
FEDERALISM CHALLENGES TO THE ADAM WALSH ACT

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INTRODUCTION

One of the fundamental features of our government's structure is that the states have a general police power, while the federal government is limited by its enumerated powers.¹ Over the past fifty years, Congress has vastly expanded the federal criminal law via the Commerce Clause.² Because regulating criminal activity is primarily the responsibility of the states,³ many scholars perceive the rapid expansion of the federal criminal law as clashing with federalism values.⁴ The Adam Walsh Child Protection and Safety Act of 2006⁵ ("the Adam Walsh Act"), once described as "the most comprehensive child crimes and protection bill in our nation's history,"⁶ is an example of this conflict.

This Note addresses two provisions of the Adam Walsh Act that scholars have challenged as violating principles of federalism: 18 U.S.C. § 4248, which provides for federal civil commitment of sexually violent predators, and 18 U.S.C. § 2250(a)(2)(A), which creates a new federal "failure to register" crime for federal sex offenders. Part I provides background information on the Adam Walsh Act and these two provisions. Part II examines the Commerce Clause and the Necessary and Proper Clause as the possible sources of constitutional authority for these provisions. Part II also explains that these two clauses provide the basis for most of federal criminal law, and describes how they might be and have been invoked to justify the Adam Walsh Act provisions at issue. Part III argues that neither provision is justified independently by the Commerce Clause.

¹ See *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961))).

² See, e.g., George D. Brown, *Counterrevolution? – National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 986 (2005); Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 59 (2008) ("[T]he federal government has over time increasingly involved itself in the nation's crime control efforts, with Congress making liberal use of its Commerce Clause authority to expand its criminal law jurisdiction and invoking its spending power to figure more centrally in state criminal justice systems.").

³ See Logan, *supra* note 2, at 53 (citing THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 260-61).

⁴ See, e.g., Brown, *supra* note 2, at 987; Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 836 (2000); Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 1991 (2008).

⁵ Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 and 42 U.S.C.).

⁶ *United States v. Comstock*, 551 F.3d 274, 276 (4th Cir. 2009) (quoting 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch)), *cert. granted*, 129 S. Ct. 2828 (2009).

Finally, Part IV argues that neither provision is justified as a law necessary and proper for carrying into execution Congress's power to enact federal criminal laws. This last argument is the chief rationale that the government relies on in cases challenging the constitutionality of the civil commitment provision. Interestingly, the government has argued that the civil commitment provision is a necessary and proper exercise of Congress's power to criminalize both federal offenders' past federal crimes and possible future federal crimes.⁷ This Note argues that neither provision is necessary and proper to execute the federal government's power to prosecute, punish, or imprison individuals for past federal offenses. Furthermore, neither provision is necessary and proper to execute the federal government's power to prevent future federal crimes. Because the provisions at issue exceed Congress's constitutional authority, they are invalid and must be struck down.⁸ The Note concludes by suggesting how the provisions might be revised to pass constitutional muster.

I. THE ADAM WALSH ACT: BACKGROUND

In recent years, state governments have imposed a variety of post-incarceration controls on sex offenders, including sex offender registration and notification requirements, civil commitment, GPS monitoring and tracking, and residency restrictions.⁹ The Adam Walsh Act imposes several of these controls at the federal level and "greatly expand[s] the role of the federal government in sex offender policy."¹⁰ The Adam Walsh Act was enacted to "protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and honor the memory of Adam Walsh and other child crime victims."¹¹ The statute creates a national sex offender registry, increases federal criminal penalties for crimes against children, provides grants to states for civil commitment programs for sexually dangerous persons, and contains measures designed to prevent child pornography.¹² Two provisions of the act violate principles of federalism: a

⁷ See, e.g., Brief for the Appellant at 34-35, *Comstock*, 551 F.3d 274.

⁸ See *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." (citing *United States v. Lopez*, 514 U.S. 549, 568, 577-78 (1995) (Kennedy, J., concurring))).

⁹ See generally Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008).

¹⁰ Richard G. Wright, *From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy*, 21 FED. SENT'G REP. 124, 124 (2008).

¹¹ Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 and 42 U.S.C.).

¹² *Id.*

provision providing for the civil commitment of sexually violent predators,¹³ and a provision creating a new federal “failure to register” crime for federal sex offenders.¹⁴

A. *Section 4248: Providing for Federal Civil Commitment of Sexually Dangerous Persons*

The Adam Walsh Act is the first federal statute to authorize civil commitment of sexually violent predators.¹⁵ The Jimmy Ryce Civil Commitment Program of the Adam Walsh Act is codified at 18 U.S.C. § 4248 (“§ 4248” or “the civil commitment provision”). Section 4248 authorizes the federal government to initiate civil commitment proceedings against three categories of individuals: (1) persons in the custody of the Bureau of Prisons (“BOP”), the federal agency responsible for the custody and care of federal offenders; (2) persons committed to the custody of the United States Attorney General based on incompetence to stand trial; and (3) persons against whom all criminal charges have been dismissed solely due to their mental condition.¹⁶ To initiate civil commitment proceedings, a person authorized by the U.S. Attorney General or the Director of the BOP may certify an individual in the foregoing categories as a “sexually dangerous person” and stay his release from federal custody pending completion of a hearing.¹⁷ Following the hearing, the individual will be committed to the custody of the Attorney General if the court finds, by clear and convincing evidence, that the individual is a sexually dangerous person.¹⁸ He will remain in such custody until a state will take responsibility for his care, or he is released upon a finding that he is no longer sexually dangerous or that his condition is controllable with the proper treatment regime.¹⁹

A “sexually dangerous person” is one who “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”²⁰ “Sexually dangerous to others” means that “the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”²¹ Thus, to civilly commit an individual under § 4248, the court must make two separate determinations: (1) “looking backwards,” the court must find that the individual “engaged or attempted to engage in sexually violent conduct or child molestation” and (2)

¹³ 18 U.S.C. § 4248 (2006).

¹⁴ *Id.* § 2250(a).

¹⁵ *See* United States v. Shields, 522 F. Supp. 2d 317, 323 (D. Mass. 2007).

¹⁶ 18 U.S.C. § 4248(a).

¹⁷ *Id.*

¹⁸ *Id.* § 4248(d).

¹⁹ *Id.*

²⁰ *Id.* § 4247(a)(5).

²¹ *Id.* § 4247(a)(6).

looking forward, the court must find that he is “sexually dangerous to others.”²²

Several features of § 4248 bear special mention. First, a determination that an individual engaged or attempted to engage in sexually violent conduct or child molestation does not depend on a state or federal conviction for a sex crime.²³ This is in contrast to many state civil commitment schemes, which require a sex crime conviction.²⁴ Second, § 4248 authorizes the government to civilly commit persons in the custody of the BOP *after* they have fully served their prison sentences.²⁵ Although the certification as a “sexually dangerous person” takes place while the prisoner is in federal custody, the statute authorizes civil commitment after the federal sentence has expired. Indeed, most certifications under § 4248 have taken place at the very end of prisoners’ terms and have detained them past their release dates.²⁶

Parties have challenged § 4248 in the federal district courts on numerous grounds, including procedural and substantive due process, *ex post facto*, double jeopardy, and the applicable burden of proof.²⁷ These challenges are similar to those mounted against state sexual predator commitment schemes.²⁸ However, because § 4248 is part of a federal statute, it is subject to an additional challenge: Congress must rely on an enumerated power to enact a federal law.²⁹ Lower courts have been divided in ruling on the question of whether § 4248 is a valid exercise of Congress’s authority under the Commerce Clause in conjunction with the Necessary and Proper Clause. Four federal district courts in Hawaii, Oklahoma, and Massachusetts have found §

²² *Id.* § 4247(a).

²³ *See* United States v. Comstock, 551 F.3d 274, 283 (4th Cir. 2009) (“[U]nder § 4248, the federal government may commit a person even though he has never been convicted by any court – state or federal – of any crime of sexual violence.”), *cert. granted*, 129 S. Ct. 2828 (2009).

²⁴ *See id.* at 277 n.2 (citing VA. CODE ANN. § 37.2-900 (2008) (requiring a person to have been convicted of a “sexually violent offense” before civil commitment proceedings may be commenced against him)).

²⁵ *See id.* at 276.

²⁶ *See id.* at 277 n.3 (noting that of the more than sixty persons the Attorney General has certified in the Eastern District of North Carolina, all but one had already served all or nearly all of their prison terms before the certification); United States v. Wilkinson, No. 07-12061-MLW, 2008 WL 427295, at *1 (D. Mass. Feb. 14, 2008).

²⁷ *See* 2 DAVID L. FAIGMAN ET AL., MOD. SCI. EVIDENCE § 11:14, at 183 n.2 (ed. 2008-2009).

²⁸ *See id.* § 11:14 at 183.

²⁹ *See* United States v. Morrison, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.))).

4248 is within Congress's authority;³⁰ two federal district courts in Massachusetts have found that it is not.³¹

In addition to the federal district court decisions, there is currently a circuit split on the issue. In *United States v. Comstock*, the Fourth Circuit declared § 4248 unconstitutional, concluding that the provision "cannot be sustained as an exercise of Congress's authority under the Commerce Clause or any other provision of the Constitution."³² In *United States v. Tom*, the Eighth Circuit upheld the civil commitment provision, concluding that "§ 4248 is a rational and appropriate means to implement comprehensive federal legislation under authority granted it by the Constitution."³³

In April, 2009, Chief Justice Roberts stayed the Fourth Circuit's decision in *Comstock* pending the disposition of a petition for a writ of certiorari,³⁴ and in June 2009, the Supreme Court granted the petition for writ of certiorari.³⁵ The Supreme Court will hear arguments in the case in its October 2009 term, and its decision will have enormous implications for the future of federalism and the federal criminal justice system.

B. *Section 2250(a)(2)(A): Creating a New Federal "Failure to Register" Crime for Federal Sex Offenders*

One of the main purposes of the Adam Walsh Act is to establish "a comprehensive national system for the registration of [sex] offenders."³⁶ The Adam Walsh Act was motivated in part by concern over variations in state law with legislators "repeatedly condemning state 'loopholes,' 'disparities,' and 'deficiencies,' which purportedly allowed an excess of 100,000 registrants to become 'lost.'"³⁷ Congress was concerned the laws' "diverse nature created a 'patchwork' permitting registrants to evade continued scrutiny, especially as a

³⁰ See *United States v. Abregana*, 574 F. Supp. 2d 1123, 1133-34 (D. Haw. 2008); *United States v. Dowell*, No. Civ-06-1216-D, 2007 WL 5361304, at *7 (W.D. Okla. Dec. 5, 2007) (citing *United States v. Shields*, 522 F. Supp. 2d 317, 328 (D. Mass. 2007)); *Shields*, 522 F. Supp. 2d at 328, *appeal docketed*, No. 09-1330 (1st Cir. Mar. 11, 2009); *United States v. Carta*, 503 F. Supp. 2d 405, 407-08 (D. Mass. 2007).

³¹ See *United States v. Wilkinson*, 626 F. Supp. 2d 184, 194 (D. Mass. 2009); *United States v. Volungus*, 599 F. Supp. 2d 68, 80 (D. Mass. 2009), *appeal docketed*, No. 09-1596 (1st Cir. May 14, 2009).

³² *United States v. Comstock*, 551 F.3d 274, 284 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

³³ *United States v. Tom*, 565 F.3d 497, 508 (8th Cir. 2009).

³⁴ Order [Granting Stay Pending Disposition of Petition for Writ of Certiorari], *United States v. Comstock*, No. 08A863 (08-1224) (U.S. Apr. 3, 2009).

³⁵ *United States v. Comstock*, 129 S. Ct. 2828 (2009).

³⁶ 42 U.S.C. § 16901 (2006).

³⁷ Logan, *supra* note 2, at 75.

result of inter-state travel.”³⁸ The legislation targeted offenders who might register in one state, then move to another and fail to register there.³⁹

Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (“SORNA”),⁴⁰ established a new federal sex offender registration framework. SORNA made two major changes to federal sex offender registration policy.⁴¹ First, the statute conditioned funds to states upon compliance with participation in a new national sex offender registry.⁴² This provision does not raise constitutional concerns because Congress has authority under the Spending Power to tie federal funds to state compliance with policy goals.⁴³

Second, SORNA created a new federal crime of “failure to register,” enacted at 18 U.S.C. § 2250(a) (“§ 2250(a”). The provision provides that:

In general. – Whoever –

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.⁴⁴

Subsection (1) refers to 42 U.S.C. § 16913 (“§ 16913”), which provides registration requirements for sex offenders.⁴⁵ Section 2250(a) requires persons

³⁸ *Id.* at 84.

³⁹ *See* United States v. Dixon, 551 F.3d 578, 582 (7th Cir. 2008) (citing H.R. REP. NO. 109-218, at 23-24, 26 (2005)).

⁴⁰ 42 U.S.C. § 16902.

⁴¹ *See* Corey Rayburn Yung, *The Sex Offender Registration and Notification Act and the Commerce Clause*, 21 FED. SENT’G REP. 133, 133 (2008).

⁴² 42 U.S.C. § 16925(a).

⁴³ *See* United States v. Perry, 788 F.2d 100, 109 (3d Cir. 1986) (“Congress can use its spending powers to coerce conduct consistent with its views of the general welfare in ways that it perhaps could not otherwise command.” (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) and *Helvering v. Davis*, 301 U.S. 619 (1937))); Yung, *supra* note 41, at 134 (stating that conditioning of federal funds to the states has historically gone unquestioned as a constitutional means to encourage state compliance with federal goals).

⁴⁴ 18 U.S.C. § 2250(a) (2006).

⁴⁵ *See* Yung, *supra* note 41, at 134.

convicted of a sex crime under either federal or state law to register.⁴⁶ Section 16913(a) provides that a sex offender must register and keep the registration current in each jurisdiction where he or she resides, is an employee, or is a student.⁴⁷

Thus, there are two core classes of sex offenders that are subject to prosecution for failing to register. Sex offenders convicted under federal law who fail to register are prosecuted under § 2250(a)(2)(A).⁴⁸ To prosecute someone under this provision, the government does not need to show that the defendant traveled in interstate commerce or Indian country.⁴⁹ Offenders prosecuted under § 2250(a)(2)(B) traveled in interstate commerce and failed to register.⁵⁰ Under this provision, the government must prove interstate travel as an element of the crime.⁵¹ This subsection primarily applies to persons who have committed state sex offenses.⁵²

The two classes of sex offenders raise different legal issues, because subsection (a)(2)(B) contains an express “jurisdictional element.”⁵³ That is, the provision ensures, through a case-by-case inquiry, that the activity in question affects interstate commerce, because it applies only to persons who have committed sex offenses and “travel[] in interstate or foreign commerce.”⁵⁴ Subsection (a)(2)(A), on the other hand, contains no jurisdictional element.⁵⁵ As of August 11, 2009, the Seventh, Eighth, Tenth, and Eleventh Circuits had upheld subsection (a)(2)(B) against constitutional challenges.⁵⁶ However, they did not use a uniform rationale in reaching their

⁴⁶ See *United States v. Dixon*, 551 F.3d 578, 581 (7th Cir. 2008) (describing “being required by the Act to register” as “being a convicted sex offender under either federal or state law”).

⁴⁷ See 42 U.S.C. § 16913(a).

⁴⁸ See Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 411 (2009) (differentiating two groups of sex offenders mainly by their travel, or lack thereof, in interstate commerce).

⁴⁹ See Yung, *supra* note 41, at 134.

⁵⁰ See Yung, *supra* note 48, at 411.

⁵¹ See Yung, *supra* note 41, at 135 (stating that while the connection between registry and interstate travel is clearer in § 2250(a)(2)(B) than in § 2250(a)(2)(A), the statute is still not narrowly tailored enough to support constitutionality under the Commerce Clause).

⁵² See *id.* at 134.

⁵³ *United States v. Lopez*, 514 U.S. 549, 561 (1995).

⁵⁴ 18 U.S.C. § 2250(a)(2)(B) (2006).

⁵⁵ See *United States v. May*, 535 F.3d 912, 922 (8th Cir. 2008).

⁵⁶ See *United States v. Ambert*, 561 F.3d 1202, 1210 (11th Cir. 2009); *United States v. Howell*, 552 F.3d 709, 713 (8th Cir. 2009); *United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008); *United States v. Lawrance*, 548 F.3d 1329, 1337 (10th Cir. 2008); *May*, 535 F.3d at 921.

conclusions.⁵⁷ One scholar has argued “the wording of § 2250(a)(2)(B) is not sufficiently tailored to support SORNA’s constitutionality under the Commerce Clause” due to “the lack of a temporal requirement for interstate travel.”⁵⁸ Because subsection (a)(2)(B) does not require a temporal link between traveling and failing to register, the government may prosecute a sex offender even though he traveled between states years before he failed to register.⁵⁹

Although subsection (a)(2)(B) thus presents its own set of constitutional issues, this Note addresses only subsection (a)(2)(A) (“the failure to register provision”) because it raises legal issues similar to those raised by the civil commitment provision. All courts that have considered prosecutions under § 2250(a)(2)(A) have upheld it as a valid exercise of Commerce Clause authority.⁶⁰ However, these courts engaged in little analysis of the issue,⁶¹ leaving a substantial question about the constitutionality of the prosecutions.

The civil commitment and failure to register provisions at first pass appear to have three differences that might entail differing constitutional analyses or outcomes. After a closer inspection, however, the same arguments can be successfully made against both provisions. First, the failure to register provision targets federal sex offenders who have been released from prison, while § 4248 targets individuals who are still in federal custody.⁶² This is not a substantive difference; although the assessment for civil commitment is made

⁵⁷ Compare *Ambert*, 561 F.3d at 1210 (upholding § 2250 under the first two *Lopez* categories), *Howell*, 552 F.3d at 717 (upholding § 2250 based on *May* and upholding § 16913 because it was “reasonably adapted to the legitimate end” of regulating the first and second *Lopez* categories), *Lawrance*, 548 F.3d at 1337 (upholding § 2250 under the first two *Lopez* categories), and *May*, 535 F.3d at 921 (upholding § 2250 under the first two *Lopez* categories), with *Dixon*, 551 F.3d at 583 (rejecting Commerce Clause argument without referencing the *Lopez* categories).

⁵⁸ Yung, *supra* note 41, at 135.

⁵⁹ See *id.*

⁶⁰ See *United States v. Thompson*, 595 F. Supp. 2d 143, 146 (D. Me. 2009); *United States v. Yelloweagle*, No. 08-cr-00364-WYD, 2008 WL 5378132, at *2 (D. Colo. Dec. 23, 2008); *United States v. Reeder*, No. EP-08-CR-977-DB, 2008 WL 4790114, at *3 (W.D. Tex. Oct. 31, 2008); *United States v. Santana*, 584 F. Supp. 2d 941, 946 (W.D. Tex. 2008); *United States v. Senogles*, 570 F. Supp. 2d 1134, 1147 (D. Minn. 2008); *United States v. David*, No. 1:08CR11, 2008 WL 2045830, at *8 n.11 (W.D.N.C. May 12, 2008); *United States v. Ditomasso*, 552 F. Supp. 2d 233, 245 n.7 (D.R.I. 2008).

⁶¹ *United States v. Van Buren, Jr.*, No. 3:08-CR-198, 2008 WL 3414012, at *12 n.14 (N.D.N.Y. Aug. 8, 2008) (noting that “[s]ome courts have indicated tangentially that a prosecution under § 2250(a)(2)(A), which requires a predicate federal conviction, does not ‘raise Commerce Clause concerns,’” but declining to address the issue (quoting *Senogles*, 570 F. Supp. 2d at 1147)).

⁶² Compare 18 U.S.C. § 2250(a) (2006) (applying only to sex offenders who have been released to the public), with *id.* § 4248(a) (targeting those “in the custody” of the BOP or the Attorney General).

while the person is in federal custody, the government must invoke an enumerated power to justify keeping him after his release date. Second, civil commitment is a much greater intrusion on a person's liberty than a registration requirement.⁶³ Strictly speaking, however, any federal government action must be tied to an enumerated power regardless of the extent of its intrusion on personal liberties. Finally, under § 2250(a)(2)(A), the liability for failing to register is tied to a past conviction of a federal *sex offense*, while under § 4248, people may be evaluated for sexual dangerousness despite the fact that they are in federal custody for a non-sexual offense such as bank robbery.⁶⁴

Despite these differences, both the civil commitment and failure to register provisions raise the same constitutional question. Both provisions target people based on their former federal convictions and impose additional restrictions on them despite the fact that they have completed their federal sentences. Neither provision contains a jurisdictional hook. In sum, both the civil commitment provision and the failure to register provision implicate the question of whether legal federal custody over a person may, without more, serve as the basis of future federal jurisdiction over that person.

II. THE COMMERCE CLAUSE AND THE NECESSARY AND PROPER CLAUSE: POSSIBLE SOURCES OF CONSTITUTIONAL AUTHORITY FOR § 4248 AND § 2250(A)(2)(A)

State governments have clearly established authority to enact statutes governing civil commitment and sex offender registration. States have a long history of “provid[ing] for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.”⁶⁵ Historically, civil commitment of the mentally ill was based on two separate powers: (1) under the *parens patriae* rationale, the state may commit individuals who cannot take care of themselves, and (2) under the police power rationale, the state may commit individuals who are mentally ill and pose a danger to the community.⁶⁶ Thus, states have long held the primary responsibility for the care and custody of the mentally ill⁶⁷ and expansive

⁶³ See *United States v. Comstock*, 551 F.3d 274, 284 (4th Cir. 2009) (“The power claimed by § 4248 – forcible, indefinite civil commitment – is among the most severe wielded by any government.”), *cert. granted*, 129 S. Ct. 2828 (2009).

⁶⁴ See *id.* at 283 (“[U]nder § 4248, the federal government may commit a person even though he has never been convicted by any court – state or federal – of any crime of sexual violence.”).

⁶⁵ *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997).

⁶⁶ See Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 489, 492 (2006), *cited in* Brief for Appellees at 36, *Comstock*, 551 F. 3d 274 (No. 07-7671).

⁶⁷ See, e.g., *United States v. Sahhar*, 56 F.3d 1026, 1029 (9th Cir. 1995); *United States v. Cohen*, 733 F.2d 128, 137 n.15 (D.C. Cir. 1984) (“[L]egislative authority in the general field

authority to require sex offender registration.⁶⁸ Most state sex offender laws emerged in the 1990s.⁶⁹

In contrast, the federal government possesses no general police or *parens patriae* power.⁷⁰ Therefore, Congress may not provide for civil commitment⁷¹ or sex offender registration to protect the general welfare of the community. Because the Framers created a federal government of limited powers,⁷² Congress may enact legislation only pursuant to an enumerated power.⁷³ The federal government may authorize civil commitment only “when such commitment is necessary and proper to the exercise of some specific federal authority.”⁷⁴ Congress did not explicitly identify the source of authority on which it relied in enacting § 4248.⁷⁵ In the federal district courts, the government has argued that authority for the provision is derived from the Commerce Clause in conjunction with the Necessary and Proper Clause.⁷⁶ Although courts have yet to discuss the constitutionality § 2250(a)(2)(A) prosecutions in depth,⁷⁷ these enumerated powers are also the most plausible sources of authority supporting the failure to register provision.

of lunacy is reserved to the states.”); Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 YALE L.J. 1070, 1070 (1955).

⁶⁸ See Stephen R. McAllister, “Neighbors Beware”: *The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 122 (1998) (“[F]or the past 100 years, the Supreme Court has generally treated statutes restricting the activities of convicted persons as valid, regulatory (i.e., non-penal) exercises of the police power.”); Yung, *supra* note 48, at 407 (“[S]tates have virtually unlimited power to create crimes related to sex offender registration . . .”).

⁶⁹ See Yung, *supra* note 48, at 372 (citing HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 35 n.91 (2007)).

⁷⁰ See *United States v. Comstock*, 551 F.3d 274, 278 (4th Cir. 2009) (citing *United States v. Lopez*, 514 U.S. 549, 566 (1995)), *cert. granted*, 129 S. Ct. 2828 (2009).

⁷¹ See *United States v. Perry*, 788 F.2d 100, 110 (3d Cir. 1986).

⁷² See *Lopez*, 514 U.S. at 552 (“The Constitution creates a Federal Government of enumerated powers.”).

⁷³ See *United States v. Morrison*, 529 U.S. 598, 607 (2000).

⁷⁴ *United States v. Comstock*, 507 F. Supp. 2d 522, 537 (E.D.N.C. 2007), *aff’d*, 551 F.3d 274, *cert. granted*, 129 S. Ct. 2828.

⁷⁵ See *id.* at 530.

⁷⁶ See *United States v. Abregana*, 574 F. Supp. 2d 1123, 1129 (D. Haw. 2008); *United States v. Tom*, 558 F. Supp. 2d 931, 936 (D. Minn. 2008), *rev’d*, 565 F.3d 497 (8th Cir. 2009); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *2 (W.D. Okla. Dec. 5, 2007); *United States v. Shields*, 522 F. Supp. 2d 317, 328 (D. Mass. 2007); *Comstock*, 507 F. Supp. 2d at 540; *United States v. Carta*, 503 F. Supp. 2d 405, 407-08 (D. Mass. 2007).

⁷⁷ See *supra* notes 60-61 and accompanying text.

A. *The Commerce Clause: Background*

The Commerce Clause provides that “Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁷⁸ Congress may regulate three categories of activities under the Commerce Clause: (1) use of the channels of interstate commerce; (2) use of the instrumentalities of interstate commerce or persons and things in interstate commerce; and (3) activities having a substantial relation to interstate commerce (“the *Lopez* categories”).⁷⁹

Since the 1930s, the Supreme Court has generally construed the Commerce Clause broadly.⁸⁰ From 1937 to 1994, the Supreme Court did not invalidate a single law as unconstitutional for exceeding the scope of Congress’s commerce power.⁸¹ However, the Supreme Court struck down statutes concerning the third *Lopez* category in two recent cases, signaling to many that it was taking a narrower approach to Commerce Clause authority.

In *United States v. Lopez*, the Court invalidated the Gun Free School Zones Act of 1990, which made possessing a gun within 1000 feet of a school a federal crime, because the Court found that the presence of a gun near a school did not substantially affect interstate commerce.⁸² First, the Court found that because the statute regulated noneconomic, criminal activity and was not an essential part of a larger regulation of economic activity, it could not be upheld “under . . . cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”⁸³ Second, the statute contained “no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”⁸⁴ Third, Congress made no findings regarding the effects of gun possession in a school zone on interstate commerce.⁸⁵ Thus, although formal findings are generally not required, the court had no data to help “evaluate the legislative judgment that the activity in question substantially affected interstate commerce.”⁸⁶ Finally, the Court rejected the government’s arguments that the presence of guns near schools increased violent crime and adversely affected the economy

⁷⁸ U.S. CONST. art. I, § 8.

⁷⁹ See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

⁸⁰ See *United States v. Volungus*, 599 F. Supp. 2d 68, 71-72 (D. Mass. 2009) (“Though once construed rather narrowly and literally, beginning in the 1930s and continuing to the present, the Commerce Clause has generally been given a broad interpretation.” (citing *Lopez*, 514 U.S. at 554-59)).

⁸¹ See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 880 (2005).

⁸² *Lopez*, 514 U.S. at 551.

⁸³ *Id.* at 561.

⁸⁴ *Id.*

⁸⁵ *Id.* at 562-63.

⁸⁶ *Id.*

because these connections were too attenuated.⁸⁷ To accept the government's "costs of crime" or "national productivity" reasoning, the Court would have to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power."⁸⁸

In *United States v. Morrison*, the Court applied the four factors articulated in *Lopez* to invalidate the civil damages provision of the federal Violence Against Women Act, which provided a civil remedy for victims of gender-motivated violence.⁸⁹ First, the Court recognized that "the noneconomic, criminal nature of the conduct at issue was central to our decision in [*Lopez*]."⁹⁰ Like possession of a gun in a school zone, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."⁹¹ Second, like the statute in *Lopez*, the civil damages provision contained no jurisdictional hook limiting its application to interstate commerce.⁹² Third, although Congress made detailed findings of the serious negative impact of gender-motivated violence on victims and families, the Court concluded that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."⁹³ Finally, the Court rejected the government's reasoning that "seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce."⁹⁴ Thus, *Morrison* articulated a four-factor test for Commerce Clause challenges: (1) whether the regulated activity is economic in nature; (2) whether the statute's reach is limited by an express jurisdictional element; (3) whether Congress made findings about the activity's effects on interstate commerce; and (4) whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated.⁹⁵

Five years after *Morrison*, the Supreme Court decided *Gonzales v. Raich*,⁹⁶ which signified to some scholars that "the Rehnquist 'New Federalism' era

⁸⁷ *Id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

⁸⁸ *Id.*

⁸⁹ *United States v. Morrison*, 529 U.S. 598, 601-02 (2000).

⁹⁰ *Id.* at 610.

⁹¹ *Id.* at 613.

⁹² *Id.*

⁹³ *Id.* at 614.

⁹⁴ *Id.* at 615.

⁹⁵ See Tanya K. Shunnara, *Reaction to Raich: The Commerce Clause Counter-Revolution*, 37 CUMB. L. REV. 575, 579 (2007) (citing *Morrison*, 529 U.S. at 610-12).

⁹⁶ 545 U.S. 1, 9 (2005) (holding that the Controlled Substance Act was a valid exercise of federal power).

ha[d] come and gone.”⁹⁷ In *Raich*, the Court held that the federal Controlled Substance Act (“CSA”) could be applied to prohibit the local cultivation and possession of marijuana despite the fact that California’s Compassionate Use Act of 1996 created an exception to its state marijuana laws for seriously ill residents.⁹⁸ The majority opinion relied on *Wickard v. Filburn*,⁹⁹ which held that Congress could regulate the local consumption of home-grown wheat because in the aggregate, it had a substantial effect on interstate commerce.¹⁰⁰ The Court noted that like the wheat in *Wickard*, home-grown marijuana has a “substantial effect on supply and demand in the national market for that commodity.”¹⁰¹ The Court noted that the prohibition of marijuana in the CSA was “merely one of many ‘essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”¹⁰² The activities regulated by the CSA were “quintessentially economic” because they included “the production, distribution, and consumption of commodities.”¹⁰³ Scalia, concurring in the judgment, suggested that “Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.”¹⁰⁴

Since the *Raich* decision, some scholars have concluded that it will be virtually impossible for future Commerce Clause challenges to succeed.¹⁰⁵ Other commentators have noted, however, that as the Supreme Court has not provided additional guidance on Commerce Clause jurisprudence since *Raich*, “lower courts have been left with substantial uncertainty as to the precise meaning of *Raich* in relation to the prior decisions in *Lopez* and *Morrison*.”¹⁰⁶

⁹⁷ Shunnara, *supra* note 95, at 579 (citing Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 643 (1996)).

⁹⁸ *Raich*, 545 U.S. at 9 (stating that “[w]ell-settled law” dictated a finding that Congress’s power to regulate interstate markets for medicinal substances included parts of those markets that are supplied with drugs produced and consumed locally).

⁹⁹ 317 U.S. 111 (1942).

¹⁰⁰ *Id.* at 125 (holding that an activity may be local and not regarded as commerce, but may still be reached by federal regulation if the activity “exerts a substantial economic effect on interstate commerce, regardless of whether the effect is ‘direct’ or ‘indirect’”).

¹⁰¹ *Raich*, 545 U.S. at 19.

¹⁰² *Id.* at 24-25 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

¹⁰³ *Id.* at 25 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

¹⁰⁴ *Id.* at 34 (Scalia, J. concurring) (citations omitted).

¹⁰⁵ See, e.g., Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 508 (“*Raich* represents a major – possibly even terminal – setback for efforts to impose meaningful judicial constraints on Congress’ Commerce Clause powers.”).

¹⁰⁶ See Yung, *supra* note 48, at 409.

B. *The Necessary and Proper Clause: Background*

The Necessary and Proper Clause provides that Congress has the power “[t]o make all laws which shall be necessary and proper for carrying into execution” both its enumerated powers and “all other powers vested by [the] Constitution in the government of the United States, or in any department or officer thereof.”¹⁰⁷ The Necessary and Proper Clause is not an independent source of authority; rather, any legislation relying on the Necessary and Proper Clause must be based on an enumerated power.¹⁰⁸ A statute must meet three requirements to be valid under the Necessary and Proper Clause: “it must be: (1) necessary, and (2) proper, to (3) the exercise of a power vested in the government by the Constitution.”¹⁰⁹

The Necessary and Proper Clause generally is not viewed as a stringent constraint on congressional authority.¹¹⁰ Under the Necessary and Proper Clause, a statute need not be “*absolutely* necessary to the exercise of an enumerated power.”¹¹¹ Rather, the Clause “enables Congress to enact laws, subject to other constitutional constraints, ‘that bear a rational connection to any of its enumerated powers.’”¹¹² This broad interpretation of the Clause “remove[s] all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution.”¹¹³ The Supreme Court defined the scope of the Necessary and Proper Clause in *M’Culloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”¹¹⁴ Thus, *M’Culloch* established “review for a means-ends rationality under the Necessary and Proper Clause,”¹¹⁵ where congressional judgments receive considerable deference.¹¹⁶

¹⁰⁷ U.S. CONST. Art. I, § 8, cl. 18.

¹⁰⁸ See *United States v. Abregana*, 574 F. Supp. 2d 1123, 1129 (D. Haw. 2008) (suggesting that the Necessary and Proper Clause “allows Congress to enact legislation . . . that is auxiliary to an incontestable federal power”); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274-75 (1993).

¹⁰⁹ See *United States v. Comstock*, 507 F. Supp. 2d 522, 531 (E.D.N.C. 2007), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

¹¹⁰ See Lawson & Granger, *supra* note 108, at 271 (“Ever since Chief Justice John Marshall’s famous opinion in *McCulloch v. Maryland*, which construed the Sweeping Clause to require only a minimal ‘fit’ between legislatively chosen means and a valid governmental end, the clause has not been widely viewed as a significant substantive limitation on congressional authority.”).

¹¹¹ *United States v. Plotts*, 347 F.3d 873, 878 (10th Cir. 2003) (citations omitted).

¹¹² *Id.* (quoting *United States v. Edgar*, 304 F.3d 1320, 1326 (11th Cir. 2002)).

¹¹³ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21 (1819).

¹¹⁴ *Id.* at 421.

¹¹⁵ *Sabri v. United States*, 541 U.S. 600, 605 (2004).

The Necessary and Proper Clause does, however, impose some constraints on congressional authority. Professor Laurence Tribe wrote that “the power to do what is necessary and proper . . . for ‘carrying into execution’ another, more specific power is not, and must not be confused with, a power to do whatever might bear some possible relationship to one of the more specific powers.”¹¹⁷

C. *The Commerce Clause and the Necessary and Proper Clause as the Basis for the Federal Criminal Law*

Although the civil commitment provision¹¹⁸ and SORNA¹¹⁹ are civil statutes, an analysis based on the federal criminal law is appropriate because both provisions involve sanctions for the violation of a federal law.¹²⁰ Congress has power under the Necessary and Proper Clause to enact criminal laws as means to exercise its enumerated powers.¹²¹ Congress derives the

¹¹⁶ See *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (“If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone.”).

¹¹⁷ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 801 (3d ed. 2000), cited in *United States v. Wilkinson*, No. 07-12061-MLW, 2009 WL 1740358, at *6 (D. Mass. Feb. 14, 2009).

¹¹⁸ See, e.g., *United States v. Abregana*, 574 F. Supp. 2d 1123, 1135 (D. Haw. 2008) (“[T]he Court finds that Section 4248 is civil and not criminal in nature”); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *2 (W.D. Okla. Dec. 5, 2007) (“[T]he Court has previously held that § 4248 is a civil statutory scheme rather than a criminal enactment”); *United States v. Shields*, 522 F. Supp. 2d 317, 338 (D. Mass. 2007) (“Because Section 4248 has the same basic characteristics that convinced the Court in *Hendricks* that the proceeding was civil, I conclude that Section 4248 establishes a scheme of civil, not criminal, commitment for sexually dangerous persons.”); *United States v. Comstock*, 507 F. Supp. 2d 522, 529 (E.D.N.C. 2007) (“Supreme Court precedent pertaining to commitment generally and to commitment of sexually dangerous individuals pursuant to state laws specifically dictates that § 4248 be characterized as a civil scheme.”), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009); *United States v. Carta*, 503 F. Supp. 2d 405, 409 (D. Mass. 2007) (“The title of § 4248, the placement of that provision with the other civil commitment sections, and the statute’s focus on commitment of those who are dangerous by virtue of a mental illness, all demonstrate that the law was intended to be civil, not criminal in nature.”).

¹¹⁹ See, e.g., *United States v. Dixon*, 551 F.3d 578, 584 (7th Cir. 2008) (“The requirement is regulatory rather than punitive.”); *United States v. Lawrance*, 548 F.3d 1329, 1333 (10th Cir. 2008) (“SORNA is both civil in its stated intent and nonpunitive in its purpose”); *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) (finding that the statutory scheme is regulatory rather than punitive because Congress’s purpose was to protect the public rather than punish sex offenders).

¹²⁰ See *United States v. Plotts*, 347 F.3d 873, 879 (10th Cir. 2003) (citing *United States v. Ward*, 448 U.S. 242, 250 (1980)).

¹²¹ See *United States v. Volungus*, 599 F. Supp. 2d 68, 73-74 (D. Mass. 2009) (citing *Logan v. United States*, 144 U.S. 263, 283 (1892)).

power to enact federal criminal laws from a variety of constitutional sources:¹²² the Spending Clause,¹²³ the power to establish post offices and post roads,¹²⁴ the power to punish counterfeiting,¹²⁵ the power to punish felonies on high seas and offenses against the Law of Nations,¹²⁶ the power to maintain military forces,¹²⁷ the power to punish treason,¹²⁸ and exclusive jurisdiction over certain lands.¹²⁹ However, the Commerce Clause is the primary basis of the federal criminal law.¹³⁰ Congress has vastly expanded the federal criminal law in recent years, with approximately 4000 federal offenses currently in effect.¹³¹ Although the Constitution only expressly empowers Congress to punish certain enumerated offenses, Congress may “punish criminal activity wherever doing so advances the execution of any of its enumerated powers”¹³² and it has the power “to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted.”¹³³

When Congress has authority under the Commerce Clause to enact federal criminal laws, it also has the auxiliary authority to pass laws necessary and

¹²² See Reply Brief for the Appellant at 6-7, *Comstock*, 551 F.3d 274 (No. 07-7671) (acknowledging the many constitutional sources of congressional authority for the federal justice and penal system).

¹²³ See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (“Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare” (citations omitted)).

¹²⁴ See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819) (finding that the federal authority to punish mail thieves is inferred from Congress’s express power to establish post offices and post roads).

¹²⁵ See U.S. CONST. art. I, § 8, cl. 6; *United States v. Hall*, 98 U.S. 343, 345-46 (1878) (“Congress may provide for the punishment of counterfeiting the securities and current coin of the United States”).

¹²⁶ See U.S. CONST. art. I, § 8, cl. 10; *Hall*, 98 U.S. at 346

¹²⁷ See U.S. CONST. art. I, § 8, cls. 12-16 (granting authority to raise and fund the army and navy, to regulate the military forces, to conscribe forces, and to govern their employment in public service); *Hall*, 98 U.S. at 346 (recognizing that Congress’s power to define and punish criminal offenses is derived from the Constitution’s grant of power upon Congress to declare war and to create, support, and discipline the military branches).

¹²⁸ See U.S. CONST. art. III, § 3.

¹²⁹ See *id.* art. I, § 8, cl. 17; *Hall*, 98 U.S. at 346 (“Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased by the consent of the legislature”).

¹³⁰ See *Rehn*, *supra* note 4, at 1991.

¹³¹ See *id.* at 771-72 (citing also an earlier study by the American Bar Association that estimated that more than 3000 federal criminal offenses were in existence).

¹³² *United States v. Volungus*, 599 F. Supp. 2d 68, 73-74 (D. Mass. 2009) (citing *Logan v. United States*, 144 U.S. 263, 283 (1892)).

¹³³ *United States v. Fox*, 95 U.S. 670, 672 (1877).

proper for carrying into execution the federal government's power to prosecute offenders,¹³⁴ punish¹³⁵ and imprison¹³⁶ offenders, and prevent¹³⁷ federal crimes. They are not enumerated powers themselves, but are "necessary and proper exercises of power premised upon enumerated powers."¹³⁸ In federal district court cases involving § 4248, the government has argued that Congress has the authority to enact the provision because it is a law necessary and proper for carrying into execution the federal government's power to prosecute federal crimes, to punish and imprison federal offenders, and to prevent federal sex crimes.¹³⁹

Thus, the government could argue that the Adam Walsh Act provisions at issue are valid independently under the Commerce Clause and the *Morrison* four-factor test, or valid as necessary and proper exercises of Congress's power to enact certain federal criminal laws. In making an argument based on the Necessary and Proper Clause, the government might argue that Congress's authority is derived from its power to criminalize two classes of crimes: the power to prosecute, punish, and imprison individuals for past crimes, or the power to prevent future federal crimes.

III. NEITHER § 4248 NOR § 2250(A)(2)(A) IS JUSTIFIED INDEPENDENTLY BY THE COMMERCE CLAUSE

A. Section 4248

Section 4248 does not regulate the channels or instrumentalities of interstate commerce or persons or things in interstate commerce, so the first two categories of permissible regulation under *Lopez* are "clearly inapplicable."¹⁴⁰ The civil commitment provision cannot be upheld under the third *Lopez* category, as regulating activities having a substantial relation to interstate commerce, because it fails the four-factor test established in *Morrison*.¹⁴¹ Section 4248 regulates the disposition of three categories of federal prisoners.¹⁴² Application of the *Morrison* four-factor test reveals that this activity is not substantially related to interstate commerce. First, § 4248 does not regulate economic activity but, like the Violence Against Women Act provision struck down in *Morrison*, provides "a civil remedy aimed at the

¹³⁴ See *Greenwood v. United States*, 350 U.S. 366, 375 (1956).

¹³⁵ See *Fox*, 95 U.S. at 672.

¹³⁶ See *United States v. Comstock*, 551 F.3d 274, 281 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

¹³⁷ See *United States v. Salerno*, 481 U.S. 739, 747 (1987).

¹³⁸ See *United States v. Comstock*, 507 F. Supp. 2d 522, 531 (E.D.N.C. 2007), *aff'd*, 551 F.3d 274, *cert. granted*, 129 S. Ct. 2828.

¹³⁹ See *supra* notes 28-29.

¹⁴⁰ *United States v. Volungus*, 599 F. Supp. 2d 68, 72 (D. Mass. 2009).

¹⁴¹ See *supra* note 95 and accompanying text.

¹⁴² See *supra* note 16 and accompanying text.

prevention of noneconomic sexual violence.”¹⁴³ The target of the statute, sexual dangerousness, is “not, in any sense of the phrase, ‘economic activity.’”¹⁴⁴ Furthermore, the provision is not an integral part of a larger scheme of economic regulation.¹⁴⁵ Second, the statute contains no “‘jurisdictional element’ that establishes a relationship of the regulated behavior to interstate commerce.”¹⁴⁶ Third, Congress made no findings of a nexus between sexually violent conduct and interstate commerce.¹⁴⁷ Fourth, any link between the regulated activity and a substantial effect on interstate commerce is too attenuated to serve as a basis for the statute’s constitutionality. In light of the Supreme Court’s rejection of the “costs of crime” rationale in *Lopez* and *Morrison*, “[a]ny contention that the cumulative effects of sexually dangerous acts would justify the commitment regime under the Commerce Clause lacks merit.”¹⁴⁸

Thus, the civil commitment provision fails to meet any of the four standards articulated in *Morrison*. Furthermore, the provision may not be sustained under the reasoning of *Raich* because it “constitutes no part of a ‘comprehensive’ legislative scheme that targets interstate markets.”¹⁴⁹ Therefore, the Commerce Clause cannot solely support the civil commitment provision.

B. *Section 2250(a)(2)(A)*

None of the three *Lopez* categories of permissible Commerce Clause regulation support § 2250(a)(2)(A). Liability for failing to register under § 2250(a)(2)(A) is predicated solely on conviction for a federal sex offense, rather than for any travel in interstate commerce or Indian Country.¹⁵⁰ Because people convicted under this provision may have never traveled interstate, the

¹⁴³ *Comstock*, 551 F.3d at 279.

¹⁴⁴ *Id.* at 280 (quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000)).

¹⁴⁵ See Memorandum in Support of Defendants’ Motion to Dismiss at 10, *United States v. Shields*, 522 F. Supp. 2d 317 (D. Mass. 2007) (No. 06-10427) (addressing the constitutionality of the gun possession statute in *Lopez*).

¹⁴⁶ *United States v. Volungus*, 599 F. Supp. 2d 68, 72 (D. Mass. 2009) (asserting that the civil commitment scheme in § 4248 does not require some relationship between the regulated activity and interstate commerce).

¹⁴⁷ See *United States v. Tom*, 558 F. Supp. 2d 931, 936 (D. Minn. 2008) (“[A] lack of Congressional findings has significantly deprived the Court of means to conclude that § 4248 is related to interstate commerce.”), *rev’d*, 565 F.3d 497 (8th Cir. 2009).

¹⁴⁸ *Volungus*, 599 F. Supp. 2d at 72.

¹⁴⁹ *Comstock*, 551 F.3d at 280 n.6 (citing *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)).

¹⁵⁰ See 18 U.S.C. § 2250(a)(2)(A) (2006).

first *Lopez* category, use of the channels of interstate commerce, can in no way justify the provision.¹⁵¹

One could argue that collecting identification information from federal sex offenders across the country in a national database regulates the second *Lopez* category, “things in interstate commerce.”¹⁵² In *United States v. Reynard*, the Ninth Circuit held that the DNA Act’s requirement that a federal offender provide a DNA sample as a condition of his supervised release was a valid exercise of Commerce Clause authority.¹⁵³ The court cited *Reno v. Condon*¹⁵⁴ for the proposition that Congress has the authority under the Commerce Clause to regulate the interstate release of personal information even when this release is non-economic in nature.¹⁵⁵ The court noted, however, that it did not decide “whether the federal government can regulate something that it, and nobody else, has placed into the stream of commerce.”¹⁵⁶ The reasoning of *Reynard* is inadequate to justify Congress’s regulation of sex offender registration because “if the government [was] allowed to regulate anything that it puts into the stream of commerce, its powers under the Commerce Clause would be without limit.”¹⁵⁷ Therefore, § 2250(a)(2)(A) may not be sustained as regulating the second *Lopez* category, things in commerce.

The third *Lopez* category, activities having a substantial relation to interstate commerce, cannot justify the failure to register provision, because the provision does not meet the *Morrison* four-factor test.¹⁵⁸ Punishing sex offenders who fail to register is not an economic activity.¹⁵⁹ As discussed above, with regard to the civil commitment provision, the provision contains no jurisdictional hook linking its application to interstate activity.¹⁶⁰ Congress did not make any findings on the effect of sex offender registration on interstate commerce.¹⁶¹ As is the case with the civil commitment provision, the effects of sexual violence on interstate commerce are too attenuated to

¹⁵¹ See Yung, *supra* note 48, at 411 (highlighting that subsections (A) and (B) of § 2250(a)(2) are disjunctive requirements, and that an offender must *either* travel interstate *or* be convicted under federal law).

¹⁵² *United States v. Lopez*, 514 U.S. 549, 558 (1995).

¹⁵³ See *United States v. Reynard*, 473 F.3d 1008, 1023 (9th Cir. 2007).

¹⁵⁴ 528 U.S. 141, 143 (2000) (upholding the Driver’s Privacy Protection Act, which restricts the ability of states to disclose drivers’ personal information, as a proper exercise of authority under the Commerce Clause).

¹⁵⁵ See *Reynard*, 473 F.3d at 1023 (finding that the personal information in DMV records is a “thing in interstate commerce” and that its sale or release is “therefore a proper subject of congressional regulation” (quoting *Reno*, 528 U.S. at 143)).

¹⁵⁶ *Id.* at 1023 n.10.

¹⁵⁷ *Id.* at 1025 (Pregerson, J., dissenting).

¹⁵⁸ See *supra* note 95 and accompanying text.

¹⁵⁹ See Yung, *supra* note 41, at 134 (arguing that *Raich* did not apply to regulation of sex offenders, since their movements were not an “economic good”).

¹⁶⁰ See *supra* notes 53-54 and accompanying text.

¹⁶¹ See Yung, *supra* note 41, at 136.

justify the constitutionality of the failure to register provision.¹⁶² Thus, the failure to register provision does not meet any of the four criteria outlined in *Morrison*.

Furthermore, like the civil commitment provision, the reasoning in *Raich* cannot support upholding the failure to register provision because Congress is not regulating a “purely local” activity as part of regulating “an economic ‘class of activities’ that have a substantial effect on interstate commerce.”¹⁶³ In contrast, the Eighth Circuit and Eleventh Circuit have upheld § 16913 as constitutional under *Raich* because it “is a necessary part of a more general regulation of interstate commerce.”¹⁶⁴ Section 16913 requires all sex offenders convicted under federal or state law to register.¹⁶⁵ It shares some similarities with § 2250(a)(2)(A) because both permit the government to reach a wholly intrastate sex offender.¹⁶⁶ However, § 2250(a)(2)(A) may not be upheld under the same rationale. In upholding § 16913, the Eighth Circuit found that “[b]ased upon the language, statutory scheme, declaration of purpose, and legislative history of SORNA . . . [it] was intended to regulate the interstate movement of sex offenders.”¹⁶⁷ The Court found that § 16913 was a reasonable means to track sex offenders when they crossed state lines, because the government had to know the offender’s initial location in order to monitor his interstate movements.¹⁶⁸ Thus, § 16913 was a necessary and proper exercise of the government’s power to regulate the first and second *Lopez* categories.¹⁶⁹

In contrast, § 2250(a)(2)(A) is not a necessary and proper exercise of the federal government’s power to monitor the interstate movement of sex offenders. In enforcing valid federal criminal laws, the constitutionality of Congress’s actions may turn on the degree of connection between the actions and a federal interest.¹⁷⁰ Section 2250(a)(2)(A) is not a means for the government to obtain information about sex offenders so that it can punish them based on a jurisdictional hook, interstate movement; it is an end itself that imposes criminal penalties on federal offenders who fail to register, despite the fact that their crimes have no connection to interstate commerce.¹⁷¹ Therefore,

¹⁶² See *supra* note 148 and accompanying text.

¹⁶³ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

¹⁶⁴ *United States v. Howell*, 552 F.3d 709, 717 (8th Cir. 2009) (citing *Gonzales*, 545 U.S. at 37 (Scalia, J., concurring)); see also *United States v. Ambert*, 561 F.3d 1202, 1211 (11th Cir. 2009).

¹⁶⁵ See *United States v. Dixon*, 551 F.3d 578, 581 (7th Cir. 2008).

¹⁶⁶ *Howell*, 552 F.3d at 717.

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See, e.g., *United States v. Volungus*, 599 F. Supp. 2d 68, 77 (D. Mass. 2009) (“Often the constitutionality of a statute turns on questions of degree.”).

¹⁷¹ See 18 U.S.C. § 2250(a) (2006).

the failure to register provision may not be upheld under any of the three *Lopez* categories as independently regulating commerce.

IV. NEITHER § 4248 NOR § 2250(A)(2)(A) IS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE FEDERAL GOVERNMENT'S POWER TO ENACT FEDERAL CRIMINAL LAWS

A. *The Provisions Are Not Laws Necessary and Proper for Carrying into Execution the Federal Government's Power to Prosecute or Punish Past Federal Crimes*

1. Power to Prosecute Federal Crimes

The government has contended that § 4248 is valid under the Necessary and Proper Clause because the federal government “retains the power to prosecute” those in its custody charged with criminal offenses.¹⁷² When the federal government has the constitutional authority to enact a federal law, it may make laws necessary and proper for carrying into execution the executive's power to prosecute those who violate that law.¹⁷³ Both § 4248 and § 2250(a)(2)(A) apply to individuals who have violated validly enacted federal criminal laws. However, neither provision may be upheld based on the federal government's power to prosecute federal offenders.

As discussed above, § 4248 authorizes the federal government to initiate civil commitment proceedings against three categories of individuals.¹⁷⁴ The government retains no power to prosecute the first and third categories of persons that the provision addresses. The government has no power to prosecute persons in the custody of the BOP because they have already been tried, convicted, and sentenced for their crimes.¹⁷⁵ Similarly, the government has no power to prosecute those against whom all criminal charges have been dismissed solely for reasons relating to their mental condition.¹⁷⁶ The government does retain power to prosecute the second category of persons, because individuals committed to the custody of the United States Attorney General based on incompetence to stand trial still face federal charges.

¹⁷² See *United States v. Comstock*, 551 F.3d 274, 283 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

¹⁷³ See *United States v. Plotts*, 347 F.3d 873, 879 (10th Cir. 2003) (“[T]he Necessary and Proper Clause entrusts Congress with the power to pass laws to aid the Executive in prosecuting those who . . . violate federal criminal laws.”).

¹⁷⁴ See *supra* note 16 and accompanying text.

¹⁷⁵ See 18 U.S.C. § 4248(a) (stating that “a person who is in the custody of the” BOP may be subject to civil commitment). *But see Comstock*, 551 F.3d at 283 (finding § 4248 unconstitutional where the government has already “charged, tried and convicted” the defendants).

¹⁷⁶ See 18 U.S.C. § 4248(a) (stating that a person who has had all criminal charges dismissed due to “the mental condition of the person” may be subject to civil commitment).

Section 4248, as it applies to the first and third categories of persons, is not a law necessary and proper for carrying into execution the government's power to prosecute federal crimes because no federal charges remain as to the individuals in these categories, and their civil commitment would not result in a federal trial. The federal government has a long history of providing for civil commitment of certain categories of persons charged with or convicted of federal offenses; Congress enacted the first legislation authorizing civil commitment of certain federal prisoners in the 1940s.¹⁷⁷ Persons eligible for civil commitment include those adjudged mentally incompetent to stand trial,¹⁷⁸ those found not guilty by reason of insanity,¹⁷⁹ and those determined to be suffering from a mental disease or defect prior to sentencing or while imprisoned.¹⁸⁰ Statutes providing for civil commitment of these categories of persons all have a clear relationship to the enforcement of federal criminal laws. Mental illness is not always permanent, and a person found mentally incompetent to stand trial might recover and be prosecuted for his crimes.¹⁸¹ A person found not guilty by reason of insanity would be eligible for imprisonment if not for his mental illness.¹⁸² A person found to be mentally ill prior to sentencing or while imprisoned is also eligible for punitive custody because of his conviction of a federal crime.¹⁸³

In contrast, § 4248, as it applies to the first and third categories of persons, is not tied to an explicit federal interest. Because no untried federal charges remain against individuals in these categories, the government retains no power to prosecute them. Furthermore, their civil commitment would not "vindicate the outcome of a completed federal trial"¹⁸⁴ as in the examples above.¹⁸⁵ Rather, § 4248 authorizes commitment "on the prospect of future conduct that may or may not affect legitimate federal interests."¹⁸⁶

¹⁷⁷ Act of Sept. 7, 1949, Pub. L. No. 286, ch. 535, 63 Stat. 686 (codified originally at 18 U.S.C. §§ 4244-4247); Act of June 25, 1948, ch. 645, 62 Stat. 855 (codified, as amended, at 18 U.S.C. § 4241). These provisions were revised in 1984 as part of the Insanity Defense Reform act and are now codified at 18 U.S.C. §§ 4241-4247. Pub. L. No. 98-473, Title II, § 403(a), 98 Stat. 2057-65 (1983); *see also* 18 U.S.C. § 4241(d); Brief for the Appellant at 24, *Comstock*, 551 F.3d 274 (No. 07-7671).

¹⁷⁸ *See* 18 U.S.C. § 4241.

¹⁷⁹ *See id.* § 4243(a).

¹⁸⁰ *See id.* §§ 4244(d), 4245(d).

¹⁸¹ *See* *United States v. Sahhar*, 917 F.2d 1197, 1203 (9th Cir. 1990) ("[T]he control and treatment of dangerous persons within the federal criminal justice system who are incompetent to stand trial . . . [is] a unique federal concern.").

¹⁸² *See* *United States v. Volungus*, 599 F. Supp. 2d 68, 74 (D. Mass. 2009).

¹⁸³ *See id.*

¹⁸⁴ *Id.* at 76.

¹⁸⁵ *See supra* notes 181-83 and accompanying text.

¹⁸⁶ *Id.*

In *Greenwood v. United States*,¹⁸⁷ the Supreme Court addressed the constitutionality of the precursor to § 4241, which provided for civil commitment of persons found incompetent to stand trial.¹⁸⁸ The Court held that Congress had the power under the Necessary and Proper Clause to provide for federal civil commitment of persons charged with federal crimes but found incompetent to stand trial.¹⁸⁹ The Court remarked that “[t]he petitioner came legally into the custody of the United States [and] [t]he power that put him into such custody – the power to prosecute for federal offenses – is not exhausted.”¹⁹⁰ Therefore, his detention could continue until his sanity was restored, arrangements are made for state custody, or his “condition [was] so improved that he [would] not endanger the officers, property, or other interests of the United States.”¹⁹¹ The Court was careful to state that “[w]e decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us.”¹⁹²

Although all categories of persons regulated under § 4248 “came legally into the custody of the United States,”¹⁹³ the government’s power to prosecute those in the first and third categories is exhausted.¹⁹⁴ Persons in the first category have been tried, convicted, and sentenced for their crimes, and persons in the third category have had federal charges dropped because of their mental illness. Furthermore, “[t]he limited holding of *Greenwood* may be characterized as one farther limited by narrow statutory language requiring a potential harm to the ‘interests of the United States’ to justify federal commitment.”¹⁹⁵ Section 4248, in contrast, requires no finding of a threat to federal interests.¹⁹⁶

Some courts have found that the government’s power to prosecute justifies the application of § 4248 to the second category of persons that the provision addresses: those committed to the custody of the Attorney General based on

¹⁸⁷ 350 U.S. 366 (1956).

¹⁸⁸ *Id.* at 378.

¹⁸⁹ *Id.* at 375.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 368-69.

¹⁹² *Id.* at 376.

¹⁹³ *Id.* at 375.

¹⁹⁴ *Cf. id.* (“[T]he power to prosecute [the petitioner] for federal offenses . . . is not exhausted.”).

¹⁹⁵ *United States v. Comstock*, 507 F. Supp. 2d 522, 533 n.7 (E.D.N.C. 2007), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

¹⁹⁶ *See United States v. Volungus*, 599 F. Supp. 2d 68, 76 (D. Mass. 2009) (“The commitment regime does not require a determination that a legitimate federal interest would be threatened in order to find a person ‘sexually dangerous’ and, thus, subject to commitment.”).

incompetence to stand trial.¹⁹⁷ The government retains the power to prosecute this category of persons if they regain competence. Another lower court, however, found that this category of persons is in the same position as the other two categories of individuals regulated by the provision.¹⁹⁸ The court noted that “[p]ersons in each category are made susceptible to civil commitment by reason of predictions (or fears) about their future behavior, not by reason of whatever prior event has led to their predicate custodial status.”¹⁹⁹

Persons committed to the custody of the Attorney General based on incompetence to stand trial may face civil commitment under § 4241, the original civil commitment scheme that *Greenwood* approved, in conjunction with § 4246.²⁰⁰ The government retains the power to prosecute this category of persons, that limited power does not imply the authority to detain persons to prevent generalized danger to the community.²⁰¹ Under § 4248, these persons would be committed not because of the federal interest in prosecuting them for their past offenses, but because of the government’s determination that they might commit a future offense.²⁰² As discussed above, the civil commitment provision is not justified based on the goal of preventing future federal sex crimes.²⁰³ Therefore, § 4248 may not be upheld based on the federal government’s power to prosecute individuals in any of the three categories that the provision addresses.

Section 4248 shares some similarities with § 4246, which authorizes civil commitment of a person in any of the three categories listed in § 4248 upon a finding that he is “presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another.”²⁰⁴ Both provisions provide for potentially indefinite commitment of a defendant whose term of incarceration is about to expire or against whom all criminal charges have been

¹⁹⁷ See, e.g., *United States v. Shields*, 522 F. Supp. 2d 317, 325 (D. Mass. 2007) (“*Greenwood* establishes congressional authority for Section 4248 as it applies to the second category of individuals potentially subject to civil commitment under the Act, which includes those who have ‘been committed to the custody of the Attorney General pursuant to § 4241(d)’ based on incompetence to stand trial.” (quoting 18 U.S.C. § 4248 (2006))); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *7 (W.D. Okla. Dec. 5, 2007).

¹⁹⁸ See *Volungus*, 599 F. Supp. 2d at 80.

¹⁹⁹ *Id.*

²⁰⁰ See 18 U.S.C. §§ 4241, 4246.

²⁰¹ See *United States v. Perry*, 788 F.2d 100, 110 (3d Cir. 1986) (“Congress may not . . . authorize commitment simply to protect the general welfare of the community at large.” (citing *Greenwood v. United States*, 350 U.S. 366 (1956))).

²⁰² See *Volungus*, 599 F. Supp. 2d at 76 n.9.

²⁰³ See *infra* Part IV.B.

²⁰⁴ 18 U.S.C. § 4246(d).

dismissed solely for reasons related to his mental condition.²⁰⁵ Both provisions contain similar certification procedures and provide for a hearing.²⁰⁶ Both provisions authorize civil commitment until the prisoner is no longer dangerous or until a state assumes responsibility for him.²⁰⁷

Although § 4246 has withstood various attacks below the Supreme Court level,²⁰⁸ its source of constitutional authority has not been challenged.²⁰⁹ Therefore, § 4248 cannot rely on § 4246 for support. The Fourth Circuit noted the similarities between the two statutes, but remarked that § 4246 was not addressed by the Supreme Court in *Greenwood* and declined to address it.²¹⁰

Furthermore, the statutory language of § 4246 is broader than the language of the statute approved in *Greenwood*, which required a potential harm to the “interests of the United States.”²¹¹ While the approved language could be construed to require an explicit threat to federal interests, § 4246 requires only a showing of risk of bodily injury or property damage.²¹² In *Comstock*, the lower court noted that it

has not located any case law actually addressing a challenge to Congress’s authority to enact such a civil commitment scheme designed to commit, among others, prisoners whose sentences are about to expire and with respect to whom the power to prosecute has arguably been exhausted simply to prevent generalized, nonspecific harm to the public.²¹³

²⁰⁵ Compare 18 U.S.C. § 4248(a) (allowing for civil commitment of “a person who is in the custody of the Bureau of Prisons . . . or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person”), with *id.* § 4246(a) (allowing for civil commitment of a “person in the custody of the Bureau of Prisons whose sentence is about to expire . . . or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person”).

²⁰⁶ See *United States v. Abregana*, 574 F. Supp. 2d 1123, 1132 (D. Haw. 2008).

²⁰⁷ Compare 18 U.S.C. § 4248(d) (allowing for commitment until the state will assume responsibility or “the person’s condition is such that he is no longer sexually dangerous to others”), with *id.* § 4246(d) (allowing for commitment until the state will assume responsibility or release “would not create a substantial risk of bodily injury or serious damage to property of another”).

²⁰⁸ See, e.g., *United States v. Sahhar*, 917 F.2d 1197, 1206-08 (9th Cir. 1990) (holding that § 4246 does not violate equal protection or due process); *United States v. Sahhar*, 56 F.3d 1026, 1029 (9th Cir. 1995).

²⁰⁹ See *United States v. Comstock*, 507 F. Supp. 2d 522, 537 n.11 (E.D.N.C. 2007) (“This court has not located a Supreme Court case specifically addressing the constitutionality of [§ 4246].”), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

²¹⁰ See *Comstock*, 551 F.3d at 283-84 n.10.

²¹¹ *Greenwood v. United States*, 350 U.S. 366, 369 (1956).

²¹² 18 U.S.C. § 4246(a).

²¹³ *Comstock*, 507 F. Supp. 2d at 533 n.7.

Because § 4246 has not been upheld against a challenge to its constitutional authority, and because both § 4246 and § 4248 contain broader language than the statute approved by the Supreme Court in *Greenwood*, § 4246 does not provide support for the constitutionality of § 4248.

Like the civil commitment provision, the failure to register provision may not be upheld based on the federal government's power to prosecute federal offenders. Section 2250(a)(2)(A) applies to persons convicted of federal sex offenses. Like the first and third categories of persons addressed by § 4248, no untried federal charges remain against these individuals. Thus, the government retains no power to prosecute them, and the reasoning above leads to the conclusion that § 2250(a)(2)(A) is not justified based on the government's power to prosecute federal offenders.

2. Power to Punish or to Imprison Federal Offenders

Because Congress has the power to enact federal criminal statutes, it also has the authority to pass laws necessary and proper for carrying into execution the government's power to punish and imprison those who violate federal criminal statutes.²¹⁴ Both § 4248 and § 2250(a)(2)(A) apply only to persons convicted of valid federal offenses. However, the provisions are not justified as laws necessary and proper for carrying into execution the government's power to punish or imprison federal offenders because the eligibility for civil commitment and the liability for failing to register are not imposed as part of a criminal sentence, term of supervised release, collateral consequence of a federal conviction, or condition of federal imprisonment.

a. *Not Imposed as Part of a Criminal Sentence or Term of Supervised Release*

The Supreme Court has held that "Congress may impose penalties in aid of the exercise of any of its enumerated powers."²¹⁵ Congress's discretion to fashion punishment is unlimited as long as the sanctions do not offend the Constitution.²¹⁶ The Ninth Circuit has noted that the legislature "may take property, liberty, or life, in punishment for an infraction of the law," subject only to constitutional limitations.²¹⁷ In *United States v. Plotts*, for example, the

²¹⁴ See *United States v. Fox*, 95 U.S. 670, 672 (1877).

²¹⁵ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940); see also *United States v. Plotts*, 347 F.3d 873, 878 (10th Cir. 2003); *United States v. Von Stephens*, 774 F.2d 1411, 1413 (9th Cir. 1985).

²¹⁶ See *Plotts*, 347 F.3d at 878 ("Congress has a discretion as to what sanctions shall be imposed for the enforcement of the law and this discretion is unlimited so long as the method of enforcement does not impinge upon some other constitutional prohibition." (citations omitted)).

²¹⁷ *Chandler v. Johnston*, 133 F.2d 139, 142 (9th Cir. 1943) ("Its power is practically unlimited . . . so long as it does not in doing so infringe or violate any of the guaranties secured to all citizens by the Constitution.").

Tenth Circuit held that the DNA Act is a necessary and proper civil sanction to a valid criminal law because the Commerce Clause empowers Congress to criminalize the conduct to which the defendant pled guilty, Congress may fashion penalties for the violation of valid federal laws under the necessary and proper clause, and the DNA Act does not violate any provision of the Constitution.²¹⁸

Furthermore, the government sometimes maintains long-term control over federal offenders through the system of supervised release.²¹⁹ For example, in *United States v. Reynard*, the Ninth Circuit held that the DNA Act was valid under the Commerce Clause because the federal government's authority to impose conditions of supervised release arose when the defendant was convicted of a federal crime, and the court was not required to analyze the constitutional authority for each individual condition of release.²²⁰ In the sex offense context, "the United States Sentencing Commission recognized the unique and real danger that sexual offenders pose when it authorized District Courts to impose life terms of supervised release for certain offenders as well as strict conditions of release involving treatment, monitoring, and warrantless search."²²¹ Federal sex offenders may also be required to register as a condition of probation, supervised release, or parole.²²²

Sections 4248 and 2250(a)(2)(A) apply only to persons convicted of federal crimes, and Congress has broad power to impose criminal and civil sanctions for the violation of federal laws.²²³ However, Congress's power to punish federal offenders is insufficient to uphold either provision because the eligibility for civil commitment and the liability for failing to register are not imposed as elements of a criminal sentence or as conditions of supervised release.

b. *Not Imposed as Collateral Consequences of a Federal Conviction*

Because persons regulated under the civil commitment provision and the failure to register provision have violated federal laws, they may be subject to a variety of collateral consequences, "the indirect consequences that flow from

²¹⁸ See *id.*

²¹⁹ See Yung, *supra* note 41, at 137 n.24.

²²⁰ See *United States v. Reynard*, 473 F.3d 1008, 1022 (9th Cir. 2007).

²²¹ *United States v. Tom*, 558 F. Supp. 2d 931, 940 (D. Minn. 2008) (citing U.S. SENTENCING GUIDELINES MANUAL §§ 5D1.2(b)(2), 5D1.3(d)(7) (2008)), *rev'd*, 565 F.3d 497 (8th Cir. 2009).

²²² See U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, FED. STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 13 (2000) (citing 18 U.S.C. §§ 3563(a)(8), 3583(d), 4209(a))(2006); 42 U.S.C. §§ 14072 (i)(3), (i)(4)), available at http://www.usdoj.gov/pardon/collateral_consequences.pdf.

²²³ See *United States v. Plotts*, 347 F.3d 873, 879 n.5 (10th Cir. 2003) (citing *United States v. Ward*, 448 U.S. 242, 250 (1980)).

federal and state criminal convictions.”²²⁴ While direct consequences of sentencing are imposed “by decision of the sentencing judge,” collateral consequences are automatically “imposed by operation of law” upon a conviction.²²⁵ Collateral consequences of a federal conviction are generally governed by state law,²²⁶ and as discussed above, the states can impose virtually limitless post-incarceration controls on sex offenders under the police power rationale.²²⁷ In contrast, the federal government may impose collateral consequences for a federal conviction only if these collateral consequences are based on an enumerated or implied power.²²⁸

Among other things, persons with federal felony convictions may lose the right to serve on a federal jury, hold federal office or employment, hold a federal license, receive federal benefits, and enlist in the armed forces.²²⁹ In all of these cases, the disability imposed on a federal offender is tied clearly to an explicit federal interest that the federal government may regulate under its enumerated or implied powers. The statute providing that persons convicted of a federal felony are disqualified from federal jury service²³⁰ is tied to the federal government’s interest in trying those accused of federal crimes. Statutes providing that persons convicted of certain federal offenses are disqualified from holding federal office²³¹ or employment²³² or a federal

²²⁴ Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 624 n.1 (2006) (emphasis omitted) (citing AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 1 (3d ed. 2004), available at <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf>).

²²⁵ *Id.* (citing Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15-17 (Marc Mauer & Meda Chesney-Lind eds., 2002)).

²²⁶ See Alan Ellis & Peter J. Scherr, *Federal Felony Conviction, Collateral Civil Disabilities*, 11 CRIM. JUST. 42, 43 (1996) (“The loss of various civil rights may, for the most part, be controlled by state law . . .”).

²²⁷ See *supra* notes 65-69 and accompanying text.

²²⁸ See Ellis & Scherr, *supra* note 226, at 43 (“[T]here are a host of federal civil disabilities that flow from a federal felony.”).

²²⁹ *Id.* at 43-44; see also THE AMERICAN BAR ASS’N, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 9-43 (2009), available at <http://www.pdsdc.org/Resources/Publication/Collateral%20Consequences%20of%20Conviction%20in%20Federal%20Laws%20and%20Regulations.pdf> (examining, in detail, privileges and benefits lost because of the collateral consequences of a federal conviction); U.S. DEPT. OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, *supra* note 222, at 1-20.

²³⁰ 28 U.S.C. § 1865(b)(5) (2006).

²³¹ *E.g.*, 18 U.S.C. § 2381 (2006) (providing that persons guilty of treason are disqualified from holding federal office).

license²³³ are tied to the federal government's interest in prescribing qualifications for federal office, employment, and licenses. Statutes prohibiting individuals convicted of certain federal crimes from receiving federal benefits²³⁴ are tied to the government's interest in regulating these federal benefits programs. Finally, the statute barring persons with felony convictions from enlisting in the military²³⁵ is tied to the federal government's interest in maintaining and regulating the armed forces. In contrast to these statutes, the civil commitment provision and the failure to register provision are not tied to an explicit federal interest based on an enumerated or implied power: the provisions may not be justified based on the federal government's power to prosecute federal offenders,²³⁶ the federal government's power to prevent federal sex crimes,²³⁷ or any other power. Rather, the provisions are designed to prevent general danger to the community in the form of sex crimes.

Because the civil commitment provision and the failure to register provision are designed to prevent general danger to the community rather than to vindicate an explicit federal interest, they are similar to federal statutes imposing collateral consequences in the form of firearm restrictions on individuals convicted of certain crimes. Several federal statutes regulate the conduct of federal offenders in this manner, but they do so only through a jurisdictional hook to interstate commerce.²³⁸

In *United States v. Dixon*,²³⁹ the Seventh Circuit compared SORNA to the felon-in-possession statute,²⁴⁰ which forbids felons from possessing firearms that have moved in interstate commerce. The statute requires the government to prove that the firearm crossed state lines in order for the regulation to fall under Congress's Commerce Clause authority.²⁴¹ The Supreme Court upheld the predecessor of this statute in *Scarborough v. United States*.²⁴² The Tenth

²³² *E.g.*, 5 U.S.C. § 7371(b) (2006) (providing that any law enforcement officer convicted of a felony shall be removed from employment).

²³³ *E.g.*, 49 U.S.C. § 44936 (2006) (providing that a list of crimes will bar individuals from employment or contracting as air carrier and air security personnel).

²³⁴ *E.g.*, 42 U.S.C. § 1320a-7 (2006) (providing for exclusion of persons convicted of certain crimes from participation in Medicare programs).

²³⁵ 10 U.S.C. § 504(a) (2006).

²³⁶ *See supra* Part IV.A.1.

²³⁷ *See infra* Part IV.B.

²³⁸ *E.g.*, 18 U.S.C. §§ 922(g)(1), 931(a) (2006).

²³⁹ 551 F.3d 578, 582 (7th Cir. 2008) (finding a "close analogy" between SORNA and 18 U.S.C. § 922(g)(1)).

²⁴⁰ 18 U.S.C. § 922(g)(1).

²⁴¹ *See Dixon*, 551 F.3d at 582 (citing *Scarborough v. United States*, 431 U.S. 563 (1977)) (stating that the felon-in-possession statute requires the firearm crosses state lines to be within Congress's Commerce Clause authority).

²⁴² 431 U.S. at 563.

Circuit noted that “the [*Scarborough*] decision assumed that Congress could constitutionally regulate the possession of firearms solely because they had previously moved across state lines.”²⁴³ Under the statute, prosecution of a felon for possessing a firearm that has never crossed state lines may not proceed, even if he has a federal conviction.²⁴⁴ Thus, even if someone has been convicted under federal law, the government must establish a jurisdictional hook to interstate commerce in order to regulate his firearm possession. Congress may not regulate solely intrastate possession of a firearm based on a federal conviction.²⁴⁵ Similarly, Congress may not assess people for sexual dangerousness or punish them for failing to register based solely on their past federal convictions, when these provisions contain no nexus to interstate commerce.

Another example of a federal statute regulating the conduct of federal offenders only through a jurisdictional hook to interstate commerce is the felon-in-possession of body armor statute. This statute makes it unlawful for a person convicted of certain federal or state crimes of violence to purchase, own, or possess body armor.²⁴⁶ Lower courts have upheld this statute based on the reasoning of *Scarborough*.²⁴⁷ Congress may regulate the possession of body armor not because of offenders’ federal convictions, but only because the body armor “moved across state lines at some point in its existence.”²⁴⁸ In contrast, the civil commitment provision and the failure to register provision attempt to regulate federal offenders’ conduct with no explicit tie to interstate commerce. Because these provisions are not tied to an enumerated or implied power of the federal government and contain no jurisdictional hook to interstate commerce, they are not valid as collateral consequences of a federal conviction.

²⁴³ *United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006) (citing Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 J. APP. PRAC. & PROCESS 671, 674 (2001)).

²⁴⁴ *See* Newton, *supra* note 243, at 682-83 (stating that the element of interstate commerce of § 922(g) relates to the firearm and not the felon).

²⁴⁵ *See id.*

²⁴⁶ 18 U.S.C. § 931(a) (2006).

²⁴⁷ *Patton*, 451 F.3d at 635. Courts and scholars have expressed doubts about the continuing validity of *Scarborough* after *Lopez* and *Morrison*. *See* Newton, *supra* note 243, at 673 (“[T]he prevailing interpretation of 18 U.S.C. § 922(g) – and the sweeping dragnet of federal prosecutions spawned by it – far exceeds Congress’s authority to regulate firearms under the Commerce Clause of the United States Constitution and is at odds with this country’s system of federalism.”). For the purpose of this Note, however, I read *Scarborough* and *Patton* to illustrate the principle that Congress may not impose regulations on people based on previous federal convictions; a connection to interstate commerce is necessary.

²⁴⁸ *Patton*, 451 F.3d at 635.

c. *Not Imposed as Conditions of Federal Imprisonment*

Although § 4248 applies to persons in federal custody and § 2250(a)(2)(A) applies to persons who have been convicted of federal sex crimes and released from federal prison, neither provision is justified based on its application to persons formerly in lawful federal custody. Congress has “broad powers over persons *during* their prison sentences.”²⁴⁹ As the Supreme Court stated, “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”²⁵⁰ This power is limited both by prisoners’ constitutional rights and by constitutional limits on the powers that provide the government with the right to control them.²⁵¹ As an example of Congress’s power over persons *during* their sentences, Congress may regulate sex crimes “in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency.”²⁵² Congress may also regulate other crimes in federal prison, such as assaults.²⁵³ The BOP may require a DNA sample from federal offenders during incarceration.²⁵⁴ However, the DNA Act regulates conduct *during* a term of incarceration rather than conduct after an offender has served his sentence.²⁵⁵ Even if a DNA sample is retained after custody ends, this is a much lesser intrusion on personal liberty than retaining custody of an inmate.²⁵⁶

²⁴⁹ *United States v. Comstock*, 551 F.3d 274, 281 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009); *see also* *United States v. Volungus*, 599 F. Supp. 2d 68, 78 (D. Mass. 2009) (“There is no doubt that Congress may enact provisions relating to the conditions under which a person in lawful custody is confined.”).

²⁵⁰ *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (citations omitted).

²⁵¹ *See* *United States v. Comstock*, 507 F. Supp. 2d 522, 531 (E.D.N.C. 2007) (“[T]he power to regulate those legitimately in federal custody is bounded by the individual rights of the persons in custody as described by the Constitution and by the limitations on the powers from which that power to regulate derives.”), *aff’d*, 551 F.3d 274, *cert. granted*, 129 S. Ct. 2828.

²⁵² *United States v. Tom*, 558 F. Supp. 2d 931, 940 (D. Minn. 2008) (quoting 18 U.S.C. § 2241(a)), *rev’d*, 565 F.3d 497 (8th Cir. 2009).

²⁵³ *See Comstock*, 551 F.3d at 281.

²⁵⁴ *See* *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (“[T]he DNA Act’s provision for the BOP’s collection of federal offenders’ DNA during incarceration is not part of appellants’ sentence, but is rather a prison condition . . .”).

²⁵⁵ *See Comstock*, 507 F. Supp. 2d at 534 (“[T]he DNA Act regulates the federal government’s interaction with persons in federal custody during the terms of their sentences. It does not attempt to regulate the behavior or constrain the liberty of individuals after the expiration of the sentences they served for their criminal convictions as § 4248 does.”).

²⁵⁶ *See Tom*, 558 F. Supp. 2d at 941 (“[R]etaining custody of a released inmate’s DNA sample is fundamentally different than retaining custody of the inmate.”).

An individual's temporary lawful status in federal custody does not supply the government with lifelong control over that person.²⁵⁷ Individuals prosecuted under § 2250(a)(2)(A) have finished serving their sentences and been released from prison. One scholar has noted that "a holding of Commerce Clause authority based only upon a prior federal conviction would create a flypaper theory of the Clause whereby any person who entered federal jurisdiction for just a moment was committed to such jurisdiction for life."²⁵⁸

Under § 4248, the assessment of sexual dangerousness is made when an individual is in federal custody.²⁵⁹ One lower court noted that "there is some intimation in the government's argument that the civil commitment regime is within congressional power because it pertains only to a person already in [federal] custody."²⁶⁰ However, an individual's temporary lawful status in federal custody does not provide Congress with the authority to enact a new basis for continued confinement. In *Comstock*, the Fourth Circuit noted that "[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls."²⁶¹

Thus, because the eligibility for civil commitment and the liability for failure to register are not imposed as elements of a criminal sentence, conditions of supervised release, collateral consequences of a federal conviction, or conditions of federal imprisonment, the provisions are not justified based on the government's power under the Necessary and Proper Clause to punish and imprison federal offenders.

B. *The Provisions Are Not Laws Necessary and Proper for Carrying into Execution the Federal Government's Power to Prevent Future Federal Crimes*

As discussed above, the federal government has the power to enact federal criminal laws based on its enumerated powers.²⁶² Congress "does not have broad power generally to criminalize sexually dangerous conduct and child molestation."²⁶³ However, the federal government may enact federal laws punishing sex crimes²⁶⁴ based on its enumerated powers.²⁶⁵ There are three

²⁵⁷ See *United States v. Volungus*, 599 F. Supp. 2d 68, 78 (D. Mass. 2009) ("The government does not achieve plenary jurisdiction over a person in its custody just by reason of that custody.").

²⁵⁸ Yung, *supra* note 41, at 135.

²⁵⁹ See 18 U.S.C. § 4248(a) (2006).

²⁶⁰ *Volungus*, 599 F. Supp. 2d at 78.

²⁶¹ *United States v. Comstock*, 551 F.3d 274, 281 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

²⁶² See *supra* notes 121-33 and accompanying text.

²⁶³ *United States v. Comstock*, 507 F. Supp. 2d 522, 538 (E.D.N.C. 2007), *aff'd*, 551 F.3d 274, *cert. granted*, 129 S. Ct. 2828.

²⁶⁴ See, e.g., 18 U.S.C. §§ 2241-2245, 2251-2252, § 3559.

general categories of federal sex offenses: criminal sexual abuse, pornography, and prostitution.²⁶⁶ Federal authority over sex crimes is “generally based on (1) specific constitutional grants of authority, such as [the Commerce Clause] or (2) federal interests in specified pieces of property, such as military posts, national parks, or Native American reservations.”²⁶⁷ Thus, statutes governing federal sex crimes “all contain specific jurisdictional limits or pertain to interstate conduct.”²⁶⁸ Because federal authority over sex crimes is so limited, “state governments prosecute the vast majority of sex offenders.”²⁶⁹ Fewer than 300 sex crimes a year are sentenced in federal court.²⁷⁰

When Congress has the power to criminalize conduct, it has the authority under the Necessary and Proper Clause to take reasonable steps to prevent that conduct.²⁷¹ Lower courts evaluating the constitutionality of § 4248 have found civil commitment permissible in some circumstances to effectuate the goals of federal criminal laws based on enumerated powers.²⁷² For example, one lower court has stated:

In providing for the effective enforcement of federal criminal laws, Congress undoubtedly has the power not only to prosecute crimes after they have been committed, but also to take certain steps to prevent the commission of future crimes. But those measures must always be connected to a legitimate federal interest and there is always a question of degree.²⁷³

The extent of a statute’s intrusion on personal liberty is relevant to the inquiry of whether it is necessary and proper. No matter how minimal a federal law’s intrusion on personal liberty, it must be based on an enumerated power to be valid. However, once that connection to an enumerated power is established, the constitutionality of a statute may turn on its degree of

²⁶⁵ See *Comstock*, 507 F. Supp. 2d at 539 (“The myriad provisions in the federal criminal code are justified, as a constitutional matter, only by reference to Congress’s enumerated powers.” (citing *United States v. Patton*, 451 F.3d 615, 618 (10th Cir. 2006))).

²⁶⁶ See Pamela Montgomery, *Sentencing Federal Sex Crimes*, 10 FED. SENT’G. REP. 98, 98 (1997).

²⁶⁷ *Id.*

²⁶⁸ *United States v. Tom*, 558 F. Supp. 2d 931, 940 (D. Minn. 2008), *rev’d*, 565 F.3d 497 (8th Cir. 2009).

²⁶⁹ See Montgomery, *supra* note 266, at 98.

²⁷⁰ *Id.* at 102.

²⁷¹ See *United States v. Salerno*, 481 U.S. 739, 747 (1987) (“[P]reventing danger to the community is a legitimate regulatory goal.”).

²⁷² See *United States v. Comstock*, 507 F. Supp. 2d 522, 539 (E.D.N.C. 2007) (“Providing for civil commitment deemed necessary to effectuate the goals of federal criminal laws, which are themselves contingent on some other enumerated power, may be permissible, but the connections should be made clear.”), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

²⁷³ *United States v. Volungus*, 599 F. Supp. 2d 68, 77 (D. Mass. 2009).

connection to a federal interest.²⁷⁴ Because the registration requirement is not an extensive intrusion on personal liberty, one might argue that the failure to register provision is necessary and proper to prevent all three categories of federal sex crimes – sexual abuse, pornography, and prostitution. However, because civil commitment is such a great intrusion on personal liberty,²⁷⁵ arguing that civil commitment is necessary and proper for any category of sex crime other than the most serious, sexual abuse, is difficult. Although the other two categories of federal sex crime offenses often involve deplorable conduct, the unparalleled intrusion of civil commitment is justified only by the necessity of preventing crimes of violence.

Both the civil commitment provision and the failure to register provision would prevent only a small number of federal sex crimes. Although the growth of the internet has increased federal prosecutions for sex crimes, the majority of sex crimes still fall within state criminal jurisdiction.²⁷⁶ Child sex offenses constitute only about 2.5% of the federal criminal caseload.²⁷⁷ Approximately 75% of child pornography possessors are charged with state crimes and 24% are charged with federal crimes.²⁷⁸ The government has argued that “[i]t is eminently reasonable to anticipate that, in light of the frequency of child pornography possession by child molesters, the crimes likely to be prevented by § 4248’s civil commitment scheme include those involving child pornography.”²⁷⁹ There is a strong correlation between sexual victimization of children and possession of child pornography; one study found that when cases of attempted child sexual victimization are included, 55% of child pornography possessors are also victimizers.²⁸⁰ However, because possession of child pornography is not a violent offense and civil commitment is a massive intrusion on personal liberty, § 4248 is not a law necessary and proper for carrying into execution the government’s power to prevent federal pornography offenses.

In *United States v. Perry*,²⁸¹ the Third Circuit upheld a provision of the Bail Reform Act authorizing the pretrial detention of an accused defendant upon a finding that “no condition or combination of conditions will reasonably assure

²⁷⁴ See, e.g., *id.* at 77 n.12.

²⁷⁵ See *Comstock*, 551 F.3d at 284 (“The power claimed by § 4248 – forcible, indefinite civil commitment – is among the most severe wielded by any government.”).

²⁷⁶ See Brief for the Appellant at 35-36, *Comstock*, 551 F.3d 274 (No. 07-7671).

²⁷⁷ See U.S. DEP’T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 1 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcseo06.pdf>.

²⁷⁸ See *id.*

²⁷⁹ Reply Brief for the Appellant at 17 n.7, *Comstock*, 551 F.3d 274 (No. 07-7671).

²⁸⁰ See NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES 16 (2005), available at http://www.missingkids.com/en_US/publications/NC144.pdf.

²⁸¹ 788 F.2d 100, 102 (3d Cir. 1986).

the appearance of the person as required and the safety of any other person and the community” when there is probable cause to believe that the accused had committed a major drug trafficking offense or a felony with a firearm.²⁸² The Court first observed that the federal interest recognized in *Greenwood*, detention for trial or sentence, was not present.²⁸³ The Court found that because Congress had the power to criminalize the acts the defendant was accused of committing, it also had “the auxiliary authority, under the necessary and proper clause, to resort to civil commitment to prevent their occurrence.”²⁸⁴ The Court held that the provision at issue was “aimed at preventing the specific harm to the community proscribed by the four designated statutes.”²⁸⁵ Therefore, it construed the presumption as “addressing only danger to the community from the likelihood that the defendant will, if released, commit one of the proscribed federal offenses.”²⁸⁶ Thus, the Court upheld federal civil commitment based on two findings tied to the government’s interest in preventing federal crimes: (1) a backward-looking finding that there was probable cause that the accused committed one of four enumerated federal offenses; and (2) a forward-looking finding that no conditions of release would assure the safety of the community from the danger of those four offenses.

This reasoning does not support upholding either § 4248 or § 2250(a)(2)(A) because neither requires similar backward-looking and forward-looking findings. Regarding § 4248, the court must determine that the individual “engaged or attempted to engage in sexually violent conduct or child molestation”²⁸⁷ and “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”²⁸⁸ However, in contrast to the findings required by the Bail Reform Act provision, neither of these findings is linked to the government’s interest in preventing *federal* sex crimes.

The backward-looking conclusion is not tied to the government’s interest in preventing federal sex crimes either. Section 4248 authorizes the civil commitment of anyone in the custody of the BOP, regardless of the nature of his crime of conviction.²⁸⁹ The provision also authorizes civil commitment of persons committed to the custody of the United States Attorney General based on incompetence to stand trial, and of persons against “whom all criminal charges have been dismissed solely for reasons relating to [their] mental

²⁸² *Id.* at 103 (quoting 18 U.S.C. § 3142(e) (2006)).

²⁸³ *Perry*, 788 F.2d at 110.

²⁸⁴ *Id.* at 111.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ 18 U.S.C. § 4247(a)(5) (2006).

²⁸⁸ *Id.* § 4247(a)(6).

²⁸⁹ *Id.* § 4248(a).

condition,” regardless of the nature of the charges against these categories of individuals.²⁹⁰ The determination requires only a finding of sexually violent conduct or child molestation, with no requirement that the conduct constitute a federal crime. Both the forward and backward-looking findings are aimed at preventing generalized danger to the community, rather than a specific harm proscribed by federal law.²⁹¹ Unlike the Bail Reform Act provision upheld in *Perry*, “section 4248 simply cannot be construed as a statute addressing *only* the danger to the community from the likelihood that the defendant will, if released, commit a proscribed federal offense.”²⁹²

If § 4248 required a determination that there was probable cause to believe that an individual committed a federal sex crime and was likely to commit another federal sex crime if released, then *Perry* would support upholding § 4248. For example, the federal government has plenary jurisdiction over Indian reservations and thus has the power to criminalize sexual offenses that occur there.²⁹³ If it were determined that a federal prisoner committed a sex crime on an Indian reservation and was likely to do so again if released, then the government could likely detain him under the reasoning of *Perry*. Section 4248, in contrast, would authorize the government to civilly commit someone convicted of bank robbery, based only on a determination that he engaged in sexually violent conduct and was sexually dangerous, with no necessary link to a federal sex crime.

If § 4248 were truly a necessary and proper exercise of Congress’s power to prevent federal sex crimes, then limiting eligibility for civil commitment to persons in federal custody only during their terms would not serve any purpose. In considering a precursor to § 4246, one scholar noted that one possible constitutional basis for continued federal custody after completion of a federal sentence is the statutory limitation that the “custody is conditioned upon a finding that ‘if released [the prisoner] will probably endanger the safety of the officers, the property, or other interests of the United States.’”²⁹⁴ However, this basis would justify committing anyone who potentially posed a

²⁹⁰ *Id.*

²⁹¹ *United States v. Comstock*, 507 F. Supp. 2d 522, 538 (E.D.N.C. 2007) (finding that protecting the “general welfare of the community . . . was not within the scope of Congressional authority”), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

²⁹² *Id.*

²⁹³ *See, e.g.*, 18 U.S.C. § 2241 (criminalizing aggravated sexual abuse “in the special maritime and territorial jurisdiction of the United States,” which includes Indian reservations).

²⁹⁴ Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 836 (1960) (citing Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 YALE L.J. 1070, 1078-79); *see also* Note, *supra* note 67, at 1078 (“[U]nder the Constitution the federal government may take whatever steps are ‘necessary and proper’ to protect itself. As a sovereign, it has the inherent constitutional power to protect itself, its officers, property and interests.”).

danger to federal interests, with no limitation to persons in federal custody.²⁹⁵ Similarly, a lower court stated that “[t]he interest in preventing future crimes, if it were a valid basis for congressional power in this instance, would justify the detention of any person who met the statutory definition of ‘sexually dangerous person,’ whether presently confined in federal custody or not.”²⁹⁶ The government’s power to prevent federal sex crimes cannot justify § 4248 because this reasoning would justify civil commitment of anyone based on a finding of “sexual dangerousness,” which is clearly not a necessary and proper exercise of Congress’s power to prevent federal crimes.

Section 2250(a)(2)(A) is more narrowly tailored than § 4248 because it applies only to persons convicted of federal *sex offenses*. Thus, like the Bail Reform Act provision upheld in *Perry*, § 2250(a)(2)(A) requires a determination that the defendant committed a proscribed federal offense. However, the failure to register provision requires only a past federal conviction, with no finding required that the individual presents a threat of committing a similar crime in the future. The Bail Reform Act provision that was upheld, in contrast, required a finding that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.”²⁹⁷ As discussed above, the failure to register provision would prevent only a small number of federal sex crimes.²⁹⁸ The provision is not justified based solely on a past federal conviction with no showing of propensity to commit future federal crimes, because the government may not impose requirements on persons based on past convictions with no tie to a federal interest.

Sections 4248 and 2250(a)(2)(A) are not justified based on the government’s power to prevent federal sex crimes, because a similar argument would have validated the statutes at issue in *Lopez* and *Morrison*.²⁹⁹ Although *Lopez* and *Morrison* are widely known as the “Commerce Clause” cases, the Supreme Court implicitly considered the Necessary and Proper Clause in analyzing the statutes as well.³⁰⁰ In *Lopez*, the government explicitly invoked the Necessary and Proper Clause.³⁰¹ In *Morrison*, although the government did not make an explicit Necessary and Proper argument, the Supreme Court

²⁹⁵ See Foote, *supra* note 294, at 836-37 (“Presumably any potentially dangerous insane person, and not just one completing a federal sentence, may take it into his mind to go to Washington and try to assassinate the President.”).

²⁹⁶ *United States v. Volungus*, 599 F. Supp. 2d 68, 78 (D. Mass. 2009).

²⁹⁷ 18 U.S.C. § 3142(e).

²⁹⁸ See *supra* note 276 and accompanying text.

²⁹⁹ See Brief for Appellees at 43, *United States v. Comstock*, 551 F.3d 274, 283 (4th Cir. 2009) (No. 07-7176).

³⁰⁰ See *id.* at 16.

³⁰¹ See *United States v. Lopez*, 514 U.S. 549, 549 (1995).

rejected the argument *sua sponte*.³⁰² Congress has the power to criminalize the possession of firearms that have traveled in interstate commerce,³⁰³ and to criminalize gender-motivated crimes of violence when certain jurisdictional hooks exist.³⁰⁴ The statute at issue in *Lopez* that criminalized the possession of guns in school zones would have prevented some federal crimes because some of these guns would have traveled in interstate commerce. The statute at issue in *Morrison* would have prevented some federal crimes because a civil remedy for victims of gender-motivated crimes of violence would deter some sex crimes with federal jurisdictional hooks. However, the Supreme Court invalidated the statutes. Similarly, the fact that § 4248 and § 2250(a)(2)(A) would prevent a small number of federal sex crimes is not a sufficient justification for its constitutionality under the Commerce Clause. Thus, neither § 4248 nor § 2250(a)(2)(A) is justified based on the government's interest in preventing federal sex crimes.

C. *Steps Congress Can Take to Address Federal Sex Crimes*

Although the civil commitment provision and the failure to register provision are unconstitutional, there are steps available to Congress to address its concern about federal sex crimes. First, in the realm of either civil commitment or sex offender registration, Congress could use its spending power to encourage state action.³⁰⁵ For example, a provision of the Adam Walsh Act grants funds to states “for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons.”³⁰⁶ Similarly, the Act conditions funds to states upon compliance with participation in the new sex offender registry.³⁰⁷ Because Congress uses its spending power to encourage states to comply willingly with federal policy goals, many commentators find that “the congressional *modus operandi* of conditional spending is respectful of state autonomy interests, especially as

³⁰² See Brief for Appellees at 16 n.2, *Comstock*, 551 F.3d 274 (No. 07-7176) (quoting *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878)).

³⁰³ See, e.g., 18 U.S.C. § 922(g) (2006); see also *supra* notes 240-43 and accompanying text.

³⁰⁴ See *supra* notes 264-68 and accompanying text.

³⁰⁵ See *Comstock*, 551 F.3d at 284 (stating that the Federal government could use its spending power to address concerns regarding dangerous persons who are going to be released from prison), *cert. granted*, 129 S. Ct. 2828 (2009); see also U.S. CONST. art. I § 8, cl. 1 (providing Congress with the power to dispense funds to promote the “general Welfare”); *United States v. Perry*, 788 F.2d 100, 109 (3d Cir. 1986) (“Congress can use its spending powers to coerce conduct consistent with its views of the general welfare in ways that it perhaps could not otherwise command.” (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) and *Helvering v. Davis*, 301 U.S. 619 (1937))).

³⁰⁶ 42 U.S.C. § 16971(a) (2006).

³⁰⁷ See *id.* § 16925(a).

compared to instances of exercise of Commerce Clause authority, which entail unalloyed federal command.”³⁰⁸

Furthermore, courts can impose conditions of supervised release to reduce the danger when prisoners with a history of sexual violence are released from prison. These conditions may “include sex offender testing and treatment, including in-patient treatment,” “prohibition of unsupervised contact with [juveniles],” and “periodic polygraph tests to determine whether the relevant conditions of Supervised Release are being obeyed.”³⁰⁹ Because conditions of supervised release are imposed at sentencing, each individual condition of release does not need an independent basis of federal constitutional authority.³¹⁰ A Massachusetts federal district court suggested that if no state were willing to take responsibility for a prisoner believed to be sexually dangerous, then the Department of Justice could request a hearing on the first day of the released prisoner’s supervised release and request that the court impose stricter conditions on him.³¹¹

If the federal government has concerns about the sexual dangerousness of a federal prisoner due for release, then it could notify state authorities, who could rely on their police and *parens patriae* powers to make a civil commitment assessment.³¹² Congress also could redraft the civil commitment provision to resemble the provision of the Bail Reform Act that the Third Circuit upheld in *Perry*. As discussed above,³¹³ the civil commitment provision might be valid under the reasoning of *Perry* if it required a backward-looking finding that the defendant committed a federal sex crime, and a forward-looking finding that the defendant would do so again if released.

There are also options available to Congress to resolve the constitutional infirmities of the failure to register provision. Congress could repeal subsection (a)(2)(A), leaving only subsection (a)(2)(B), which requires travel in interstate commerce to support a conviction.³¹⁴ Or, if Congress wanted to target federal sex offenders regardless of their movement in interstate

³⁰⁸ Logan, *supra* note 2, at 95 (citations omitted). *But see id.* at 96 (“Even assuming the principled use of conditional spending, however, the story of federal intrusion with respect to registration and community notification raises some troubling issues.”).

³⁰⁹ See *United States v. Wilkinson*, 626 F. Supp. 2d 184, 193 (D. Mass. 2009).

³¹⁰ See *supra* notes 220-22 and accompanying text.

³¹¹ See *Wilkinson*, 626 F. Supp. 2d at 193-94 (citing 18 U.S.C. § 3582(e)(2) (2006)); FED. R. CIV. P. 32(c)(1).

³¹² See *United States v. Comstock*, 551 F.3d 274, 284 (4th Cir. 2009) (recognizing that even if § 4248 is invalid it does not “require that the Government’s legitimate policy concerns go unaddressed”), *cert. granted*, 129 S. Ct. 2828 (2009).

³¹³ See *supra* notes 289-93 and accompanying text.

³¹⁴ See Yung, *supra* note 41, at 136

commerce or lack thereof, then it could impose a registration requirement as part of a defendant's federal sentence.³¹⁵

CONCLUSION

Because the Framers created a federal government of limited powers, every action taken by Congress must be based on an enumerated power.³¹⁶ The Adam Walsh Act civil commitment provision and failure to register provision are both tangentially related to the federal government's enumerated powers in two ways. First, both provisions apply only to persons convicted under federal laws that Congress had the authority to enact under the Commerce Clause or other grants of constitutional power. Second, both provisions would prevent some federal sex crimes, which Congress has the power to take steps to do under the Commerce Clause in conjunction with the Necessary and Proper Clause. However, this Note has argued that because the provisions at issue are not tied strongly and explicitly enough to either of these justifications or to any other enumerated or implied power, they are unconstitutional.

Sex offenders receive little sympathy in our society, and many restrictions on them, such as eligibility for civil commitment under § 4248, affect few people. As of April 3, 2009, the BOP had certified only ninety-five persons as "sexually dangerous."³¹⁷ Despite the small number of people affected, the Supreme Court's ruling on the civil commitment provision in *Comstock* will have enormous implications for the future of federalism and the scope of the federal criminal law. Since *Raich*, lower courts have been left with little guidance as to the Supreme Court's federalism jurisprudence and how *Raich* may affect the holdings of *Lopez* and *Morrison*. Thus, the Supreme Court's decision in *Comstock* will represent a landmark in its Commerce Clause jurisprudence and offer lower courts crucial direction in future cases implicating the limits of the federal government's power.

Crimes of sexual violence, particularly against children, justifiably provoke extreme public rage. Reducing these terrible crimes in our society is certainly a worthy goal. However, so is prohibiting guns in school zones and preventing gender-motivated crimes of violence; the Supreme Court struck down statutes with those goals in *Lopez* and *Morrison*. No matter how sound a policy rationale a federal statute rests on, its validity depends on having its basis in an enumerated power. Both the civil commitment provision and the failure to register provision depend on the erroneous assumption that once a person is in

³¹⁵ See *id.* at 137 n.24 ("If SORNA conditions were applied as part of an offender's original sentence, a § 2250(a) prosecution would function in a manner very similar to a violation of supervised release terms.").

³¹⁶ See *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C. J.))).

³¹⁷ Petition for Writ of Certiorari, *United States v. Comstock*, 2009 WL 907847, at *16 n.10 (2009) (No. 08-1224).

federal custody, the person's custody may serve as the basis of future federal jurisdiction over that person. The provisions greatly expand the reach of the federal government and ensconce people in federal jurisdiction based solely on past federal control. If we are to maintain our system of federalism and the well established limits on the federal criminal law, then the Supreme Court must recognize that the civil commitment and failure to register provision exceed Congress's constitutional authority and must strike down the provisions.³¹⁸

³¹⁸ See *Morrison*, 529 U.S. at 607 ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." (citing *United States v. Lopez*, 514 U.S. 549, 568, 577-78 (1995) (Kennedy, J., concurring))).