Abstract: The civil commitment of “sexually dangerous persons” is not a new concept. States first began doing so in the mid-20th century, based then on “sexual psychopathy.” Since that time, concepts of “sexually dangerous predators” have evolved and the laws have evolved with them. It was not until 2006, however, that Congress created federal laws to mirror those of the States. The Adam Walsh Act, named after the son of television host John Walsh, was created to “protect children” and “make communities safer.” The Supreme Court in United States v. Comstock held the Act constitutional under the Necessary and Proper Clause. While Congress had good intentions behind the Act, Comstock’s ruling created a veritable “blank check” for Congress and paved the way for exorbitant costs to the States, in a time when fiscal pressures make simply implementing the law nearly impossible. This Note explores the rationale behind Comstock and the Adam Walsh Act, highlights the damaging implications behind the decision and the good intentions of Congress, and makes recommendations for the future of both the case and the Act itself.
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Introduction

Society does not like criminals—that is not an unheard of proposition. We use phrases such as “scum of the earth,” “dirt-bags,” and “evil-hearted” to describe them, sometimes deservedly, other times as unfair, broad generalizations. Even historical figures such as Napoleon and Calvin have had their own colorful descriptions of the thieves, assaulters, drug-users, and murderers that “plague” our culture.

But for sex offenders, the public at large has especially reserved feelings: historically, society’s view of the mentally ill and sex offenders has been “one of intolerance rather than compassion.” And the distaste is not exclusive to the general public—the law-makers in Congress have their own things to say about this group of people. Some states have even created especially harsh laws against sex offenders. In 2006, Congress enacted the first federal laws specifically targeting sex offenders: the Adam Walsh Child Protection and Safety Act.

The stated goal of the Act is “to protect children, to secure the safety of judges, prosecutors, law enforcement officers, and their family members . . . and for other purposes.” Codified at 18 U.S.C. § 4248, one portion of the Act allows for the civil commitment of sex offenders who are considered, by the government, to be “sexually dangerous persons.” The constitutionality of this section has been
challenged several times, but in May 2010, the Supreme Court held § 4248 constitutional under the Necessary and Proper Clause of the U.S. Constitution. Despite both this decision and the standard of public safety the Act proposes, the untold consequences may eviscerate the constitutional rights of those it attacks and cost the States more than they can bear.

This Note argues that the decision in United States v. Comstock, holding § 4248 of the AWA valid as a Necessary and Proper exercise of Congress’ authority, blazes the path for broad, arbitrary legislation against anyone in federal incarceration and treads on the rights of those specifically targeted by 4248. Part I of this note briefly describes the history of the Adam Walsh Act and the cases prior to United States v. Comstock that paved the way for the decision. Part II more deeply analyzes the holding and concurring and dissenting opinions of Comstock, giving specific attention to Justice Thomas’ dissenting opinion. Part III describes a few of the most costly implications of the holding in Comstock, both fiscally and procedurally. Finally, Part IV suggests recommendations for the future of the case and the Act, arguing for legislative change or abolition of § 4248 entirely.

**Part I – Background**

a) The Adam Walsh Act
On July 27, 1981, a then-unknown person abducted six-year-old Adam Walsh from a mall in Hollywood, Florida. Two weeks later, authorities discovered his severed head in a canal in Vero Beach, Florida, more than 100 miles from his home. In response to this and several other attacks between 1981 and 2006, John Walsh, father of Adam, lobbied Congress to enact stronger laws “in order to protect the public from sex offenders and offenders against children.”

The result of these efforts was the Adam Walsh Child Protection and Safety Act of 2006 (the “AWA”), signed into effect by President George W. Bush on July 27, 2006. Included in this act was the Jimmy Ryce Civil Commitment Program, codified at 18 U.S.C. § 4248. Under § 4248, any person either in custody of the Bureau of Prisoners (BOP), committed to the custody of the Attorney General due to mental incompetence, or against whom all criminal charges have been dropped due to the person’s medical condition may be certified as a “sexually dangerous person” by either the Attorney General or any individual whom the Attorney General or the Director of the Bureau of Prisons authorizes to do so. The law entitles the now-labeled person to a hearing to determine if they are, indeed, a “sexually dangerous person.” If the court finds him or her—by “clear and convincing evidence”—to be sexually dangerous, the Attorney General will either place the person in
a “suitable facility” for treatment or release him or her to the State, which then assumes responsibility for doing the same.  

In order to be discharged under the AWA, the Director of the treatment facility must determine that the person is “no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment.”  

Although now considered “treated,” the Attorney General may request another hearing to determine the truthfulness of that claim, now under a preponderance-of-the-evidence standard, where the court must find one of the above-mentioned conditions has been met.  

Should the person not follow any part of the prescribed “regimen,” he may be immediately remanded, pending yet another hearing.

Just over a year after its enactment, five inmates of a North Carolina prison challenged the statute, claiming the commitment being forced upon them was unconstitutional.

b) The Case: United States v. Comstock

On October 4, 2000, Graydon Earl Comstock pled guilty to one count of “[r]eceipt [by computer] of materials depicting a minor engaging in sexually explicit conduct” and one count of forfeiture.  

He was sentenced to prison for thirty-seven months, followed by a three-year period of supervised release.  

Although his term of imprisonment ended on November 8, 2006, Comstock
remained in prison; pursuant to the government's certification of Comstock as a “sexually dangerous person,” under the civil-commitment provision of the AWA, Comstock's release was stayed indefinitely. During his trial and appeals, he was held at FCI-Butner.

Comstock filed a motion to appeal, arguing the federal government did not have the constitutional authority to seek civil commitment. Joining him in the motion were four other persons facing similar civil commitments, all under § 4248: Shane Catron, Thomas Matherly, Markis Revland, and Marvin Vigil. The case came before the Court of Appeals for the Eastern District of North Carolina. The court held that the civil-commitment scheme of the AWA was “not sufficiently tied to the exercise of any enumerated or otherwise identifiable constitutional power of Congress,” that “the scheme was not a proper exercise of any power that Congress might constitutionally exercise,” and the “use of a clear and convincing burden of proof [in the commitment hearings under the AWA] violated the substantive due process rights of those subject to commitment.”

The United States appealed. The Court of Appeals for the Fourth Circuit affirmed the ruling and held the AWA was authorized neither under the Commerce Clause nor the Necessary and Proper Clause. The United States then petitioned for cert
to the Supreme Court of the United States. The petition was granted in June of 2009. Arguments took place on January 12, 2010 with the decision to follow on May 17, 2010.

c) The Supreme Court Ruling

In a seven-to-two ruling, the Supreme Court reversed the ruling of the Fourth Circuit and, in an opinion written by Justice Breyer, concluded the AWA was constitutional under the Necessary and Proper Clause of the Federal Constitution. The majority based its conclusion on five “considerations” laid out individually in the opinion. Justices Alito and Kennedy concurred in the judgment, while Justice Thomas dissented, joined by Justice Scalia.

Part II: The Five Considerations

The heaviest issue on the Justice’s collective hands was deciding whether or not the Necessary and Proper Clause was broad enough to allow the use of civil commitment by the Government for federally incarcerated prisoners. Indeed, that was the exact issue at stake in Comstock and the issue that had sharply divided the state district courts at the time of the Fourth Circuit ruling. The Fourth Circuit affirmed the North Carolina District Court’s ruling that the statute “lie[s] beyond the scope of Congress’s authority,” relying on the historically state control of civil commitments, justified under their parens patriae, or police, power. Past cases ruling on state sex-
offender civil-commitment laws have used this same rationale in upholding challenges to such statutes.\textsuperscript{50} The federal government, however, “has no general police or \textit{parens patriae} power.”\textsuperscript{51}

\textbf{a) The Majority Opinion}

\textbf{(1) The First Consideration: The Breadth of the Necessary and Proper Clause}

The Supreme Court, however, saw the issue differently. Rather than relying on a police power to validate the federal government’s use of civil commitment, the AWA instead needed only to be “rationally related to the implementation of a constitutionally enumerated power.”\textsuperscript{52} The only question the Court had to answer, then, was “whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.”\textsuperscript{53}

Armed with this “rational basis” ammunition, the Court pointed to Congress’s ability to enact criminal laws outside of those specifically enumerated in the Constitution.\textsuperscript{54} Similar to past criminal laws enacted without specific enumeration, said the Court, Congress can erect prisons for violators of these laws, pass laws to provide for the proper administration of these prisons, and create laws to ensure the safety of “the surrounding community.”\textsuperscript{55} Although nowhere in the Constitution are these actions specifically stated, the broad authority of the Necessary and Proper Clause allows them.\textsuperscript{56}
The Second Consideration: The Long History of Federal Involvement in Civil Commitment

The Court next turned to Congress’s history of “providing” for both “mental health care” and civil commitment to federal prisoners. Although the Court did concede that historical federal action did not equate to constitutionality, it noted how a “history of involvement” could be “helpful.” It then dissected the history of civil-commitment statutes, beginning with nineteenth-century acts that provided for civil commitment of persons in the army and navy, in a U.S. penitentiary, or who “become insane” while imprisoned. Although these statutes were written so that commitment would end contemporaneously with incarceration, the 1945 Judiciary Conference completely reformed those acts. The Conference reviewed a long-running study of what prisons do when the confinement of insane criminals ends, “where it would be dangerous to turn them loose upon society and where no state will assume responsibility for their custody.” Based on this review, the Conference recommended to Congress a law providing for the extended detention of these individuals.

Following this recommendation, Congress modified 18 U.S.C. §§ 4244-48 to allow commitment of an individual whose prison term is about to expire, pending a hearing to determine if “he will probably endanger the safety of the officers, the property, or other interests of the United States” upon release.
Congress altered the provision to explicitly authorize civil commitment if release would “substantially risk . . . bodily injury to another.” Thus, the 2006 alteration of § 4248 as part of the AWA was only a “modest addition” to this longstanding civil-commitment scheme, affecting only those “already subject to civil commitment under § 4246.”

(3) The Third Consideration: The Government’s Custodial Interest in Safeguarding the Public from Dangers Posed by Those in Federal Custody

Justice Breyer began the third consideration by noting that the Federal Government, as “custodian of its prisoners . . . has the constitutional power to . . . protect . . . communities from the danger federal prisoners may pose.” In this role as “custodian,” therefore, it is necessary and proper to confine these harmful individuals, just as it is necessary and proper to confine those with “communicable diseases.” Thus, it was “reasonabl[e]” for Congress to believe persons held under § 4247(a)(6) would “pose an especially high danger to the public if released.” It was further reasonable, the Court posited, for Congress to conclude that many prisoners were unlikely to be detained by the States, as they had “severed their claim to ‘legal residence in any State’” when they became incarcerated, and if the States did not take them, the Government would have to. Thus, due to Congress’ “responsibilit[y] as a federal custodian,” there was a rational means for supporting § 4248.
(4) The Fourth Consideration: The Statute’s Accommodation of State Interests

The Tenth Amendment of the U.S. Constitution reserves those powers “not delegated to the United States by the Constitution” to the States.\textsuperscript{75} Although “[t]he States have traditionally exercised broad power to commit persons found to be mentally ill,”\textsuperscript{76} the Court broadly read the language of the Tenth Amendment to include powers granted to Congress via the Necessary and Proper Clause in addition to those expressly enumerated within the Constitution.\textsuperscript{77} Thus, such powers cannot, “virtually by definition,” be reserved to the States.\textsuperscript{78}

Rather than intruding on the interests of the States, the Court proffered, § 4248 accommodates those interests.\textsuperscript{79} Dismissing the respondents’ concerns that the States could not “prevent the detention of their citizens under []4248,”\textsuperscript{80} the Court instead accepted Solicitor General Kagan’s argument that “‘the Federal Government would have no appropriate role’ with respect to an individual covered by [4248] once ‘the transfer to State responsibility and State control has occurred.’”\textsuperscript{81}

The Court then briefly discussed Greenwood v. United States,\textsuperscript{82} a predecessor to the AWA (a statute “less protective to State interests”),\textsuperscript{83} held to not invade state interests.\textsuperscript{84} The Court concluded, “[I]f the statute . . . in Greenwood did not invade state interests, then . . . neither does § 4248.”\textsuperscript{85}
(5) The Fifth Consideration: The Statute’s Narrow Scope

The respondents argued that when creating laws pursuant to the Necessary and Proper Clause, only one step could separate the act in question and Congress’ constitutionally enumerated power. Over Respondents’ objection that the Court could not “pile inference upon inference,” the Court selected various precedential counter-examples, again citing Greenwood. Although different enumerated powers justify Congress’ enactments of different federal statutes, “every such statute must itself be legitimately predicated on an enumerated power.” So long as those statutes are “ultimately ‘derived from’ an enumerated power,” the enactment is valid; i.e., more than a single step may separate “an enumerated power and an Act of Congress.”

The Court dismissed the “fear” that a general police power akin to that of the States would be created, as § 4248 is narrowly tailored to a small group of prisoners and limited to those already in federal custody. The Court reserved questions of constitutionality under any other amendments for remand, and likely further appeals, and concluded § 4248 was authorized under the Necessary and Proper Clause.

b) Concurring Opinions

Justice Kennedy concurred but noted his concern with the majority’s explanation of the Tenth Amendment: the majority’s analysis was essentially backwards, he concluded—the power not
expressly delegated to the Federal Government was reserved for the States, “not the other way around.”  

Justice Alito agreed § 4248 was constitutionally authorized but “on narrow grounds.” He also agreed that the Government could “pile inference upon inference,” at least in a limited scope, as it is entirely “necessary and proper” to criminalize certain conduct and also create prisons for violators of laws against that conduct. From these premises, Justice Alito felt it “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.”

c) Dissenting Opinion: Justice Thomas

Justice Thomas began his dissent by noting § 4248 “[e]xecut[es] no enumerated power.” He agreed with Justice Kennedy, and the Constitution, that Congress’ powers are “few and defined” while the States’ are “numerous and indefinite.”

After reviewing McCulloch v. Maryland and “necessary and proper” jurisprudence, Justice Thomas noted Congress’s restrictions—regardless of how “‘necessary’ or ‘proper’ an Act of Congress may be,” Congress can only create statutes with the objective of “‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.”

Justice Thomas felt no enumerated power could support § 4248, not even the Commerce Clause—“the enumerated power this
Court has interpreted most expansively.”¹⁰² The Constitution, rather, grants to the States the power to “‘protect the community from the dangerous tendencies of some’ mentally ill persons.”¹⁰³ Justice Thomas highlighted this power by showing the parallel between § 4248 and civil-commitment laws enacted by states under their *parens patriae* powers:¹⁰⁴ “[Section] 4248 is aimed at protecting society from acts of sexual violence, not toward ‘carrying into Execution’ any enumerated power or powers of the Federal Government.”¹⁰⁵ Although this protection is unquestionably important, “the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.”¹⁰⁶

Justice Thomas criticized the five-considerations test created by the majority as “rais[ing] more questions than it answers.”¹⁰⁷ He then criticized each of the five considerations separately, beginning with the first—Congress’ broad powers under the Necessary and Proper Clause. Unfortunately, argued Justice Thomas, “the Court put[] the cart before the horse”—to find a rational link between the means and the end, the end itself must be legitimate.¹⁰⁸ In this case, that end is simply furthering other laws Congress enacted via its “incidental authority”—section 4248 does not “carry into Execution” any enumerated power of Congress, as the Constitution requires.¹⁰⁹
Justice Thomas next dissented on the Court’s fifth consideration—that § 4248 carried into execution the “enumerated power that justified that person’s arrest or conviction in the first place”—and the Court’s analogy of § 4248 to the statutes already in place that allow prison officials to care for prison inmates. For three reasons, Justice Thomas disagreed: First, there is no element in the AWA relating to the defendant’s crime. Thus, a defendant can be civilly committed without ever being convicted of a federal crime involving sexual violence. Second, § 4248 authorizes federal custody over a person whom the federal government lacks jurisdiction to detain—one whose sentence has expired. Third, the definition of a “sexually dangerous person” for 4248 purposes requires no finding of a likelihood of future violations of federally enacted laws.

Justice Thomas also attacked the remaining considerations: he pointed out the “puzzling” citations by the majority in its third consideration that the government had a duty to protect the public, the Court’s “overstate[ment]” of relevant history, and the constitutional authority of the States to “take charge” of federal prisoners released there. Justice Thomas concluded by noting the Court’s holding “transform[ed] the Necessary and Proper Clause into a basis for the federal police power . . . [by] endors[ing] the precise abuse of power Article I is designed to prevent—the use of a limited grant of
authority as a ‘pretext . . . for the accomplishment of objects not intrusted to the government.’”\textsuperscript{119} In the next Part, I discuss a few potential implications from this conclusion.

**Part III: Potential Implications of the Five Considerations**

Despite Congress’ presumed—good intentions behind the AWA, the Act has produced both economical and procedural consequences that blunt any gain. As Part III(a) discusses, the AWA has granted seemingly unrestricted legislative power to Congress, so long as it meets the broad necessary-and-proper definition of Comstock. Part III(b) explains the economical costs the States have been forced to shoulder just in implementing the AWA. Part III(c) discusses a potential procedural risk that the AWA creates to plea deals in the criminal system.

**a) A “Blank Check” for Congress**

As Justice Thomas concluded in his dissent, the greatest implication of the ruling in Comstock is the seemingly unfettered grant of power to Congress.\textsuperscript{120} The majority’s overly expansive reading of the Necessary and Proper Clause coupled with its “ultimately derived from” language suggests this could very well be the case.\textsuperscript{121} Justice Breyer attempted to alleviate fears of such a possibility by noting the statute’s narrow scope;\textsuperscript{122} but what is there to stop Congress from enacting a new statute, under the same authority, citing the same concerns for public safety, but targeting different conduct? What if Congress
were to declare, e.g., kleptomania to be a crime of great harm to the public and its chattels, so much so that those suffering from such an infliction were a danger to the community? So long as some enumerated power could “ultimately” be reached from seemingly any number of removed connections, under Comstock, the law would be perfectly valid. Although this sounds absurd now, various points suggest its potential.

First, to civilly commit a person under the AWA, the crime for which he or she was incarcerated need not be a sexually violent one. Comstock himself was charged with receipt of “material involving the sexual exploitation of minors,” a crime that inherently involves no violence whatsoever. The government then, under § 4248, could civilly commit a person with no link whatsoever to a violent federal sex crime, so long as there was something in his or her past that the government could determine makes him or her “sexually dangerous.”

Second, the court in Comstock gives no direction for its “ultimately derived from” standard: How many steps are too many under this standard before the power is too far removed from the Act of Congress? Using the kleptomania example above, the enumerated power Congress could enforce might be to “provide for the . . . general Welfare of the United States.” Assume to carry this power into execution, Congress makes it a federal crime to commit burglary more than five times, arguing that
stealing the belongings of others affects their “general Welfare.” Congress would already have the power to imprison people as punishment for this crime. Because these people have a problem controlling their urge to steal, the chattels of the public would be in constant danger. Thus, Congress could provide for the civil commitment of these persons arguing that, under Comstock, this provision is valid as it “ultimately derives from” the enumerated power to protect the general welfare.

Third, without question kleptomania is not seen as a “mental abnormality” or disease necessitating civil commitment. But as it has been noted, “the legal concept of mental illness . . . is not simply a clinical category.” All that is required to consider someone “legally mentally ill” is that they “suffer from an impaired psychological process . . . which renders them incapable of meeting some previously determined adequate standard of functioning.” While some clinical diagnosis would be necessary as well, this may not be such a hurdle either. The Diagnostic Statistic Manual of Mental Disorders (“DSM”) is the guide for mental-health professionals in diagnosing persons as mentally ill. Kleptomania is already included in the DSM; if Congress decided kleptomania was serious enough to warrant civil-commitment, it already has the requisite diagnosis.

The Supreme Court has even held that, to be valid, statutes only need to require a “mental abnormality” or “personality
disorder” in the person, as defined by the legislature.\textsuperscript{132} The abnormality in question could even be simply “emotional,”\textsuperscript{133} likely requiring an even smaller suggestion of dangerousness, if requiring it at all. This element itself, however, is broader than the classifications within the DSM: the DSM has a caveat that it “does not meet the legal standards necessary for commitment.”\textsuperscript{134} Thus, the legislature can pick-and-choose diagnoses from the DSM, define the standard of “abnormality” the diagnosis entails, and enact legislation to confine persons who fall within these lines. A practical example of this is shown with Antisocial Personality Disorder.\textsuperscript{135} The Supreme Court has held persons with this condition are insufficiently dangerous to civilly commit them.\textsuperscript{136} But if Congress were to define this disorder as a “mental abnormality” that harbored signs of dangerousness, commitment would likely be found valid under the standards above. This result would be especially onerous considering that “40%-60% of the male prison population is diagnosable with antisocial personality disorder.”\textsuperscript{137}

The AWA itself contains a provision that could perpetuate commitments of persons not charged with a sexually dangerous crime. If a person currently out of prison fails to register himself under the newly enacted SORNA,\textsuperscript{138} he can be imprisoned for up to ten years.\textsuperscript{139} After the new incarceration but before his release, this person could be determined sexually dangerous
and civilly committed under § 4248 of the same act. Thus, Congress could effectively civilly commit all prior sex offenders who were incarcerated before the AWA was enacted, but who will be released now, since its enactment, or at least the forgetful and irresponsible ones.

What all this means is that the government could keep a person indefinitely confined where they feel his sentence was simply not long enough. Without defining more compelling reasons for a person’s civil commitment, the power of Comstock risks “‘civil commitment’ becom[ing] a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment.”\textsuperscript{140} Although both juries and judges typically sentence a person based on “whether the offender has done enough time,”\textsuperscript{141} recent studies have found juries will also use civil commitment “to correct the error.”\textsuperscript{142} Vileness notwithstanding, this finding sounds loudly of a due-process violation, a topic discussed in Part IV(a).

All this assumes, however, that Justice Breyer was wrong. It assumes the legislature will seek a more general police power as that carried by the States. But given the above considerations, the worry is well defined:

How can we be sure . . . that the legislature will continue to view only sexual offenders as a special and unique class of criminals? If prosecutors are able
to find mental health professionals willing to testify that people who commit repetitive assaults of a non-sexual nature have a mental abnormality predisposing them to such violent behavior, will the legislature pass laws to keep them incarcerated beyond their criminal sentences by the device of civil commitment? How about perpetrators of multiple domestic violence? Chronic drunk drivers? Violent drug offenders? What are the limits of this “end run” around the normal criminal justice process?\textsuperscript{143}

\textbf{b) Fiscal Costs}

A second concern, a more tangible one, also pointed out by Justice Thomas, is the costs the government will be forced to take on to accommodate the civil-commitment scheme of § 4248. These costs are so high that, in their \textit{amici} briefs in \textit{Comstock}, twenty-nine states stated they would prefer the government bear the costs to commit persons under the AWA—approximately $64,000 per year.\textsuperscript{144} Aside from the costs imposed by the AWA, any State that does not “substantially comply” loses ten percent of federal judicial assistance funding.\textsuperscript{145} Due to these costs, many states simply opt out of the AWA and lose the funding—which actually ends up costing less than implementing the Act—thereby frustrating the purpose of the Act altogether.\textsuperscript{146}
A separate section of the AWA, however, does grant funds to “jurisdictions for the purpose of establishing, enhancing, or operating effective civil-commitment programs for sexually dangerous persons.”\textsuperscript{147} No exact amount is set out, however, and in parallel state-enacted sexually violent predator commitment statutes, the costs have been exorbitant.\textsuperscript{148} The costs of a national, federal statute will undoubtedly be exponentially larger.\textsuperscript{149} Numbers aside, a federal mandate against sex-offenders may not be the most fiscally prudent legislation when the country is facing a recession. While “protecting society from violent sexual offenders is certainly an important end,”\textsuperscript{150} there are more important allocations of federal funding to be made.\textsuperscript{151} Aside from funding-allocation imprudence, any failing of the AWA may lead to additional costs caused by new lawsuits entirely.\textsuperscript{152} Perhaps these unavoidable costs are most appropriate as part of an argument for complete policy reform, an argument beyond the scope of this Note. However, such costs, and their possible diminution, are something readers should keep in mind during later Parts discussing alternative options.\textsuperscript{153}

c) “Bait-and-Switch” Plea Deals

When a criminal defendant pleads guilty to a charge, it is often said they are “getting a deal”—the save on time for trial preparation and execution is traded in exchange for a lighter sentence to the defendant upon his plea of guilty. Graydon
Comstock likely made such a deal when he pled guilty originally, in October 2000. In making this deal, however, it is unlikely he was aware he could be indefinitely civilly confined following his prison sentence. Indeed, it is called a plea deal for a reason: both the defendant and his attorney expect to benefit from the agreement. With the possibility of indefinite commitment a new factor in the plea-bargaining calculus, the number of deals is certain to fall—why take the deal and be indefinitely committed when you can fight the charge at trial, the only risk that you will still be indefinitely committed?

Holding knowledge the defense may not possess, prosecutors often offer deals “too good to be true” only to “follow up with civil commitment” at the end of the sentence. As the AWA becomes more prominent, however, it is more likely defense attorneys will become privy to the possible consequences of misleading deals. The result could be an increase in criminal trials on federal sex offenses, eating up court time and pushing the ever-crowded dockets even further back on the calendar.

Currently, plea deals are an integral part of the federal criminal justice system, incorporating 96% of all federal charges in 2004. Defendants who plead guilty are processed through the system 5.4 months faster than those who choose to go to trial. Supporting the proposition that guilty pleas are often deals, courts sentence defendants who go to trial and are
convicted to prison time in eighty-eight percent of cases, whereas those who plead guilty receive prison only seventy-seven percent of the time, and the average prison term of those who went to trial was three times longer than for those who pled guilty.\textsuperscript{159} Were defendants informed of the possibility—even the likelihood—they would be committed following whatever sentence they received, it is likely they would opt for the trial, perhaps with hope they would win and face no time whatsoever.

But what if the defendant is not advised of this possibility? What if his or her attorney neglects to advise the defendant of the risk of civil commitment or simply does not know of the possibility? Could the defendant raise a claim of ineffective assistance of counsel? In a similar situation recently heard by the Supreme Court in \textit{Padilla v. Kentucky}, the Court decided a defense attorney’s failure to apprise his client of the risks of deportation following a guilty plea constituted ineffective assistance.\textsuperscript{160} This change came about due to drastic changes in immigration law over the past ninety years.\textsuperscript{161}

Parallel to immigration laws, sex-offender laws have also drastically changed over the past century.\textsuperscript{162} The same characteristics that apply to deportation consequences—the “close connection to the criminal process,” the “drastic” level of the consequence, the civil nature of the proceedings\textsuperscript{163}—all apply equally to civil-commitment. Under the logic of \textit{Padilla},
it is possible that the dockets of federal courts could be further clogged with additional litigation due to failure to warn of commitment possibilities.

Other areas of litigation and the law could be, and have been, affected by the AWA’s demands as well. Whether the legislature takes any of these concerns into consideration to revise the AWA is to be seen. From the momentum of these concerns, the final Part of this Note will make recommendations for the future of both the Comstock case and the AWA itself, arguing for retained state control of civil commitment for sexually dangerous persons or, more drastically, abolishment of civil commitment for these persons entirely.

**Part IV: Recommendations for the Future**

Whether or not the implications discussed in the preceding Part materialize, there are several changes that Congress should make to the AWA. In this section, I discuss one recommendation and its alternative: reserve the power to civilly commit to the States (Part IV(b)) or abolish civil commitment entirely (Part IV(c)). Before I discuss my suggestions for the legislature and the Act itself, however, in Part IV(a) I discuss the remaining issue of Due Process, leftover from Comstock.

a) **Petition the Supreme Court for Certiorari on the Due Process Issue**
At the start of the majority opinion in Comstock, Justice Breyer noted that the appeal was limited to discussion of the Commerce Clause—the opinion proceeded under the assumption that the Due Process Clause did not preclude commitment. Rather, he left any issues of due process or equal protection to be pursued on remand. On December 6, 2010, Comstock and the other defendants challenged this assumption—they appealed on remand to the Fourth Circuit.

In the latest installment of United States v. Comstock, the Fourth Circuit confronted the due-process issue on which the Supreme Court had passed. The district court originally found the use of a “clear and convincing evidence” standard of proof in the AWA civil-commitment proceedings unconstitutional, holding that Due Process required the Government to establish sexual dangerousness beyond a reasonable doubt. The Fourth Circuit, however, disagreed and reversed.

The court stated that the Appellants had “misread” the AWA and that Addington v. Texas “expressly rejected respondents’ view” and use of In re Winship to argue against the clear-and-convincing-evidence standard of proof in civil-commitment proceedings. A civil-commitment proceeding, the court held, unlike a criminal sentence, “does not impose either the stigma attendant to criminal culpability or the loss of liberty
associated with a criminal sentence, and therefore does not require the criminal law burden of proof.”\(^{173}\)

The Fourth Circuit also relied on *Kansas v. Hendricks*\(^ {174}\) to support its conclusion that civil-commitment proceedings are not criminal in nature, and, thus, do not require the heightened standard of proof to meet the Constitution. Like the statute at issue in *Hendricks*, the AWA “does not seek to ‘affix culpability for prior’ acts. Instead, it simply ‘uses’ prior acts ‘solely for evidentiary purposes’ to support a finding of a person's mental abnormality or future dangerousness . . . .”\(^ {175}\) Despite the Fourth Circuit’s clench and use of civil-commitment precedent, the appellants should petition the Supreme Court for cert on the issue of Due Process.

The Fourth Circuit relied extensively on *Addington* and *Hendricks* in its holding that, parallel with these two cases, civil-commitment proceedings under § 4248 are not criminal in nature, and, thus, the higher standard of proof is not required to pass Due Process muster. The reasoning behind those two cases, however, suggests the higher standard is the appropriate one, despite what those cases actually held.

(1) **The Reasoning Behind the Court’s Opinion in Addington Suggests the Standard for Civil-Commitment Proceedings Should Be Beyond A Reasonable Doubt**

The *Addington* Court conceded that “civil commitment . . . constitutes a significant deprivation of liberty that requires
due process protection.‖ The “due-process protection” granted those in criminal prosecutions, including those charged with violating a federal sex law, the same persons now facing civil commitment, is invariably beyond a reasonable doubt. It only makes logical sense that the same standard applied to detain these persons in the first place should be applied where the result is likely indefinite, continued detention. Undoubtedly, some of the persons convicted of sexually violent offenses are those from whose confinement society would benefit. But this is certainly not the case for all sex offenders of whom we risk indefinite deprivation under an “intermediate standard” of proof. The standard must be more demanding to be sure those who will likely be forever removed from society are of the former category, lest we permit such a “grave invasion” upon any offender without delving into the risk they might present.

(2) The Concerns of the Court in Addington are Antiquated

Not only does the Court’s reasoning in Addington suggest a higher standard for civil-commitment proceedings, but the assumptions that support its holding that a lower standard is adequate have become antiquated. The Court was concerned a state could likely not prove a person is dangerous beyond a reasonable doubt, largely due to the inefficaciousness of psychiatric treatment. Much of this concern, however, may stem from the lackluster methods of prediction available in 1979. A 2009 study
of different “approaches to the prediction of recidivism” compared predictions of over 45,000 sex offenders to determine which methods were most successful.\(^{183}\) In civil-commitment hearings, the study found, “structured risk tools” are almost always used.\(^{184}\) The study also reviewed four general ways to structure risk assessment.\(^{185}\)

The results of the study found that empirical–actuarial methods specifically tailored to sexual recidivism were the most accurate, whereas unstructured professional judgment was much less predictive.\(^{186}\) Interestingly, the unstructured evaluations were precisely the type of predictive measure in place between 1970 and 1998\(^{187}\)—the opinion of Addington, of course, was written in 1979.\(^{188}\) The study also found that “clinically adjusted actuarial approaches”—designed to work in tandem with unstructured professional judgments to adjust to a particular individual based on a clinical judgment\(^{189}\)—effectively decreased the predictive accuracy of the measure.\(^{190}\) It is common, however, for evaluators to use multiple risk tools at civil-commitment procedures,\(^{191}\) a practice that allows evaluators much more confidence in their decisions.\(^{192}\) Thus, although the methods to predict recidivism used in the time of Addington were poor at best, modern methods tailored to specific offenders are much better predictors. Rather than assuming a State could not prove an offender’s likeliness to recidivate beyond a reasonable
doubt, civil-commitment procedures should simply use a variety of different, newer, and proven-more-accurate methods in their determination of an offender’s propensity to recidivate.

The Court in Addington held proof of “mental illness” in civil-commitment proceedings need only be found by clear and convincing evidence to meet Due Process. But by the Court’s reasoning, thanks to improvements in prediction methodology, and due to the substantial gravity and effect of civil commitment under the AWA, due process should require this proof be found beyond a reasonable doubt.

(3) The Appellant and Statute in Hendricks Are Distinguishable from Comstock and the AWA

Hendricks was a much different man than Comstock: Hendricks had a long history of molesting children and admitted as much, stating the only way to make him stop was for him “to die.” The statute in question was markedly different from the AWA as well: the statute defined what a “sexually violent predator” actually was; the statute required the prisoner be found to be a sexually violent predator beyond a reasonable doubt, rather than the clear-and-convincing-evidence standard of the AWA; and under the Kansas statute, the confined person could, at any time, file a release petition, as opposed to the requirement of the AWA that the Director of the facility make the finding. With these differences, the Court held the Kansas statute did
not violate due process and was constitutional. Although Hendricks appeared to preclude the appellants in Comstock from making a due-process argument, Hendricks was predicated on different rules than Comstock. As the cases are distinguishable, the Fourth Circuit’s use of Hendricks is inapposite.

First, the statute in Hendricks was a state statute and, thus, authorized under the parens patriae powers conferred upon the States, as discussed in several cases before Comstock. There is no concern that the statute is “too far attenuated” from any particular power, as the States are implicitly granted this power through the Tenth Amendment. It is under this parens power that statutes, such as the one in Hendricks, are found to pass due process muster. The AWA, however, as a federal statute, must “carry into Execution” some enumerated power. The federal government has no parens power—it cannot hang its due-process hat on this power. The “significant deprivation of liberty” from civil commitment requires equally significant “due process protection.” The power authorizing the federal government to execute that deprivation is lacking.

Second, not only was the finding of a “mental abnormality” more easily obtained in Hendricks, but the required standard of proof to find it was higher. The Kansas statute required finding sexual violence beyond a reasonable doubt, whereas the AWA only requires clear and convincing evidence. Cases since Hendricks
have even suggested the higher standard is the constitutional minimum. In *Foucha v. Louisiana*, for instance, the Court stated, “The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.”

Third, according to some scholars, *Hendricks* never actually answered the due-process question. Typically, courts attempt to strike a balance between “the individual’s liberty interest and due process rights with the state’s obligation to act as a guardian for its citizens.” But as Justice Thomas noted, the federal government does not have this “guardian” obligation. A federal statute cannot use this criterion to meet due process. The statute itself is not even linked to interstate commerce, a requirement of the Commerce Clause. There simply is no authority of Congress to commit sex offenders based on a finding of “dangerousness” and leave the Due Process Clause intact.

Although the Fourth Circuit relied on these two principle cases in its holding, the reasoning behind and differences of both *Addington* and *Hendricks* leave *Comstock* in its own category. The lack of power of the federal government coupled with the significance of the deprivation of civil commitment weighs strongly against the AWA passing due-process requirements. Upon a grant of certiorari, the Supreme Court should find as such.

**b) Reserve Power to the States**
With all the discussion about State powers and obligations, the solution seems simple—reserve to the States the power to civilly commit persons whom those states consider “sexually dangerous” based on their own laws. The federal government has already intervened in many other areas of criminal law, doubling its criminal docket over the past twenty-five years and dominating drug-related offenses.\(^{214}\) Draining additional judicial resources to determine sexual dangerousness would further strain an already stretched system.\(^{215}\) Those states that decide “protection” of their constituents from persons determined to be sexually dangerous is an efficient use of their parens powers may enact laws to effectuate this protection; those states that deem it an unnecessary safeguard need not be forced into funding the requisite facilities and officers. And in fact, more than twenty states already have civil-commitment laws in effect.\(^{216}\)

One suggested way to grant states control over civil commitments is to simply have the federal government “notify state authorities, who could rely on their police and parens patriae powers to make a civil commitment assessment.”\(^{217}\) This vicarious approach presumes the remaining twenty-eight states that do not have commitment laws\(^{218}\) enact them or else are left out of the notification entirely.

Justice Scalia also proposed the idea of the federal government funding “an office which brings involuntary
commitment proceedings in a state where a prisoner is released when the federal government believes the prisoner is unsafe.”

He also suggested the federal government reimburse the States for the costs associated with taking on civil commitment of federally-detained persons themselves. This reimbursement “combined with a letter to the elected governor . . . or the elected attorney general,” would, in Justice Scalia’s opinion, be enough to ensure the States would take responsibility over any released prisoners. These proposals would also prevent the unbridled power that § 4248 appears to grant and curb the costs the States have been forced to endure.

Although SVP laws are expensive in general, reserving power to enact them to the States would allow those with firm economic groundings to provide the requisite officers and facilities and avoid over-burdening states with the thinnest budgets. Because a number of states have already enacted their civil commitment laws, any new states to do the same have a cost guide to help them decide if they can afford implementing one. The new federal system is unchartered—there is much less certainty about what the “lingering costs” really are. Specifically, the three-tiered system of the AWA would actually lead to higher costs for administration and enforcement, as most violators would fall in the highest-risk category, which requires the most attention and longest sentences, i.e., the highest cost.
commitment state-controlled would at least better prepare states to shoulder the costs associated with commitment, if a state so chose to endure them.

Perhaps this is the way to go—states are left to construct their own laws not empowered to the federal government, and those not desiring civil-commitment laws can just refuse to enact them.224 Indeed, other similar federal civil-commitment laws may be “vulnerable” to attack on similar grounds as those against the AWA,225 leaving the States as the sole providers of commitment laws. Even with the States left to enact civil-commitment laws, assuming they enact them at all, the problems with enforcement and bait-and-switch plea deals still exist.

c) Abolish Civil Commitment for Sex Offenders Entirely

The best plan for these commitment laws may simply be to sentence sex offenders more strongly, to fit the crime, and have no civil commitment at all. The civil-commitment programs invoked since Hendricks have proven more costly than incarceration226 and the treatment involved during commitment ineffective and insufficient.227 If offenders were simply given sentences to match the estimated severity of their crimes,228 thus confining them longer, civil commitment would be unnecessary.229 Although I am more an advocate for the latter proposition—that treatment simply be implemented so that those confined do not have to remain there for the rest of their
lives—I discuss below the reasons for abolishing commitment entirely, precluding a specific discussion on treatment.

Aside from exorbitant costs and lack of treatment, civil commitment is arguably not effective at reducing the amount of sexual crimes in a state.\textsuperscript{230} Civil commitment also risks replacing the present criminal system—which requires proof of criminal action beyond a reasonable doubt— with “confinements for dangerousness”\textsuperscript{231} for “sexually dangerous” offenders. With the growing acceptance of civil-commitment statutes, a jury might be more willing to commit a “sexually dangerous” person with the promise of treatment as opposed to incarcerating them in harsher-thought prisons.\textsuperscript{232} But when that promise fails to keep, the jury has likely sent a person to their final resting place, albeit with good intentions. If the sentence were made to match the charge and seek the retributive goals against the crime, this potential damning would be avoided.

Adjusting punishment in lieu of civil commitment would also keep a check on congressional power. The federal government already has the power to create federal criminal statutes and punish offenders accordingly;\textsuperscript{233} that much is not debated. Adjusting the statutory punishments for these federal crimes, thus, would follow the same logic, yet would not overstep congressional abilities. Although this may lead to some increased costs due to the longer terms of incarceration of sex-
related federal criminals, it would not be exponential growth as the AWA commands with its increased administrative and enforcement costs. Plea deals would only be affected insofar as defense counsel would have to inform themselves and their clients of the new statutory punishments for certain charges. Plea-deal frequency would not be diminished; if anything, it may increase: the want of defendants to avoid more severe penalties would be extra incentive to take a deal but would not risk the post-sentence consequences of civil commitment, as does the AWA.

The AWA itself, somewhat unsurprisingly, has suggested “enhanced penalties” for some of the most heinous violent crimes and appropriate due-process provisions under which a sex-offender may challenge the sentence. Although the suggested new sentences are unquestionably excessive, it shows a step in the right direction. Either these sentences should be responsibly, rather than emotionally, set by Congress and used as substitutes for civil commitment, or, preferably, civil commitment should be abandoned altogether.

The Appellants in Comstock also proposed modified supervised release as an alternative to commitment. Under this proposal, federal probation officers would be responsible for the supervision of released offenders. Those released could obtain necessary health care, and the release would limit their access to travel and computers. Rather than facing indefinite
commitment, the individuals would be monitored and, as the AWA purports to seek, rehabilitated. With this approach, the safety of the community would be protected; the rights of the individual would be preserved; the punishment would fit the crime; the costs would be greatly reduced; and, as the supervised release would appear as part of the sentencing scheme during plea negotiations, there would be no risk of reduced plea deals. In fact, having the supervised release would likely increase the frequency of such deals—assuming the individual prefers freedom, even supervised freedom, over incarceration.

Supervised release, as proposed by the appellants, sounds like the best middle ground. The Court in Comstock, however, never discussed this possibility. In future hearings of Comstock, if they occur, or in subsequent challenges to the AWA, the Court should be less dismissive of these alternate proposals. The Court’s heavy use of cases such as Addington and Hendricks shows a dated approach to an issue that has evolved exponentially. While psychiatric prediction is not infallible, the science has made great strides over the last thirty years, since Addington, and many concerns of that Court have lessened or vanished. Whether they abolish commitment or only alter the AWA, Congress and the Court must give alternative solutions more than a passing glance. The best solution, with the least risk, may be arguing its case right in front of them.
Conclusion

When Congress enacted the Adam Walsh Act, it had the intentions of well-meaning individuals. Sex crimes often involve horrible circumstances and terrible acts of depravity. But the AWA goes too far to accomplish its purpose and does so at the cost of the liberty of citizens that, although are in many cases criminal, still deserve the same protection of the Constitution and the same rights accorded to all members of this country.

The recommendations discussed above may keep the deprivation of liberty of sex offenders to a minimum yet still accomplish the AWA’s purpose. The greatest challenge is likely to be the alteration of public perception, from a view of “intolerance”\textsuperscript{241} to one of understanding, or at least decreased hostility. The unfortunate truth is that all the statistics, studies, and treatment programs available are unlikely to significantly affect the distasteful view the public generally holds. This battle will be especially hard because, while members of the general public view sex offenders as the “greatest villains” of society, judging by the decision in Comstock, they may not be the only ones. As Rutherford B. Hayes said, “One of the tests of the civilization of people is the treatment of its criminals.”\textsuperscript{242} If President Hayes was right, the implications and directives of § 4248 of the AWA speak a disheartening message about ours.
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2 “In my opinion, we don't devote nearly enough scientific research to finding a cure for jerks.” BILL WATTERSON, ATTACK OF THE DERANGED MUTANT KILLER MONSTER SNOW GOONS 58 (1992) (statement of Calvin of Calvin and Hobbes fame, that is).


4 For example, Congressman Mike Pence, commented specifically on the “wicked hearts” of child predators “who have no decency and know no shame,” and Congressman Phil Gingrey called them “monsters [that need to] be put behind bars.” 152 CONG. REC.
As part of sentencing, eight states allow chemical castration; hurricane shelters in Florida ban sex offenders from entering during natural disasters; and some states even hold family members of sex offenders criminally liable for the offenders’ actions. Corey Rayburn Yung, The Emerging War on Sex Offenders, 45 Harv. C.R.-C.L. Rev. 435, 449 (2010) [hereinafter Yung, Emerging War].

* RECORD, supra note 4, at 5705.

* Id. (statement of Congressman Jim Sensenbrenner).


* RECORD, supra note 4, at 5706; Holland, supra note 9.

* See RECORD, supra note 4, at 5706 (naming seventeen other victims of sexual attacks).

* Holland, supra note 9; RECORD, supra note 4, at 5706 (“[I]n response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those
offenders.”). The AWA also created the Sex Offender Registration and Notification Program, placed a prohibition on internet sales of date-rape drugs, and increased the penalties for sexual offenses against children. *Id.* at H5706, H5712.


15 RECORD, supra note 4, at H5714. The civil-commitment program includes “appropriate control, care, and treatment during such confinement; and [] appropriate supervision, care, and treatment for individuals released following such confinement.” *Id.*

16 See 18 U.S.C. § 4241(d) (describing the determination of mental competency to stand trial to undergo post-release proceedings).

17 A “sexually dangerous person” is someone “suffering from a serious mental illness, abnormality, or disorder, as a result of which the individual would have serious difficulty in refraining
from sexually violent conduct or child molestation.” Record, supra note 4, at 5714.


19 See id. § 4247(d) (granting counsel to persons subject to the hearing and laying out rights also afforded those persons).

20 Id. § 4248(a).

21 Id. § 4248(d).

22 Id. § 4248(e).

23 Id.

24 Id. § 4248(f).

25 Id. § 2252(a)(2).


27 Id.

28 Id.


31 Id. FCI-Butner is a Federal Correctional Institute in Butner, North Carolina housing medium- and minimum-security prisoners. BOP: FCI Butner Medium, http://www.bop.gov/locations/institutions/but/index.jsp (last visited Feb. 8, 2011). It is part of the Butner Federal Correctional Complex, along with the Federal Medical Center
where other respondents were being held. *Id.*; see text accompanying notes 33–36, *infra.*


33 Catron was found incompetent to stand trial for the charges against him of aggravated sexual abuse of a minor and abusive sexual conduct under 18 U.S.C. § 4241. *Id.* at 522 n.2. He was confined at FMC-Butner. *Id.*

34 Matherly was sentenced to a forty-one-month term, followed by a three-year period of supervised release, after pleading guilty to one count of possession of child pornography under 18 U.S.C. § 2252(a)(5)(B), (b)(2). *Id.* On November 23, 2006, Matherly's term of imprisonment ended and he was sent to FCI-Butner due to his certification under the AWA. *Id.*

35 Revland pled guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B). *Id.* He was sentenced to a sixty month term of imprisonment followed by a three-year period of supervised release. *Id.* He also is confined at FCI-Butner. *Id.*

36 Vigil pled guilty to one count of sexual abuse of a minor in violation of 18 U.S.C. §§ 2242(a) and 2246. *Id.* He was sentenced to a ninety-six-month term of imprisonment, followed by a three-year period of supervised release. *Id.* He was confined at FCI-Butner. *Id.*
37 *Comstock*, 507 F. Supp. 2d at 522.

38 *Id.*


40 *Id.* at 280, 283-85.


This issue may pose an interesting future dynamic, should cases of a similar nature—or even the same case on different issues—appear before the new Court. Kagan has, in fact, already disqualified herself from several cases to appear before the Court in her first term on the bench due to her involvement in them as Solicitor General. Greg Stohr, *Kagan Disqualified From Supreme Court Cases*, S. F. CHRONICLE, Sept. 27, 2010, at D-3, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/09/26/BUJG1FJ715.DTL.

Id. at 1954.

Id. at 1956.

Id. at 1949.


Id.

Id. at 278.

See, e.g., Foucha v. Louisiana, 504 U.S. 71, 96 (1992) (“In the civil context, the State acts in large part in its parens patriae power . . . to ensure the public safety.”); Allen v. Illinois, 478 U.S. 364, 373 (1986) (noting “Illinois' decision to supplement its parens patriae concerns with measures to protect the welfare and safety of other citizens” did not make the statute in question criminal for purposes of Fifth Amendment challenge); Addington v. Texas, 441 U.S. 418, 426 (1979) (“The state has a legitimate interests under its parens patriae powers . . . to protect the community.”).

Comstock, 551 F.3d at 278 (citing United States v. Lopez, 514 U.S. 549, 566 (1995)).
Comstock, 130 S. Ct. at 1956.

Id. at 1957 (quoting Gonzales v. Raich, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)). The Court also noted that the statute in question could not be elsewhere prohibited by the Constitution—e.g., the Due Process clause—, but it left such questions unanswered and assumed prohibition did not elsewhere occur. Id. at 1956-57. I will discuss Due Process issues infra, Part IV(a).

Id. at 1957 (mentioning counterfeiting, treason, and crimes committed “on the high Seas” or “against the Law of Nations” among those enumerated in Articles I and III).

Id. at 1958.

Id.

Id.

Id.


Id. (citing Judicial Conference, Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime 11 (1945)).

Id. Apparently, the committee was worried the States would turn away these prisoners due to a “lack of legal residence.”

64 Id. at 1959-60.

65 Id. at 1960 (quoting 18 U.S.C. §4247 (1952)). Subsequent cases interpreted this clause to mean “release would endanger the safety of persons, property or the public interest in general.” United States v. Curry, 274 F.2d 1372, 1374 (4th Cir. 1969) (quoted in Comstock, 130 S. Ct. at 1960).

66 Comstock, 130 S. Ct. at 1960 (citing 18 U.S.C. § 4246(d) (1986)).

67 Id. at 1961.

68 Id.

69 Id. The Court puzzlingly cited Youngberg v. Romeo, 457 U.S. 307, 320 (1982), for the proposition that, “In operating an institution such as [a prison system], there are occasions in which it is necessary for the State to restrain the movement of residents . . . to protect them as well as others from violence.” Id. The States, however, have powers drastically different from that of the federal government. See id. at 1982 (Thomas, J. dissenting) (“[T]he duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States.” (emphasis added)).
The Court also noted how at common law, “one ‘who takes charge of a third person’ is ‘under a duty to exercise reasonable care to control’ that person to prevent him from causing reasonably foreseeable ‘bodily harm to others.’”  Id. (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1963)). Justice Thomas, in his dissent, criticized this reliance on common law “because federal authority derives from the Constitution[.]”  Id. at 1978 (Thomas, J., dissenting).

18 U.S.C. § 4247(a)(6) (2006) (defining “sexually dangerous persons” as those who “suffer[] from a serious mental illness . . . as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released”).

Comstock, 130 S. Ct. at 1961 (majority opinion).

Id. (quoting H. R. REP. No. 1319, at 2); see 18 U.S.C. § 4248(d) (“If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility . . . .”).

Comstock, 130 S. Ct. at 1962.

U.S. CONST. amend. X.

Comstock, 130 S. Ct. at 1962 (quoting Jackson v. Indiana, 406 U.S. 715, 736 (1972)).
The powers ‘delegated to the United States by the Constitution’ include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause.

Id. (citing New York v. United States, 505 U.S. 144, 156 (1992)) ([I]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . .

Id.

Id. (quoting Brief for Respondents at 11, Comstock, 130 S. Ct. 1949 (No. 08-1224)).

Id. (quoting Transcript of Oral Argument at 9, Comstock, 130 S. Ct. 1949 (No. 08-1224)).


Comstock, 130 S. Ct. at 1963.

Greenwood, 350 U.S. at 375.

Comstock, 130 S. Ct. at 1963.

Id.

Brief for Respondents, supra note 80, at 21-22 (internal quotation marks omitted) (quoting United States v. Lopez, 514 U.S. 549, 567 (1995)) (“To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the
Commerce Clause to a general police power of the sort retained by the States.”).

88 Comstock, 130 S. Ct at 1963 (”[F]rom the implied power to punish we have further inferred both the power to imprison . . . and, in Greenwood, the federal civil-commitment power.”) (citation omitted).

89 Id. at 1964.

90 Id. (quoting United States v. Hall, 98 U.S. 343, 345 (1879)). The Court concluded its analysis, “[T]he same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well.” Id.

91 See cases cited supra at note 50 and accompanying text.

92 Comstock, 130 S. Ct. at 1964.

93 See Part IV(a), infra.

94 Comstock, 130 S. Ct. at 1965.

95 Id. at 1967. The Court also had narrowly defined the States’ reserved powers; rather, these powers are “so broad that they remain undefined. Residual power, sometimes referred to . . . as the police power, belongs to the States and the States alone.” Id.

96 Id. at 1968-69 (Alito, J., concurring).
Id. at 1969. Justice Alito also noted the long-standing recognition of these principles, dating back to the "beginning of our country." See id. and sources cited in footnotes therein.  

Id. at 1970. This was the "substantial link to Congress' constitutional powers" necessary to authorize 4248. Id.  

Id. (Thomas, J., dissenting) (internal quotation marks omitted).  

Id. at 1971 (quoting THE FEDERALIST No. 45, at 328 (James Madison) (B. Wright ed. 1961)).  

Id. (quoting U.S. CONST. art. I, § 8, cl. 18) (the Necessary and Proper Clause).  

Id. at 1973 ("Under the Court's precedents, Congress may not regulate noneconomic activity (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce.") (citing United States v. Morrison, 529 U.S. 598, 617-618 (2000); United States v. Lopez, 514 U.S. 549, 563-567 (1995)).  

Id. at 1974 (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)). Justice Thomas added that the "States may 'take measures to restrict the freedom of the dangerously mentally ill'—including those who are sexually dangerous." Id. (citing Kansas v. Hendricks, 521 U.S. 346, 363 (1997)) (emphasis added).  

Id. See note 50 and accompanying text.
Id.; see also Emily Eschenbach Barker, *The Adam Walsh Act: Un-Civil Commitment*, 37 Hastings Const. L.Q. 141, 162 (2009) ("Because Congress has no general police powers . . . it cannot create a federal civil commitment regime unless that regime is predicated upon some enumerated or incontestable federal power.").


*Id.* at 1975. Justice Thomas enunciated a few of these possible questions:

Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress’ Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, which three or four are imperative? At a minimum, this shift from the two-step *McCulloch* framework to this five consideration approach warrants an explanation as to why *McCulloch* is no longer good enough and which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices.

*Id.* See also Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal*
Power, 2010 Cato Supreme Court Review 239, 244 (2010) (quoting Justice Thomas and asking the same questions).


109 Id. at 1975–77. As Justice Thomas further delineates in a footnote, to enact § 4248, Congress would have to have an enumerated power for the actions of that statute itself; it is not valid simply because it ties into other actions that are themselves only authorized via a “Necessary and Proper” connection to an enumerated power. Id. at 1976 n.8. In other words, because § 4248 is not itself Necessary and Proper for “carrying into execution” an enumerated power, but only ties to an already implied (rather than explicit) action, Congress does not have the authority to legislate it—it cannot “double-dip” its Necessary and Proper authority. For a “more general” description of this analysis, see Somin, supra note 107, at 250.


111 Id.


113 Comstock, 130 S. Ct. at 1977. Comstock himself is such an example: the crime with which he was charged prior to his commitment was the “[r]eceipt of materials depicting a minor engaging in sexually explicit conduct,” a crime requiring no violence whatsoever and to which he pled guilty. United States
v. Comstock, 507 F. Supp. 2d 522, 526 (E.D.N.C. 2007), rev’d, Comstock, 130 S. Ct. 1949. The government conceded this point, as Justice Thomas pointed out. Comstock, 130 S. Ct. at 1977 (“The Government concedes that nearly 20% of individuals against whom §4248 proceedings have been brought fit this description.” (citing Transcript of Oral Argument, supra note 81, at 23–25)).

114 Comstock, 130 S. Ct. at 1977. Justice Thomas contrasted this approach with that of the statute in Greenwood, which allowed detention of an individual pending trial until he was fit to do so. Id. (citing Greenwood v. United States, 350 U.S. 366, 368 n.2 (1956)).

115 Id. at 1978. Although there are federal laws prohibiting certain types of sexual violence, those statutes tie into an enumerated power of Congress, unlike 4248, which only requires a showing that the defendant will in some way “present a risk to others.” Id. (quoting 18 U.S.C. § 4247 (2006)).

116 Id. at 1979. Justice Thomas notes the reliance on the Restatement (Second) of Torts was poor, and on Youngberg v. Romeo to be even less supportive. Id. at 1979 n.11 (noting that Youngberg, 457 U.S. 307 (1982), referred to the hospital’s duty to protect its residents, rather than the public and that the case lent no support whatsoever to detention against prisoners feared to be dangerous if released after their incarceration
period has ended). Justice Thomas also disagreed with Justice Alito’s concurrence that 4248 prevented harm “created by the federal criminal justice and prison systems. Id. at 1979, 1979 n.12 (“A federal criminal defendant’s ‘sexually dangerous’ propensities are not ‘created by’ the fact of his incarceration or his relationship with the federal prison system.”).

117 Id. at 1979–80 (noting that, although history supports the government’s ability to detain mentally ill persons, it did not support Congress’ authorization of detention of persons with “[no] basis for federal criminal jurisdiction”).

118 Id. at 1981 (“[T]he assumption that a State knowingly would fail to exercise that authority is, in my view, implausible.”). Justice Thomas also expressed several Federalism concerns, concluding, “[T]he duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States.” Id. at 1983 (citing United States v. Morrison, 529 U.S. 598 (2000); Cohens v. Virginia, 6 Wheat. 264, 426 (1821)).

119 Id. at 1983 (quoting McCulloch v. Maryland, 4 Wheat. 316, 423 (1819); see Transcript of Oral Argument, supra note 81, at 20 (Scalia, J.) (“[T]his is a recipe for the Federal Government taking over everything.”); Somin, supra note 107, at 248 (“The Necessary and Proper Clause does not give Congress a blank check to adopt any laws that might advance some useful purpose.”)); see
also Ilya Somin, Gonzales v. Raich: Federalism as a Casualty of the War on Drugs, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (noting that after Raich, Commerce Clause challenges are unlikely to succeed) [hereinafter Somin, Federalism], quoted in Robin Morse, Federalism Challenges to the Adam Walsh Act, 89 B.U. L. REV. 1753, 1766 (2009).

120 Comstock, 130 S. Ct. at 1983 (Thomas, J., dissenting). See Yung, supra note 5, at 466 (noting how courts allowing expansive jurisdiction for civil commitment “turn the Commerce Clause into a ‘spider web’ whereby any person who enters federal jurisdiction at one point is stuck there for life”).

121 See Somin, supra note 107, at 254-55 (“[U]nder the majority’s reasoning in Comstock, Congress would have almost as much authority as it currently has even if the Constitution gave Congress only two enumerated powers: the power to regulate interstate commerce and the Necessary and Proper Clause itself. The rest of the enumerated powers in Article I become surplus verbiage.”).


123 Transcript of Oral Argument, supra note 81, at 23-24. The government need only “decide” before the end of the prisoner’s term that he should be deemed sexually dangerous based on something in his history, not necessarily the crime for which he
was imprisoned in the first place. Id. at 24–25 (statement of Solicitor Gen. Elena Kagan).


125 Transcript of Oral Argument, supra note 81, at 24–25; Morse, supra note 119, at 1789 ("Section 4248 . . . authorize[s] the government to civilly commit someone convicted of bank robbery, based only on a determination that he engaged in sexually violent conduct and was sexually dangerous, with no necessary link to a federal sex crime.").

126 U.S. CONST. art. I, § 8, cl. 1.


129 Id.


131 Id. at 667–69 (classifying kleptomania under "impulse-control disorders not elsewhere classified").

132 See Kansas v. Hendricks, 521 U.S. 346, 359 (1997) ("[W]e have traditionally left to legislators the task of defining terms of a medical nature that have legal significance.").

John A. Fennel, Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37, 42 (2009) (citing DSM, supra note 130, at xxxviii).

See DSM, supra note 130, at 701–06 (defining Antisocial Personality Disorder).


18 U.S.C. § 2250(a); see Corey Rayburn Yung, One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions, HARV. J. ON LEGIS. 369, 380 (2009).

Fennel, supra note 134, at 61.

Id. at 62 (quoting Kevin M. Carlsmith et al., The Function of Punishment in the “Civil” Commitment of Sexually Violent Predators, 25 Behavioral Sci. & L. 437, 445–46 (2007) (finding support that use of civil-commitment procedures for sexually dangerous persons is based on retributive rather than “incapacitative” goals); see also Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (worrying that civil commitment for nonsexual crimes “would also be only a step away from substituting confinements for dangerousness for our present system which . . . incarcerates only those who are proved beyond a reasonable doubt to have violated the criminal law”); Eric S. Janus, Closing Pandora’s Box: Sexual Predators and the Politics of Sexual Violence, 34 Seton Hall L. Rev. 1233, 1235 (2004) (noting how civil-commitment statutes for sexually dangerous persons “can compensate for the ‘comparatively short correctional sentences’ for sex offenders by confining individuals after they have completed their criminal sentences”) (quoting In re Linehan, 557 N.W.2d 171, 183 (Minn. 1996)).


Id. at 496 (citing Human Rights Watch, No Easy Answers: Sex Offender Laws in the U.S. 12 (2007), available at http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf); see also Janus, supra note 142, at 1236 (noting how Sexually Violent Predator (“SVP”) commitment laws are “very expensive”). Janus also cites statistics of various states and the costs of their SVP commitment laws, including Wisconsin ($26 million per year, $40 million for the facility), California ($350 million for the housing facility), and Minnesota ($76.9 million). Id. (citing Jessica McBride & Reid J. Epstein, State Tops in Release of Sexual Predators, Milwaukee J. Sentinel, Sept. 22, 2003, at 1A). See also Allen Greenblatt, States Struggle to Control Sex Offender Costs, NPR.ORG (May 28, 2010), http://www.npr.org/templates/story/story.php?storyId=127220896 (“In these incredibly difficult fiscal times, with states near bankruptcy, it is extraordinarily hard for them to come into
compliance, just for financial reasons."} (statement of consultant with the Association for the Treatment of Sexual Abusers, Alisa Klein).

147 42 U.S.C. § 16971(a).

148 See supra note 146.

149 See Yung, supra note 5, at 447 (noting that “a War on Sex Offenders could easily cost more than the War on Drugs,” an amount totaling “$2.5 trillion”) (citing Claire Suddath, A Brief History of the War on Drugs, TIME ONLINE, Mar. 25, 2009, available at http://www.time.com/time/world/article/0,8599,1887488,00.html).

150 United States v. Comstock, 560 U.S. ___, 130 S. Ct. 1949, 1974 (2010) (Thomas, J., dissenting); see also Greenblatt, supra note 146 (“I disagree with the criticism that I hear that the costs are too high . . . . It's absolutely not asking too much of government to protect children from violent sex predators.”) (statement of Assemb. Nathan Fletcher).

151 Obviously, not everyone agrees with this statement. See Yung, supra note 5, at 452 (“[E]ven in these dire economic times, the Obama administration has proposed a new allocation of $381 million so that fifty United States Marshals can be hired to enforce the AWA.”) (citing 2010 Budget: Agency by Agency, FED. TIMES, May 11, 2009, at 12).
See Greenblatt, supra note 146 ("[T]he legislature has basically made a commitment to the citizens regarding how sex offenders will be managed and kept track of . . . . To the extent they're not able to fulfill those expectations, then it becomes grounds for disappointment and lawsuits and other financial consequences.") (statement of Dir. of the Wash. State Inst. for Pub. Policy, Roxanne Lieb).

E.g. Parts IV(b), (c).


Of course, in 2000, the AWA was not yet in effect, so he could not have been so confined under federal law, at least not for being "sexually dangerous."

Fennel, supra note 134, at 62-63.


Id. at 60.

Id. at 70.


Id. at 1478.


Padilla, 130 S. Ct. at 1478, 1481-82.
See Somin, supra note 107 (discussing the potential impacts of Comstock on the recent healthcare legislation passed in March 2010); Enniss, supra note 14 (criticizing the Adam Walsh Act for its negative consequences on “those it aim[ed] to protect—children”); Yung, supra note 5, at 478 (forecasting “restrictions” of traditional due-process rules for “undesirable” populations such as sex-offenders).

Comstock, 130 S. Ct. at 1956.

Id. at 1965.

627 F.3d 513 (4th Cir. 2010).


Comstock, 627 F.3d at 515.


Comstock, 627 F.3d at 519–521 (“More than thirty years ago, the Supreme Court held that a state could civilly commit a person without proving ‘beyond a reasonable doubt’ that he suffered from a mental illness . . . because the reasonable doubt standard ‘historically has been reserved for criminal cases’ . . . . [P]roof by clear and convincing evidence sufficed
to justify civil commitment of mentally ill persons.”) (quoting Addington v. Texas, 441 U.S. 418, 427-31 (1979)).

173 Comstock, 627 F.3d at 521.


175 Comstock, 627 F.3d at 523 (quoting Kansas v. Hendricks, 521 U.S. 346, 362 (1997)).


177 See Ahluwalia, supra note 128, at 526 (noting the “superficial distinction between civil commitment and punishment”).

178 See Addington, 441 U.S. at 420-21 (discussing Addington’s criminal sexual history); Hendricks, 521 U.S. at 350 (same for Hendricks).


180 See Yung, supra note 5, at 448 (“Release from the facilities is rare and placement within the facilities typically amounts to a lifetime sentence.”).

181 United States v. Perry, 788 F. Supp. 2d 100, 114 (1986); see also Jones v. United States, 463 U.S. 354, 372 (1983) (Brennan,
J., dissenting) (calling commitment a “massive intrusion on individual liberty”).

182 Addington, 441 U.S. at 429 (1979) (“Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.”).

183 R. Karl Hanson & Kelly E. Morton-Bourgon, The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies, 21 Psychological Assessment 1 (2009). All of the offenders in the study had committed offenses that meet “contemporary definitions of sexual crimes,” and the average follow-up period was seventy months. Id. at 4.

184 Id. at 1. This includes specific measures such as the Static-99, a tool which predicts recidivism based on factors such as prior offenses and victim characteristics. Id.

185 Id. at 3 (including “empirical actuarial, clinically adjusted actuarial, mechanical, and structured professional judgment”).

186 Id. at 6, 8. The actuarial methods designed to detect recidivism of any kind were the most accurate in the study, with a 97% predictive rate. Id. at 6.

187 Id. (“The accuracy of the unstructured evaluations did not change on the basis of the year in which the risk assessment was
conducted (all rs [r is the linear relationship between two variables, here comparing the year in question with the predictive quality of the unstructured evaluations] were nonsignificant for the prediction of sexual, violent, or any recidivism.”).


189 See *A Comparison of Approaches to Risk Assessment in Child Protection and Brief Summary of Issues Identified From Research on Assessment in Related Fields*, *Child Welfare League of Am.* 5 (Nov. 11, 2005), http://www.pacwcbt.pitt.edu/Organizational%20Effectiveness/Practice%20Reviews/RevisedRAArticleCWLA11-05.DOC.

190 Hanson & Morton-Bourgon, *supra* note 183, at 9 (“[T]he simplest interpretation is that the overrides simply added noise.”).

191 *Id.* at 10 (noting that 79.5% of evaluators used multiple risk tools).

192 *Id.* (citing J. F. Mills & D. G. Kroner, *The Effect of Discordance Among Violence and General Recidivism Risk Estimates*
on Predictive Accuracy, 16 Criminal Behaviour and Mental Health 155 (2006)).

193 Addington, 441 U.S. at 427.

194 See generally Tsesis, supra note 188 (arguing for the beyond a reasonable doubt standard in civil commitment proceedings).


196 Although the AWA now has this definition, it was added after Comstock was committed. Petition for a Writ of Certiorari at 6 fn.5, United States v. Comstock, 560 U.S. ___, 130 S. Ct. 1949 (No. 08-1224).


198 Hendricks, 521 U.S. at 535.


200 Hendricks, 521 U.S. at 371.

201 See Somin, supra note 107, at 241 ("[T]he Comstock defendants could not argue that their continued confinement violated an individual constitutional right.").

202 See supra note 50 and cases cited therein.

203 See United States v. Comstock, 560 U.S. ___, 130 S. Ct. 1949, 1974 (Thomas, J., dissenting) ("This Court, moreover, consistently has recognized that the power . . . ‘to protect the community from the dangerous tendencies of some’ mentally ill
persons, are among the numerous powers that remain with the States.” (citing Addington v. Texas, 441 U.S. 418, 426 (1979)).

The finding of dangerousness required by these state statutes implicitly activates the parens power, granting States the right to commit offenders and thus protect their citizens. See Wangenheim, supra note 3, at 574 (“For SVPAs, the relationship between commitment and a state's interest easily passes muster under a state's already existing parens patriae powers to provide care for those citizens ‘who are unable because of emotional disorders to care for themselves,’ and under a state's police power to ‘protect the community from the dangerous tendencies of some who are mentally ill.’”) (quoting Addington, 441 U.S. at 426). Even this power, however, has its limits, specifically those predicated under due process. See Mara Lynn Krongard, A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks, 90 CAL. L. REV. 11, 121-22 (“‘[T]he States are vested with the historic parens patriae power,’ but that power is subject to due process limitations.”) (quoting O’Connor v. Donaldson, 422 U.S. 563, 583 (1974)) (Burger, J., concurring).

Somin, supra note 107, at 248-51.

Morse, supra note 119, at 1763 (“T]he federal government possesses no general police or patriae power. Therefore,
Congress may not provide for civil commitment . . . to protect the general welfare of the community.”) (internal footnotes omitted).

207 Addington, 441 U.S. at 425.


210 Ahluwalia, supra note 128, at 512 (“Justice Thomas’ opinion . . . avoids asking the crucial question of whether the diluted mental abnormality standard satisfies due process.”).

211 Id. at 497–97.

212 See United States v. Comstock, 560 U.S. ___, 130 S. Ct. 1949, 1974 (2010) (Thomas, J., dissenting) (“But the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.”). Justice Kennedy noted that simply having “an evil at hand for correction” was only sufficient to meet due-process standards if it referred to “a challenge to a State’s exercise of its own powers, powers not confined by the principles that control the limited nature of
our National Government.” Id. at 1966 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-488 (1955)). The highly deferential standard allowed in that case, however, was limited to that case and its state-law issues. Id.

213 See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (upholding statute regulating medicinal-marijuana market as covering economic activity); United States v. Morrison, 529 U.S. 589 (2000) (rejecting statute that regulated aggregate, non-economic criminal conduct); United States v. Lopez, 514 U.S. 549 (1995) (holding statute governing non-economical intrastate activity was not within Congressional power); see also Consolidated Brief of the Cato Institute and Prof. Randy Barnett as Amici Curiae in Support of Respondents at 31-32, Comstock, 130 S. Ct. 1949 (No. 08-1224) (discussing Raich, Morrison, and Lopez, among others).

214 See Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from the States, 109 Mich. L. Rev. 519, 524-25 (2011) (noting the doubling of the federal prison population to 70,000 over the past twenty-five years and more than 300% growth of drug cases since 1980); See also Alex Kozinski & Misha Tseytlin, You’re (Probably) a Federal Criminal, in In The Name Of Justice 43, 44-48 (Timothy Lynch, ed. 2009) (noting how due to the massive expansion of federal criminal law, the “average American
may commit as many as three federal felonies per day”), cited in Somin, supra note 107, at 267.

215 See Barkow, supra note 214, at 531-32 (describing how, according to opponents of “increased federal involvement . . . the size and structure of the federal judiciary is not suited for taking on a larger share of criminal matters”) (citing Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 983-91 (1995)).

216 See Comstock, 130 S. Ct. at 1981 fn. 15 (Thomas, J., dissenting) (citing the twenty-two states that have currently-enacted involuntary civil-commitment statutes).

217 Morse, supra note 137, at 1792.

218 See supra note 216.

219 Transcript of Oral Argument, supra note 81, at 43.

220 Id. at 36 (“[I]f the problem is that the States are unwilling to incur the expenses for these people . . . Congress could pass a statute saying the Federal Government will pay the expenses of any prisoners released from Federal prison.”).

221 Id.

222 See Greenblatt, supra note 146 (“Sometimes federal mandates and state laws get passed without a real sense of what the lingering costs are.” (statement of Suzanne Brown-McBride,
Deputy Dir., Council of State Governments Justice Center)). The greatest expense, however, is incarceration under the AWA. Id. 223 Id.; 42 U.S.C. § 16911 (2006).

224 See Tsesis, supra note 188, at 5 (suggesting “state-by-state legislative reform” should be implemented to preserve the “integrity of the [civil] commitment process”).

225 See Somin, supra note 107, at 258. This discussion, although inviting, is beyond the purview of this Note.


228 In the Congressional hearings on the AWA, it was pointed out that federal sex crimes have, in fact, increased in length of punishment. See RECORD, supra note 4, at H5723 (“[W]e recently increased Federal sex offenses penalties in the PROTECT Act with mandatory minimums of at least 5 years and some up to mandatory life . . . .”) (statement of Congressman Bobby Scott).
Much of the time, both judges and juries allocate punishment based on whether they feel “the offender has done enough time or done enough penance through treatment.” Fennel, supra note 134, at 61. Juries consider amount of punishment a more important factor when deciding new sentences than risk of recidivism. Id. at 61–62 (citing Carlsmith et al., supra note 142). Thus, if the offender was facing his first-time offense, a jury could adequately determine punishment and not be called upon later to indefinitely, and unnecessarily, confine the offender.

Wright, supra note 226, at 40 (noting how the recently-enacted New York legislation was criticized as “merely another effort at controlling public fear and would have little to no impact on sexual assault”) (citing Editorial, Wrong Turn on Sex Offenders, N.Y. TIMES, Mar. 13, 2007, at A18.).


Janus, supra note 142, at 1233.

234 See Greenblatt, supra note 146.


236 See Enniss, supra note 14, at 701 (citing Mona Lynch, Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation, 27 LAW & SOC. INQUIRY 529, 530-31 (2002)).

237 See Transcript of Oral Argument, supra note 81, at 45.

238 Id.

239 Id. at 46-47.

240 See supra Part IV(a).

241 Wangenheim, supra note 3.