes, and those actions prohibited by state law. 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, the Court had to take its analysis beyond this precedent to reach the conclusion that § 4248 was valid.

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
justifying

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.”

These factors included: (1) “the breadth of the Necessary and Proper Clause”; (2) the “long history of federal involvement” in the area 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, state interests; and (5) the narrow scope of § 4248.

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.

The first consideration the majority addressed was the “broad authority” that the Necessary and Proper Clause grants Congress to enact federal legislation. 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.

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. While the Court’s majority did not speak directly to which specific enumerated powers § 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.

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.” 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. 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. 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.” 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.”

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.

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. 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.” 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. 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. 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.

Next, the Court addressed another pressing concern that § 4248 raised: the potential infringement it imposes on the sovereignty of the states. 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.

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 wary 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 exercise 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 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 “executes no enumerated power.”243 Justice Thomas read a two-part test into McCalloch, 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 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. 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.” 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.

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. 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.” 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.

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 its 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”—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. 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, 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” 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.
of a person to a psychiatric hospital or other mental health treatment—of
2007, New York became the eighteenth state to enact legislation calling

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).


Id. at 558-59.

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

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

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).

Id.

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).

545 U.S. 1 (2005).

U.S. CONST. art. I.


U.S. CONST. art. I, § 8, cl. 18.

U.S. CONST. amend. X.

U.S. CONST. art. I, § 8, cl. 3.

17 U.S. (4 Wheat.) 316 (1819).

Id. at 413–15.

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).

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 world “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).


Id. at 413.

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 CUML. L. REV. 511, 530 (1999) (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.


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 railroad 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.


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 practices. 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.


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.

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”).

*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”).


[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.
concurring). He insisted that Congress has the authority to “regulate even commerce.” Gonzales v. Raich, 545 U.S. 1, 34–35 (2005) (Scalia, J., to laws governing intrastate activities that substantially affect interstate commerce.

Proper Clause, and that the authority to enact laws that are necessary and 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 commerce power.” Id. at 37.

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

Id. at 506.

Id. at 505–06.

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


Volungus, 595 F.3d at 6.

Greenwood, 350 U.S. at 367-68.

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).


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”)

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”).


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. CIT-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”).

See Transcript of Oral Argument at 22, United States v. Comstock, 560 U.S. ___ (2010) (No. 08-12224) (Solicitor General Elena Kagan stating that the government was not arguing the Commerce Clause “because of . . . the Morrison precedent”).

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


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 Ham. 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”).

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”); 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/noneconomic” 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”).

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.

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).

Raich, 545 U.S. at 15.

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

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.

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”).


Morrison challenged the constitutionality of a provision 18 U.S.C. § 13981. U.S. v. Morrison, 529 U.S. 598, 600 (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)).

See Morrison, 529 U.S. at 617-18 (recognizing that the “regulation and punishment of intrastate violence” is the a 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”).

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.

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.

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.e 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.

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

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

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.


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 territorial”). 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”).


183 Raich, 545 U.S. at 25-26.

184 As noted above, the Court in Raich maintained that “[h]economics’ 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).


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 is 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 3561304, at *5 (W.D. Okla. Dec. 5 2007) (citing 10th and 11th Circuit cases as its basis for its necessary and proper rationale).

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 “confferred 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).

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).


Id. at 375

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

Id.


Id.

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).

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).

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

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).

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).

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).

Comstock at *3 (internal quotations omitted).

Id. at *15.

Id. at *5.

Id.

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

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, has 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);

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.
222 Id.
223 Id. at *11.
224 Id. (quoting Restatement (Second) of Torts § 319).
225 Id.
226 Id.
227 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.
228 Id. at *11-12. See infra Part I.c for a discussion of the Tenth Amendment and the powers reserved to the states.
229 Comstock, 2010 WL at *11.
230 Id.
231 Id. at *12.
232 Id.
233 Id.
234 Id.
235 Id. at *14-15.
236 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.
237 Id. at *17.
238 Id. at *18 (Alito, J., concurring).
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.
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.
259 Comstock, 2010 WL at *31 (Thomas, J., dissenting).

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**About the Author**

Lauren Marsh is a rising third-year law student at American University Washington College of Law, and is the Senior Note and Comment Editor for American University Law Review. She received her B.A. in Political Science at Allegheny College. She is spending this summer as an intern in the Appellate Division at the United States Attorney’s Office for the District of Columbia. Her legal interests include Constitutional Law, Civil Rights Law, and Criminal Procedure.