Only as Strong as the Missing Link:
The Unsteady Constitutionality of the Adam Walsh Act

“The federal government’s power to punish crimes has drastically expanded in the past few decades . . . . The tension between the federal government’s law enforcement authority and its limited power is apparent in United States v. Comstock. This case is about how far the Constitution will allow the federal government to go in preventing crime.”

I. INTRODUCTION

“We indeed live in a vulgar age.” Sex crimes against children, widely reviled and condemned by American society, occur with tragic frequency and have devastating, long-lasting effects on the victimized children. Despite extensive legislation criminalizing and prescribing harsh penalties for the sexual abuse of minors, federal convictions for sex offenses involving children have increased sharply over the past two decades. During the 1990s and early 2000s, several extraordinarily brutal sex crimes involving children captured the

nation’s attention.\textsuperscript{5} These crimes received an enormous amount of media coverage and contributed to a public clamor for harsher penalties for child molesters.\textsuperscript{6}

In response to the public outcry, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act or the Act) “[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.”\textsuperscript{7} The Act, among other things, creates a national sex-offender registry, enhances existing penalties for federal sex offenses involving children, authorizes grants for community-safety programs, and establishes the Jimmy Ryce Civil Commitment Program (the civil-commitment provision) for sexually dangerous offenders, a hitherto unprecedented federal regulatory scheme.\textsuperscript{8}

The civil-commitment provision of the Adam Walsh Act authorizes the United States to seek the indefinite detention of any individual in its custody deemed to be “sexually dangerous to others.”\textsuperscript{9} To initiate a civil-commitment proceeding, the United States Attorney General or the Director of the Bureau of Prisons must file a certificate with the district court certifying a prisoner or detainee as sexually dangerous.\textsuperscript{10} The filing stays the prisoner’s release pending a hearing regarding the individual’s status.\textsuperscript{11} At the hearing, the government must prove by clear and convincing evidence that the individual is a sexually dangerous person within the meaning of the statute.\textsuperscript{12} In order to meet its burden of proof, the government must establish three separate elements: that the defendant has, in the past, “engaged or attempted to engage

\textsuperscript{5} See Enniss, supra note 3, at 698-702 (describing several heinous crimes involving child victims).

\textsuperscript{6} See id. (arguing public fear and demand contributed to legislation requiring sex-offender registration and authorizing civil commitment).


\textsuperscript{8} See id. §§ 101-131 (creating national sex-offender registry); id. §§ 201-216 (describing enhanced penalties for child sex exploitation offenses); id. §§ 601-639 (establisItion grants for specific programs dedicated to enhancing child safety); id. § 302 (codified at 18 U.S.C. § 4248) (creating civil-commitment provision for sexually dangerous offenders).

\textsuperscript{9} See 18 U.S.C. § 4248 (authorizing United States to seek civil commitment of certain class of offenders); see also id. § 4247(a)(6) (defining “sexually dangerous to others”).

\textsuperscript{10} See 18 U.S.C. § 4248(a) (2006) (providing direction for initiation of civil-commitment proceeding). Specifically, the statute applies to “a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person.” Id.

\textsuperscript{11} See id. The individual’s civil commitment can last beyond the date of his scheduled release. See United States v. Comstock, 551 F.3d 274, 276 (4th Cir. 2009), rev’d, 130 S. Ct. 1949 (2010).

\textsuperscript{12} See 18 U.S.C. § 4248(d) (establishing government’s burden of proof as “by clear and convincing evidence”). The defendant is entitled to due process protections, including the right to representation by counsel, the right to testify, to present evidence, and to confront and cross-examine the prosecution’s witnesses. Id. § 4247(d).
in sexually violent conduct or child molestation”; that the defendant “suffers from a serious mental illness, abnormality, or disorder”; and that, as a result of said mental illness, abnormality, or disorder, the defendant “would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”

13 If the government succeeds, the defendant will be committed to the custody of the Attorney General, who will then endeavor to release the prisoner to the custody of an appropriate state official.14 If no state will accept the individual into its custody, he will be committed to a federal facility.15 Once in federal custody, the statute sets forth a procedure by which the committed person may seek release once his condition is such that he is no longer sexually dangerous.16

The civil-commitment provision of the Adam Walsh Act incited a flurry of litigation in the federal courts regarding Congress’s power to enact the provision and the manner of its application.17 While the United States has defended the Act as an appropriate exercise of Congress’s power under the Necessary and Proper Clause, those challenging the Act have sharply criticized such reasoning, arguing that rationalization of the Act amounts to a piling of inferences, and thus betrays the traditional test for constitutionality under the Necessary and Proper Clause.18 Those challenging the Adam Walsh Act have also argued that the civil-commitment provision denies defendants due process and equal protection of laws under the Fifth Amendment.19 The Supreme Court granted certiorari to resolve the controversy in the circuit courts and held that the Act was a constitutional exercise of Congress’s power under the Necessary and Proper Clause.20 The Court refused to hear individual rights

13. Id. § 4247(a)(5)-(6) (defining “sexually dangerous person” and “sexually dangerous to others”); id. § 4248(a) (granting individual hearing to determine sexual dangerousness); United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (articulating elements government must prove at commitment hearing); see also infra Part II.A.2 (discussing definitions of Act’s specific statutory terms).

14. See 18 U.S.C. § 4248(d) (describing effect of sexual dangerousness determination and federal government’s efforts to return individual to states).

15. See id. (describing effect of state’s refusal to assume responsibility for person adjudged sexually dangerous). The statute further requires the individual to remain in federal custody until he is no longer sexually dangerous, or until a state will assume responsibility for his care. Id. § 4248(d)(1)-(2).


17. See infra Part II.C. (discussing various dispositions of Act’s constitutionality in district and circuit courts).


challenges to the Act, inviting the petitioners to raise due process challenges on remand. The Fourth Circuit, on remand, concluded that the Adam Walsh Act did not deny defendants due process of law, a result not in complete harmony with other courts’ conclusions.

This Note will examine constitutional challenges to the Adam Walsh Act, analyze the history of relevant jurisprudence, discuss the flaws in the Supreme Court’s opinion, and offer recommendations for legislative modification. Parts II.A and II.B will discuss the history of sexually violent person (SVP) laws at the state and federal level. Part II.C will review the various constitutional challenges brought against the Act. In Part II.D, this Note will discuss the Supreme Court’s reasoning in United States v. Comstock. Part III.A will analyze the weakness of the Court’s opinion in Comstock, and suggest that the Court’s analysis of the Adam Walsh Act under the Necessary and Proper Clause is, at best, tenuous. Part III.B will offer alternative arguments for constitutional justification of the Act under the Commerce Clause. Part III.C offers recommendations for legislative changes to avoid additional litigation regarding the Act’s due process guarantees.

II. HISTORY

A. State Civil-Commitment Statutes: An Established Tradition

Determining the most effective way to draft civil-commitment legislation has frustrated state legislatures for over a century. The first state laws authorizing indefinite civil commitment for sexual offenders emerged during the first half of the twentieth century. In several different states, individuals
subject to proceedings under these laws brought suit, claiming the laws violated their rights to equal protection and due process under the Fourteenth Amendment. States responded by arguing that the enactment of civil-commitment provisions was justified, citing both the states’ *parens patriae* power—the power of a state to protect those unable to care for themselves—and the states’ general police power to protect the community as a whole.

In *Addington v. Texas*, the Supreme Court laid to rest many constitutional challenges to the various state civil-commitment laws. Responding to the petitioner’s due process claims, the Court ruled that the clear and convincing standard of proof utilized by most state civil-commitment statutes comported with constitutional due process requirements. Despite this decisive victory

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32. See Minnesota *ex rel. Pearson v. Probate Court of Ramsey Cnty.*, 309 U.S. 270, 272 (1940) (noting petitioner’s equal protection and due process challenge to Minnesota law). In *Pearson*, the Court reasoned that because the statute permitted civil commitment in instances where there was a demonstrable connection between a sex offense and insanity, the statute was constitutional on its face and did not violate the petitioner’s rights under the Fourteenth Amendment. *Id.* at 274-77; see also Baxstrom v. Herold, 383 U.S. 107, 114 (1966) (ruling state civil-commitment statute denied petitioner equal protection of law). The New York statute in *Baxstrom*, however, did not provide petitioner—who was subject to commitment proceedings upon conclusion of his prison sentence—with a jury review, as was available to all other individuals subject to civil-commitment proceedings in New York. *See Baxstrom*, 383 U.S. at 110. The Court reasoned that equal protection “does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.” *Id.* at 111. The Court concluded that the distinction in this case—between an individual ending his prison sentence and any other person who may be civilly committed—was not rational for the purposes of denying judicial review. *Id.* at 111-12.

33. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (citing *parens patriae* power and police power as proper authority for passage of SVP laws). The Court in *Addington* stated:

The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

*Id.*; see also Prescott, supra note 31, at 841 (discussing states’ authority for passing sexual psychopath laws); BLACK’S LAW DICTIONARY 1221 (9th ed. 2009) (defining *parens patriae* as states’ “capacity [to act as a] provider of protection to those unable to care for themselves”).

34. 441 U.S. 418 (1979).

35. See *id.* at 426 (recognizing states have two sources of authority to enact SVP laws); supra note 33 and accompanying text (discussing states’ *parens patriae* and police power as sources of authority for SVP legislation).

36. See *Addington*, 441 U.S. at 428-32 (holding clear and convincing evidence standard of proof constitutionally acceptable for civil-commitment proceedings). In so holding, the Court reasoned that the beyond a reasonable doubt standard was one traditionally reserved for criminal cases, and as the central inquiry in a civil-commitment case is different from that of a criminal case, civil-commitment proceedings did not require the same exacting standard. *Id.* at 428-29. In criminal cases, the central issue is generally a factual determination focused on whether the defendant committed the act charged. See *id.* at 429. Conversely, at a civil-commitment hearing, the central issue, whether or not the individual is mentally ill, depends on the interpretation of facts and manifested symptoms as explained by expert witnesses. *Id.* Because of the uncertainty and subtleties intrinsic to psychiatric medicine, the Court held that imposing a criminal beyond a reasonable doubt standard could create an impossibly high burden for the prosecution. *Id.* at 430. The Court
for proponents of SVP laws, the laws eventually fell out of favor due to sharp criticism from the Group for the Advancement of Psychiatry and the American Bar Association’s Criminal Justice Mental Health Standards, in addition to research demonstrating the ineffectiveness of then-existing treatment programs.37

Subsequent nationwide changes in sentencing policies resulted in a trend toward long, determinate sentences for sex offenders, a radical change from the previous policy encouraging short, indeterminate sentences.38 In an effort to impose uniformity and equity on sex-offender sentencing, courts sentenced sex offenders to the average prison sentence accompanying the same crime imposed during the indeterminate sentencing regime.39 However, this policy resulted in shorter net sentences, leading to the premature release of mentally ill offenders who presented a high risk of recidivism.40

In 1990, Washington passed the first modern SVP law in response to a particularly brutal crime committed by a recently released sex offender and rising public concern regarding sex offender recidivism rates.41 Subsequently,
nineteen other states and the District of Columbia enacted civil-commitment provisions for sexually dangerous offenders. The reemergence of SVP laws, however, has not been without challenge; the Supreme Court again considered the constitutionality of sexually violent predator civil-commitment statutes in Kansas v. Hendricks and again in Kansas v. Crane. In Hendricks, an inmate nearing the end of his prison sentence challenged the constitutionality of the Kansas Sexually Violent Predator Act’s civil-commitment provision. Hendricks alleged the statute’s definitions were ambiguous, which caused inconsistent application of the law, and therefore violated his constitutional right to due process. Hendricks also alleged the Kansas Sexually Violent Predator Act violated the Double Jeopardy Clause and the Ex Post Facto Clause of the United States Constitution. The Court disagreed, holding that the statute complied with due process requirements because it required a finding that the subject’s existing mental abnormality was linked to the high likelihood of future dangerousness. The Court rejected Hendricks’ Double Jeopardy claim, reasoning that the legislature intended the statute to operate as a civil measure because the statute’s purpose was neither...
retribution nor deterrence. Accordingly, because the purpose of the Act was not punishment, the Court concluded that the statute did not implicate the Ex Post Facto Clause. Subsequently, in Crane, the Court clarified its holding in Hendricks, ruling that, in order to comport with constitutional due process requirements, the subject of the proceedings did not have to have a complete and total lack of control over his behavior, but required reviewing courts to conduct some type of control inquiry. The Court’s decisions in Crane, Hendricks, and Addington have firmly stamped state civil-commitment statutes with the imprimatur of constitutionality.

B. Federal Civil-Commitment Provisions


In the mid-nineteenth century, Congress enacted the first legislation granting the federal government authority to civilly commit mentally ill individuals with whom the federal government had a special relationship, including residents of the District of Columbia and members of the United States Army and Navy. Congress, over the next century, enacted additional legislation authorizing civil

49. Kansas v. Hendricks, 521 U.S. 346, 361-63 (1997). The Court reasoned that the statute did not intend to deter criminal activity, but rather aimed to rehabilitate individuals committed under the Act who suffered from a mental disorder that prevented them from controlling their impulses, and, as such, could not be deterred by the threat of commitment. See id. at 362-63. Furthermore, the Court concluded that it was not likely that the goal of the statute was retribution for past misdeed because a prior criminal conviction was not a prerequisite for commitment. Id. at 362. The Court stated, “The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded.” Id. at 363.

50. See id. at 370-71. The Court stated, “The Ex Post Facto Clause . . . forbids the application of any new punitive measure to a crime already consummated.” Id. at 370 (citations omitted) (internal quotation marks omitted). Because the Court had already concluded that the statute’s goal was not punishment, the Ex Post Facto Clause was inapplicable. See id. at 370-71.

51. See Kansas v. Crane, 534 U.S. 407, 411-13 (2002). The Court reasoned that requiring the prosecution to prove that an individual lacked any sort of control over his behavior would be too rigid a requirement. See id. at 411-12. In holding that proof of “serious difficulty in controlling behavior” was sufficient to satisfy the requirements of due process, the Court reasoned that psychiatric standards are continuously evolving, and, as such, the law should remain somewhat flexible in order to admit new discoveries and research pertinent to a determination of sexual dangerousness. See id. at 413-14.

52. Id. at 410 (ruling Kansas SVP law and all others with similar structure constitutional); see also Addington v. Texas, 441 U.S. 418, 426 (1979) (holding states possess ample authority to enact civil-commitment provisions).

53. See An Act to Organize an Institution for the Insane of the Army and Navy, and of the District of Columbia, in the Said District, ch. 199, § 1, 10 Stat. 682 (1855). According to Congress, the Government Hospital for the Insane’s “objects shall be the most humane care and enlightened curative treatment of the insane of the army and navy of the United States, and of the District of Columbia.” Id.; see also White v. Treibly, 19 F.2d 712, 713 (D.C. Cir. 1927) (upholding federal government’s authority to civilly commit insane retired navy officer). The court held, “His care and protection, while thus incapacitated and unable to act for himself, are the concern and duty of the government.” Treibly, 19 F.2d at 713.
commitment for a widening class of individuals. The increase in legislation authorizing civil commitment of certain mentally ill and dangerous individuals was touted as an essential exercise of the federal penal power. In 1949, acting pursuant to a 1945 legislative study citing the dangers and difficulties of releasing certain mentally ill prisoners into the community, Congress enacted a new statute, granting the federal government broad authority to civilly commit prisoners eligible for release but suffering from a mental disorder that made the prisoner dangerous to others.

In 1984, Congress promulgated the Insanity Defense Reform Act, consolidating much of the prior civil-commitment legislation. As part of the Insanity Defense Reform Act, Congress set forth a clear provision outlining the scope of the federal civil-commitment power and describing the applicable procedures. One aspect of the civil-commitment provision allows the federal

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54. See An Act Supplementary to “An Act to Organize an Institution for the Insane of the Army and Navy, and of the District of Columbia, in the said District,” approved March Third, Eighteen Hundred and Fifty-Five, ch. 36, §§ 5-6, 11 Stat. 157, 158 (1857) (expanding federal civil-commitment authority). Under this statute, Congress authorized the civil commitment of individuals charged with a federal crime but deemed incompetent to stand trial due to insanity. Id. § 5. Congress also authorized the civil commitment of any prisoner currently serving a federal prison sentence who is determined to be legally insane. Id. § 6. Further, Congress authorized the transfer of any prisoner to the Government Hospital for the Insane who, “having been charged with offenses against the United States, are in the actual custody of its officers, and all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any State prison or penitentiary of any State.” An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Eighty-Three, and for Other Purposes, ch. 433, 22 Stat. 302, 329-30 (1882) (expanding scope of federal civil-commitment authority); see also infra notes 55-56 and accompanying text (discussing development of federal civil-commitment legislation).

55. See ch. 433, 22 Stat. at 329-30. These statutes were intended to fulfill the government’s responsibilities to certain classes of people under its care, such as members of the Army and Navy, as well as the public at large. See Brief for the United States at 25-26, United States v. Comstock, 130 S. Ct. 1949 (2010) (No. 08-1224), 2009 WL 2896312 at *15-16 (explaining legislative intent behind early federal civil-commitment statutes).

56. See Care and Custody of Insane Persons Charged with Federal Offenses: Hearing Before a Subcomm. of the S. Comm. on the Judiciary, 80th Cong. 5 (1948) (describing problem presented by release of mentally ill federal prisoners). Judge Magruder, chairman of the Judicial Conference Committee, noted there were few procedures in place at the federal level to address a situation in which a state refused custody of a mentally ill prisoner “who would be a menace if left at large.” Id. A House Report noted that releasing a mentally ill prisoner upon completion of his federal prison sentence could place an “unfair burden upon the community where release [was] effected.” See Brief for the Appellant at 15, United States v. Volungus, 595 F.3d 1 (1st Cir. 2010) (No. 09-1596), 2009 WL 6927876, at *7 (alteration in original) (quoting H.R. REP. NO. 81-1319, at 2 (1949)) (internal quotation marks omitted); see also Brief for the United States, supra note 55, at *28-30 (describing congressional hearings on mentally ill prisoners); Act of Sept. 7, 1949, ch. 535, 63 Stat. 686, 686-88 (current version at 18 U.S.C. §§ 4244-4248 (2006)) (granting federal government authority to civilly commit federal prisoners due to mental illness).


58. 18 U.S.C. § 4247 (defining various terms and describing procedure for mental competency hearing prior to trial); id. § 4243 (requiring hospitalization of defendant found not guilty by reason of insanity); id. § 4244 (requiring hospitalization of mentally ill convict, if hospitalization found more suitable than imprisonment); id. § 4245 (requiring hospitalization of person currently imprisoned if suffering from mental
government to institute civil-commitment proceedings against any prisoner

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 related to the mental condition of the person, [who] 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.59

The statute requires that a prisoner be represented by counsel at the commitment hearing and guarantees the prisoner the right to confront witnesses, present evidence, and testify on his own behalf.60 If, at the hearing, the court finds by clear and convincing evidence that the individual is afflicted with a mental disease or defect such that he would present a “substantial risk of bodily injury to another person or serious damage to property of another” if released, the court will commit the individual to the custody of the Attorney General.61 The statute further requires that the Attorney General make all reasonable efforts to return the individual to an appropriate state facility.62 The federal government will only take custody of the individual if a state refuses to assume responsibility for the person.63 The statute also implements procedures by which the committed individual may petition for his release.64

The constitutionality of the statute was challenged as an improper extension

59. Id. § 4246 (requiring hospitalization of mentally ill prisoners due for release who pose danger to others). In order to initiate civil-commitment proceedings against an individual, a director of a facility in which the individual is hospitalized must submit a certificate to the District Court, certifying the person as both mentally ill and a danger to other persons or property. Id. § 4246(a). The certificate, when filed, automatically stays the release of the prisoner until a hearing on the prisoner’s mental state is held. Id. Prior to the hearing, the district court may order a psychiatric or psychological examination of the defendant. Id. § 4246(b).

60. Id. § 4246(c) (“The hearing shall be conducted pursuant to the provisions of section 4247(d).”); id. § 4247(d) (setting forth procedural requirements for commitment hearing).

61. Id. § 4246(d).

62. 18 U.S.C. § 4246(d). The statute specifies that the Attorney General must seek to transfer the individual to the state in which he is domiciled, or to the state in which he was tried. Id.

63. 18 U.S.C. § 4246(d) (2006) If, after reasonable efforts, the state of domicile or the state of trial refuses custody, the person will be committed to a federal facility for treatment of his mental disease or defect. Id. The individual will remain there until a state assumes responsibility for his custody and care or until his mental disease or defect no longer “create[s] a substantial risk of bodily injury to another person or serious damage to property of another.” Id. § 4246(d)(1)-(2).

64. Id. § 4246(e). The statute states that once a person hospitalized pursuant to § 4246(d) recovers to the extent that he no longer poses a threat to others or to others’ property, the director of the facility where the person is hospitalized may file a certificate with the district court. Id. The court will then either order the person’s release or order a hearing to investigate his mental state. Id.; see also id. § 4247(e) (requiring director of facility to issue periodic reports on committed individual’s mental condition). Such reports shall describe the person’s present mental state as well as a recommendation regarding release or continued commitment. Id. § 4247(e)(1)(A)-(B).
of federal power in Greenwood v. United States. In Greenwood, the petitioner was found mentally incompetent to stand trial, and civilly committed. The Court held that, because the defendant was properly in the custody of the United States at the time of the civil-commitment hearing, having committed a federal crime, the power to prosecute him for committing a federal offense was not exhausted, as “[i]ts assertion in the form of the pending indictment persists.” Accordingly, the Court ruled that civil commitment was “plainly within congressional power under the Necessary and Proper Clause,” as the Necessary and Proper Clause gives the federal government the power to prosecute crimes against the United States. The Court also cited practical concerns, stating that dangerous individuals should not escape commitment because they are incarcerated in a federal facility as opposed to a state facility. In a subsequent case, the Court recast its holding in Greenwood, ruling that the individual must pose a real danger to society to be held indefinitely; in other words, the mere existence of federal charges is not sufficient to civilly commit an individual for more than a reasonable time. Subsequent jurisprudence confirmed the United States’ power to protect the community at large from dangerous individuals over whom the government has a custodial responsibility. These cases simultaneously resolved due process challenges to the civil-commitment legislation.

66. Id. at 369-73.
67. Id. at 375. The Court reasoned that, although the petitioner was mentally ill and could not stand trial at the time, he may recover and be held accountable. See id. Because he was charged with a federal crime, the federal government maintains an interest in holding him in custody until he can be brought to trial. See id.
68. See id. at 375; see also U.S. CONST. art I, § 8, cl. 18. The Court held that the Necessary and Proper Clause provided the necessary authority for federal civil-commitment legislation because the power to prosecute is “auxiliary to incontestable national power.” Greenwood, 350 U.S. at 375 (finding sufficient nexus between enumerated powers in Article I and § 4246).
69. See Greenwood, 350 U.S. at 374. The Court cited the district court’s finding of dangerousness in its decision to uphold the statute, arguing that it is difficult to rationalize the release of dangerous mentally ill prisoners solely because they were incarcerated in a federal facility. Id.
70. See Jackson v. Indiana, 406 U.S. 715, 731-33 (1972). The Court cited a number of lower court decisions “impos[ing] a ‘rule of reasonableness’ upon §§ 4244 and 4246.” Id. at 733 (citations omitted); see also United States v. Curry, 410 F.2d 1372, 1374 (4th Cir. 1969) (holding court should not civilly commit defendant unless defendant poses public or private danger); United States v. Walker, 335 F. Supp. 705, 708-09 (N.D. Cal. 1971) (reading “rule of reason” into § 4246 in order to comport with due process) (citation omitted); Cook v. Ciccone, 312 F. Supp. 822, 824 (W.D. Mo. 1970) (holding indefinite civil commitment based solely on mental incompetence unconstitutional). The Jackson Court held that a finding of actual dangerousness was necessary to justify indefinite civil commitment. 406 U.S. at 732-33 (holding incompetency alone not sufficient to justify indefinite civil commitment).
72. See Jones, 463 U.S. at 361. The Court in Jones recognized “that ‘commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.’” Id. (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)) (acknowledging due process concerns implicated by civil commitment of
The Greenwood era yielded several conclusions about the federal government’s power in the realm of civil commitment. First, Greenwood and its progeny demonstrated the Court’s willingness to accept civil commitment when necessary to protect the inmate in need of psychiatric treatment. Second, the cases established community protection as a legitimate interest served by committing dangerous individuals. Finally, the Greenwood decision situates civil commitment of mentally ill patients as a permissible exercise of congressional power stemming from the Necessary and Proper Clause.

2. The Adam Walsh Act

Congress passed the Adam Walsh Child Safety and Protection Act of 2006 for the purposes of "protect[ing] . . . children from exploitation and danger." The language of the Adam Walsh Act mirrors the language of the preexisting civil-commitment provision in place for other dangerously mentally ill prisoners, and ensures that dangerous federal prisoners are not released into the community when they would otherwise be detained under state law had they served a sentence in state prison. The civil-commitment provision of the Adam Walsh Act permits the Attorney General, the Director of the Bureau of Prisons, or any person so authorized by these individuals to submit a certificate to the district court certifying a person as sexually dangerous. In order for the person deemed incompetent to stand trial). The Court held, “The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.” Id. at 364. Moreover, his conviction is “strong evidence that his continued liberty could imperil the preservation of the peace.” Id. (quoting Lynch v. Overholser, 369 U.S. 705, 714 (1962)) (holding dangerousness finding defeats due process challenges). In Youngberg, the Court argued that to determine whether an individual’s rights under the Due Process Clause had been violated, the Court should conduct a balancing test, weighing the individual’s interest in liberty against “the demands of an organized society.” 457 U.S. at 320 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)) (internal quotation marks omitted).

73. See supra notes 74-76 and accompanying text (discussing legal landscape after Greenwood).

74. See Brief for the United States, supra note 55, at *30-33 (mentioning Greenwood recognizes federal obligation to protect those in its care).

75. See id. at *32 (explaining protection of public primary purpose of civil-commitment statutes).

76. See Greenwood v. United States, 350 U.S. 366, 375 (1956) (holding insanity plea does not dispel pendency of charges, thus preserving federal government’s power to prosecute); Brief for the United States, supra note 55, at *33 (reviewing Greenwood holding).

77. See Enniss, supra note 3, at 702 (quoting President George W. Bush and discussing events motivating legislation) (internal quotation marks omitted); see also supra notes 5-8 and accompanying text (reviewing legislative history of Adam Walsh Act).


79. 18 U.S.C. § 4248(a) (2006), see also id. § 4247(a)(5). “Sexually dangerous person” is defined as “a

United States to exercise its civil-commitment power, the individual in question must be in the custody of the Bureau of Prisons, in the custody of the Attorney General, or have had all charges against him dismissed as a result of mental incompetence. 80 Similar to § 4246, the statute allows the court to order a psychological or psychiatric exam of the defendant prior to the hearing. 81 At the hearing, the defendant is entitled to representation by counsel and has the right to present evidence, testify, and cross-examine witnesses. 82 At the hearing, the court must make two determinations: first, the court must decide whether the individual is a sexually dangerous person, defined as “a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others,” which requires, secondly, that the court determine whether the defendant is sexually dangerous to others, meaning the defendant “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.” 83 If the court finds by clear and convincing evidence that the defendant is a sexually dangerous person who is sexually dangerous to others, the individual will be committed to the custody of the Attorney General. 84 The Attorney General will endeavor to transfer the person to state custody; only if a state refuses custody of a prisoner will the federal government commit the prisoner in a federal facility. 85 The statute authorizes release from confinement upon a facility director’s certification that the person is no longer sexually dangerous to others. 86

80. Id. § 4248(a).
81. Id. §§ 4247(d), 4248(c). At the hearing, a defendant must be represented by counsel, have the opportunity to testify on his own behalf, present evidence and witnesses, and cross-examine witnesses against him. Id. § 4247(d).
82. Id. § 4248(b).
83. 18 U.S.C. § 4248(d); see also id. § 4247(a)(5) (defining “sexually dangerous”); id. § 4247(a)(6) (defining “sexually dangerous to others”).
84. Id. § 4248(d).
85. 18 U.S.C. § 4248(d) (2006). The statute requires the Attorney General to petition the state of the prisoner’s domicile or the state where he was tried if the trial did not take place in the state of the prisoner’s domicile for a transfer of custody. Id. If the state or states refuse, the prisoner is committed to a federal institution until an eligible state consents to assume custody or the individual’s condition improves to the extent that he is no longer sexually dangerous to others. Id.
86. Id. § 4248(c). If and when a facility director determines the committed individual is no longer sexually dangerous to others, the director will file a certificate with the district court, and the court will either order the inmate discharged, or order a hearing to determine sexual dangerousness. Id.
C. Preliminary Challenges to the Adam Walsh Act

As the United States Attorney began to initiate civil-commitment proceedings against federal prisoners, many of the individuals brought constitutional challenges against the Act, with varying results. The majority of challenges fall into four broad categories. First, many defendants argued that Congress did not have sufficient authority under the Necessary and Proper Clause to enact the Adam Walsh Act, alleging an insufficient nexus between the enumerated powers granted to Congress by the Constitution and the power granted by the Adam Walsh Act. Second, many defendants argued Congress did not have the authority to promulgate the Adam Walsh Act pursuant to its commerce power, because the regulation of sexual violence did not fall into one of three recognized categories of commerce-related activities Congress


88. See infra notes 89-93 and accompanying text (analyzing courts’ decisions upholding and striking down Adam Walsh Act).

89. See Comstock, 551 F.3d at 281 (holding Necessary and Proper Clause not sufficient authority for enactment of federal civil-commitment program); Wilkinson, 626 F. Supp. 2d at 190 (holding link between enumerated power and power exercised too remote); Comstock, 507 F. Supp. 2d at 533 (holding no authority for civil commitment under Necessary and Proper Clause). The Fourth Circuit reasoned that because the power to prosecute has been exhausted, there was no link between an enumerated power and the action taken by the federal government. See Comstock, 507 F. Supp. 2d at 533-35. But see Volungus, 595 F.3d at 5-6 (upholding Adam Walsh Act under Necessary and Proper Clause); Tom, 565 F.3d at 502 (connecting power to civilly commit to power to criminalize and punish); Shields, 522 F. Supp. 2d at 326 (upholding Act under Necessary and Proper Clause and Commerce Clause). The Shields court concluded that the federal government had the authority to civilly commit an individual as an auxiliary power to its power to prohibit and punish federal sex crimes. 522 F. Supp. 2d at 326. The court argued, “The Supreme Court ‘long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be absolutely necessary to the exercise of an enumerated power.’” Id (quoting Jinks v. Richland County, 538 U.S. 456, 462 (2003)).
may regulate.90 Due Process challenges were also common; many defendants alleged that the Act’s use of the clear and convincing evidence standard of proof for the statute’s past-acts determination was a deprivation of due process, arguing the beyond a reasonable doubt standard should apply instead.91 Many defendants also argued that the Act violated both the Double Jeopardy and Ex Post Facto Clauses of the Constitution.92 Finally, many defendants argued that the Act violated their rights under the Equal Protection Clause, alleging that the Act created classes of sexually dangerous individuals and treated the classes differently by subjecting some, but not others, to civil-commitment proceedings.93

90. See U.S. Const. art. I, § 8, cl. 3 (setting forth Congress’s power to regulate interstate commerce); United States v. Lopez, 514 U.S. 549, 558-59 (1995) (articulating areas subject to congressional regulation under Commerce Clause); see also Comstock, 551 F.3d at 280 (holding previous Commerce Clause jurisprudence excludes civil commitment from federal regulation); Wilkinson, 626 F. Supp. 2d at 189-90 (holding civil commitment falls outside three areas subject to regulation under Commerce Clause); Comstock, 507 F. Supp. 2d at 534-40 (summarizing defendant’s challenges to Act under Commerce Clause). But see Tom, 565 F.3d at 502-03 (holding Act constitutional under Commerce Clause). The court argued that Congress has long held the power to forbid or punish the use of the channels of interstate commerce “as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin.” Id. (quoting Brooks v. United States, 267 U.S. 432, 436 (1925)) (internal quotation marks omitted) (explaining basis for upholding Act’s constitutionality under Commerce Clause).

91. See U.S. Const. amend. V; 18 U.S.C. § 4248 (2006). The statute requires the government to prove that the individual subject to civil-commitment proceedings has “engaged or attempted to engage in sexually violent conduct or child molestation.” 18 U.S.C. § 4247(a)(5). Subsequently, the government must prove that the individual subject to the proceedings is sexually dangerous to others. Id. § 4247(a)(6). The government must prove both prongs by clear and convincing evidence. Id. § 4248(d); see also Comstock, 507 F. Supp. 2d at 555 (holding clear and convincing evidence standard of proof for determination of sexual dangerousness acceptable). The course, however, found the clear and convincing evidence standard, as applied to the first prong—whether the individual is a sexually dangerous person—was an unconstitutional deprivation of due process because the first prong is a purely factual question that is not plagued by the uncertainty of psychological and psychiatric diagnoses. See Comstock, 507 F. Supp. 2d at 551-54; see also Carta, 592 F.3d at 42 (discussing standard of proof issues). The Carta court ruled, pursuant to Addington, that determinations of future dangerousness only require the government to meet the clear and convincing evidence standard. 592 F.3d at 42; see also Shields, 522 F. Supp. 2d at 331 (holding clear and convincing evidence standard acceptable for proof of sexual dangerousness). The Shields court, however, argued that the beyond a reasonable doubt standard should apply to the first prong, whether the individual had “engaged or attempted to engage in sexually violent conduct or child molestation.” 522 F. Supp. 2d at 330 (quoting 18 U.S.C. § 4247(a)(5)) (internal quotation marks omitted).

92. See Carta, 503 F. Supp. 2d at 409-10 (ruling Adam Walsh Act does not violate due process rights). Focusing on the statute’s placement near other civil-commitment statutes, the court ruled that the statute was a civil provision, not a criminal punishment, as defendants contended, and as such, did not violate the Double Jeopardy Clause of the Fifth Amendment. Id.; see also Abregana, 574 F. Supp. 2d at 1135 (denying double jeopardy and ex post facto claims).

93. See United States v. Shields, 522 F. Supp. 2d 317, 340 (D. Mass. 2007). The court rejected defendants’ equal protection claims, reasoning “sexually dangerous persons in the custody of the federal government are not similarly situated to sexually dangerous persons not charged with a federal crime or serving a federal sentence.” Id. at 341; see also United States v. Carta, 503 F. Supp. 2d 405, 408 (D. Mass. 2007) (denying equal protection claims), aff’d in part, rev’d in part 592 F.2d 34 (1st Cir. 2010).
1. The Necessary and Proper Clause

The Necessary and Proper Clause of the United States Constitution states: “Congress shall have the power to . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

The Supreme Court examined the clause for the first time in *McCulloch v. Maryland*. In response to a challenge attacking Congress’s authority to create a national bank, the Court held that the Necessary and Proper Clause permits Congress to legislate in furtherance of its enumerated powers, so long as the means bear a reasonable relationship to the intended end. The Court broadened its original construction of the Necessary and Proper Clause during the twentieth century, particularly with respect to legislation promulgated under the Commerce Clause. In the last decade, the Court expanded its interpretation even further, ruling that a strict link between the enumerated power and congressional action is not necessary.

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94. U.S. Const. art. I, § 8, cl. 18; see also United States v. Morrison, 529 U.S. 598, 607 (2000) (discussing Congress’s limited powers). The Court in *Morrison* stated, “Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.” 529 U.S. at 607.

95. 17 U.S. (4 Wheat.) 316, 420 (1819).

96. Id. at 421. The Court stated, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” Id. The Court in *McCulloch* described the Necessary and Proper Clause as granting “the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.” Id. at 420-21. The Court’s language in *McCulloch* still acts as a reference point for originalists on the Court in determining whether legislation is a proper exercise of Congress’s enumerated powers. See United States v. Comstock, 130 S. Ct. 1949, 1971-73 (2010) (Thomas, J., dissenting) (arguing Court should have used *McCulloch* originalist test in its determination).

97. See United States v. Darby, 312 U.S. 100, 121 (1941). The Court held that the Necessary and Proper Clause authorized Congress to legislate in furtherance of an enumerated power. Id. The Court stated, “Such legislation has often been sustained with respect to powers . . . when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.” Id.; see also Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (calling for broad interpretation of Necessary and Proper Clause to increase Congress’s commerce power); United States v. Wrightwood Dairy Co., 315 U.S. 110, 118-19 (1942) (holding Congress has power to enforce regulations made pursuant to other enumerated power). The Court in *Wrightwood Dairy* held that, while Congress clearly had the authority to regulate milk prices under the Commerce Clause, the Necessary and Proper Clause gave Congress the power to enforce that regulation. See 315 U.S. at 118-19 (holding Congress “possesses every power needed to make that regulation effective”).

98. See Jinks v. Richland Cnty., 538 U.S. 456, 462 (2003). Writing for the majority, Justice Scalia stated, “[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be absolutely necessary to the exercise of an enumerated power.” Id. (internal quotation marks omitted) (holding statute “conducive to . . . due administration of justice” acceptable legislation under Necessary and Proper Clause). In *United States v. Edgar*, the Eleventh Circuit held that Congress may enact legislation under the Necessary and Proper Clause “that bear[s] a rational connection to any of its enumerated powers.” 304 F.3d 1320, 1326 (11th Cir. 2002); see also *Morrison*, 529 U.S. at 608 (stating Court will only strike down legislation if Congress clearly overstepped limits). The Court’s deference to the legislature results in a “presumption of constitutionality.” *Morrison*, 529 U.S. at 608 (articulating respect for judgment of other branches of government). Such deference mirrors the mandate of the *McCulloch* Court.
has read the Necessary and Proper Clause especially broadly with regard to Congress’s ability to establish criminal punishments.\footnote{99}{See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940). The Court in Sunshine Anthracite Coal held, “Congress may impose penalties in aid of the exercise of any of its enumerated powers.”} \footnote{100}{See supra note 89 and accompanying text (discussing various courts’ approaches to Necessary and Proper Clause challenges).} Lower courts disagreed over whether the Adam Walsh Act was an impermissible extension of Congress’s power under the Necessary and Proper Clause.\footnote{101}{See United States v. Tom, 565 F.3d 497, 502 (8th Cir. 2009). The court reasoned that Title 18 of the United States Code contains many criminal statutes proscribing activities that Congress has the ability to regulate pursuant to its enumerated powers, and that the Necessary and Proper Clause gives Congress the ability to punish or incapacitate those who violate such provisions. See id. at 502-03. The court concluded that the “federal criminal law would be frustrated without the related civil commitment provision,” due to the fact that the person subject to the proceedings is in such a position because he is dangerous to society and likely to offend again. \textit{Id.} at 504; see also United States v. Perry, 788 F.2d 100, 111 (3d Cir. 1986) (holding civil commitment necessary to prevent violation of federal law). The court in \textit{Perry} stated, “[B]ecause Congress has the power to proscribe the activities in question, it has the auxiliary authority, under the necessary and proper clause, to resort to civil commitment to prevent their occurrence.” 788 F.2d at 111; see also Sunshine Anthracite Coal Co., 310 U.S. at 393 (“Congress may impose penalties in aid of the exercise of any of its enumerated powers.”).} Courts upholding the Adam Walsh Act as constitutional held that Congress had the authority to criminalize conduct and devise appropriate punishments in furtherance of its enumerated powers, and thus could freely establish a civil-commitment program to prevent dangerous offenders from reoffending.\footnote{102}{See Greenwood v. United States, 350 U.S. 366, 375 (1956) (holding civil commitment of individuals incompetent to stand trial constitutional); Jackson v. Indiana, 406 U.S. 715, 732 (1972) (modifying Greenwood by adding dangerousness requirement); see also United States v. Volungus, 595 F.3d 1, 5-7 (1st Cir. 2010) (analogizing 18 U.S.C. § 4248 to § 4246). The court in \textit{Volungus} ruled that “section 4248 is simply a specific application of section 4246, designed to forestall dangers presented by those who do not necessarily meet the criteria for commitment under \ldots section 4246.” 595 F.3d at 7. The court also held that the civil-commitment provision was permissible as a result of the duty of care owed to individuals in the custody of the federal government and to the public as a whole, as civil commitment protects both the safety of the community and public health.”}

Additionally, many courts cited \textit{Greenwood}, reasoning that the federal government’s authority to civilly commit mentally ill individuals had already been confirmed, and that the Adam Walsh Act reflected only a minimal extension of that power.\footnote{102}{See supra note 89 and accompanying text (discussing various courts’ approaches to Necessary and Proper Clause challenges).} Courts upholding the Adam Walsh Act universally

\[\text{We think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.}\]


\footnote{99}{See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940). The Court in Sunshine Anthracite Coal held, “Congress may impose penalties in aid of the exercise of any of its enumerated powers.”}
concluded that the exercise of such authority under the Necessary and Proper Clause presented no federalism issues, characterizing the Act as sufficiently respectful of states’ sovereign powers.\textsuperscript{103} Other courts, however, held that the nexus between civil commitment of dangerous sex offenders was too far removed from Congress’s enumerated powers to be considered constitutional under the Necessary and Proper Clause.\textsuperscript{104} Many of these courts also held that the Act violated basic principles of federalism by directly interfering with states’ right to care for the health, safety, and wellness of their respective citizenries under the police power.\textsuperscript{105}

\section*{2. The Commerce Clause}

The Supreme Court’s construction of the Commerce Clause has changed dramatically over the course of the twentieth century.\textsuperscript{106} While the New Deal era Court tended toward a broad reading of the Commerce Clause, recent Courts have consistently read the Clause as permitting regulation of fewer

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\bibitem{103} See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (setting forth test for legislation promulgated under Necessary and Proper Clause). The Court held that legislation must “consist with the letter and spirit of the constitution.” \textit{Id.; see also Volungus}, 595 F.3d at 8-9 (denying civil-commitment provision interferes with state sovereignty). The court in \textit{Volungus} argued that § 4248 is sufficiently deferential to state interests: “[S]ection 4248 defers to state custody whenever possible. Its commitment scheme operates as a gap-filler in which states either cannot or do not wish to assume responsibility for sexually dangerous persons in federal custody.” \textit{Id. at 10} (addressing dual sovereignty concerns); \textit{see also Tom}, 565 F.3d at 507-08 (holding § 4248 does not interfere with state sovereignty). The \textit{Tom} court pointed out that the civil-commitment provision “express[es] a preference for state custody of civilly committed individuals,” and acts as a “stop gap” to ensure that dangerous sex offenders are not released into the community simply because they are in federal custody as opposed to state custody. \textit{565 F.3d at 507-08} (explaining why Adam Walsh Act does not implicate federalism concerns); \textit{see also Shields}, 522 F. Supp. 2d at 328 (holding § 4248 designed to prevent release of dangerous individuals in federal custody).

\bibitem{104} See United States v. Comstock, 551 F.3d 274, 281 (4th Cir. 2009), rev’d, 130 S. Ct. 1949 (2010). The court held that while the United States may have the power to enact criminal laws, prosecute those who violate them, and create appropriate punishments, the United States does not have the authority to detain individuals further once the offender has completed his prison sentence, as Congress does not have the enumerated authority to regulate future conduct that occurs outside its custody. \textit{See id.; see also United States v. Wilkinson}, 626 F. Supp. 2d 184, 187 (D. Mass. 2009) (holding link between enumerated power and exercised power too remote). The court in \textit{Wilkinson} argued the power to operate a penal system is itself a power implied through the Necessary and Proper Clause, not a power expressly granted to Congress in the text of the Constitution. \textit{626 F. Supp. 2d at 187}. The court continued, reasoning that the power to civilly commit is derived from an already implied power, making the link between Congress’s legislation and its existing power too remote. \textit{See id. But see Volungus}, 595 F.3d at 7 (arguing certificate filed while prisoner still serving sentence). Because the certificates are filed while the prisoners are still in the custody of the Bureau of Prisons, the federal government still maintains a custodial duty over them, and is therefore responsible for their care. \textit{See id.}


\bibitem{106} \textit{See infra} note 107 and accompanying text (describing various interpretations of to Commerce Clause power throughout American history).
activities. Presently, the Court recognizes three distinct categories of commerce over which Congress has plenary regulatory power: the channels of interstate commerce, the instrumentalities of interstate commerce, and any intrastate activity that substantially affects interstate commerce. While the majority opinion in the most recent major Commerce Clause case, *Gonzales v. Raich,* echoed the Rehnquist Court’s decisions, Justice Scalia, in his concurring opinion, stated that Congress may regulate more than just the three basic categories discussed by the majority. Justice Scalia argued:

107. See U.S. Const. art. I, § 8, cl. 3. During the New Deal Era, the Court dramatically expanded its interpretation of the Commerce Clause, holding the Commerce Clause provides Congress with the authority to legislate regarding issues such as labor laws and minimum wage. See United States v. Darby, 312 U.S. 100, 122 (1941) (holding Congress may regulate minimum wage and maximum hours under commerce power); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38-39 (1937) (holding Congress may regulate labor laws under commerce power). During the 1960s, the Commerce Clause was used to justify legislation passed as a means to enforce civil-rights laws. See Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (holding Commerce Clause allows Congress to prevent racially discriminatory hotel practices); Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (using Commerce Clause authority to prevent racially discriminatory restaurant practices). Subsequently, the Supreme Court curtailed the broad commerce power by striking down certain legislative measures, holding that the laws impermissibly interfered with intrastate affairs. See United States v. Lopez, 514 U.S. 549, 567-68 (1995) (holding regulation of firearms in public schools beyond Congress’s commerce power); see also United States v. Morrison, 529 U.S. 598, 613 (2000) (ruling Congress could not regulate gender-motivated violence because not economic activity).

108. See *Lopez,* 514 U.S. at 558-59. In *Lopez,* the Court held that Congress did not have the power to pass the Gun-Free School Zones Act of 1990, because the presence of guns in public schools was not activity that substantially affected interstate commerce. See *id.* at 567. The Court rejected the government’s arguments that the “costs of crime” had a measurable effect on interstate commerce, stating that the argument amounted to an attenuated inferential chain and would lead to an almost limitless police power. See *id.* at 563-68. In *Morrison,* the Court ruled that a provision of the Violence Against Women Act (VAWA) creating a civil remedy for victims of sexual violence was an unconstitutional exercise of Congress’s commerce power. See *id.* at 617. The Court held, “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Id.* The Court recognized Congress’s findings regarding the significant effect violence against women had on families, communities, and the marketplace, but disregarded these findings, arguing “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.” *Id.* at 614; *see also* *Gonzales,* 545 U.S. 1, 16-17 (2005) (recognizing three distinct categories of commerce Congress may regulate). The Court in *Gonzales* held that, pursuant to the Controlled Substance Act promulgated under the Commerce Clause, California residents prescribed medical marijuana could not grow the marijuana in their own homes, because there was an illegal market nationwide for marijuana and the intrastate production of an illegal substance, in the aggregate, could substantially affect interstate commerce. See *id.* at 19.


110. See *id.* at 36-38 (Scalia, J., concurring) (arguing Congress has another power to regulate commerce apart from three well-established categories). Justice Scalia cited the Necessary and Proper Clause and argued that while Congress may not regulate purely intrastate activity, “as such,” under the Necessary and Proper Clause, Congress has the power to make effective regulations of interstate commerce, “although intrastate transactions . . . may thereby be controlled.” *Id.* at 36-38 (quoting *Shreveport Rate Cases,* 234 U.S. 317, 353 (1914)) (internal quotation marks omitted) (discussing implications of Necessary and Proper Clause on Commerce Clause). Justice Scalia acknowledged that congressional authority to regulate intrastate activities that substantially affect interstate commerce may overlap with congressional power to make a regulation of interstate commerce effective, but argued that “the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not
The category of ‘activities that substantially affect interstate commerce’ is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.  

Lower courts have reached opposing conclusions regarding Congress’s ability to enact the Adam Walsh Act under the Commerce Clause. Relying heavily on Justice Scalia’s concurring opinion in *Raich*, many courts ruled in favor of the United States, reasoning that civil commitment of sex offenders was necessary to ensure the continued function of a broader regulatory scheme. Certain advocates purported that the civil-commitment provision of the Adam Walsh Act contained a jurisdictional limit, as it only applied to federal prisoners, and therefore was within Congress’s power to control.

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111. *Id.* at 34-35. Justice Scalia recognized the Court’s limitation in *Lopez* and *Morrison* on Congress’s ability to regulate intrastate commerce, but stated that the Court implicitly acknowledged in *Lopez* that Congress may “enact laws necessary and proper for the regulation of interstate commerce,” and that this power “is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.” *Id.* at 36.

112. See *supra* note 90 and accompanying text (describing lower court decisions regarding Congress’s power to enact Adam Walsh Act under Commerce Clause).

113. See United States v. Tom, 565 F.3d 497, 504-06 (8th Cir. 2009) (ruling Congress has authority under Commerce Clause to promulgate civil-commitment legislation). The court in *Tom* reasoned that the violation of a “statute making it illegal to cross state lines with intent to engage in a sexual act with a minor” was within Congress’s Commerce Clause power to regulate and punish. *Id.* at 498. The court reasoned that the civil commitment of the defendant, who had been certified as sexually dangerous pursuant to § 4248, was “necessary and proper to the functioning of federal criminal laws.” *Id.* at 504. The court then concluded that, because the civil-commitment provision of the Adam Walsh Act was necessary to enforce a regulation of interstate commerce, the provision was properly promulgated under the Commerce Clause. *Id.* at 504-05. The *Tom* court reasoned, “[L]egislation is sustained ‘when the means chosen, although not themselves within the granted power, [are] nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.’” *Id.* (quoting United States v. Darby, 312 U.S. 100, 121 (1941)); see also United States v. Abregana, 574 F. Supp. 2d 1123, 1130 (D. Haw. 2008) (arguing Congress may regulate commerce to extent necessary to broader regulatory scheme); United States v. Shields, 522 F. Supp. 2d 317, 328 (D. Mass. 2007) (concluding Congress has authority under Commerce Clause and Necessary and Proper Clause to commit defendant).

114. See Brief for the States of Kansas et al. as Amici Curiae in Support of Petitioner at 11-12, United States v. Comstock, 130 S. Ct. 1949 (2010) (No. 08-1224), 2009 WL 2896311 (arguing provision implicates federal interests only). The State of Kansas, writing as Amicus Curiae to the United States, argued that the civil-commitment provision is a valid exercise of Congress’ power under the Commerce Clause and its plenary power over federal territories, because the federal program is rationally related to reducing crimes against undisputed federal interests, by providing long term care and treatment for a particular class of
Advocates also invoked the logic of \textit{Raich}, arguing that, with respect to child pornography, even small additions to the illegal market affect the interstate market, and, as such, those deemed sexually dangerous and likely to reoffend should be committed to prevent almost certain contribution to the illegal market.\footnote{See \textit{id.} at 11-12 (analogizing issue of illegal child pornography market to \textit{Raich} rationale). The Kansas brief also argues that sexually dangerous individuals, if released, are only a “click of a computer mouse . . . away from committing future federal sex offenses.” \textit{Id.} The Court in \textit{Raich} relied extensively on \textit{Wickard v. Filburn}, ruling that even miniscule additions to an illegal or controlled market can substantially affect interstate commerce, when considered in the aggregate. \textit{See Gonzales v. Raich, 545 U.S. 1, 18-19 (2005)\textup{(explaining effect of \textit{Wickard} on analysis)}; see also \textit{Wickard v. Filburn, 317 U.S. 11 (1942)\textup{(articulating rationale that additions, in aggregate, substantially affect interstate commerce)}}. The State of Kansas argued that Congress has the power to regulate sexually dangerous persons’ actions due to the likelihood that they will reoffend by engaging in the market for child pornography. \textit{See Brief for the States of Kansas, supra note 114, at 12\textup{(explaining illegal-markets argument); see also \textit{Mahan, supra note 1, at 130\textup{(arguing statute’s application to federal prisoners places it within Congress’s plenary power)}}. \textit{Mahan} argued that \textit{Raich} modified \textit{Morrison}, and, as such, Congress was authorized to institute civil-commitment proceedings against federal prisoners, because preventing sexually dangerous individuals from committing further crimes is necessary to enforce a broader regulatory scheme that proscribes sex offenses against minors. \textit{See \textit{Mahan, supra note 1, at 130\textup{(arguing Congress has power under Commerce Clause to create civil-commitment provision)}}. \textit{Mahan} further argued that even if the logic of \textit{Morrison} controls, the statute still contains a “requisite jurisdictional limitation,” and, as such, renders the program a proper exercise of Congress’s power under the Commerce Clause. \textit{Id.}}\textup{(detailing lower courts’ decisions on Adam Walsh Act regarding commerce power).}}\footnote{See United States v. Comstock, 551 F.3d 274, 279-80 (4th Cir. 2009)\textup{(holding \textit{Lopez} and \textit{Morrison} foreclose Commerce Clause argument), rev’d, 130 S. Ct. 1949 (2010). The Fourth Circuit considered the three categories of commerce discussed in \textit{Lopez}, and held that the only possible category the civil-commitment procedure could fall under was an activity with substantial effects on interstate commerce. \textit{See id.} at 279. Following the Supreme Court’s decision in \textit{Morrison}, which held that gender-motivated violence is not an activity substantially affecting interstate commerce, the Fourth Circuit in \textit{Comstock} concluded that sexual violence against minors likewise did not substantially affect interstate commerce. \textit{See Comstock, 551 F.3d at 279; see also United States v. Morrison, 529 U.S. 598, 613 (2000)\textup{(holding violence against women not economic activity)}; United States v. Wilkinson, 626 F. Supp. 2d 184, 189-90 (D. Mass. 2009)\textup{(arguing Adam Walsh Act beyond Congress’s power to regulate)}; Brief for Respondents at 34, United States v. Comstock, 130 S. Ct. 1949 (2010)\textup{(No. 08-1224), 2009 WL 3453655\textup{(arguing Adam Walsh Act attempts to destroy distinction between national and local realms of regulation)}}.}}\footnote{See \textit{Morrison}, 529 U.S. at 613-15\textup{(denying sexual violence against women economic activity substantially affecting interstate commerce)}; \textit{Comstock, 551 F.3d at 279\textup{(holding \textit{Morrison} preempts argument}}

Other courts took a significantly narrower view on the issue.\footnote{See \textit{supra note 90 and accompanying text (detailing lower courts’ decisions on Adam Walsh Act regarding commerce power).}} Many of the courts denying Congress’s power to grant the federal government civil-commitment powers cited the Supreme Court’s decisions in \textit{Lopez} and \textit{Morrison}, reasoning that the civil-commitment provision of the Adam Walsh Act did not fit into any of the categories of commerce the Constitution has authorized Congress to regulate.\footnote{See United States v. Comstock, 551 F.3d 274, 279-80 (4th Cir. 2009)\textup{(holding \textit{Lopez} and \textit{Morrison} foreclose Commerce Clause argument), rev’d, 130 S. Ct. 1949 (2010). The Fourth Circuit considered the three categories of commerce discussed in \textit{Lopez}, and held that the only possible category the civil-commitment procedure could fall under was an activity with substantial effects on interstate commerce. \textit{See id.} at 279. Following the Supreme Court’s decision in \textit{Morrison}, which held that gender-motivated violence is not an activity substantially affecting interstate commerce, the Fourth Circuit in \textit{Comstock} concluded that sexual violence against minors likewise did not substantially affect interstate commerce. \textit{See Comstock, 551 F.3d at 279; see also United States v. Morrison, 529 U.S. 598, 613 (2000)\textup{(holding violence against women not economic activity)}; United States v. Wilkinson, 626 F. Supp. 2d 184, 189-90 (D. Mass. 2009)\textup{(arguing Adam Walsh Act beyond Congress’s power to regulate)}; Brief for Respondents at 34, United States v. Comstock, 130 S. Ct. 1949 (2010)\textup{(No. 08-1224), 2009 WL 3453655\textup{(arguing Adam Walsh Act attempts to destroy distinction between national and local realms of regulation)}.}} In particular, courts pointed to \textit{Morrison}’s express holding that sexual violence does not substantially affect interstate commerce as support for their reasoning.\footnote{See \textit{United States v. Comstock, 551 F.3d 274, 279-80 (4th Cir. 2009)\textup{(holding \textit{Lopez} and \textit{Morrison} foreclose Commerce Clause argument), rev’d, 130 S. Ct. 1949 (2010). The Fourth Circuit considered the three categories of commerce discussed in \textit{Lopez}, and held that the only possible category the civil-commitment procedure could fall under was an activity with substantial effects on interstate commerce. \textit{See id.} at 279. Following the Supreme Court’s decision in \textit{Morrison}, which held that gender-motivated violence is not an activity substantially affecting interstate commerce, the Fourth Circuit in \textit{Comstock} concluded that sexual violence against minors likewise did not substantially affect interstate commerce. \textit{See Comstock, 551 F.3d at 279; see also United States v. Morrison, 529 U.S. 598, 613 (2000)\textup{(holding violence against women not economic activity)}; United States v. Wilkinson, 626 F. Supp. 2d 184, 189-90 (D. Mass. 2009)\textup{(arguing Adam Walsh Act beyond Congress’s power to regulate)}; Brief for Respondents at 34, United States v. Comstock, 130 S. Ct. 1949 (2010)\textup{(No. 08-1224), 2009 WL 3453655\textup{(arguing Adam Walsh Act attempts to destroy distinction between national and local realms of regulation)}}.}} Finally, opponents of the Act
denied that Raich could be interpreted as a modification of the strict interpretation of the Commerce Clause advocated in Morrison and Lopez, thus precluding Congress from passing legislation concerning the civil commitment of sex offenders.\textsuperscript{119}

3. Due Process, Double Jeopardy, and Ex Post Facto Challenges

Beginning with the advent of state civil-commitment statutes in the mid-twentieth century, individuals subject to civil-commitment proceedings have challenged the provisions as deprivations of due process with limited success.\textsuperscript{120} The Supreme Court recognized the dangers to liberty posed by civil commitment, but ruled that both states and the federal government may civilly commit particular classes of individuals, provided certain conditions are fulfilled.\textsuperscript{121} One of the most commonly challenged components of civil-commitment statutes is that Congress can regulate sexual violence under Commerce Clause); United States v. Comstock, 507 F. Supp. 2d 522, 534 (E.D.N.C. 2007) (citing Morrison, arguing sexual violence not subject to regulation under Commerce Clause), aff’d, 551 F.3d 274 (4th Cir. 2009), rev’d, 130 S. Ct. 1949 (2010); Brief for Respondents, supra note 117, at 32-33 (citing Morrison as limiting Congress’s ability to legislate over sexual violence). The Respondents argued that Comstock was even further removed from Morrison, in that Congress had made numerous findings regarding the effect of violence against women on interstate commerce, whereas Congress, in passing the Adam Walsh Act, had made none. See Brief for Respondents, supra note 117, at 32-33 (attacking Congress’s power to pass Adam Walsh Act); see also Emily Eschenback Barker, Note, The Adam Walsh Act: Un-Civil Commitment, 37 HASTINGS CONST. L.Q. 141, 149-50 (2009) (arguing Supreme Court’s decision in Morrison precludes Commerce Clause argument).

\textsuperscript{119} See Wilkinson, 626 F. Supp. 2d at 191-92 (arguing Raich not controlling because § 4248 not necessary to broader regulatory scheme). The Wilkinson court reasoned that the regulation in Raich was proper because failure to regulate the drug market could directly undercut Congress’s efforts under the Controlled Substances Act to eliminate the sale and use of illegal drugs. See id. The Wilkinson court did not find the existence of federal statutes prohibiting the possession, sale, or transfer of child pornography and federal statutes prohibiting the trafficking or transporting of minors across state lines for the purpose of sexual activity persuasive, arguing that the text of the Adam Walsh Act contained no findings that such statutes “would be undercut without the power to commit provided by the Act.” See id. at 192; see also 18 U.S.C. § 1591 (2006) (criminalizing sex trafficking of children); 18 U.S.C. § 2252 (criminalizing possession, production, and distribution of child pornography); Barker, supra note 118, at 151 (arguing Raich does not affect determination of Adam Walsh Act’s constitutionality under Commerce Clause).


\textsuperscript{121} See Addington, 441 U.S. at 425. The Court stated, “[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Id.; see also Kansas v. Crane, 534 U.S. 407, 412 (2002) (allowing states to commit dangerous sex offenders if some lack of control over behavior shown); Jackson, 406 U.S. at 731-32 (holding federal civil commitment of mentally ill constitutional if individual dangerous to others); Greenwood v. United States, 350 U.S. 366, 375 (1956) (holding federal government may civilly commit mentally ill prisoners).
commitment statutes is the use of the clear and convincing standard of proof.\textsuperscript{122} The Supreme Court held, however, that the clear and convincing evidence standard is appropriate for sexual-dangerousness determinations.\textsuperscript{123} The Court reasoned that the psychological and psychiatric standards that form the basis for sexual-dangerousness determinations are constantly evolving and vary in application from person to person, and therefore concluded, “The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations.”\textsuperscript{124} The Supreme Court has also rejected claims that civil-commitment statutes violate the Double Jeopardy Clause and the Ex Post Facto Clause of the United States Constitution.\textsuperscript{125}

Individuals subject to civil-commitment proceedings under the Adam Walsh Act have almost universally attacked the Act as a deprivation of due process with varying degrees of success.\textsuperscript{126} Double jeopardy and ex post facto challenges were rejected, with many courts relying on the Supreme Court’s language in \textit{Kansas v. Hendricks} as a basis for their reasoning.\textsuperscript{127} The standard

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\item \textsuperscript{122} See supra note 91 and accompanying text (discussing due process challenges to Act).
\item \textsuperscript{123} See Addington, 441 U.S. at 431-33. The Court held that an intermediate standard of proof was appropriate because it guaranteed the defendant greater protection than the preponderance of evidence standard, which was necessary in light of the fact that his liberty interest was at risk; however, the Court held the beyond a reasonable doubt standard was unnecessary because it placed an unfairly high burden on the government. See id. at 427-33; see also supra note 36 and accompanying text (further explaining clear and convincing evidence standard).
\item \textsuperscript{124} See Addington, 441 U.S. at 430 (explaining unique characteristics of psychological evidence meriting alternative standard of proof).
\item \textsuperscript{125} See U.S. CONST. amend. V. The Double Jeopardy Clause states that “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” \textit{Id.} The Ex Post Facto Clause states, “No Bill of Attainder or ex post facto law shall be passed.” U.S. CONST. art. I, § 9, cl. 3; see also Hendricks, 521 U.S. at 360-71 (denying defendant’s double jeopardy and ex post facto claims). The Court examined the Kansas SVP Act and concluded that it encompassed none of the traditional goals of criminal punishment. Hendricks, 521 U.S. at 361-62. In conjunction with the statute’s nonpunitive goals, the statute was placed among other civil provisions. \textit{Id.} at 361 (noting statute’s placement in Kansas probate code, not in criminal code). Therefore, the Court concluded that the statute did not violate the Double Jeopardy Clause, as it was not a criminal statute and was not intended as a punitive measure. \textit{Id.} at 369; see also supra notes 48-50 and accompanying text (explaining holding of Hendricks Court).
\item \textsuperscript{126} See supra note 92 and accompanying text (describing lower courts’ dispositions regarding due process challenges).
\item \textsuperscript{127} See United States v. Shields, 522 F. Supp. 2d 317, 337-38 (D. Mass. 2007) (characterizing Adam Walsh Act as civil, not criminal, proceeding). The \textit{Shields} court cited \textit{Hendricks}, stating that the Supreme Court had characterized civil-commitment provisions for sexually dangerous persons as noncriminal. \textit{Id.} The court acknowledged the Act’s placement in the United States criminal code, but argued that such placement was not dispositive because the civil-commitment provision was codified alongside other civil-commitment provisions. \textit{Id.} at 337; see also United States v. Coho, No. 09-CV-754, 2009 WL 3156739, at *8 (D.N.M. Sept. 18, 2009) (denying double jeopardy and ex post facto claims); United States v. Abregana, 574 F. Supp. 2d 1123, 1134 (D. Haw. 2008) (ruuling § 4248 noncriminal and denying double jeopardy and ex post facto claims). The \textit{Shields} court also held that the Adam Walsh Act’s civil-commitment provision does not implicate any of the traditional goals of punishment and therefore it is unlikely that it was intended as a punitive measure. See 522 F. Supp. 2d at 338; see also United States v. Carta, 503 F. Supp. 2d 405, 409-10 (D. Mass. 2007) (construing § 4248 as civil statute and holding Double Jeopardy Clause not implicated), aff’d in part, rev’d in part, 592 F.3d 34 (1st Cir. 2010).
of proof, however, has proved to be a much more difficult question. Defendants have claimed that the clear and convincing standard of proof used to determine whether the individual has engaged in past crimes of sexual violence or child molestation is a deprivation of due process, because the Adam Walsh Act does not require the individual subject to commitment to have been convicted of a sex offense in the past. Rather, the reviewing court must determine, based on clear and convincing evidence, whether the individual “has engaged . . . in sexually violent conduct or child molestation.” Courts have dealt with standard of proof challenges in different ways, but many have concluded that a higher standard than clear and convincing evidence should be applied to the first prong of the determination. Recognizing that persons subject to the Act’s proceedings faced a complete loss of liberty, certain courts cited In re Winship, where the Supreme Court extended due process protections to juveniles in delinquency proceedings, despite the noncriminal nature of those proceedings. Courts ruling that a heightened burden of proof...
was necessary to comport with the requirements of the Due Process Clause reasoned that, based on the fact that defendants faced loss of a fundamental right, due process required that the beyond a reasonable doubt standard apply to the factual determination prong. 134 Other courts disagreed, holding that the clear and convincing evidence standard did not impact defendants’ rights under the Due Process Clause, while many courts avoided the issue altogether. 135

4. Equal Protection Challenges

Equal protection challenges to civil-commitment statutes have been common throughout the history of civil-commitment legislation. 136 The Equal Protection Clause of the Fourteenth Amendment expressly prohibits state governments from treating similarly situated individuals differently on the basis of certain traits or characteristics, but the Supreme Court has also imposed such prohibitions on the federal government through the Due Process Clause of the Fifth Amendment. 137 Although certain statutory classifications are routinely viewed as suspect, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” 138 Despite the Supreme Court’s holding that “freedom from physical


135. See United States v. Coho, No. 09-CV-754, 2009 WL 3156739, at *6 (D.N.M. Sept. 18, 2009) (refusing to find due process violation). The court in Coho concluded the clear and convincing evidence standard did not violate due process, because the Supreme Court has never required that a person first be convicted of a crime in order to be subject to civil commitment. Id. Furthermore, the court has upheld similar statutes that required the government to prove sexual dangerousness, similar to the Adam Walsh Act’s requirement. See id. (finding Adam Walsh Act satisfies due process); see also Carta, 592 F.3d at 43 (declining to address due process issue as defendant conceded prior acts of child molestation); United States v. Abregana, 574 F. Supp. 2d 1123, 1136 (D. Haw. 2008) (declining to address due process question because defendant had federal and state convictions for sex crimes against minors); United States v. Dowell, No. CIV-06-1216 2007 WL 5361304, at *8 (W.D. Okla. Dec. 5, 2007) (declining to address due process challenge because past conviction not disputed issue of fact).

136. See Baxstrom v. Herold, 383 U.S. 107, 114-15 & n.5 (1966) (upholding insane defendant’s equal protection claim). The State of New York committed the defendant to a civil hospital under the jurisdiction of the Department of Mental Hygiene without according him a jury trial or any type of impartial review. Id. at 109-10. The Court held that the defendant’s rights to equal protection of law were violated because all other individuals civilly committed were afforded a hearing to determine sanity. Id. at 110; see also infra notes 143-144 and accompanying text (discussing equal protection challenges to Adam Walsh Act).

137. See U.S. CONST. amend. XIV, § 1. The Equal Protection Clause states, in pertinent part, “[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Id.; U.S. CONST. amend V; see also Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981) (stating Equal Protection Clause repeatedly held to restrict federal government through Fifth Amendment).

138. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining standards of scrutiny for equal protection claims). The Cleburne Court ruled that all equal protection claims should be reviewed using the rational basis standard unless the statute classified individuals on the basis of race, alienage, national origin, or gender, all of which warrant a higher standard of review. Id. at 440-42. The Court also stated that heightened scrutiny is necessary when the classification “impinge[s] on personal rights protected by the Constitution.” Id. at 440.
“restraint” is a fundamental right of all citizens, the Court, in *Jones v. United States*,139 held that rational basis review is the standard of scrutiny to be used in civil-commitment proceedings.140 Subsequent challenges to civil-commitment provisions as violations of equal protection have been denied.141 Various individuals subject to civil-commitment proceedings under the Adam Walsh Act also challenged the Act as a violation of the Equal Protection Clause.142 Petitioners alleged the civil-commitment provision of the Adam Walsh Act created an improper classification, thus denying equal protection to those similarly situated.143 The lower courts overwhelmingly rejected such claims.144


140. See id. at 363 n.10; Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (arguing freedom from physical restraint a fundamental right); see also United States v. Weed, 389 F.3d 1060, 1071 (10th Cir. 2004) (recognizing rational basis review applies to nonsuspect classes such as insanity acquitees).

141. See United States v. Sahhar, 917 F.2d 1197, 1203 (9th Cir. 1990) (denying petitioner’s claim that § 4246 violated Equal Protection Clause). Sahhar argued that § 4246 created a distinction among those who were dangerous to others as a result of mental illness: those who have not been charged with a federal crime were not eligible for civil commitment under § 4246, whereas persons who have been charged with federal crimes were. See id. at 1200-02. The court stated that “the government routinely may classify persons on the basis of their status as criminal defendants,” noting that criminal defendants may be searched, held without bail, or interrogated. Id. at 1201. The court held that the government had a compelling interest in protecting society from “those charged with crimes,” and denied the petitioner’s equal protection argument. Id. at 1201-03; see also United States v. Perry, 788 F.2d 100, 116 (3d Cir. 1986) (holding dangerous individuals not a suspect classification).

142. See supra note 93 and accompanying text (summarizing challenges to Act under Equal Protection Clause).

143. See United States v. Carta, 592 F.3d 34, 44 (1st Cir. 2010). The petitioner in *Carta* argued that the Adam Walsh Act created a classification among sexually dangerous individuals—those in federal custody and those not in federal custody—and that the classification bears no “rational relationship to the government purpose of incapacitating ‘sexually dangerous’ individuals.” Id.; see also United States v. Coho, No. 09-CV-754, 2009 WL 3156739, at *7 (D.N.M. Sept. 18, 2009) (setting forth defendant’s claims). The defendant in *Coho* argued that the statute was overinclusive and failed rational basis review because it failed to protect the public from all sexually dangerous predators, the statute’s articulated goal. *Coho*, 2009 WL 3156739, at *7; see also United States v. Shields, 522 F. Supp. 2d 317, 340 (D. Mass. 2007). The defendant in *Shields* argued strict scrutiny should be applied, and that the statute created an impermissible classification among mentally ill federal prisoners. 522 F. Supp. 2d at 340.

144. See *Carta*, 592 F.3d at 44 (rejecting petitioner’s equal protection claims). The court stated that the federal government did not have custody or control over the remainder of sexually dangerous individuals and therefore the statute did not create a classification. *Id.; see also Coho*, 2009 WL 3156739, at *7 (rejecting petitioner’s equal protection claims). The court in *Coho* rejected the defendant’s claims, stating that persons subject to civil-commitment hearings are members of a nonsuspect class entitled only to rational basis review, and concluded that the statute bears a rational relationship to the legitimate government purpose of protecting the public from demonstrably dangerous sex offenders. *Coho*, 2009 WL 3156739, at *7; see also *Shields*, 522 F. Supp. 2d at 340-41 (rejecting defendant’s equal protection claims). The *Shields* court refused to consider the class of civil committees a suspect class, stating that sexually dangerous persons in the custody of the federal government are not similarly situated to sexually dangerous persons who are not in federal custody or not charged with a federal crime, and, applying rational basis, concluded that the statute was proper, as there was a rational connection between those who have committed a sexually violent act and dangerousness. See 522 F. Supp. 2d at 340-41.
D. United States v. Comstock: Constitutionality Resolved?

The divergent decisions regarding the Adam Walsh Act’s constitutionality resulted in a split between the Fourth Circuit and the First and Eighth Circuits. The Supreme Court granted certiorari in United States v. Comstock to determine whether the federal government has the authority under Article I of the United States Constitution to enact a civil-commitment provision. The Court ruled that the Constitution grants Congress sufficient authority under the Necessary and Proper Clause to enact such a measure. Choosing not to consider the petitioners’ equal protection or due process challenges, the Court invited the petitioners’ to raise said concerns again on remand.

The Court offered five arguments in support of its decision to uphold the Adam Walsh Act as a proper exercise of legislative power. First, the Court cited the Necessary and Proper Clause, arguing the Clause gives Congress the power to define federal crimes, punish those convicted of such crimes, establish a prison, and provide reasonable care to those within the prison. Citing a variety of cases to support its broad interpretation of the Necessary and Proper Clause, the Court held that there existed a reasonable relationship between the means utilized by the statute and the desired end, as required by McCulloch. Second, the Court pointed to the lengthy legislative history surrounding federal civil commitment of mentally ill individuals, and held that the Adam Walsh Act was a “modest addition” to the preexisting provisions. Third, the Court


148. Id. at 1965. At the outset of the opinion, the Court stated, “[W]e assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances.” Id. at 1956; see also infra Part II.E (discussing disposition of case on remand to Court of Appeals for Fourth Circuit).


150. See Comstock, 130 S. Ct. at 1956-58 (advocating broad interpretation of Necessary and Proper Clause).

151. See id. The Court, citing McCulloch, stated that Congress has a “broad power to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’” Id. at 1956 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819)) (arguing Congress has wide latitude to legislate in furtherance of enumerated powers). Because legislative action does not have to be absolutely necessary to the exercise of an enumerated power, the Comstock Court held that the civil-commitment provision satisfied the second part of the Necessary and Proper test articulated in McCulloch, which requires the legislation to act as a means “rationally related to the implementation of a constitutionally enumerated power.” See Comstock, 130 S. Ct. at 1956 (reviewing McCulloch requirements and arguing for “rational basis” test); see also McCulloch, 17 U.S. (4 Wheat.) at 421 (articulating test for legislation under Necessary and Proper Clause).

152. See United States v. Comstock, 130 S. Ct. 1949, 1958 (2010). The Court thoroughly reviewed the
held that the federal government owes a duty of care to those in its custody as well as to the public, and classified the Adam Walsh Act as a means by which the government could fulfill both duties.\textsuperscript{153} Fourth, the Court held that the Adam Walsh Act “properly account[ed] for state interests,” and therefore did not violate the Tenth Amendment.\textsuperscript{154} Finally, the Court concluded that “the links between § 4248 and an enumerated Article I power are not too attenuated,” and, while offering several examples of legislation passed pursuant to the Necessary and Proper Clause, the Court did not specifically discuss a link between Congress’s enumerated powers and the Adam Walsh civil-commitment provision.\textsuperscript{155}

Justice Kennedy wrote separately, concurring in the judgment but criticizing the majority’s broad reading of the Necessary and Proper Clause, stating that “the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.”\textsuperscript{156} Justice Alito also wrote separately, offering a slightly different argument for the statute’s constitutionality under the Necessary and Proper Clause; Justice Alito concluded that the Act was constitutional because civil commitment was necessary for the continued support of the “federal criminal statutes under which the affected prisoners were convicted.”\textsuperscript{157} Justice Thomas dissented, citing heavily to \textit{McCulloch} and attacking the majority’s reasoning as a radical departure from the originalist

history of federal civil commitment and held that § 4248 was similar to a statute already ruled constitutional—§ 4246. \textit{Id.} at 1958-61.


\textsuperscript{154} See \textit{Comstock}, 130 S. Ct. at 1962-63. The Court reasoned that the statute is sufficiently deferential to state interests because § 4248 requires an attempt to release the committed individual into state custody, and only in the case of a state’s explicit refusal will the individual be placed in a federal facility. \textit{See id.} at 1962.

\textsuperscript{155} \textit{Id.} at 1963. The Court did not discuss the link itself, but rather, cited to a variety of cases decided under the Necessary and Proper Clause. \textit{Id.} (ruling Adam Walsh Act appropriate exercise of congressional power).

\textsuperscript{156} See \textit{id.} at 1966 (Kennedy, J., concurring) (presenting different view of Necessary and Proper Clause). Justice Kennedy found the statute constitutional because it was “a discrete and narrow exercise of authority over a small class of persons already subject to the federal power.” \textit{Id.} at 1968. Justice Kennedy, however, criticized the majority’s expansive interpretation of the Necessary and Proper Clause, arguing that there must be more than a “conceivable rational relation” between the enumerated power and the exercise of that power. \textit{See id.} at 1967 (arguing against majority’s broad interpretation); see also \textit{The Supreme Court, 2009 Term–Leading Cases}, 124 HARV. L. REV. 279, 283 (2010) [hereinafter \textit{The Supreme Court 2009 Term}] (discussing Justice Kennedy’s concurring opinion).

\textsuperscript{157} \textit{See Comstock}, 130 S. Ct. at 1969 (Alito, J., concurring). Justice Alito argued, “Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.” \textit{Id.} at 1970; see also Ilya Somin, \textit{Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power}, 2010 CATO SUP. CT. REV. 239, 246 (2010) (analyzing Justice Alito’s concurring opinion).
Like many of the lower courts, Justice Thomas argued that the Necessary and Proper Clause only provides authority for congressional measures that are necessary and proper to an actual enumerated power of the federal government, not to measures with only a remote link to enumerated powers.\footnote{159}

### E. United States v. Comstock on Remand

The Supreme Court remanded the case to the Court of Appeals for the Fourth Circuit after upholding the statute as a constitutional exercise of Congress’s power under the Necessary and Proper Clause.\footnote{160} Because the Supreme Court refused to hear individual rights challenges, the respondents instead argued that the statute’s clear and convincing evidence standard for the determination of prior criminal acts violated their rights under the Fifth Amendment Due Process Clause.\footnote{161} Respondents based their argument on the Court’s reasoning in \textit{In re Winship}, comparing the loss of liberty and stigmatization resulting from civil commitment to a delinquency adjudication in juvenile court.\footnote{162} Arguing that “‘civil labels and good intentions do not themselves obviate the need for criminal due process safeguards’ where the loss of liberty is ‘comparable in seriousness to a felony prosecution,’” respondents concluded that “due process mandates the application of our most rigorous procedural safeguards.”\footnote{163} The Fourth Circuit rejected respondents’ claims, holding instead that nothing in the language of the Adam Walsh Act required a finding of criminal conduct, but simply a finding of unlawful conduct.\footnote{164} The court further reasoned that \textit{Addington v. Texas} modified the holding in \textit{In re Winship}, drawing a sharp distinction between criminal
prosecutions and civil-commitment proceedings. Because the Adam Walsh Act authorized civil proceedings, there was, pursuant to the Court’s reasoning in Addington, no reason to require a heightened standard of proof. The court dismissed the respondents’ challenge.

III. ANALYSIS

The Adam Walsh Act has inspired a great deal of litigation and commentary, culminating in the Supreme Court’s recent decision regarding the Act’s constitutionality. Several scholars have criticized the Supreme Court’s decision in Comstock, particularly its analysis of the Necessary and Proper Clause, arguing the opinion is vague and fails to present a strong case for constitutionality. Additionally, on remand, the Fourth Circuit held that the Act’s standard of proof did not violate due process, a conclusion that ignores important indications of prior Supreme Court jurisprudence, therefore increasing the possibility that the Act will come before the Supreme Court yet again. The sections that follow will discuss the flaws in the Court’s decision and offer suggestions as to how the Adam Walsh Act could be rationalized on firmer constitutional grounds.

165. See Comstock, 627 F.3d at 520-21 (comparing Court’s reasoning in Addington to its reasoning in Winship). The Fourth Circuit noted that the Supreme Court in Addington rationalized its holding in Winship based on the fact that juvenile delinquency proceedings, while not criminal proceedings, implicated the same “loss of liberty and stigma.” See id. (quoting Addington v. Texas, 441 U.S. 418, 427 (1979). Civil commitments present different concerns than do criminal proceedings. See id. at 521. The Fourth Circuit did not examine the difference between a civil commitment based on “unlawful” conduct and an ordinary civil commitment, but simply concluded that the differences in the proceedings warranted the use of different standards of proof. See id. (concluding respondents misapplied Winship). See generally Alexander Tsesis, Due Process in Civil Commitments, 68 WASH. & LEE L. REV. 253 (2011) (exploring issues arising from variant standard of proof challenges).

166. See Comstock, 627 F.3d at 520-21.


168. See supra notes 89-93 and accompanying text (detailing various challenges brought against Adam Walsh Act).

169. See Somin, supra note 157, at 248-52. Somin argued, “The Necessary and Proper Clause does not give Congress a blank check to adopt any laws that might advance some useful purpose.” Id. at 248. Somin further argued that the majority’s reliance on the power to act as a federal custodian is misplaced, as “there is no independent congressional power to create ‘custodians’ for federal prisoners.” Id. at 249; see also The Supreme Court 2009 Term, supra note 156, at 284 (arguing Comstock Court’s reliance on federal custodial power “questionable”).


171. See infra Parts III.A-D.
A. The Court’s Necessary and Proper Analysis

1. Flawed Reasoning

Chief Justice Marshall’s ruling in *McCulloch* set forth the controlling standard for assessment of congressional action under the Necessary and Proper Clause: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” While the Court quoted extensively from *McCulloch*, it failed to clearly explain the connection between the legitimate end of the Adam Walsh Act, the means by which Congress attempted to effectuate that goal, and the enumerated power from which Congress drew its authority to enact the legislation. Justice Thomas stated in his lengthy dissent that “the Court first inverts, then misapplies *McCulloch*’s straightforward two-part test,” arguing that because the end itself is not rationally related to “carrying into Execution” any enumerated power, any means-ends analysis and consistency with other parts of the Constitution are irrelevant.

The Court rationalized the civil-commitment provisions, in part, based upon the federal government’s ability to act as a federal custodian. However, the Court failed to address the relationship between civil-commitment powers and the federal government’s custodial duty—a power not included in the enumerated powers of the Necessary and Proper Clause. The Court’s failure to link the civil-commitment provision of the Adam Walsh Act to an enumerated power creates a substantial weakness in the strength of the majority’s argument, one that even a long history of civil commitment and appropriate deference to the states cannot ameliorate.

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173. See Shapiro & Burrus, supra note 149, at 420 (“[A] meaningful connection between § 4248 and any enumerated power is noticeably lacking.”).
175. See *Comstock*, 130 S. Ct. at 1961.
176. See id. (arguing federal government has power to act as custodian of federal prisoners). The Court argued, “§ 4248 is ‘reasonably adapted’ to Congress’ power to act as a responsible federal custodian . . . .” Id. (quoting United States v. Darby, 312 U.S. 100, 121 (1941)). The Court, however, did not address the connection between the power to act as a federal custodian of prisoners—so as to protect both the prisoners themselves and the surrounding communities—and an enumerated power. See id. at 1961-62 (discussing government’s power as federal custodian but not discussing associated enumerated power); see also Somin, supra note 157, at 249. Somin argued that “there is no independent congressional power to create ‘custodians’ for federal prisoners.” See Somin, supra note 157, at 249; see also Pursley, supra note 153, at 105 (critiquing Court’s use of federal-custodian rationale).
177. See *Comstock*, 130 S. Ct. at 1972 (Thomas, J., dissenting) (“Unless the end itself is ‘legitimate’ the fit
The Court’s extremely broad interpretation of the Necessary and Proper Clause has wide-reaching implications, far beyond the scope of civil-commitment legislation.\(^{178}\) Scholars have criticized the Court’s opinion as “interpreting the clause as a virtual blank check for Congress to regulate almost any activity it wants.”\(^{179}\) The effect of the Court’s decision and five-part analysis has yet to be determined, but represents a significant departure from traditional Necessary and Proper Clause jurisprudence.\(^{180}\)

2. **Alternative Arguments for Constitutionality Under the Necessary and Proper Clause Are Likewise Insufficient**

Although Justice Alito’s concurring opinion in *Comstock* presents the strongest argument for the constitutionality of the Adam Walsh civil-commitment provision under the Necessary and Proper Clause, it is still constitutionally deficient.\(^{181}\) Congress has broad authority under the Necessary and Proper Clause to prescribe sanctions and punishments for violations of the laws of the United States.\(^{182}\) Justice Alito argued the Necessary and Proper Clause “provides the constitutional authority for most federal criminal statutes” between the means and end is irrelevant.”); Somin, *supra* note 157, at 250 (explaining issue of remote relations between enumerated powers and exercised power). Somin stated:

[L]et us assume that \(A\) is one of Congress’s enumerated powers under the Constitution. Let us also assume that \(B\) is at least sometimes a permissible “necessary and proper” means to the implementation of \(A\). Finally, let us posit that \(C\) is a power that is somehow connected to \(B\). It does not follow from this that Congress has the authority to enact laws that do \(C\) any time there is some connection between \(C\) and \(B\). Indeed, it *does not have* that power in cases where \(C\)’s connection to \(B\) does nothing to facilitate \(A\). Since \(B\) itself is permissible only insofar as it facilitates \(A\), \(C\) is permissible only insofar as its connection to \(B\) assists the latter in a way that helps implement \(A\).

\(^{178}\) See *infra* notes 179-180 and accompanying text (discussing uncertain future implications of *Comstock*’s five-factor test).

\(^{179}\) See Somin, *supra* note 157, at 259 (discussing implications of Court’s reasoning in *Comstock*).

\(^{180}\) See id. at 267 (arguing broad interpretation of Necessary and Proper Clause affects many areas of law). Somin argued that the *Comstock* decision will have implications for the Patient Protection and Affordable Care Act as well as many federal criminal statutes. *Id.*; see also Shapiro & Burrus, *supra* note 149, at 422-25 (exploring ways in which five-factor *Comstock* test could be applied to healthcare challenges).


\(^{182}\) See *Sunshine Anthracite Coal Co. v. Adkins*, 301 U.S. 381, 393 (1940) (“Congress may impose penalties in aid of the exercise of its enumerated powers.”); United States v. *Plotts*, 347 F.3d 873, 878-79 (10th Cir. 2003) (arguing Congress has broad authority in designing punishments and penalties). The court in *Plotts* stated, “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.” 347 F.3d at 878 (quoting *Rodgers v. United States*, 138 F.2d 392, 994-95 (6th Cir. 1943)) (internal quotation marks omitted) (noting broad congressional power to legislate punishment for violations of federal law).
and “§ 4248 . . . is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted.”183 In forming his argument, Justice Alito reasoned, “[I]t is also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems.”184 Because Congress has clear authority under the Necessary and Proper Clause to create federal prisons, Justice Alito argued that the civil commitment of sexually dangerous individuals is appropriate, as these prisoners “would otherwise escape civil commitment as a result of federal imprisonment.”185

The rationalization of the federal civil-commitment power as a component of Congress’s power to operate a federal prison system is much stronger than the Court’s rationalization of the civil-commitment program under the federal custodial responsibility, but is still vulnerable to the remote-nexus arguments raised by the dissent in Comstock.186 Justice Alito’s reasoning is as follows: if Congress has the power under the Constitution to criminalize certain conduct and, via the Necessary Proper Clause, the power to operate federal facilities and incarcerate those who violate laws, Congress has the authority to further detain those who, as a result of a proven mental disorder, will almost certainly violate federal laws upon their release.187 Like the majority’s rationale, Justice Alito’s conception of the Act’s constitutionality does not solve the remote-nexus problem, because his proposed rationalization still requires an additional inferential step between the actual enumerated power and the exercise of the Act.188

Additionally, many courts and defenders of the Adam Walsh Act have noted the substantial similarities between § 4246, the civil-commitment statute ruled constitutional in Greenwood, and § 4248, arguing that the Adam Walsh Act

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184. See id. at 1970.
185. See id. at 1969-70 (rationalizing Adam Walsh Act under Necessary and Proper Clause).
186. See Somin, supra note 157, at 249 (criticizing majority’s rationalization of Adam Walsh Act as necessary and proper to federal custodial power). “[T]he government is not the custodian of persons after their terms of imprisonment expire. . . . This legal authority can derive neither from the expired sentence nor from the commitment decision, whose authorization depends on the custodial powers derived from the criminal sentence.” The Supreme Court 2009 Term, supra note 156, at 284-85 (arguing Court’s federal-custodial-responsibility argument fails).
187. See United States v. Comstock, 130 S.Ct. 1949, 1969-70 (2010) (Alito, J., concurring) (arguing Congress has power under Necessary and Proper Clause to enact Adam Walsh Act); Somin, supra note 157, at 250 (providing hypothetical illustration of required connection between enumerated power and exercised power). In its brief, the State of Kansas, argued, “If Congress has enumerated powers to criminalize such conduct, it necessarily has the power to imprison, commit, treat and attempt to rehabilitate those who commit such offenses. . . . Civil commitment of sexually dangerous federal prisoners will prevent the commission of future federal crimes by these same offenders.” See Brief for the States of Kansas et al., supra note 114, at *4 (arguing Adam Walsh Act appropriate exercise of congressional power).
188. See supra note 177 and accompanying text (providing hypothetical illustration of lack-of-nexus problem).
should similarly be ruled constitutional. While both statutes have as a goal the prevention of the release of dangerous individuals who are likely to cause harm to others if released, the civil-commitment provision of the Adam Walsh Act does not rely on the pendency of federal charges that § 4246 relies on. In the context of § 4246, the fact that an unanswered federal indictment persists puts the individual in a special relationship with the United States—but for his mental illness, he would be forced to face the federal charge. The civil-commitment proceedings under the Adam Walsh Act take place after the individual has completed his federal prison sentence, a crucial feature that destroys the analogy between § 4246 and § 4248.

B. The Overlooked Role of the Commerce Clause

The Commerce Clause provides a stronger constitutional basis for Congress’s enactment of the Adam Walsh Act. The Court in Lopez, while limiting Congress’s ability to legislate interstate commerce to three strictly defined categories, recognized that Congress has the power to regulate intrastate commerce if such regulation is necessary to enforce a broader regulatory scheme. Congress has, pursuant to its Commerce Clause authority, passed legislation banning the introduction and distribution of child

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189. See United States v. Volungus, 595 F.3d 1, 6-7 (1st Cir. 2010) (noting similarities between § 4248 and § 4246). The First Circuit in Volungus reviewed the Greenwood holding, and reasoned, “Section 4248 is simply a specific application of Section 4246, designed to forestall dangers presented by those who do not necessarily meet the criteria for commitment under the more general Section 4246 scheme.” Id. at 7 (holding no discernible difference between § 4246 and § 4248). The Volungus court reasoned that “the case for constitutionality here may be even stronger than in Greenwood. There, the defendant was merely charged with having committed a federal crime. Here, however, the respondent has already been found guilty of a crime.” Id. (reasoning past conviction stronger indication of dangerousness than simple charge of dangerous crime). The Volungus court also held that the pendency of federal charges was not a dispositive difference because the certificate for civil commitment is filed when the prisoner is in custody, while the federal government owes the prisoner a custodial duty and, thus, is a proper exercise of the federal government’s power. See id. (arguing pending federal charges not crucial difference between statutes); see also Brief for United States, supra note 55, at 40-41 (analogizing § 4248 to § 4246); Brief for the State of Kansas et al., supra note 114, at *6 (noting similarities between § 4248 and § 4246).

190. See 18 U.S.C. § 4248 (2006) (requiring no pendency of federal charge); Volungus, 595 F.3d 1, 6-8 (noting similarities between federal civil-commitment statutes and arguing Adam Walsh Act constitutional as result).


192. See Brief for Respondents, supra note 117, at 23 (“[P]ost-sentence § 4248 proceedings take place after the government’s power to punish the underlying offense is exhausted.”).

193. See infra notes 194-198 and accompanying text (explaining constitutionality of Adam Walsh Act under Commerce Clause).

194. See United States v. Lopez, 514 U.S. 549, 561 (1995) (recognizing Congress may regulate commerce to extent necessary to enforce broader regulatory scheme); see also Gonzales v. Raich, 545 U.S. 1, 36 (2005) (Scalia, J., concurring) (explaining scope of Congress’s commerce power).
pornography into the marketplace. Following the reasoning of Justice Scalia’s concurring opinion in *Raich*, even a moderate addition to an illegal market could frustrate Congress’s intent in enacting laws against producing, selling, transferring, and possessing the illegal commodity. The civil commitment could be rationalized as necessary to enforce Congress’s prohibition of child pornography or child sex trafficking because the individuals subject to proceedings under the Adam Walsh Act present an almost certain risk of reoffending. Such a rationalization may require legislative tailoring to restrict application of the Act to only those individuals who present a risk of reoffense in an area subject to federal regulation.

C. The Adam Walsh Act and Due Process

1. The Legislature Should Address the Standard of Proof Inconsistencies in the Act to Avoid Future Challenges

The Fourth Circuit recently held that the past-acts requirement of the Adam Walsh Act may be proved by clear and convincing evidence, a decision at odds with the decisions of other courts. The Supreme Court denied a petition of certiorari from the subjects of the proceeding. The question of whether the language of the Adam Walsh Act constitutes a deprivation of due process is a close question. The Court’s ruling in *In re Winship*, which seems to indicate that a higher standard of proof is required for a successful showing of past crimes or unlawful acts, is complicated by the ruling in *Addington*, which seems to authorize the use of the clear and convincing evidence standard for


196. See *Raich*, 545 U.S. at 36 (Scalia, J., concurring) (arguing enforcement of broader regulatory scheme distinct category of Commerce Clause authority); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (holding commodities produced and entered into marketplace in violation of regulation subject to congressional regulation).

197. See Brief for the State of Kansas et al., *supra* note 114, at *5 (noting role of internet in facilitating sex offenses); *Mahan, supra* note 1, at 125 (arguing Commerce Clause provides authorization for enactment of Adam Walsh Act); see also *Brooks v. United States*, 267 U.S. 432, 436 (1925) (discussing limits of Congress’s ability to regulate interstate commerce). The *Brooks* Court stated, “Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin.” 267 U.S. at 436.

198. See U.S. Const. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 558-59 (setting forth three categories of commerce Congress may regulate).


201. See *supra* note 199 and accompanying text (illustrating conflicting dispositions of standard of proof issues).
civil-commitment proceedings.\textsuperscript{202}

As a result of the conflicting decisions, it is possible that this issue may again reach the Supreme Court.\textsuperscript{203} However, a legislative change in the language of the statute to require proof beyond a reasonable doubt for proof of past acts would eliminate many due process concerns while allowing the statute to retain its potency.\textsuperscript{204}

2. Double Jeopardy and Ex Post Facto Challenges

While the Supreme Court did not address double jeopardy and Ex Post Facto challenges to the Act, it could have dismissed these challenges in the same way as the lower courts.\textsuperscript{205} As stated in Hendricks, great deference should be given to Congress’s label of a statute as civil, as opposed to criminal.\textsuperscript{206} Additionally, because the Act does not implicate the traditional goals of punishment, it does not violate the Double Jeopardy or Ex Post Facto Clauses.\textsuperscript{207}

D. The Adam Walsh Act and Equal Protection

Equal protection challenges to the Adam Walsh Act were correctly rejected by the lower courts and could have been definitively put to rest by the Supreme Court.\textsuperscript{208} First, the classification itself, whether between prisoners in federal custody, or between sexually dangerous persons in federal custody and those not in federal custody, is not a suspect classification and is therefore not entitled to heightened scrutiny.\textsuperscript{209} As a result, the classification must only pass

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\item \textsuperscript{202} See Addington v. Texas, 441 U.S. 418, 428 (1979) (stating beyond reasonable doubt standard too high for civil-commitment cases); In re Winship, 397 U.S. 358, 362 (1970) (requiring proof beyond reasonable doubt for unlawful criminal act); United States v. Comstock, 507 F. Supp. 2d 522, 552 (E.D.N.C. 2007) (requiring beyond reasonable doubt standard), aff’d, 551 F.3d 274 (4th Cir. 2009), rev’d, 130 S. Ct. 1949 (2010). The court in Shields reasoned, “Winship not only establishes that a reasonable doubt standard can be constitutionally required in a civil proceeding, but also ‘supports the proposition that where factual findings of criminal acts must precede the taking of an individual’s liberty, those findings must be made beyond a reasonable doubt.’” 522 F. Supp. 2d at 329 (quoting Comstock, 507 F. Supp. 2d at 552).
\item \textsuperscript{203} See supra note 199 and accompanying text (illustrating conflicting dispositions of standard of proof issues).
\item \textsuperscript{204} See 18 U.S.C. § 4248 (2006).
\item \textsuperscript{205} See supra note 127 and accompanying text (discussing lower court dispositions of double jeopardy and ex post facto claims).
\item \textsuperscript{206} See Kansas v. Hendricks, 521 U.S. 346, 361-63 (1997) (deferring to legislature’s classification of statute as civil, not criminal).
\item \textsuperscript{207} See supra note 125 and accompanying text (discussing lower courts’ rejection of double jeopardy and ex post facto claims).
\item \textsuperscript{208} See supra note 93 and accompanying text (discussing lower courts’ dispositions of equal protection challenges).
\item \textsuperscript{209} See United States v. Weed, 389 F.3d 1060, 1071 (10th Cir. 2004) (declining to apply heightened scrutiny to classifications for purpose of civil commitment); United States v. Sahhar, 917 F.2d 1197, 1201 (9th Cir. 1990) (“[G]overnment routinely may classify persons on the basis of their status as criminal defendants.”).
\end{itemize}
Rational basis review; the classification must be rationally related to a legitimate government purpose. The classification survives rational basis review, because protecting the public from dangerous offenders is a legitimate government purpose, and the continued commitment of dangerous offenders is rationally related to that goal.

IV. CONCLUSION

Until 2006, state law exclusively governed the civil commitment of sexually dangerous offenders. The Adam Walsh Act dramatically changed the civil-commitment landscape by drastically extending federal power. The Supreme Court’s rationalization of the statute under the Necessary and Proper Clause is somewhat lacking; the Court did not identify a specific enumerated power from which Congress could derive the authority to civilly commit sexually dangerous individuals, nor did it address the alleged lack of nexus between an enumerated power and the Adam Walsh Act. Instead, the Court relied on a broad, unspecific interpretation of the Necessary and Proper Clause. This new, less-exacting mode of Necessary and Proper analysis marks a departure from precedent and may open the door for more aggressive legislation in other areas.

Although many of the district and circuit courts considered the role of the Commerce Clause in their analyses, the Supreme Court did not incorporate that argument into its rationalization of the Adam Walsh Act. Congress’s ability to control commerce in furtherance of a broader legislative scheme, as discussed by Justice Scalia in *Raich*, could have provided a more concrete rationalization for the statute by grounding it in existing Commerce Clause jurisprudence. If the legislation was amended to apply specifically to offenders that engaged in sex crimes involving some element of interstate commerce—such as the receipt or sale of child pornography, or the transportation of minors across state lines—the Adam Walsh Act could be clearly rationalized as an exercise of Congress’s power to regulate interstate commerce.

By declining to hear individual rights challenges, the Supreme Court has created the possibility that a case concerning the Adam Walsh Act may again reach its doors. Specifically, the Fourth Circuit’s ruling on due process under the Adam Walsh Act has created inconsistency among the lower courts, which the Supreme Court will likely need to resolve. An intervening legislative remedy could eliminate potential legal challenges: if Congress amended the Adam Walsh Act to require a finding beyond a reasonable doubt as to the


211. See *Sahhar*, 917 F.2d at 1201 (holding government’s interest in protecting society from criminals legitimate and compelling).
statute’s first prong, it could extinguish many of the aforementioned due process challenges. In its present state, the Jimmy Ryce Civil Commitment provisions of the Adam Walsh Act stand on uncertain and tenuous grounds.

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