South Carolina Law Review

Volume 60
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 17

Summer 2009

Unwanted Advances: Civil Commitment and Congress's Illicit Use of the Commerce Clause--United States v. Comstock

Miles Coleman

UNWANTED ADVANCES: CIVIL COMMITMENT AND CONGRESS'S ILLICIT USE OF THE COMMERCE CLAUSE—*UNITED STATES V. COMSTOCK*

I. INTRODUCTION

In *United States v. Comstock*,[1] a unanimous panel of the United States Court of Appeals for the Fourth Circuit struck down a federal statute allowing for the indefinite civil commitment of "sexually dangerous" persons who have completed serving their prison sentences.[2] The Fourth Circuit affirmed the district court, holding that 18 U.S.C. § 4248 "cannot be sustained as an exercise of Congress's authority under the Commerce Clause or any other provision of the Constitution."[3]

Comstock is noteworthy for a number of reasons and, not surprisingly, the Supreme Court has granted certiorari to review the case.[4] As noted in the opinion, the Fourth Circuit was "the first appellate court to address this question, but the issue has divided trial courts across the nation."[5] Further, the Eighth Circuit subsequently decided a case in which they upheld the statute,[6] thus creating a circuit split among the courts of appeals. Additionally, the opinion implicates significant constitutional issues of federalism and the scope of congressional power. Finally, this case presents an opportunity for the Supreme Court to clarify its evolving and often disputed recent Commerce Clause jurisprudence.[7]

---

1. 551 F.3d 274 (4th Cir. 2009).

2. *Id.* at 276 (citing Adam Walsh Child Protection and Safety Act of 2006 § 302, 18 U.S.C. § 4248 (2006)).

3. *Id.* at 284.

4. *See* 129 S. Ct. 2828 (2009).

5. *Id.* at 276. *Compare* United States v. Volungus, 599 F. Supp. 2d 68, 79 (D. Mass. 2009) ("Congress lacked power to adopt the Act's regime for the civil commitment of sexually dangerous persons either under the Commerce Clause directly or as its authority over interstate commerce is supplemented by the Necessary and Proper Clause."), *and* United States v. Tom, 558 F. Supp. 2d 931, 941 (D. Minn. 2008) ("[T]he Court has determined that § 4248 was not a valid exercise of Congressional power . . . ."), *and* United States v. Comstock, 507 F. Supp. 2d 522, 559 (E.D.N.C. 2007) ("Because the civil commitment scheme set forth at 18 U.S.C. § 4248 is not sufficiently tied to the exercise of any enumerated or otherwise identifiable constitutional power of Congress and because § 4248, as currently structured, is not a proper exercise of any power that Congress might constitutionally exercise, this court concludes that 18 U.S.C. § 4248 is unconstitutional."), *with* United States v. Abregana, 574 F. Supp. 2d 1123, 1129 (D. Haw. 2008) ("Congress acted within its authority in enacting Title 18 U.S.C. § 4248 . . . ."), *and* United States v. Shields, 522 F. Supp. 2d 317, 323 (D. Mass. 2007) ("[T]he Act was a necessary and proper exercise of congressional power . . . ."), *and* United States v. Carta, 503 F. Supp. 2d 405, 407–08 (D. Mass. 2007) ("[T]his court concludes that the scope of the [Necessary and Proper Clause] . . . extends so far as to allow Congress to prevent the release of those lawfully in custody, where it has rationally set up a process for determining that those individuals are likely to commit further acts of sexual violence proscribed under Congress's Commerce Clause authority.").

6. United States v. Tom, 565 F.3d 497 (8th Cir. 2009); *see generally infra* Part IV.D (summarizing *Tom*).

7. *See* Gonzales v. Raich, 545 U.S. 1, 15–16 (2005) (citing United States v. Lopez, 514 U.S. 549, 552–58 (1995); *id.* at 568–74 (Kennedy, J., concurring); *id.* at 604–07 (Souter, J., dissenting))

Part II of this Note outlines the statutory, factual, and procedural background of *Comstock*. Part III examines the Fourth Circuit's reasoning in *Comstock*. Finally, Part IV briefly explores some of the counterarguments to and potential flaws in *Comstock*'s reasoning, ultimately concluding the Fourth Circuit's analysis is correct, and the Supreme Court should affirm.

II. BACKGROUND

A. 18 U.S.C. § 4248.

Congress passed the Adam Walsh Child Protection and Safety Act of 2006 to "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."[8] The Act is designed as "a comprehensive bill to address the growing epidemic of sexual violence against children" and aims "to address loopholes and deficiencies in existing [federal] laws" intended to protect children.[9] Described as "the most comprehensive child crimes and protection bill in our Nation's history,"[10] the Act, among other things, "creates a National Sex Offender Registry, increases punishments for a variety of federal crimes against children, and strengthens existing child pornography prohibitions."[11] In addition to strengthening existing federal law, the Act "is designed to close the gap between federal and state efforts to identify, track, and confine sexual predators."[12]

The respondent's in *Comstock* challenged only one section of the Act. The contested provision allows the federal government to civilly commit at the conclusion of his sentence any federal prisoner certified as "sexually dangerous".[13] A sexually dangerous person is one "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others."[14] The Attorney General commences a commitment proceeding by filing a certification with a district court stating that the prisoner is sexually dangerous.[15] This certification stays the prisoner's often

---

("[O]ur understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time."); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce."); *see also infra* Part IV.A (analyzing *Lopez*, *Morrison*, and *Raich*).

8. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 587 (codified as amended in scattered sections of 8, 18, 21, and 42 U.S.C.).

9. H.R. REP. NO. 109-218, pt. 1, at 20 (2005).

10. 152 CONG. REC. S7949, S8012 (daily ed. July 20, 2006) (statement of Senator Hatch).

11. United States v. Comstock, 551 F.3d 274, 276 (4th Cir. 2009) (citations omitted).

12. United States v. Comstock, 507 F. Supp. 2d 522, 526 (E.D.N.C. 2007).

13. *See* 18 U.S.C. § 4248(d) (2006).

14. *Id.* § 4247(a)(5).

15. *Id.* § 4248(a).

imminent release pending a hearing by the district court.[16] At that hearing, if the government shows by clear and convincing evidence that the prisoner is sexually dangerous, then the court must commit the prisoner to the custody of the Attorney General.[17] Section 4248 provides in pertinent part:

> (a) INSTITUTION OF PROCEEDINGS.—In relation to a person who is in the custody of the Bureau of Prisons . . . the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government . . . . The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.
>
> . . . .
>
> (d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—
>
> (1) such a State will assume such responsibility; or
>
> (2) the person's condition is such that he 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;
>
> whichever is earlier.[18]

A person civilly committed pursuant to § 4248 remains confined until he is no longer sexually dangerous to others.[19] This determination, made by "the [d]irector of the facility in which [the] person is placed," commences the discharge procedure.[20] The facility director must then file a certificate with the

16. *Id.*
17. § 4248(d).
18. § 4248(a), (d).
19. § 4248(e).
20. *See id.*

court that ordered the commitment.[21] That court must either summarily discharge the person or, on motion of the government or sua sponte, must hold a hearing to determine if the person should be released.[22] At the hearing, if the court finds by a preponderance of the evidence that the person is no longer sexually dangerous, then the court shall order either his immediate discharge or a discharge conditioned on a prescribed regimen of treatment or care.[23]

B. Factual Background

Comstock consolidated five challenges to § 4248, brought by inmates confined in the Federal Correctional Institution at Butner, North Carolina.[24] Of the five inmates, the government had charged three with receipt of child pornography and two with sexual abuse of a minor.[25] Four of the inmates found their way into federal custody via guilty pleas; one was found incompetent to stand trial.[26] Their sentences ranged from thirty-seven to ninety-six months.[27] In each case, the government certified the inmate as "sexually dangerous" under § 4248 within a month of the end of the inmate's prison term—in one case certifying an inmate on the final day of his 96-month sentence.[28] At the time the Fourth Circuit decided *Comstock*, each inmate had remained in federal custody more than two years after the conclusion of his prison sentence.[29]

C. District Court Opinion

Upon being certified as sexually dangerous, all five inmates filed motions in the Eastern District of North Carolina to dismiss the civil commitment proceedings.[30] Although the district court did not consolidate the motions, in light of their nearly identical substance, it addressed them in a single opinion.[31] On September 7, 2007, the district court granted the motions to dismiss, holding

---

21. *Id.*
22. *Id.*
23. *Id.*
24. United States v. Comstock, 551 F.3d 274, 277–78 (4th Cir. 2009).
25. *See* United States v. Comstock, 507 F. Supp. 2d 522, 526 & n.2 (E.D.N.C. 2007).
26. *Id.*
27. *Id.*
28. *Comstock*, 551 F.3d at 277–78.
29. *Id.* at 278. As of early 2009, more than sixty inmates remained incarcerated in the Eastern District of North Carolina alone, all but one of whom had served all, or nearly all, of their prison sentences when certified for further confinement. *Id.* at 277 n.3.
30. *Comstock*, 507 F. Supp. 2d at 527.
31. *Id.* at 527 n.3.

that § 4248 was unconstitutional.[32] The court found the statute exceeded Congress's authority and violated the due process rights of those committed.[33]

At the outset, the district court determined that § 4248 is properly classified as a civil, not criminal, scheme, and thus the inmates' double jeopardy, ex post facto, cruel and unusual punishment, and jury trial claims were not cognizable.[34] The court then turned to an inspection of Congress's authority to civilly commit sexually dangerous persons, examining "carefully the enumerated and incidental powers upon which the government relies,"[35] particularly the Necessary and Proper Clause.[36] Because that clause does not itself create any congressional power,[37] the court sought to determine "whether § 4248 is a necessary and proper means of effectuating" an identifiable enumerated constitutional power.[38]

Of the various powers suggested by the government as possible bases for § 4248, the court found the Commerce Clause to be the only plausible possibility.[39] Analyzing the Commerce Clause question under the precedents of *United States v. Lopez*[40] and *United States v. Morrison*,[41] the court noted the lack of any nexus between § 4248 and interstate commerce or the channels or instrumentalities of interstate commerce.[42] Ultimately, the court concluded "that neither the Commerce Clause, the Necessary and Proper Clause, nor any other authority suggested, provide Congress with the power to enact § 4248 . . . ."[43] Further, the court concluded that even if Congress had the power to enact § 4248, the statute was neither necessary nor proper, and it impermissibly intruded into an area of state concern.[44]

Finally, the district court determined that § 4248 violated the due process rights of the persons committed under its procedures.[45] Section 4248(d) provides

---

32. *Id.* at 526.

33. *Id.* While the court characterized its holding as one concerning substantive due process, *id.* at 526, the issue—the appropriate standard of proof for a factual determination—seems better denominated as a violation of procedural due process.

34. *Id.* at 530.

35. *Id.* at 531.

36. *See* U.S. CONST. art. I, § 8, cl. 18 (providing Congress with the power "[t]o 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").

37. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960) ("The [Necessary and Proper Clause] is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers . . . .").

38. *Comstock*, 507 F. Supp. 2d at 531.

39. *Id.* ("The other powers cited by the government—such as the power to criminalize and punish certain conduct, and the power to prosecute—are certainly recognized government powers; however, those powers are themselves necessary and proper exercises of power premised upon enumerated powers.").

40. 514 U.S. 549 (1995).

41. 529 U.S. 598 (2000).

42. *Comstock*, 507 F. Supp. 2d at 535.

43. *Id.* at 540.

44. *Id.* at 551.

45. *Id.* at 559.

that, after a hearing to determine sexual dangerousness, a district court shall commit the person to the Attorney General's custody if "the court finds *by clear and convincing evidence* that the person is a sexually dangerous person."[46] This "intermediate standard of proof"[47] differs from the standard typically applied in criminal contexts: proof beyond a reasonable doubt.[48] Despite the fact that § 4248 is a civil, not criminal, scheme, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[49] The court determined that using the clear and convincing evidence standard rather than requiring proof beyond a reasonable doubt constituted a due process violation.[50] In light of the conclusion that § 4248 was beyond Congress's power and violated due process, the court declined to "address the remaining substantive due process and equal protection arguments also raised by respondents."[51]

III. THE FOURTH CIRCUIT'S OPINION

On appeal, a unanimous Fourth Circuit panel affirmed the holding of the district court, finding "that § 4248 does indeed lie beyond the scope of Congress's authority."[52] The court anchored its decision solely in the lack of congressional authority and declined to reach the merits of the statute's other alleged defects.[53] While the court's holding rests primarily on Commerce Clause analysis, federalism concerns permeate the analysis: the court was specifically concerned about federal intrusion into an area traditionally controlled by states despite the absence of a federal police power or *parens patriae* power.[54]

---

46. 18 U.S.C. § 4248(d) (2006) (emphasis added).

47. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990) (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)) (internal quotation marks omitted).

48. *See* Addington v. Texas, 441 U.S. 418, 423–24 (1979) (citing *In re* Winship, 397 U.S. 358, 370 (1970)).

49. *Comstock*, 507 F. Supp. 2d at 551 (quoting *Addington*, 441 U.S. at 426) (internal quotation marks omitted).

50. *Id.* at 552.

51. *Id.* at 560.

52. United States v. Comstock, 551 F.3d 274, 276 (4th Cir. 2009).

53. *Id.* at 276 n.1. These alleged defects remain, however, as potential alternate grounds for affirmance by the Supreme Court. *See also* Brief for Appellee at 18 n.3, United States v. Comstock, 551 F.3d 274 (4th Cir. 2009) (No. 07-7671), 2008 WL 839580 (preserving issues of "the Double Jeopardy Clause, the Ex Post Facto Clause, the Eighth Amendment prohibition against cruel and unusual punishment and the Sixth Amendment right to a jury trial").

54. *See Comstock*, 551 F.3d at 278 (citing United States v. Lopez, 514 U.S. 549, 566 (1995)) ("Unlike the states, the federal government has no general police or *parens patriae* power."); *see also id.* at 283 ("[T]he Government's argument attempts to 'pile inference upon inference' so as to 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'" (quoting *Lopez*, 514 U.S. at 567)); *id.* at 284 ("If the federal government has serious concerns . . . it can notify state authorities, who may use their well-settled police and *parens patriae* powers to pursue civil commitment under state law.").

In support of the statute, the government relied almost exclusively on the Necessary and Proper Clause,[55] a strategy that seemed both to perplex and exasperate the court.[56] However, because "that provision, by itself, creates *no* constitutional power,"[57] the court turned first to the Commerce Clause—the only specific enumerated constitutional power the government could identify as authorizing § 4248.[58]

A. Commerce Clause Analysis

The Fourth Circuit's analysis relied heavily on *Lopez* and *Morrison*, cases which "provide[] substantial assistance in resolving the question of whether the Commerce Clause authorizes § 4248."[59] In those cases, the Supreme Court identified three areas subject to Congressional regulation pursuant to the Commerce Clause: "(1) the channels of interstate commerce, (2) instrumentalities of or persons and things in interstate commerce, and (3) activities that 'substantially affect' interstate commerce."[60] The Fourth Circuit determined that neither of the first two categories applied; thus, the court could uphold § 4248 "only if it regulates activities that 'substantially affect' interstate commerce."[61]

Analogizing to several "striking similarities" in *Morrison*, the court had no difficulty concluding that § 4248 lay outside the scope of Congress's power.[62] First, the statute is "aimed at the prevention of noneconomic sexual violence,"[63] an area that "has always been the province of the States."[64] Second, § 4248 targets conduct that is "not, in any sense of the phrase, economic activity."[65] Similar to the gender-motivated violence at issue in *Morrison*, "sexual dangerousness does not substantially affect interstate commerce."[66] While the statute's intent may be "a sound proposal as a matter of social policy,"[67] that does not "create congressional authority."[68]

---

55. *Id.* at 278 (citing U.S. CONST. art. I, § 8, cl. 18) ("[T]he Government attempts to defend the validity of § 4248 largely by direct reliance on the Necessary and Proper Clause.").

56. *Id.* at 280 ("What is less understandable is the Government's heavy reliance on the Necessary and Proper Clause, standing alone, as a source of congressional power.").

57. *Id.* at 278.

58. *Id.* at 279 n.5.

59. *Id.* at 279. For summaries of *Lopez* and *Morrison* and a discussion of whether the Supreme Court's opinion in *Gonzales v. Raich*, 545 U.S. 1 (2005), diverged from *Lopez* and *Morrison*, see *infra* Part IV.A.

60. *Id.* (citing *Lopez*, 514 U.S. at 558–59).

61. *Id.* (citing *Morrison*, 529 U.S. at 609).

62. *Id.*

63. *Id.*

64. *Id.* at 280 (quoting *Morrison*, 529 U.S. at 618–19) (internal quotation marks omitted).

65. *Id.* (quoting *Morrison*, 529 U.S. at 613) (internal quotation marks omitted).

66. *Id.*

67. *Id.*

68. *Id.* (citing *Morrison*, 529 U.S. at 627).

B. *Necessary and Proper Clause Analysis*

The Fourth Circuit next turned to an analysis of the Necessary and Proper Clause. The discussion begins by repeating that this clause "simply does not—in and of itself—*create* any Congressional power."[69] Noting that "[o]rdinarily, this would end [the] discussion," the court nonetheless proceeded to consider the government's arguments, which rested "almost exclusively on that Clause."[70]

The court first considered the government's argument that § 4248 is a necessary and proper extension of "its ability to establish and maintain a 'federal criminal justice and penal system.'"[71] The court rejected this argument, noting the distinction between federal power over "persons *during* their prison sentences" and "*after* the expiration of their prison terms."[72] In language mirroring the district court's conclusion, the court found that "previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls."[73]

The Fourth Circuit then considered the government's argument that "§ 4248 constitutes a necessary and proper exercise of its power to prevent 'sex-related crimes.'"[74] The court rejected this argument, stating that "federal statutes regulating sex crimes are limited in number and breadth" and require a "connection to interstate commerce or limit[] their scope to the territorial jurisdiction of the United States."[75] Furthermore, because "many commitments under § 4248 would prevent conduct prohibited *only* by *state law*," the statute "sweeps far too broadly to be a valid effort to prevent *federal* criminal activity."[76] The court distinguished *United States v. Perry*,[77] on which the government relied, noting that the *Perry* court recognized "that a specific, enumerated federal power must support a federal civil commitment."[78] In the absence of specific constitutional authorization, the government's argument merely "attempts to 'pile inference upon inference' so as to 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'"[79]

Finally, the Fourth Circuit considered the government's argument that § 4248 is a necessary and proper outgrowth of the "'power to prosecute' all persons in its custody charged with criminal offenses."[80] The court rejected this

---

69. *Id.* (citing Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960)).
70. *Id.* at 281.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 282.
75. *Id.* (citations omitted).
76. *Id.*
77. 788 F.2d 100 (3d Cir. 1986).
78. *Comstock*, 551 F.3d at 282.
79. *Id.* at 283 (quoting United States v. Lopez, 514 U.S. 549, 567 (1995)).
80. *Id.*

argument, stating "the Government has already charged, tried, and convicted [the inmates] of all alleged federal crimes; it retains no power to prosecute them."[81] The court distinguished *Greenwood v. United States*,[82] which upheld a statute that, while somewhat similar to § 4248, applied only to persons found incompetent to stand trial.[83] Accordingly, the court found *Greenwood* did not approve federal civil commitment of people who, like the respondents in this case, "have stood trial, been convicted, and fully served all federal prison sentences."[84]

C. Conclusion and Holding

The Fourth Circuit concluded "that the district court correctly held § 4248 unconstitutional."[85] The court did, however, suggest alternative methods to address "the Government's legitimate policy concerns."[86] Reemphasizing its federalism concerns, the court suggested "notify[ing] state authorities, who may use their well-settled police and *parens patriae* powers to pursue civil commitment under state law."[87] If additional incentive is needed, the government may "wield its spending power to encourage state action."[88] Ultimately, the court concluded its opinion by holding that § 4248 "cannot be sustained as an exercise of Congress's authority under the Commerce Clause or any other provision of the Constitution."[89]

IV. COUNTERARGUMENTS TO AND POTENTIAL FLAWS IN *COMSTOCK*

The issue and analysis in *Comstock* revolve around an evolving and often contested area of law, namely the scope of Congress's power under the Commerce Clause. While an exhaustive analysis of the scope and evolution of the Commerce Clause power is clearly beyond the scope of this Note, a few points require a brief discussion.

Indeed, *Comstock* may be most notable (and objectionable) for what is absent. While the *Comstock* court relied heavily on *Lopez* and *Morrison*, it relegated the Supreme Court's most recent Commerce Clause decision—*Gonzales v. Raich*[90]—to a single footnote.[91] The court justified this because

---

81. *Id.*
82. 350 U.S. 366 (1956).
83. *Comstock*, 551 F.3d at 283–84 (citing *Greenwood*, 350 U.S. at 367–68).
84. *Id.* at 284. Technically, none of the respondents were convicted after standing trial. *See supra* text accompanying note 26.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. 545 U.S. 1 (2005).
91. *See Comstock*, 551 F.3d at 280 n.6.

"nothing in *Gonzales v. Raich* alters the core holding in *Morrison*."[92] Some scholars have contended, however, that *Raich* signals a pullback from the jurisprudential deviations in *Morrison* and *Lopez*.[93] This tension raises three questions: (1) does *Raich* diverge from *Morrison* and *Lopez*?; (2) if so, which line of reasoning controls in *Comstock*?; and (3) if *Raich* controls, does it mandate a different result than the Fourth Circuit Court reached? For the reasons set forth below, it appears that regardless of how the first two questions are answered, there should be no change to the outcome and the Supreme Court will likely affirm the Fourth Circuit.

A. Lopez, Morrison, *and* Raich*—Contradiction or Elaboration?*

Scholarly opinion is divided as to whether *Raich* contradicts or merely elaborates on the framework set out in *Lopez* and *Morrison*.[94] A brief summary of each case may prove helpful.[95]

1. Lopez v. United States

Lopez involved a challenge to the Gun-Free School Zones Act (GFSZA) of 1990,[96] which prohibited possession of a gun in a school zone.[97] The Supreme Court struck down the act as exceeding Congress's power under the Commerce Clause.[98] As the *Comstock* court noted, *Lopez* limited that clause's reach to (1) the channels of interstate commerce, (2) instrumentalities of or persons and things in interstate commerce, and (3) activities that "substantially affect" interstate commerce.[99] Like the Fourth Circuit concluded regarding the statute at issue in *Comstock*, the *Lopez* Court concluded that the only possibility of sustaining the GFSZA was under the third category.[100] However, the Court struck down that statute, finding it was "not an essential part of a larger regulation of economic activity" nor was there a "jurisdictional element which

---

92. *Id.* (citation omitted).

93. *See, e.g.*, Jonathan H. Adler, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 751 (2005) (arguing that *Raich* is a repudiation of the doctrines adopted in *Lopez* and *Morrison*).

94. *Compare id.* at 777 ("Insofar as *Morrison* validated and fortified the holding of *United States v. Lopez*, its work has been undone."), *with* Christopher DiPompeo, Comment, *Federal Hate Crime Laws and* United States v. Lopez*: On a Collision Course to Clarify Jurisdictional-Element Analysis*, 157 U. PA. L. REV. 617, 637 (2008) ("*Lopez*, *Morrison*, and *Raich* each add to, and build upon, the Supreme Court's new Commerce Clause doctrine . . . .").

95. For a more thorough discussion of these cases, see generally Adler, *supra* note 93.

96. *See* 18 U.S.C. § 922(q)(2)(A) (1988), *invalidated by* United States v. Lopez, 514 U.S. 549, 551 (1995).

97. *Lopez*, 514 U.S. at 551.

98. *Id.*

99. United States v. Comstock, 551 F.3d 274, 279 (4th Cir. 2009) (citing *Lopez*, 514 U.S. at 558–59).

100. *Lopez*, 514 U.S. at 559.

would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[101] Indeed, the Court found that possession of a gun "is in no sense an economic activity."[102] Congress's power, while broad, is not without limits,[103] and the Court declined to convert Congress's authority under the Commerce Clause to a general police power.[104]

2. Morrison v. United States

The Court expanded on this reasoning in *United States v. Morrison*.[105] *Morrison* involved a challenge to the Violence Against Women Act (VAWA)[106] that created a federal civil remedy for victims of gender-motivated violence.[107] Unlike *Lopez*, where "the link between gun possession and a substantial effect on interstate commerce was attenuated,"[108] in enacting the VAWA Congress made "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."[109] However, the "existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[110] The Court specifically rejected the argument that Congress can regulate based on the "aggregate effect on interstate commerce,"[111] an argument that would permit Congress to regulate nearly any crime with an "attenuated effect upon interstate commerce."[112] Ultimately, the Court concluded that the statute was beyond Congress's power.[113]

3. Gonzales v. Raich

The final member of the recent Commerce Clause trilogy is *Gonzales v. Raich*,[114] a challenge to the Controlled Substances Act (CSA).[115] Federal Drug Enforcement Agency agents charged Raich, who under California law was legally growing and using marijuana for medicinal purposes, under the CSA.[116] The issue was whether the CSA, "as applied to the *intrastate* manufacture and possession of marijuana for medical purposes . . . exceeds Congress'[s] authority

---

101. *Id.* at 561.
102. *Id.* at 567.
103. *See id.* at 566.
104. *Id.* at 567.
105. 529 U.S. 598 (2000).
106. 42 U.S.C. § 13981 (2000).
107. *Morrison*, 529 U.S. at 601–02.
108. *Id.* at 612 (citing *Lopez*, 514 U.S. at 563–67).
109. *See id.* at 614 (noting the presence of congressional findings).
110. *Id.*
111. *Id.* at 617.
112. *Id.* at 615.
113. *Id.* at 627.
114. 545 U.S. 1 (2005).
115. *See* 21 U.S.C. §§ 801–971 (2006).
116. *See Raich*, 545 U.S. at 6–8.

under the Commerce Clause."[117] Relying on "[w]ell-settled law," the Court found the statute to be "a valid exercise of federal power."[118] Emphasizing the "particular relevance"[119] of the aggregation principle of *Wickard v. Filburn*,[120] the Court found that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[121] In fact, the Court concluded the regulation was "squarely within Congress'[s] commerce power because the production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."[122] The Court distinguished *Lopez* and *Morrison*, noting that, unlike in those cases, "the activities regulated by the CSA are quintessentially economic."[123] Ultimately, the Court had no difficulty concluding that Congress had a rational basis in deciding that activities like Raich's, in the aggregate, substantially affect interstate commerce.[124]

4. *Contradiction or Elaboration?*

With this background in mind, we can return to the question posed earlier—does *Raich* alter or merely elaborate upon the principles set out in *Lopez* and *Morrison*? Though scholars may quibble, only the Court's precedent is binding, and *Raich* itself indicates that it does not contradict or limit the earlier two cases.[125] Indeed, *Raich* takes pains to distinguish those cases[126]—a task that is not particularly difficult. A key distinction is that the target of the statute in *Raich*—marijuana—is a commodity;[127] in contrast, statutes in *Lopez* and *Morrison* focused on acts: gun possession and gender-motivated violence. Thus, it appears that *Raich* applies to different situations than *Lopez* and *Morrison*. Accordingly, *Raich* seems best labeled as an elaboration on, not a contradiction to, principles adopted in those cases.

---

117. *Id.* at 15 (emphasis added).
118. *Id.* at 9.
119. *Id.* at 17.
120. *See* 317 U.S. 111, 127–28 (1942).
121. *Raich*, 545 U.S. at 18.
122. *Id.* at 19.
123. *Id.* at 25.
124. *Id.* at 22.
125. *See id.* at 23–33. Admittedly, a minority of the Justices, dissenting in *Raich*, see that case as contradicting *Lopez* and *Morrison*. *See id.* at 43 (O'Connor, J., dissenting).
126. *See id.* at 23, 26 (majority opinion); *id.* at 38, 40, 41 n.3 (Scalia, J., concurring).
127. *See id.* at 40 (Scalia, J., concurring).

B. If Two Roads Diverged[128]

Assuming for the sake of argument that *Raich* does diverge from and alter the doctrines espoused in *Lopez* and *Morrison*, it remains to be determined which of these two lines of precedent controls in *Comstock*. For a variety of reasons, the Fourth Circuit was correct to rely on the reasoning of *Lopez* and *Morrison*.

First, the *Comstock* court noted, "§ 4248 bears striking similarities to the VAWA provision struck down in *Morrison*."[129] Both provide a civil remedy aimed at the prevention of sexual violence.[130] Further, both statutes target acts that do "not substantially affect interstate commerce" and, in fact, are "not, in any sense of the phrase, economic activity."[131] Additionally, the *Raich* Court distinguished *Lopez* and *Morrison* on grounds that support the Fourth Circuit's reasoning in *Comstock*. Indeed, the Supreme Court found those two cases to be "markedly different" from *Raich* because both "asserted that a particular statute or provision fell outside Congress'[s] commerce power in its entirety."[132] In contrast, *Raich* involved an individual exception to "a concededly valid statutory scheme."[133] In *Comstock*, the inmates committed under § 4248 raised a challenge to the statute in its entirety, not simply as applied to them.[134] This more closely mirrors the situations in *Lopez* and *Morrison* and indicates that those cases should control.

Furthermore, the *Raich* Court noted that the CSA, unlike the statutes at issue in *Lopez* and *Morrison*, dealt with activities that "are quintessentially economic."[135] Under this distinction, *Comstock* more closely resembles *Lopez* and *Morrison* and appears quite different from *Raich*'s focus on "the production, distribution, and consumption of commodities."[136] Finally, the dissenters in *Raich*—who do see that case as a departure from *Lopez* and *Morrison*[137]—clearly believe (as evidenced by their status as dissenters) that the two earlier cases should control and would likely affirm the application of those cases to *Comstock*.

---

128. *See* ROBERT FROST, THE ROAD NOT TAKEN: A SELECTION OF ROBERT FROST'S POEMS 270 (Macmillen, 2002).

129. United States v. Comstock, 551 F.3d 274, 279 (4th Cir. 2009).

130. *Id.*

131. *Id.* at 280 (quoting United States v. Morrison, 529 U.S. 598, 613 (2000)) (internal quotation marks omitted).

132. *See Raich*, 545 U.S. at 23.

133. *Id.*

134. United States v. Comstock, 507 F. Supp. 2d 522, 528 (E.D.N.C. 2007).

135. *Raich*, 545 U.S. at 25.

136. *Id.*

137. *Id.* at 43 (O'Connor, J., dissenting) (citations omitted) ("[The majority decision is] irreconcilable with our decision in *Lopez* and *Morrison*.").

Thus, even if *Raich* did contradict or retreat from principles set out in *Lopez* and *Morrison*—which seems unlikely—*Comstock* rightly applied the line of precedent set out in the two earlier cases.

C. *Potential Result Under* Raich

While it seems unlikely, it is possible that *Raich* should have controlled the determination in *Comstock*. If so, while a closer call, the outcome seems likely to have remained unchanged. *Raich* arguably affected the Commerce Clause in three ways,[138] two of which seem relatively benign in this instance and one of which could affect the outcome.

First, *Raich* adopted a "definition of 'economic' that is almost limitless."[139] However, this definition, while broad, is still linked to commodities, and thus seems unlikely to apply to § 4248.[140] Second, *Raich* allows Congress "to impose controls on even 'noneconomic' activity by claiming that it is part of a broader 'regulatory scheme.'"[141] However, as the *Comstock* court noted, "§ 4248 constitutes no part of a 'comprehensive' legislative scheme that targets interstate markets."[142] Whether there is a comprehensive legislative scheme regulating sexually dangerous persons seems doubtful; even more dubious is whether such a scheme truly targets interstate markets.

The third and potentially most problematic effect for *Comstock* is that "*Raich* reasserts the so-called 'rational basis' test."[143] Under this test, "congressional regulation will likely . . . be upheld if Congress could 'rationally' conclude that such an [interstate economic] effect exists"[144] despite any lack of empirical proof.[145] Thus, if *Raich* applies, the Fourth Circuit could have upheld § 4248 merely on the basis that sexually dangerous persons might conceivably have an effect on interstate commerce. The Supreme Court seems unlikely to reverse the Fourth Circuit on these grounds, however, particularly in light of the absence of legislative findings indicating that sexual dangerousness affects interstate commerce.[146]

---

138. *See* Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508–09 (2006).

139. *Id.* at 508.

140. *See supra* text accompanying note 135.

141. Somin, *supra* note 138, at 509 (quoting *Raich*, 545 U.S. at 24–25).

142. United States v. Comstock, 551 F.3d 274, 280 n.6 (4th Cir. 2009) (quoting *Raich*, 545 U.S. at 22).

143. Somin, *supra* note 138, at 509 (citing *Raich*, 545 U.S. at 22).

144. *Id.*

145. *See id.*

146. *See Comstock*, 551 F.3d at 280.

D. Contrasting the Eighth Circuit's Reasoning in United States v. Tom

Subsequent to the Fourth Circuit's decision in *Comstock*, the Eighth Circuit Court of Appeals considered the constitutionality of § 4248 in *United States v. Tom*.[147] The court in *Tom* upheld the statute, concluding that the statute is a valid exercise of Congress's power.[148] The Eighth Circuit's reasoning diverges from *Comstock* in four significant respects.

1. Necessary and Proper Clause

First, *Comstock* and *Tom* see the scope of the Necessary and Proper Clause differently, particularly whether it is acceptable to use one Necessary and Proper power as the basis for another. In *Tom*, the Eighth Circuit concluded that where Congress has the power to criminalize and punish certain conduct, Congress also has the power to prevent that conduct.[149]

> [W]e conclude that Congress, having been empowered by the Commerce Clause to criminalize and punish the conduct of which Tom is guilty, has the ancillary authority under the Necessary and Proper Clause to provide for his civil commitment so that he may be prevented from its commission in the first place.[150]

Like the court in *Comstock*, the Eighth Circuit recognized that the power to criminalize and punish is *itself* an exercise of the Necessary and Proper Clause.[151] Unlike the Fourth Circuit, however, the court in *Tom* implicitly assumed that it is acceptable to use one Necessary and Proper power as the basis for another. In contrast, *Comstock* rejected this attempt to pile one Necessary and Proper power onto another and the resulting attenuated connection between the power exercised and any enumerated constitutional power.[152]

2. Interstate Nexus

The second major divergence between *Comstock* and *Tom* regards § 4248's lack of an interstate nexus requirement. The Eighth Circuit admits "that § 4248 does not contain an explicit interstate travel requirement," but contends that the

---

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

148. *Id.* at 505.

149. It is beyond the scope of this Note to address the shocking civil liberty implications of a broad Congressional power to prevent crime by confining those deemed likely to commit future crimes.

150. *Tom*, 565 F.3d at 505.

151. *Id.* at 502 ("Congress has the authority under the Necessary and Proper Clause to criminalize and punish certain activities as a means of effectuating its enumerated powers . . . ."); *Comstock*, 551 F.3d at 281.

152. *Comstock*, 551 F.3d at 281–82.

statute is nevertheless constitutionally sound.[153] Underlying this determination is the *Tom* court's presupposition that the operation of the statute will surely prevent federal crimes.[154] In contrast, the Fourth Circuit holds the opposite presumption that "most crimes of sexual violence violate state and not federal law . . . [and] Section 4248 thus sweeps far too broadly to be a valid effort to prevent *federal* criminal activity."[155]

The Eighth Circuit acknowledges that the statute would prevent state crimes as well as (ostensibly) federal crimes but argues that Congress is not required "to legislate with scientific exactitude."[156] Further, the Eighth Circuit contends that even if such precision were required, § 4248 "applies to a restricted universe of individuals . . . who because of the nature of their proclivities are likely to commit federal crimes."[157] This argument is problematic not because it is invalid but because it is limitless. Even assuming the argument is correct, it could be applied (to some extent) to *every* federal prisoner, and thus sweeps too broadly. The Eighth Circuit, however, is untroubled by the statute's lack of an interstate nexus.[158]

3. Reliance on Legal Authority

The third divergence between the Fourth and Eighth Circuits' decisions is *Tom*'s selective reliance on legal authority. Although the district court in *Tom* relied largely on *Lopez* and *Morrison*,[159] the Eight Circuit ignored those cases almost entirely. The absence of these two cases is truly remarkable and almost inexplicable. Instead, the Eighth Circuit relied primarily on *Greenwood*, which is easily distinguishable,[160] and on its own precedent.[161] Although the Eighth Circuit acknowledged that *Greenwood*'s holding "was confined to 'the narrow constitutional issue raised by the order of commitment in the circumstances of th[at] case,'" the court nonetheless concluded that *Greenwood* is dispositive.[162]

The Eighth Circuit also cites various other civil commitment statutes, arguing that the same reasoning that supports those statutes justifies § 4248.[163] This argument is undermined, however, when the court acknowledged that in the case of those statutes, "the operation of the underlying federal criminal law

153. *Tom*, 565 F.3d at 505.

154. *Id.* ("[I]ndividuals committed under [§ 4248] might be prevented from committing state crimes in addition to federal crimes.")

155. *Comstock*, 551 F.3d at 282.

156. *Tom*, 565 F.3d at 505 (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005)).

157. *Id.*

158. *Id.* at 505.

159. *See id.* at 497.

160. *See supra* notes 82–84 and accompanying text.

161. *See Tom*, 565 F.3d at 502–05.

162. *Id.* at 503 (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)).

163. *Id.* at 504.

would be frustrated without the related civil commitment provision."[164] That reasoning, however, is emphatically not applicable to § 4248. Here, the federal law was not frustrated. The prisoners in *Tom* and *Comstock* were arrested and imprisoned as a result of the operation of the underlying federal criminal law, and civil commitment is not necessary to avoid frustrating those laws.

4. Federalism

The final way *Tom* differs from *Comstock* is the Eighth Circuit's treatment of federalism, finding that "§ 4248 simply does not upset the delicate federal state balance mandated by the Constitution."[165] The court acknowledges several differences between § 4248 and § 4246,[166] which is similar but more deferential to states; however, the court was "not persuaded that these differences are significant enough to render § 4248 incompatible with our federalist system."[167] First, the court notes that there is no inherent impropriety when a federal law intrudes on an area of traditional state concerns.[168] Next, the court emphasizes that § 4248 is merely a "stop gap" measure and, as such, is duly deferential to state interests.[169] Ultimately, the Eighth Circuit concludes "that § 4248 is a rational and appropriate means to implement comprehensive federal legislation under authority granted it by the Constitution."[170]

V. CONCLUSION

The Fourth Circuit's recent decision in *United States v. Comstock* is an intriguing and noteworthy case implicating important constitutional issues and skirting the tension of recent Commerce Clause jurisprudence. While the Fourth Circuit's reliance on *United States v. Lopez* and *United States v. Morrison* is probably correct, even under the potential alternative precedent of *Gonzales v. Raich*, it seems likely that Congress exceeded its constitutional authority in enacting 18 U.S.C. § 4248. Additionally, federalism concerns support the outcome in *Comstock* and counsel for affirmance by the Supreme Court.

Miles Coleman

---

164. *Id.*

165. *Id.* at 508.

166. 18 U.S.C. § 4246 (2006). This was the statute at issue in *Greenwood*. *See Greenwood*, 350 U.S. at 367.

167. *Tom*, 565 F.3d at 507.

168. *Id.* (citing Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 292 (1981)).

169. *Id.*

170. *Id.* at 508.