

There Ain't No End for the "Wicked": Implications of and Recommendations for § 4248 of the Adam Walsh Act After *United States v. Comstock*

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ABSTRACT: The civil commitment of "sexually dangerous persons" is not a new concept. States began committing such persons in the mid-twentieth 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 may have had good intentions in passing the Act, the Supreme Court's ruling in Comstock created a veritable "blank check" for Congressional power and paved the way for imposing exorbitant costs on the states, in a time when fiscal pressures make simply implementing the law nearly impossible. This Note explores the rationales behind the Comstock decision and the Adam Walsh Act, highlights the damaging implications of the decision and the good intentions of Congress, and makes recommendations for the future of both the case and the Act itself.

INTRODUCTION.....	631
I. BACKGROUND	632
A. THE ADAM WALSH ACT.....	632
B. THE CASE: UNITED STATES V. COMSTOCK.....	634
II. THE SUPREME COURT RULING AND THE FIVE CONSIDERATIONS.....	635
A. THE MAJORITY OPINION.....	636

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1.	The First Consideration: The Breadth of the Necessary and Proper Clause.....	636
2.	The Second Consideration: The Long History of Federal Involvement in Civil Commitment.....	637
3.	The Third Consideration: The Government's Custodial Interest in Safeguarding the Public from Dangers Posed by Those in Federal Custody.....	638
4.	The Fourth Consideration: The Statute's Accommodation of State Interests.....	639
5.	The Fifth Consideration: The Statute's Narrow Scope	640
B.	CONCURRING OPINIONS.....	641
C.	DISSENTING OPINION: JUSTICE THOMAS.....	641
III.	POTENTIAL IMPLICATIONS OF THE FIVE CONSIDERATIONS.....	644
A.	A "BLANK CHECK" FOR CONGRESS.....	645
B.	FISCAL COSTS.....	649
C.	BAIT-AND-SWITCH PLEA DEALS.....	650
IV.	RECOMMENDATIONS FOR THE FUTURE.....	652
A.	THE SUPREME COURT SHOULD FIND THAT THE AWA VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.....	652
1.	The Reasoning Behind the Court's Opinion in <i>Addington</i> Suggests the Beyond-a-Reasonable-Doubt Standard of Proof Should Be Applied in Civil-Commitment Proceedings.....	654
2.	The Concerns of the <i>Addington</i> Court Are Antiquated	655
3.	The Appellant and Statute in <i>Hendricks</i> Are Distinguishable from <i>Comstock</i> and the AWA	656
B.	RESERVE POWER TO THE STATES.....	659
C.	ABOLISH CIVIL COMMITMENT FOR SEX OFFENDERS ENTIRELY	661
	CONCLUSION	663

INTRODUCTION

Society does not like criminals. We use phrases like *scum of the earth*, *dirt-bags*, and *evil-hearted* to describe them, sometimes deservedly, other times unfairly, as broad generalizations. Even historical figures such as Napoleon¹ and Calvin² had their own colorful descriptions of the thieves, assaulters, drug users, and murderers that *plague* our culture.

But the public at large has particularly bitter feelings about sex offenders. Historically, society's view of mental illness—a prerequisite for civil commitment and a facet of the definition of *sexually dangerous person*³—and of sex offenders has been “one of intolerance rather than compassion.”⁴ This distaste is not exclusive to the general public—the lawmakers in Congress have their own things to say about this group of people. For example, one Congressman has commented on the “wicked hearts of child predators . . . who have no decency and know no shame,”⁵ and another has described them as “monsters.”⁶ Some states have even created especially harsh laws against sex offenders.⁷ In 2006, Congress enacted the first set of federal laws specifically targeting sex offenders: the Adam Walsh Child Protection and Safety Act of 2006 (the “Act” or “AWA”).⁸

The stated goal of the Act is “to protect children, [and] to secure the safety of judges, prosecutors, law enforcement officers, and their family members.” One portion of the Act, the Jimmy Ryce Civil Commitment Program (“civil-commitment provision”), codified at 18 U.S.C. § 4248, allows for the civil commitment of sex offenders whom the government

1. “The *infectiousness of crime* is like that of the plague.” *Napoleon Bonaparte Quotes*, BRAINYQUOTE.COM, <http://www.brainyquote.com/quotes/quotes/n/napoleonbo150169.html> (last visited Oct. 22, 2011) (emphasis added).

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).

3. See, e.g., 42 U.S.C. § 16971(c)(2) (2006).

4. Melissa Wangenheim, Note, ‘To Catch a Predator,’ Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders, 62 RUTGERS L. REV. 559, 568 (2010); see also Michael Ko & Maureen O’Hagan, *Child-Sex Case Jolts Family, Small Community*, SEATTLE TIMES (Mar. 27, 2004), http://seattletimes.nwsourc.com/html/localnews/2001889375_sexcrimes27m.html (“I don’t want none of [him], he’s a sick bastard,” [the sister of a charged sex offender] said.”).

5. 152 CONG. REC. H5705, 5724 (daily ed. July 25, 2006) (statement of Rep. Mike Pence).

6. *Id.* at H5727 (statement of Rep. Phil Gingrey).

7. 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 Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 449 (2010).

8. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in part at 18 U.S.C. § 4248 and 42 U.S.C. §§ 16901–16929, 16971).

considers to be “sexually dangerous person[s].”⁹ Prisoners have challenged the constitutionality of this section several times, but in May 2010, the Supreme Court held the civil-commitment provision constitutional under the Necessary and Proper Clause of the U.S. Constitution.¹⁰ Despite Congress’s good intentions in passing the Act, the untold consequences of both the AWA and the Supreme Court’s decision in *United States v. Comstock* may eviscerate the constitutional rights of targeted sex offenders and cost the states more than they can bear.

This Note argues that the decision in *Comstock*, holding the civil-commitment provision of the AWA valid as a necessary and proper exercise of Congress’s authority, blazes the path for broad, arbitrary legislation against federal prisoners and treads on the rights of those specifically targeted by the provision. Part I of this Note briefly describes the factual history of the Adam Walsh Act and the procedural history of *Comstock*. Part II closely examines the Supreme Court’s holding and the concurring and dissenting opinions of *Comstock*, giving specific attention to Justice Thomas’s dissenting opinion. Part III describes a few of the most costly implications of the holding in *Comstock*, both fiscally and procedurally. Finally, Part IV makes recommendations for the future of *Comstock* and the Act, and argues for amending or completely abolishing § 4248.

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.¹¹ Two weeks later, authorities discovered Adam’s severed head in a canal in Vero Beach, Florida, more than 100 miles from his home.¹² In response to this and several other attacks between 1981 and 2006,¹³ John Walsh, father of Adam, lobbied Congress to enact stronger laws¹⁴ “to protect the public from sex offenders and offenders against children.”¹⁵

9. 18 U.S.C. § 4248(a).

10. *United States v. Comstock*, 130 S. Ct. 1949 (2010).

11. 152 CONG. REC. at H5706; John Holland, *Adam Walsh Case Is Closed After 27 Years*, L.A. TIMES (Dec. 17, 2008), <http://articles.latimes.com/2008/dec/17/nation/na-adam17>.

12. 152 CONG. REC. at H5706; Holland, *supra* note 11.

13. *See* Adam Walsh Child Protection and Safety Act § 102, 120 Stat. at 590 (codified at 42 U.S.C. § 16901) (naming seventeen victims of sexual attacks). The Adam Walsh Act was in part a “response to the vicious attacks by violent predators against” these named victims. *See id.*

14. 152 CONG. REC. at H5706; Holland, *supra* note 11.

15. Adam Walsh Child Protection and Safety Act § 102, 120 Stat. at 590 (codified at 42 U.S.C. § 16901). In addition to the civil-commitment program discussed in this Note, the AWA 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.* § 103, 120 Stat. at 591 (codified at 42 U.S.C. § 16902) (establishing Sex Offender Registration and Notification Program); *id.* § 201, 120 Stat. at 611–12 (amending 21 U.S.C.

The result of these efforts was the AWA,¹⁶ signed into law by President George W. Bush on July 27, 2006.¹⁷ Included in this Act was 18 U.S.C. § 4248, the civil-commitment provision, and the Jimmy Ryce Civil Commitment Program.¹⁸ Under § 4248, any person either in custody of the Bureau of Prisons ("BOP"), committed to the custody of the Attorney General due to mental incompetence,¹⁹ or against whom all criminal charges have been dropped due to the person's mental condition, may be certified as a "sexually dangerous person"²⁰ by either the Attorney General or any individual whom the Attorney General or the Director of the BOP authorizes to so certify.²¹ The law entitles the now-labeled person to a hearing²² to determine if he or she is, indeed, a sexually dangerous person.²³ If by clear and convincing evidence the court finds him or her to be sexually dangerous, a finding that necessarily presumes the person has a "mental illness, abnormality, or disorder,"²⁴ the Attorney General will either place the person in a "suitable facility" for treatment,²⁵ in which the person would likely remain indefinitely,²⁶ or release him or her to officials of the state where the person "is domiciled or was tried," who may assume responsibility for providing treatment or may simply release the person.²⁷

841) (prohibiting internet sales of date-rape drugs); *id.* § 206, 120 Stat. at 613–15 (amending scattered sections of 18 U.S.C.) (increasing penalties for sex offenses against children).

16. Adam Walsh Child Protection and Safety Act, 120 Stat. 587 (codified in part at 18 U.S.C. § 4248 and 42 U.S.C. §§ 16901–16929, 16971). Sections 16911 through 16929 are also known as the Sex Offender Registration and Notification Act ("SORNA").

17. Press Release, Office of the White House Press Sec'y, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>. For a discussion of the haste and imprudent manner of the AWA's enactment, see Brittany Ennis, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 697–706.

18. Adam Walsh Child Protection and Safety Act §§ 301–302, 120 Stat. at 617–22 (codified in part at 18 U.S.C. § 4248, 42 U.S.C. § 16971). 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.* § 301(e)(1)(B), 120 Stat. at 618 (codified at 42 U.S.C. § 16971(e)(1)(B)).

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

20. 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." 42 U.S.C. § 16971(e)(2).

21. 18 U.S.C. § 4248(a).

22. *See id.* § 4247(d) (granting counsel to persons subject to the hearing and identifying other rights of those persons).

23. *Id.* § 4248(a).

24. 42 U.S.C. § 16971(e)(2).

25. 18 U.S.C. § 4248(d).

26. *See infra* Part IV.A.

27. 18 U.S.C. § 4248(d).

To be discharged from civil commitment 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”;²⁸ that is, the person no longer has the “mental illness” that caused him or her to commit the sexual offense or offenses. Although the person is now considered “treated,” the Attorney General may request another hearing to determine whether the person has actually been rehabilitated.²⁹ At this stage, the court applies a preponderance-of-the-evidence standard and must find either that the person is no longer sexually dangerous or will not be sexually dangerous if he or she follows the prescribed treatment regimen.³⁰ Should the person not follow any part of the prescribed regimen, he or she may be arrested and put back into a treatment facility.³¹

Just over a year after the AWA’s enactment, five inmates of a North Carolina prison challenged the civil-commitment provision, claiming the commitment being forced upon them was unconstitutional.

B. THE CASE: UNITED STATES V. COMSTOCK

On October 4, 2000, Graydon Earl Comstock, Jr., 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.³² The trial court sentenced him to thirty-seven months in prison, followed by a three-year period of supervised release.³³ Although his term of imprisonment ended on November 8, 2006, Comstock remained in prison: the government certified him as a “sexually dangerous person”³⁴ under the civil-commitment provision of the AWA,³⁵ and his release was stayed indefinitely.³⁶

Comstock filed a motion to dismiss, arguing that the federal government did not have the constitutional authority to seek civil commitment.³⁷ Joining him in the motion were four other persons facing similar civil commitments, all under § 4248: Shane Catron,³⁸ Thomas

28. *Id.* § 4248(e).

29. *Id.*

30. *Id.*

31. *Id.* § 4248(f).

32. *United States v. Comstock*, 507 F. Supp. 2d 522, 526 (E.D.N.C. 2007) (second alteration in original) (internal quotation marks omitted) (citing 18 U.S.C. § 2252(a)(2)), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *rev’d*, 130 S. Ct. 1949 (2010)).

33. *Id.*

34. *Id.* (internal quotation marks omitted).

35. 18 U.S.C. § 4248.

36. *Comstock*, 507 F. Supp. 2d at 526.

37. *Id.*

38. Catron was found “incompetent to stand trial for aggravated sexual abuse of a minor and abusive sexual conduct under 18 U.S.C. § 4241.” *Id.* at 526 n.2.

Matherly,³⁹ Markis Revland,⁴⁰ and Marvin Vigil.⁴¹ The case came before the District Court for the Eastern District of North Carolina.⁴² 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 that "commitment pursuant to [the AWA] . . . would constitute a violation of due process because such commitment . . . is permitted based on a proof of [criminal] conduct . . . by clear and convincing evidence."⁴³

The United States appealed.⁴⁴ The Fourth Circuit Court of Appeals affirmed the Eastern District of North Carolina's ruling and held that the AWA was not authorized under the Commerce Clause or the Necessary and Proper Clause.⁴⁵ The United States then petitioned for certiorari to the Supreme Court of the United States. The petition was granted on June 22, 2009.⁴⁶ Arguments took place on January 12, 2010,⁴⁷ and the decision followed on May 17, 2010.⁴⁸

II. THE SUPREME COURT RULING AND THE FIVE CONSIDERATIONS

In a seven-to-two ruling, the Supreme Court reversed the Fourth Circuit and, in an opinion written by Justice Breyer, concluded the civil-commitment provision was constitutional under the Necessary and Proper

39. Matherly "was sentenced to a 41-month term to be 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.*

40. 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 60-month term of imprisonment to be followed by a three-year period of supervised release." *Id.*

41. Vigil pled guilty to one count of sexual abuse of a minor under 18 U.S.C. §§ 2242(a) and 2246 and "was sentenced to a 96-month term of imprisonment to be followed by a three-year period of supervised release." *Id.*

42. *Id.* at 522.

43. *Id.* at 559–60.

44. *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009), *rev'd*, 130 S. Ct. 1949 (2010).

45. *Id.* at 280, 283–85.

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

47. It is worth noting that arguing for the United States was then-Solicitor General Elena Kagan, who later took Justice Stevens's position on the Supreme Court. Ed Pilkington, *Elena Kagan Appointed to the Supreme Court After US Senate Vote*, *GUARDIAN* (Aug. 5, 2010), <http://www.guardian.co.uk/law/2010/aug/05/elena-kagan-us-supreme-court>. This issue may pose an interesting dynamic in the future, should cases of a similar nature appear before the new Court. Justice Kagan, in fact, disqualified herself from twenty cases that appeared 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>.

48. *Comstock*, 130 S. Ct. 1949.

Clause of the Federal Constitution.⁴⁹ The majority based its conclusion on five “considerations” laid out individually in the opinion.⁵⁰ Justices Alito and Kennedy concurred in the judgment, while Justice Thomas dissented, joined in part by Justice Scalia.⁵¹

The heaviest issue on the Justices’ collective hands was whether the Necessary and Proper Clause was broad enough to allow the federal government’s use of civil commitment for federally incarcerated prisoners. Indeed, that was the exact issue in *Comstock* and the issue that had sharply divided the district courts at the time of the Fourth Circuit ruling.⁵² The Fourth Circuit affirmed the district court’s ruling that the statute “lie[s] beyond the scope of Congress’s authority.”⁵³ In doing so, it relied on the historical *state* control of civil commitments, justified under the states’ *parens patriae*, or police, power.⁵⁴ Past cases ruling on state sex-offender-civil-commitment laws have used this same rationale in upholding challenges to such statutes.⁵⁵ The federal government, however, “has no general police or *parens patriae* power.”⁵⁶ Rather than relying on a police power to validate the federal government’s use of civil commitment, then, the Supreme Court relied on its rational-basis test. In other words, the Supreme Court held that to be valid, the AWA needed only to be “rationally related to the implementation of a constitutionally enumerated power.”⁵⁷

A. THE MAJORITY OPINION

1. The First Consideration: The Breadth of the Necessary and Proper Clause

Having held that the AWA need only have a rational basis to be valid, the only question the Court had to answer was “whether the means chosen

49. *Id.* at 1954.

50. *Id.* at 1956.

51. *Id.* at 1949.

52. *See* *United States v. Comstock*, 551 F.3d 274, 276 (4th Cir. 2009) (listing cases from various jurisdictions with opposing conclusions regarding the Act’s constitutionality), *rev’d*, 130 S. Ct. 1949.

53. *Id.*

54. *Id.* at 278.

55. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) (“[T]he State acts in large part on the basis of its *parens patriae* power . . . to ensure the public safety.”); *Allen v. Illinois*, 478 U.S. 364, 373 (1986) (noting that “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 a Fifth Amendment challenge); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (“The state has a legitimate interest under its *parens patriae* powers . . . to protect the community . . .”).

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

57. *Comstock*, 130 S. Ct. at 1956.

are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."⁵⁸

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.⁵⁹ 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 communities."⁶⁰ The Court concluded that although the Constitution does not specifically grant these powers, the broad authority of the Necessary and Proper Clause allows Congress to use them.⁶¹

2. The Second Consideration: The Long History of Federal Involvement in Civil Commitment

The Court next turned to Congress's history of delivering "mental health care to federal prisoners" and "provid[ing] for their civil commitment."⁶² Although the Court conceded that historical federal action did not equate to constitutionality, it noted that a "history of involvement" could be "helpful in reviewing the substance of a congressional statutory scheme" and to its analysis of the rational basis between the AWA and "federal interests."⁶³ 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,⁶⁴ in a U.S. penitentiary,⁶⁵ or who "become insane" while imprisoned.⁶⁶ Although these statutes were written so that commitment would end contemporaneously with incarceration, the 1945 Judicial Conference completely reformed them.⁶⁷

58. *Id.* at 1957 (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) (internal quotation marks omitted)). The Court also assumed, without deciding, "that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances. In other words, we assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well." *Id.* at 1956 (citations omitted). This Note discusses due-process issues *infra* Part IV.A.

59. *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).

60. *Id.* at 1958.

61. *Id.*

62. *Id.*

63. *Id.* (quoting *Raich*, 545 U.S. at 21) (internal quotation marks omitted).

64. *Id.* at 1958–59 (Act of Mar. 3, 1855, 10 Stat. 682; 39 Stat. 309).

65. *Id.* at 1959 (Act of Feb. 7, 1857, §§ 5–6, 11 Stat. 158).

66. *Id.* (quoting Act of June 23, 1874, ch. 465, 18 Stat. 251) (internal quotation marks omitted).

67. *Id.* (internal quotation marks omitted) (citing JUDICIAL CONFERENCE, REPORT OF COMMITTEE TO STUDY TREATMENT ACCORDED BY FEDERAL COURTS TO INSANE PERSONS CHARGED WITH CRIME 11 (1945)).

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.”⁶⁸ Based on this review, the Conference recommended to Congress a law providing for the extended detention of these individuals.⁶⁹

Following this recommendation, Congress modified 18 U.S.C. §§ 4244–4248 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.⁷⁰ In 1984, Congress explicitly authorized civil commitment if the prisoner’s release would “create a substantial risk of bodily injury to another.”⁷¹

Thus, the Court concluded, the 2006 alteration of § 4248 as part of the AWA was only a “modest addition” to this long-standing civil-commitment scheme, affecting only those “already subject to civil commitment under § 4246.”⁷²

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 Court’s discussion of 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.”⁷³ In this role as custodian, he noted, it is necessary and proper to confine harmful individuals, just as it is necessary and proper to confine those with communicable diseases.⁷⁴ Thus, it was

68. *Id.* (quoting JUDICIAL CONFERENCE, *supra* note 67, at 11) (internal quotation marks omitted). Apparently, the committee was worried the states would turn away these prisoners due to a “lack of legal residence.” See H.R. REP. NO. 81-1319, at 2 (1949) (statement of James V. Bennett, Director), *quoted in Comstock*, 130 S. Ct. at 1959.

69. *Comstock*, 130 S. Ct. at 1959–60.

70. *Id.* at 1960 (quoting 18 U.S.C. § 4247 (1952)) (internal quotation marks omitted). 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*, 410 F.2d 1372, 1374 (4th Cir. 1969), *quoted in Comstock*, 130 S. Ct. at 1960.

71. *Comstock*, 130 S. Ct. at 1960 (quoting 18 U.S.C. § 4246(d) (2006)).

72. *Id.* at 1961.

73. *Id.* The Court puzzlingly cited *Youngberg v. Romeo* for the proposition that “[i]n 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.* (first alteration in original) (emphasis omitted) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982)) (internal quotation marks omitted). The States, however, have powers drastically different from those 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) (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000))).

74. *Id.* at 1961 (majority opinion). 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

"reasonabl[e]" for Congress to believe persons held under § 4247(a)(6)⁷⁵ "would pose an especially high danger to the public if released."⁷⁶ It was also 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 federal government would have to.⁷⁷ Thus, the Court concluded, Congress's "responsibilities as a federal custodian" constituted a legitimate basis for enacting § 4248.⁷⁸

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.⁷⁹ Although "[t]he States have traditionally exercised broad power to commit persons found to be mentally ill,"⁸⁰ the Court expansively 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.⁸¹ Thus, the Court concluded, such powers cannot, "[v]irtually by definition," be reserved to the states.⁸²

Rather than intruding on the interests of the states, the Court proffered, § 4248 "*accommodat[es]*" those interests.⁸³ Dismissing Comstock's and the other respondents' concerns that the states could not "*prevent* the detention of their citizens under § 4248,"⁸⁴ the Court instead accepted Solicitor General Kagan's argument that "the Federal Government would

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 1979 (Thomas, J., dissenting).

75. 18 U.S.C. § 4247(a)(6) (defining "sexually dangerous person" as an individual who "suffers 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").

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

77. *Id.* (quoting H.R. REP. NO. 1319, at 2 (1949)); *see also* 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 . . .").

78. *Comstock*, 130 S. Ct. at 1962.

79. U.S. CONST. amend. X.

80. *Comstock*, 130 S. Ct. at 1962 (quoting *Jackson v. Indiana*, 406 U.S. 715, 736 (1972)).

81. *Id.* ("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.").

82. *Id.* (citing *New York v. United States*, 505 U.S. 144, 156, 159 (1992)).

83. *Id.*

84. *Id.* at 1962–63 (emphasis in original) (quoting Brief for Respondents at 11, *Comstock*, 130 S. Ct. 1949 (No. 08-1224)) (internal quotation marks omitted).

have no appropriate role' with respect to an individual covered by [§ 4248] once 'the transfer to State responsibility and State control has occurred.'"⁸⁵

The Court then briefly discussed *Greenwood v. United States*,⁸⁶ which involved a predecessor statute to the AWA—a statute “less protective of state interests”⁸⁷—that the *Greenwood* Court held did not invade state interests.⁸⁸ The *Comstock* Court concluded: “[I]f the statute . . . in *Greenwood* did not invade state interests, then . . . neither does § 4248.”⁸⁹

5. The Fifth Consideration: The Statute’s Narrow Scope

Comstock and the other respondents argued that when creating laws pursuant to the Necessary and Proper Clause, only one step could separate the act in question and Congress’s constitutionally enumerated power.⁹⁰ Over their objection that the Court could not “pile inference upon inference,”⁹¹ the Court selected various precedential counterexamples, again citing *Greenwood*.⁹² Although different enumerated powers justify Congress’s enactments of different federal statutes, said the Court, “every such statute must itself be legitimately predicated on an enumerated power.”⁹³ 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.”⁹⁴

The Court dismissed the “fear” that enforcement of the civil-commitment provision would create a general police power akin to that of the states,⁹⁵ as § 4248 is narrowly tailored to a small group of federally incarcerated prisoners.⁹⁶ The Court reserved questions of constitutionality

85. *Id.* at 1963 (quoting Transcript of Oral Argument at 9, *Comstock*, 130 S. Ct. 1949 (No. 08-1224)).

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

87. *Comstock*, 130 S. Ct. at 1963.

88. *See Greenwood*, 350 U.S. at 375.

89. *Comstock*, 130 S. Ct. at 1963.

90. *Id.*

91. Brief for Respondents, *supra* note 84, at 34–35 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)) (internal quotation marks omitted). As the *Lopez* court stated, “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.” *Lopez*, 514 U.S. at 567.

92. *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)).

93. *Id.* at 1964.

94. *Id.* (emphasis added) (quoting *United States v. Hall*, 98 U.S. 343, 345 (1879)). The Court concluded: “[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.*

95. *See* cases cited *supra* note 55 and accompanying text.

96. *Comstock*, 130 S. Ct. at 1964.

under other amendments for remand, and likely further appeals,⁹⁷ and concluded the Necessary and Proper Clause authorized civil commitment under § 4248.⁹⁸

B. CONCURRING OPINIONS

Justice Kennedy concurred in the judgment but noted his concern with the majority's explanation of the Tenth Amendment. He concluded that the majority's analysis was essentially backwards—the powers not expressly delegated to the federal government were reserved for the states, “not the other way around.”⁹⁹

Justice Alito agreed that § 4248 was constitutionally authorized, but “on narrow grounds.”¹⁰⁰ He also agreed with Justice Breyer that § 4248 was within the enumerated powers of Congress, as “it is a necessary and proper means of carrying into execution the enumerated powers that support the [underlying] federal criminal statutes . . . [which] criminalize certain conduct” and create prisons for violators of laws opposing that conduct.¹⁰¹ 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.”¹⁰²

C. DISSENTING OPINION: JUSTICE THOMAS

Justice Thomas began his dissent by noting that the civil-commitment provision “[e]xecut[es]’ no enumerated power.”¹⁰³ He agreed with Justice Kennedy, and the Constitution, that Congress's powers are “few and defined” while the states' are “numerous and indefinite.”¹⁰⁴ 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

97. See *infra* Part IV.A.

98. *Comstock*, 130 S. Ct. at 1965.

99. *Id.* at 1967 (Kennedy, J., concurring). The Court had also narrowly defined the states' reserved powers; however, Kennedy thought these powers were “so broad that they remain undefined. Residual power, sometimes referred to . . . as the police power, *belongs to the States and the States alone.*” *Id.* (emphasis added).

100. *Id.* at 1968–69 (Alito, J., concurring).

101. *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.

102. *Id.* at 1970. This was the “substantial link to Congress’ [sic] constitutional powers” necessary to authorize § 4248. *Id.*

103. *Id.* (Thomas, J., dissenting) (second alteration in the original).

104. *Id.* at 1971 (quoting THE FEDERALIST NO. 45, at 328 (James Madison) (Benjamin F. Wright ed. 1961)) (internal quotation marks omitted).

the objective of “‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.”¹⁰⁵

Justice Thomas felt that no enumerated power could support the civil-commitment provision, not even the Commerce Clause—“the enumerated power this Court has interpreted most expansively.”¹⁰⁶ Instead, he noted, the Constitution grants to *the states* “the power ‘to protect the community from the dangerous tendencies of some’ mentally ill persons.”¹⁰⁷ Justice Thomas highlighted this power by showing the parallel between § 4248 and other civil-commitment laws—those enacted by states under their *parens patriae* powers¹⁰⁸: “[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.”¹⁰⁹ Although this protection is unquestionably important, Justice Thomas noted that “the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.”¹¹⁰

Justice Thomas then criticized the majority’s “five considerations” test for “rais[ing] more questions than it answers.”¹¹¹ He also criticized each of the five considerations separately, beginning with the first—Congress’s broad powers under the Necessary and Proper Clause. Unfortunately,

105. *Id.* at 1972 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and quoting U.S. CONST. art. I, § 8, cl. 18).

106. *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, 617–18 (2000); *United States v. Lopez*, 514 U.S. 549, 563–67 (1995))).

107. *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.* (emphasis added) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).

108. *Id.*; see also *supra* note 55 and accompanying text.

109. *Id.*; see also Emily Eschenbach Barker, Note, *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.”).

110. *Comstock*, 130 S. Ct. at 1974.

111. *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 SUP. CT. REV. 239, 244 (quoting Justice Thomas and asking the same questions).

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.¹¹² In this case, he noted, that end is simply furthering other laws Congress enacted via its “incidental authority”—§ 4248 does not “carr[y] into Execution” any enumerated power of Congress, as the Constitution requires.¹¹³

Justice Thomas next dissented on the Court’s fifth consideration—that the civil-commitment provision carried into execution the “enumerated power that justified that person’s arrest or conviction in the first place”¹¹⁴—and the Court’s analogizing § 4248 to the statutes already in place that allow prison officials to care for prison inmates.¹¹⁵ Justice Thomas disagreed for three reasons. First, he noted, there is no element in the AWA relating to the defendant’s crime.¹¹⁶ Thus, a defendant can be civilly committed without ever being convicted of a federal crime involving sexual violence.¹¹⁷ Second, § 4248 authorizes federal custody over a person whom the federal government lacks jurisdiction to detain—one whose sentence has expired.¹¹⁸ Third, the definition of a “sexually dangerous person” for § 4248 purposes requires no finding of a likelihood of future violations of federally enacted laws.¹¹⁹

112. *Comstock*, 130 S. Ct. at 1975.

113. *Id.* at 1975–77. As Justice Thomas further delineated 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 into an already implied (rather than explicit) action, Congress did not have the authority to legislate it—Congress cannot “double-dip” with respect to its Necessary and Proper authority. For a “more general” description of this analysis, see Somin, *supra* note 111, at 250.

114. *Comstock*, 130 S. Ct. at 1977.

115. *Id.*

116. *Id.*; see 18 U.S.C. § 4247(a)(5)–(6) (2006).

117. *Comstock*, 130 S. Ct. at 1977. The government conceded this, as Justice Thomas pointed out. *Id.* (“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 85, at 23–25)). *Comstock* himself is such an example: the crime with which he was charged, and to which he pled guilty, prior to his commitment was the “[r]eceipt . . . of materials depicting a minor engaging in sexually explicit conduct,” a crime requiring no violence whatsoever. *United States v. Comstock*, 507 F. Supp. 2d 522, 526 (E.D.N.C. 2007) (internal quotation marks omitted), *aff’d*, 551 F.3d 274 (4th Cir. 2009), *rev’d*, 130 S. Ct. 1949.

118. *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 stand trial. *Id.* (citing *Greenwood v. United States*, 350 U.S. 366, 368 n.2 (1956)).

119. *Id.* at 1978 (internal quotation marks omitted). Although there are federal laws prohibiting certain types of sexual violence, those statutes tie into an enumerated power of Congress, unlike § 4248, which requires only a showing that the defendant will in some way “present[] a risk ‘to others.’” *Id.* (quoting 18 U.S.C. § 4247(a)(5)).

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;¹²⁰ the Court’s “overstate[ment]” of relevant history;¹²¹ and the constitutional authority of the states to “take charge” of federal prisoners released in those states.¹²² In his conclusion, Justice Thomas noted that the Court’s holding “comes perilously close to transforming 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.’”¹²³ The next Part discusses a few potential consequences, as highlighted through Justice Thomas’s concerns, of the five considerations.

III. POTENTIAL IMPLICATIONS OF THE FIVE CONSIDERATIONS

Despite Congress’s presumed good intentions behind passing the AWA, the Act has produced both economic and procedural consequences that blunt any gain. Part III.A discusses how the AWA has granted seemingly unrestricted legislative power to Congress, so long as that power meets

120. *Id.* at 1979. Justice Thomas noted that the majority’s reliance on the Restatement (Second) of Torts was poor and that *Youngberg v. Romeo* “lend[ed] even less support than the Restatement.” *Id.* at 1978–79 & n.11 (writing that *Youngberg* referred to the hospital’s duty to “protect *its residents*,” rather than the public, and that the case lent no support whatsoever to detention of 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. Justice Thomas continued, “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.” *Id.*; *see also id.* at 1979 n.12 (“Contrary to the Government’s suggestion, federal authority to exercise control over individuals serving terms of ‘supervised release’ does not derive from the Government’s ‘relationship’ with the prisoner but from the original criminal sentence itself.” (citation omitted)).

121. *Id.* at 1979–80 (noting that, although history supports the government’s ability to detain mentally ill persons, it “provides no justification whatsoever for reading the Necessary and Proper Clause to grant Congress the power to authorize the detention of persons without a basis for federal criminal jurisdiction”).

122. *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*, 19 U.S. (6 Wheat.) 264, 426 (1821)).

123. *Id.* at 1983 (fourth alteration in original) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819); *see* Transcript of Oral Argument, *supra* note 85, at 20 (Scalia, J.) (“[T]his is a recipe for the Federal Government taking over everything.”); Somin, *supra* note 111, 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* Robin Morse, Note, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1766 (2009) (citing Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 508 (2006)) (noting that after *Raich*, Commerce Clause challenges are unlikely to succeed).

Comstock's broad definition of *necessary and proper*. Part III.B explains the economic costs the states have been forced to shoulder just in implementing the AWA. Finally, Part III.C explores a potential procedural risk that the AWA creates for 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 power it grants to Congress.¹²⁴ The majority's overly expansive reading of the Necessary and Proper Clause coupled with its "ultimately derived from" language suggests this conclusion.¹²⁵ The majority attempted to alleviate fears of such a grant of power by noting the statute's narrow scope,¹²⁶ 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, for example, that kleptomania was a crime of great harm to the public and its chattels, so harmful, in fact, that those suffering from such an affliction were a danger to the community? As long as Congress could "ultimately" reach some enumerated power from seemingly any number of rational bases, however far removed, under *Comstock* the law would be perfectly valid. Although this idea 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.¹²⁷ *Comstock* himself was charged with receipt of "material involving the sexual exploitation of minors,"¹²⁸ 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, as long as there was something in his or her past that the government could determine makes him or her "sexually dangerous."¹²⁹

124. *Comstock*, 130 S. Ct. at 1982–83; see Yung, *supra* note 7, at 466 (noting how courts that allow 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").

125. See Somin, *supra* note 111, at 254 ("[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.").

126. See *Comstock*, 130 S. Ct. at 1964 (majority opinion).

127. *Id.* at 1977 (Thomas, J., dissenting). 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. Transcript of Oral Argument, *supra* note 85, at 24–25 (statements of Justice Stevens).

128. 18 U.S.C. § 2252 (2006).

129. Transcript of Oral Argument, *supra* note 85, at 24–25; Morse, *supra* note 123, at 1789 ("Section 4248 . . . authorize[s] the government to civilly commit someone convicted of bank

Second, the Court in *Comstock* gave no direction for its “ultimately derived from” standard: How many steps are too many under this standard before the act of Congress is too far removed from an enumerated power? Using the kleptomania example above, the enumerated power Congress could enforce might be to “provide for the . . . general Welfare of the United States.”¹³⁰ Assume that in executing this power 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.¹³¹ Because kleptomaniacs 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 by arguing that under *Comstock*, this provision is valid as it “ultimately derives from” the enumerated power to protect the general welfare.

Third, similar to one’s status as a sex offender, kleptomania is not a “mental abnormality” necessitating civil commitment. But as one scholar notes, “the legal concept of mental illness . . . is not simply a clinical category.”¹³² 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.”¹³³ While some sort of clinical diagnosis would be necessary for civil commitment as well, obtaining such a diagnosis may not be a hurdle either. The *Diagnostic and Statistical Manual of Mental Disorders* (“*DSM*”) is the guide for mental-health professionals in diagnosing persons as mentally ill.¹³⁴ Kleptomania is already included in the *DSM*.¹³⁵ Thus, if Congress decided that kleptomania was a serious enough “impulse control disorder” to warrant civil commitment of those afflicted by it—just as Congress has decided that the mental illness or abnormality that makes a person “sexually violent” is worthy of commitment—it already has the requisite diagnosis.

The Supreme Court has even held that to be valid, civil-commitment statutes only need require a “mental abnormality” or “personality disorder”

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.”).

130. U.S. CONST. art. I, § 8, cl. 1.

131. *Ex parte Karstendick*, 93 U.S. 396, 400 (1876), cited in *Comstock*, 130 S. Ct. at 1958 (majority opinion).

132. Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L., POL’Y & ETHICS J. 489, 501 (2006).

133. *Id.*

134. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at xxiii (4th ed., Text Rev. 2000) [hereinafter *DSM*].

135. *Id.* at 667–69 (classifying kleptomania under “impulse-control disorders not elsewhere classified”).

in the person, as defined by the legislature.¹³⁶ The abnormality in question could simply be "emotional,"¹³⁷ requiring an even smaller suggestion of dangerousness, if requiring it at all. The statutory requirement of an abnormality or disorder, however, is more demanding than the classifications within the *DSM*: the *DSM* "does not meet the legal standards necessary for commitment."¹³⁸ Thus, the legislature can pick and choose diagnoses from the *DSM*, define the standard of "abnormality" that the diagnosis entails, and enact legislation to confine persons who fall within those lines.

Antisocial personality disorder is one practical example of this idea.¹³⁹ The Supreme Court has held that persons with this condition are insufficiently dangerous to civilly commit them.¹⁴⁰ But if Congress were to define this disorder as a "mental abnormality" that harbored signs of dangerousness, commitment would likely be valid under the "ultimately derived from" standard, as discussed above. This result would be especially onerous considering that "40%–60% of the male prison population is diagnosable with antisocial personality disorder."¹⁴¹ Thus, by giving Congress the power to define which mental illnesses are worthy of civil commitment and to enact statutes to enforce that commitment, the Court's decision in *Comstock* has granted Congress the virtually unlimited ability to indefinitely commit any person with any diagnosable mental illness that it feels renders that person too dangerous for civilian life.

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 or herself under the newly enacted SORNA, part of the AWA,¹⁴² he or she can be imprisoned for up to ten years.¹⁴³ After the new incarceration but before his or her release, this person could be determined sexually dangerous and civilly committed

136. See *Kansas v. Hendricks*, 521 U.S. 346, 358–59 (1997). The *Hendricks* Court added, "[W]e have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Id.* at 359.

137. *United States v. Wilkinson*, 646 F. Supp. 2d. 194, 200 (D. Mass. 2009) (stating that in considering civil commitments, the Court has not "ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments" (quoting *Kansas v. Crane*, 534 U.S. 407, 415 (2002))).

138. 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).

139. See *DSM*, *supra* note 134, at 701–06 (defining *antisocial personality disorder*).

140. *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992).

141. *Crane*, 534 U.S. at 412 (citing P. Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999)).

142. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 111–131, 120 Stat. 587, 591–601 (codified at 42 U.S.C. §§ 16911–16929 (2006)).

143. 18 U.S.C. § 2250(a) (2006); see also Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 380 (2009).

under § 4248 of the same Act. Thus, Congress could effectively civilly commit all sex offenders who were incarcerated before Congress enacted the AWA, who now, post-enactment, are set for release, and who forgot or were too irresponsible to register. The AWA, then, gives prosecutors the ability to commit and the grounds to do so.

All this means that the government could keep a person confined indefinitely when it feels that his or her 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."¹⁴⁴ Although both juries and judges typically sentence a person based on "whether the offender has done enough time,"¹⁴⁵ recent studies have found juries will also use "civil commitment to correct the error."¹⁴⁶ Vileness notwithstanding, this finding sounds loudly of a due-process violation, a topic Part IV.A discusses.

This commitment-for-punishment hypothesis assumes, however, that Justice Breyer was wrong. It assumes the legislature *will* seek a more general police power like that possessed 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

144. *United States v. Wilkinson*, 646 F. Supp. 2d. 194, 199 (D. Mass. 2009) (quoting *Crane*, 534 U.S. at 412).

145. Fennel, *supra* note 138, at 61.

146. *Id.* at 62 (quoting Kevin M. Carlsmith et al., *The Function of Punishment in the "Civil" Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & L. 437, 445-46 (2007) (finding 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) (noting the concern 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 reasonable doubt to have violated a 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 PSYCHOPATHIC PERSONALITIES SUBCOMM., MINN. DEPT. OF HUMAN SERV'S, REPORT TO THE COMMISSIONER: COMMITMENT ACT TASK FORCE 45, 49 (1988))).

the limits of this "end run" around the normal criminal justice process?¹⁴⁷

B. FISCAL COSTS

A more tangible concern also pointed out by Justice Thomas is that of the costs the federal government will be forced to shoulder to accommodate the civil-commitment scheme of § 4248.¹⁴⁸ These costs are so high that in their *amici* briefs in *Comstock*, twenty-nine states wrote that they would prefer the federal government bear the costs of committing persons under the AWA—approximately \$64,000 per individual per year.¹⁴⁹ Aside from the costs imposed on the federal government by the AWA, any state that does not substantially comply with the AWA loses ten percent of federal judicial-assistance funding.¹⁵⁰ Consequently, many states may simply opt out of the AWA and lose the funding—which would actually end up costing *less* than implementing the Act—thereby frustrating the purpose of the AWA altogether.¹⁵¹

A separate section of the AWA, however, does authorize the Attorney General to grant funds to "jurisdictions for the purpose of establishing, enhancing, or operating effective civil-commitment programs for sexually dangerous persons."¹⁵² This section does not set out an exact amount that the Attorney General could authorize to grant these jurisdictions, however,

147. Wangenheim, *supra* note 4, at 597 (quoting *State v. Ehrlich (In re Leon G.)*, 26 P.3d 481, 491 (Ariz. 2001) (Zlaket, C.J., dissenting), *vacated on other grounds*, *Glick v. Arizona*, 535 U.S. 982 (2002)).

148. *United States v. Comstock*, 130 S. Ct. 1949, 1982 (2010) (Thomas, J. dissenting).

149. *Id.* (citing Brief for the States of Kansas, et al., as Amici Curiae in Support of Petitioner at 2, *Comstock*, 130 S. Ct. 1949 (No. 08-1224), 2009 WL 2896311).

150. Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 495 (2008) (citing 42 U.S.C. § 16925(a) (2006)); *see also* 42 U.S.C. § 16925(b)(4).

151. Farley, *supra* note 150, at 496 (citing Hector Castro, *Keeping Tabs on Sex Offenders Is Daunting Task*, SEATTLE POST-INTELLIGENCER (July 19, 2007), <http://www.seattlepi.com/local/article/Keeping-tabs-on-sex-offenders-is-daunting-task-1244174.php>); *see also* Janus, *supra* note 146, at 1236 (noting that 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.* at 1251-52 (citing Jessica McBride & Reid J. Epstein, *State Tops in Release of Sexual Predators*, MILWAUKEE J. SENTINEL, Sept. 22, 2003, at 1A; CIVIL COMMITMENT STUDY GRP., MINN. DEP'T OF CORR., 1998 REPORT TO THE LEGISLATURE 21 (1999), *available at* <http://www.doc.state.mn.us/publications/documents/Civil%20Commitment%20Study%20Group%20Report%20to%20the%20Legislature.PDF>); *see also* Allen Greenblatt, *States Struggle To Control Sex Offender Costs*, NPR (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." (quoting Alisa Klein, a consultant with the Association for the Treatment of Sexual Abusers)).

152. 42 U.S.C. § 16971(a).

and in parallel state-enacted sexually-violent-predator commitment statutes, the costs have been exorbitant.¹⁵³ The costs of a national, federal statute will undoubtedly be exponentially higher.¹⁵⁴ Numbers aside, a federal mandate against sex offenders may not be the most fiscally prudent legislation when the country is already financially strapped. While “protecting society from violent sexual offenders is certainly an important end,”¹⁵⁵ there are more important allocations of federal funding to be made.¹⁵⁶ Aside from funding-allocation imprudence, any failing of the AWA may also lead to additional costs caused by new lawsuits.¹⁵⁷

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 to the civil-commitment provision.¹⁵⁸

C. BAIT-AND-SWITCH PLEA DEALS

When a criminal defendant pleads guilty to a charge, it is often said he or she is “getting a deal”—the defendant pleads to a lighter sentence and avoids, among other things, the possibility of receiving the maximum sentence at trial, and the prosecutor saves the time she would have needed for trial preparation and execution.¹⁵⁹ Graydon Earl Comstock likely made such a deal when he originally pled guilty in October 2000. In making this deal, however, it is unlikely he was aware he could be forever civilly

153. See *supra* note 151.

154. See Yung, *supra* note 7, at 447 (“[A] War on Sex Offenders could easily cost more than the War on Drugs”). The War on Drugs has so far cost the federal government more than \$2.5 trillion. Claire Suddath, *Brief History: The War on Drugs*, TIME (Mar. 25, 2009), available at <http://www.time.com/time/world/article/0,8599,1887488,00.html>, cited in Yung, *supra* note 7, at 440.

155. *United States v. Comstock*, 130 S. Ct. 1949, 1974 (2010) (Thomas, J., dissenting); see also Greenblatt, *supra* note 151 (“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.” (quoting California Assemblyman Nathan Fletcher) (internal quotation marks omitted)).

156. Obviously, not everyone agrees with this statement. See Yung, *supra* note 7, 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)).

157. See Greenblatt, *supra* note 151 (“[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.” (quoting Roxanne Lieb, Director of the Washington State Institute for Public Policy) (internal quotation marks omitted)).

158. See, e.g., Parts IV.B–C.

159. See JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 1016–19 (4th ed. 2010) (quoting JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* § 9.06 (4th ed. 2006)).

committed following his prison sentence.¹⁶⁰ 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 as a new variable 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 being 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.”¹⁶¹ As the AWA becomes more prominent, however, it is likely that 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 courts’ time and further bogging down the courts’ ever-crowded dockets.

Currently, plea deals are an integral part of the federal criminal justice system, incorporating 96% of all federal charges in 2004.¹⁶² Defendants who plead guilty are processed through the system 5.4 months faster than those who choose to go to trial.¹⁶³ Supporting the proposition that guilty pleas are often deals, courts sentence defendants who go to trial (and are convicted) to prison in 88% of cases, whereas those who plead guilty receive prison sentences only 77% of the time, and the average prison terms of those who go to trial are three times longer than sentences of those who plead guilty.¹⁶⁴ If defendants are informed of the possibility—nay, the likelihood—that they will be civilly committed following their sentences, it is probable they will opt for trial, perhaps with hope they will 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? Can the defendant raise a claim of ineffective assistance of counsel? In a similar situation recently heard by the Supreme Court in *Padilla v. Kentucky*, the Court decided that a defense attorney’s failure to apprise his client of the risks of deportation following a guilty plea constituted ineffective assistance.¹⁶⁵ This change came about due to drastic changes in immigration law over the past ninety years.¹⁶⁶

160. 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.”

161. Fennel, *supra* note 138, at 62–63.

162. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 213476, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 2 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf>.

163. *Id.* at 60.

164. *Id.* at 70.

165. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486–87 (2010).

166. *See id.* at 1478–80.

Parallel to immigration laws, sex-offender laws have also drastically changed over the past century.¹⁶⁷ The same characteristics of deportation proceedings—the “close connection to the criminal process,”¹⁶⁸ the “drastic” consequences,¹⁶⁹ the civil nature of the proceedings¹⁷⁰—all exist equally in civil commitment. Under the logic of *Padilla*, it is possible that federal court dockets could be further clogged with additional litigation due to attorneys’ failures to warn their clients of civil-commitment possibilities.

Other areas of litigation and the law could be, and have been, affected by the AWA’s demands as well.¹⁷¹ Whether Congress takes any of these concerns into consideration to revise the AWA remains to be seen. From the momentum of these concerns, the final Part of this Note makes 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, the abolishment of civil commitment for these persons entirely.

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. This Part first discusses a recommendation about due process for the Court. Although the Court has refused to hear the due-process issue it reserved in *Comstock*, future cases are likely to argue it again. The subsequent Subparts discuss one recommendation and its alternative for Congress and the Act itself: reserving the civil-commitment power to the states or abolishing civil commitment of sex offenders entirely.

A. THE SUPREME COURT SHOULD FIND THAT THE AWA VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

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

167. See *United States v. Comstock*, 130 S. Ct. 1949, 1958–61 (2010).

168. *Padilla*, 130 S. Ct. at 1481–82.

169. *Id.* at 1478. (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)) (internal quotation marks omitted).

170. *Padilla*, 130 S. Ct. at 1481–82.

171. See Ennis, *supra* note 17, at 697 (criticizing the Adam Walsh Act for its negative consequences for “those it aim[ed] to protect—children”); Somin, *supra* note 111, at 260–67 (discussing the potential impact of *Comstock* on the recent health-care legislation passed in March 2010); Yung, *supra* note 7, at 478 (forecasting “restrictions” of traditional due-process rules for “undesirable” populations such as sex offenders).

not preclude commitment.¹⁷² Rather, he left any issues of due process to be pursued on remand.¹⁷³

In the latest installment of *United States v. Comstock*,¹⁷⁴ the Fourth Circuit confronted the due-process issue on which the Supreme Court 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.¹⁷⁵ The Fourth Circuit, however, disagreed and reversed.¹⁷⁶

The court stated that Comstock and his fellow respondents had "misread" the AWA and that *Addington v. Texas*¹⁷⁷ "expressly rejected respondents' view" of *In re Winship*¹⁷⁸ and their use of it to argue against the clear-and-convincing-evidence standard in civil-commitment proceedings.¹⁷⁹ 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."¹⁸⁰

The Fourth Circuit also relied on *Kansas v. Hendricks*¹⁸¹ 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 constitutional requirements.¹⁸² 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 . . ." ¹⁸³

On March 4, 2011, Comstock and Matherly once again petitioned the Supreme Court for certiorari, this time arguing that the AWA violated the Due Process Clause of the Fourteenth Amendment and that § 4248

172. *Comstock*, 130 S. Ct. at 1956.

173. *Id.* at 1965.

174. *United States v. Comstock*, 627 F.3d 513 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 3026 (2011).

175. *United States v. Comstock*, 507 F. Supp. 2d 522, 559–60 (E.D.N.C. 2007) ("Application of the reasonable doubt standard . . . is necessary to ensure due process . . ."), *aff'd*, 551 F.3d 274 (4th Cir. 2009), *rev'd*, 130 S. Ct. 1949.

176. *Comstock*, 627 F.3d at 515.

177. *Addington v. Texas*, 441 U.S. 418 (1979).

178. *In re Winship*, 397 U.S. 358 (1970).

179. *Comstock*, 627 F.3d at 519–21 ("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." (citing and quoting *Addington*, 441 U.S. at 427–33)).

180. *Id.* at 521.

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

182. *Comstock*, 627 F.3d at 522–23.

183. *Id.* at 523 (quoting *Hendricks*, 521 U.S. at 362).

proceedings constitute “criminal, and not civil, proceedings.”¹⁸⁴ The Supreme Court, however, declined to rehear the case and denied the petition on June 20, 2011.¹⁸⁵ For Graydon Earl Comstock, the other four respondents¹⁸⁶ from *Comstock*, and all other civilly confined “sexually dangerous persons,” the answer to the due-process question remains what the lower federal courts have handed down: the AWA does not violate the Due Process Clause.

Although the Fourth Circuit relied extensively on *Addington* and *Hendricks* in its holding—that parallel with those two cases, civil-commitment proceedings under § 4248 are not criminal in nature, and thus, do not require the beyond-a-reasonable-doubt standard of proof to pass due-process muster—the reasoning behind those two cases suggests the higher standard is the appropriate one.

1. The Reasoning Behind the Court’s Opinion in *Addington* Suggests the Beyond-a-Reasonable-Doubt Standard of Proof Should Be Applied in Civil-Commitment Proceedings

The standard of proof required in criminal prosecutions, including those involving charges of violating a federal sex law where the alleged violator is now facing civil commitment, is invariably beyond a reasonable doubt. Because incarceration and civil commitment could both involve indefinite detention, it only makes sense that courts apply the same standard of proof to both.¹⁸⁷ Indeed, the *Addington* Court conceded that “civil commitment . . . constitutes a significant deprivation of liberty that requires due process protection.”¹⁸⁸ Undoubtedly, some of the persons convicted of sexually violent offenses are people from whose confinement society would benefit.¹⁸⁹ But that is certainly not the case for every sex offender who faces the possibility of indefinite detention under the current “intermediate

184. Petition for Writ of Certiorari at 6, 13, *Comstock*, 627 F.3d 513 (No. 10-9360) (on file with the author).

185. *Comstock v. United States*, 131 S. Ct. 3026 (2011). Justice Kagan took no part in the consideration or decision of the petition. *Id.*

186. Only Comstock and Matherly filed the petition this time around. Petition for Writ of Certiorari, *supra* note 184, at ii n.1. Matherly also filed, pro se, a petition for habeas corpus under 28 U.S.C. § 2241, which the Eastern District of North Carolina dismissed, without prejudice, due to Matherly’s failure to exhaust his remedies “within the § 4248 action.” *Matherly v. Johns*, No. 5:10-HC-2091-BO, 2011 WL 317748, at *1 (E.D.N.C. Jan. 28, 2011), *aff’d*, 427 F. App’x 257 (4th Cir. 2011), *cert. denied*, No. 10-10934, 2011 WL 4536574 (U.S. Oct. 3, 2011).

187. See Ahluwalia, *supra* note 132, at 526 (noting the “superficial distinction between civil commitment and punishment”).

188. *Addington v. Texas*, 441 U.S. 418, 425 (1979).

189. See *id.* at 420–21 (discussing *Addington*’s criminal sexual history); *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (same for *Hendricks*).

standard" of proof.¹⁹⁰ The standard for civil commitment must be more demanding to ensure that those who will likely be forever removed from society¹⁹¹ are of the former, "Addington" category, lest we permit such a "grave invasion"¹⁹² upon any offender without assessing the risk he or she might pose.

2. The Concerns of the *Addington* Court 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 in *Addington* was concerned that a state would not be able to prove that a person was dangerous beyond a reasonable doubt, largely due to the inefficaciousness of psychiatric treatment.¹⁹³ Much of this concern, however, may have stemmed from the lackluster methods of psychological prediction available in 1979. A 2009 study of different "approaches to the prediction of recidivism" compared the accuracy of predictions for more than 45,000 sex offenders to determine which methods were most successful.¹⁹⁴ In civil-commitment hearings, the study found, "structured risk tools" are almost always used.¹⁹⁵ The study also reviewed four general ways to structure risk assessment.¹⁹⁶

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.¹⁹⁷ Interestingly, the unstructured evaluations were precisely the type of

190. *Addington*, 441 U.S. at 424. Comstock, Matherly, and Revland, for example, do not fit into the same category of offender as Addington. See *United States v. Comstock*, 130 S. Ct. 1949, 1955 (2010) (discussing the crimes of these three respondents as "possession of child pornography").

191. See Yung, *supra* note 7, at 448 ("Release from the facilities is rare and placement within the facilities typically amounts to a lifetime sentence.").

192. *United States v. Perry*, 788 F.2d 100, 114 (3d Cir. 1986); see also *Jones v. United States*, 463 U.S. 354, 372 (1983) (Brennan, J., dissenting) (calling civil commitment a "massive intrusion on individual liberty").

193. *Addington*, 441 U.S. at 429 ("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.").

194. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. 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.

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

196. *Id.* at 3 (including "empirical actuarial, clinically adjusted actuarial, mechanical, and structured professional judgment").

197. *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.

predictive measure in place between 1970 and 1998¹⁹⁸—the *Addington* Court, of course, handed down its decision in 1979.¹⁹⁹ 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 judgment²⁰⁰—effectively *decreased* the predictive accuracy of the measure.²⁰¹ It is now common, however, for evaluators to use multiple risk tools during civil-commitment procedures,²⁰² a practice that allows evaluators to be much more confident in their decisions.²⁰³ 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 courts should simply use a variety of different, newer, and proven-more-accurate methods to determine an offender’s propensity to recidivate.

The Court in *Addington* held that proof of “mental illness” in civil-commitment proceedings need only be found by clear and convincing evidence to satisfy due process.²⁰⁴ 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 that courts find “mental illness” beyond a reasonable doubt.²⁰⁵

3. The Appellant and Statute in *Hendricks* Are Distinguishable from Comstock and the AWA

Leroy Hendricks was a much different man from Graydon Earl Comstock: Hendricks had a long history of molesting children and admitted

198. *Id.* (“The accuracy of the unstructured evaluations did not change on the basis of the year in which the risk assessment was conducted (all *r*s [*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).”).

199. *Addington v. Texas*, 441 U.S. 418 (1979); *see also* Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 283–84 (2011) (discussing the *Addington* Court’s seeming ignorance of or indifference to psychiatric methodological debate).

200. *See* CHILD WELFARE LEAGUE OF AM., A COMPARISON OF APPROACHES TO RISK ASSESSMENT IN CHILD PROTECTION AND BRIEF SUMMARY OF ISSUES IDENTIFIED FROM RESEARCH ON ASSESSMENT IN RELATED FIELDS 5 (2005), *available at* www.childwelfare.gov/responding/ia/safety_risk.

201. Hanson & Morton-Bourgon, *supra* note 194, at 9 (“[T]he simplest interpretation is that the overrides simply added noise.”).

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

203. *Id.* (citing Jeremy F. Mills & Daryl G. Kroner, *The Effect of Discordance Among Violence and General Recidivism Risk Estimates on Predictive Accuracy*, 16 CRIM. BEHAV. & MENTAL HEALTH 155 (2006)).

204. *Addington*, 441 U.S. at 427.

205. *See generally* Tsesis, *supra* note 199, at 300–06 (arguing for the beyond-a-reasonable-doubt standard in civil-commitment proceedings).

as much, stating the only way to make him stop was for him "to die."²⁰⁶ The statute in question in *Hendricks* was markedly different from the AWA as well: the statute defined what a "sexually violent predator" actually was;²⁰⁷ it required that the prisoner was found a sexually violent predator *beyond a reasonable doubt*, rather than the clear-and-convincing-evidence standard of the AWA;²⁰⁸ and under the statute at issue in *Hendricks*, the confined person could, at any time, file a release petition,²⁰⁹ as opposed to the AWA's requirement that the director of the facility order discharge.²¹⁰ With these differences, the Court held that the Kansas statute did not violate due process and was constitutional.²¹¹ Although the *Hendricks* decision appeared to preclude the appellants in *Comstock* from making a due-process argument,²¹² the *Hendricks* decision was predicated on different rules than the *Comstock* holding. Because 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* power conferred upon the states, as discussed in several cases before *Comstock*.²¹³ Because the statute in *Hendricks* was a state statute, there was no concern that the statute was "too attenuated" from any enumerated power, as the Tenth Amendment implicitly grants the states this power.²¹⁴ It is under this *parens patriae* power that courts find statutes, such as the one in *Hendricks*, to pass due-process muster.²¹⁵ The AWA, however, as a

206. *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997).

207. Although the AWA now defines "sexually violent conduct," this definition was added after *Comstock* was committed. Petition for a Writ of Certiorari at 6 n.5, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08-1224).

208. Compare *Hendricks*, 521 U.S. at 353, with 18 U.S.C. § 4248(d) (2006).

209. *Hendricks*, 521 U.S. at 353.

210. 18 U.S.C. § 4248(e).

211. *Hendricks*, 521 U.S. at 371.

212. See *Somin*, *supra* note 111, at 240 ("[T]he *Comstock* defendants could not argue that their continued confinement violated an individual constitutional right.").

213. See *supra* note 55.

214. See *United States v. Comstock*, 130 S. Ct. 1949, 1974-75 (2010) (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." (quoting *Addington v. Texas*, 441 U.S. 418, 426 (1979))).

215. The finding of dangerousness that these state statutes require implicitly activates the *parens patriae* power, granting states the right to commit offenders and, thus, protect their citizens. See Wangenheim, *supra* note 4, 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 CALIF. L. REV. 111, 121-22 (2002) ("[T]he States are vested with the historic

federal statute, must “carr[y] into Execution” some enumerated power.²¹⁶ The federal government has no *parens patriae* power, so unlike the states, it cannot hang its due-process hat on this power.²¹⁷ The “significant deprivation of liberty” from civil commitment requires equally significant “due process protection.”²¹⁸ The power authorizing the federal government to execute that deprivation is lacking.

Second, not only did the Court in *Hendricks* more easily find a “mental abnormality” than in *Comstock*—Hendricks went so far as to state the “only sure way” to prevent him from committing sexually violent attacks in the future would be for him “to die,”²¹⁹ whereas Comstock was convicted only of receipt of child pornography—but the required standard of proof to find this abnormality was higher. The statute in *Hendricks* required finding sexual violence beyond a reasonable doubt,²²⁰ whereas the AWA requires only clear and convincing evidence.²²¹ Cases since *Hendricks* have even suggested that 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.”²²²

Third, according to some scholars, *Hendricks* never actually answered the due-process question.²²³ Typically, courts attempt to strike a balance between “the individual’s liberty interest and due-process rights [and] the state’s obligation to act as a guardian for its citizens.”²²⁴ But as Justice Thomas noted, the federal government does not have this “guardian” obligation.²²⁵ A federal statute cannot use this criterion to meet due process.

parens patriae power,’ but that power is subject to due process limitations.” (quoting O’Connor v. Donaldson, 422 U.S. 563, 583 (1975) (Burger, J., concurring)).

216. Somin, *supra* note 111, at 248–51.

217. Morse, *supra* note 123, at 1763 (“[T]he federal government possesses no general police or *parens patriae* power. Therefore, Congress may not provide for civil commitment . . . to protect the general welfare of the community.” (footnotes omitted)).

218. *Addington*, 441 U.S. at 425.

219. *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997).

220. *Id.* at 353.

221. 18 U.S.C. § 4248(d) (2006).

222. *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (emphasis added) (quoting *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (internal quotation marks omitted); *see also Jones v. United States*, 463 U.S. 354, 384 (1983) (Brennan, J., dissenting) (“[C]onfinement in a mental institution is even more intrusive than incarceration in a prison.”).

223. Ahluwalia, *supra* note 132, at 512 (writing that Justice Thomas’s opinion “avoids asking the crucial question of whether the diluted mental abnormality standard satisfies due process”).

224. *Id.* at 496–97.

225. *See United States v. Comstock*, 130 S. Ct. 1949, 1974 (2010) (Thomas, J., dissenting) (“[T]he 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

The statute itself is not even linked to interstate commerce, a requirement of the Commerce Clause.²²⁶ There simply is no authority for Congress to civilly commit sex offenders based on a finding of "dangerousness" and leave the Due Process Clause intact.

Although the Fourth Circuit relied on these two principal cases in its holding, the reasoning behind those cases and the differences among *Comstock*, *Addington*, and *Hendricks* leave *Comstock* in its own category. The federal government's lack of power coupled with the significant deprivation of liberties of civil commitment weigh strongly against the AWA passing due-process requirements. In a future case hearing the due-process issue, the Supreme Court should find as much.

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 the 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.²²⁷ Draining additional judicial resources to determine sexual dangerousness would further strain an already stretched system.²²⁸ Those states that decide "protection" of their constituents from persons determined to be sexually dangerous is an efficient use of their *parens patriae* powers may enact laws to effectuate this protection; those states that deem it an unnecessary safeguard need not be forced to fund the

nature of our National Government." *Id.* at 1966 (Kennedy, J. concurring) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955)). The highly deferential standard that the Court allowed in *Williamson*, however, was limited to that case and its state-law issues. *Id.*

226. 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, noneconomic criminal conduct); *United States v. Lopez*, 514 U.S. 549 (1995) (holding statute governing noneconomic intrastate activity was not within congressional power); see also Consolidated Brief of the Cato Institute and Prof. Randy E. 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).

227. 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 docket of criminal cases over the past twenty-five years and the more than 300% growth of drug cases since 1980); see also Somin, *supra* note 111, at 267 (citing Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF THE CRIMINAL LAW" 43, 44–49 (Timothy Lynch ed., 2009)) (noting that due to the massive expansion of federal criminal law, the "average American may commit as many as three federal felonies per day").

228. See Barkow, *supra* note 227, at 531–32 (describing how "[o]pponents of increased federal involvement . . . observ[e] that the size and structure of the federal judiciary is not suited for taking on a larger share of criminal matters").

requisite facilities and officers. In fact, more than twenty states already have involuntary-civil-commitment laws in effect.²²⁹

One way to grant states control over civil commitments might be 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,” that sex offenders will soon be released there.²³⁰ The states that have civil-commitment laws could then choose whether to seek civil commitment of these persons. This vicarious approach presumes the remaining twenty-eight states that do not have commitment laws²³¹ will enact them or else be left out of the notification entirely.

Justice Scalia 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.”²³² He also suggested that the federal government reimburse the states for the costs associated with taking on civil commitment of federally detained persons.²³³ 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 for any released prisoners.²³⁴ These proposals would also curb the unbridled power that the civil-commitment provision appears to grant to Congress and the costs the states have been forced to endure.

Although sexually-violent-person laws are expensive in general, reserving the power to enact them to the states would allow states with firm economic groundings to provide the requisite officers and facilities and avoid overburdening states with the thinnest budgets. Because a number of states have already enacted their own 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 uncharted—there is much less certainty about what the “lingering costs” really are.²³⁵ Specifically, the three-tiered system of the AWA would actually lead to higher costs for administration and enforcement; most violators would fall in the highest-risk category, which requires the most attention and longest sentences, *i.e.*, the

229. See *Comstock*, 130 S. Ct. at 1981 n.15 (Thomas, J., dissenting).

230. Morse, *supra* note 123, at 1792.

231. See *Comstock*, 130 S. Ct. at 1981 n.15.

232. See Transcript of Oral Argument, *supra* note 85, at 45.

233. See *id.* at 37 (“[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.”).

234. *Id.*

235. See Greenblatt, *supra* note 151 (“Sometimes federal mandates and state laws get passed without a real sense of what the lingering costs are.” (quoting Suzanne Brown-McBride, Deputy Director of the Council of State Governments Justice Center)). The greatest expense, however, is incarceration under the AWA. *Id.*

highest costs.²³⁶ Keeping civil commitment state-controlled would at least better prepare states to shoulder the costs associated with commitment, if states chose to endure them.

Perhaps this is the way to go—leave states to construct their own laws, and those not desiring civil-commitment laws can just refuse to enact them.²³⁷ Indeed, other, similar federal civil-commitment laws may be “vulnerable” to attack on parallel grounds that critics use to attack the AWA,²³⁸ leaving the states as the sole providers of commitment laws. Even with the states left to enact civil-commitment laws, assuming they enact them, the problems with enforcement and bait-and-switch plea deals still exist.

C. ABOLISH CIVIL COMMITMENT FOR SEX OFFENDERS ENTIRELY

Rather than reserve the power to enact civil-commitment laws to the states, the best plan for these 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 incarceration²³⁹ and the treatment involved during commitment ineffective and insufficient.²⁴⁰ If offenders were simply given sentences to match the severity of their crimes,²⁴¹ thus confining them longer, civil commitment would be unnecessary.²⁴² Aside from exorbitant costs and lack of treatment, civil commitment is arguably ineffective at reducing the amount of sexual crimes in a state.²⁴³ Civil commitment also risks replacing

236. *Id.*; see also 42 U.S.C. § 16911 (2006).

237. See Tsesis, *supra* note 199, at 259 (suggesting “state-by-state legislative reform” should be implemented to preserve the “integrity of the involuntary [civil] commitment process”).

238. See Somin, *supra* note 111, at 258. This discussion is beyond the purview of this Note.

239. Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 39 (2008) (citing Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES (Mar. 4, 2007), <http://www.nytimes.com/2007/03/04/us/04civil.html>).

240. *Id.* (citing Abby Goodnough & Monica Davey, *A Record of Failure at Center for Sex Offenders*, N.Y. TIMES (Mar. 5, 2007), <http://www.nytimes.com/2007/03/05/us/05civil.html>).

241. In congressional proceedings on the AWA, Congressman Bobby Scott pointed out that federal sex crimes have, in fact, increased in length of punishment. See 152 CONG. REC. H5705, 5723 (daily ed. July 25, 2006) (“[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 . . .”).

242. 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 138, at 61. Juries consider amount of punishment a more important factor than risk of recidivism when deciding new sentences. *Id.* at 61–62 (citing and quoting Carlsmith et al., *supra* note 146, at 445–46). Thus, if the offender was convicted of a first-time offense, a jury could adequately determine punishment and not be called upon later to indefinitely, and unnecessarily, confine the offender.

243. Wright, *supra* note 239, at 40 (citing Editorial, *Wrong Turn on Sex Offenders*, N.Y. TIMES (Mar. 13, 2007)) (noting that the recently enacted New York legislation was criticized as

the present criminal system—which requires proof of criminal action beyond a reasonable doubt—with “confinements for dangerousness”²⁴⁴ for “sexually dangerous” offenders under a clear-and-convincing-evidence standard. 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.²⁴⁵ But when that promise fails to keep, the jury has likely sent a person to his or her final resting place, albeit with good intentions. If the sentence were made to match the charge and serve 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;²⁴⁶ that much is not debated. Adjusting the statutory punishments for these congressionally created federal crimes would follow the same logic, yet would not overstep congressional authority. Although this adjustment may lead to some increased costs due to the longer terms of incarceration of sex-related federal criminals, the increase would not compare to the exponential growth the AWA commands with its increased administrative and enforcement costs.²⁴⁷ 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 desire of defendants to avoid more severe penalties would be an extra incentive to take a deal but would not risk the post-sentence consequences of civil commitment.

The AWA itself, somewhat unsurprisingly, has suggested “enhanc[ed] penalties” for some of the most heinous violent crimes and appropriate due-process provisions under which a sex-offender may challenge the sentence.²⁴⁸ Although the suggested new sentences are arguably excessive, they show a step in the right direction. These sentences should be

“merely another effort at controlling public fear and would have little to no impact on sexual assault”).

244. *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992).

245. *Cf. Janus*, *supra* note 146, at 1233–34.

246. *See United States v. Comstock*, 130 S. Ct. 1949, 1957–58 (2010); *see also Sabri v. United States*, 541 U.S. 600 (2004) (upholding statute prohibiting bribery involving federal funds); *Lottery Case*, 188 U.S. 321 (1903) (upholding Congress’s ability to create criminal statute); *Ex parte Karstendick*, 93 U.S. 396, 400 (1876) (recognizing ability of Congress to imprison federal criminal offenders).

247. *See Greenblatt*, *supra* note 151.

248. *Wright*, *supra* note 239, at 35 (citing Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 202, 120 Stat. 587, 612–13 (amending 18 U.S.C. § 3559)).

responsibly, rather than emotionally, set by Congress²⁴⁹ and could be used as substitutes for civil commitment, eliminating civil commitment altogether.

The respondents in *Comstock* also proposed modified supervised release as an alternative to commitment.²⁵⁰ Under this proposal, federal probation officers would be responsible for the supervision of released offenders.²⁵¹ Those released could obtain necessary mental-health care, and the release would limit their access to travel and computers.²⁵² Rather than facing indefinite commitment, the individuals would be monitored and rehabilitated, a goal of the AWA. 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, 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 respondents, sounds like the best middle ground. The Court in *Comstock*, however, never discussed this possibility. In subsequent challenges to the civil-commitment provision of 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 drastically evolved. While psychiatric prediction is not infallible, the science has made great strides since *Addington* and has diminished or eliminated many of the *Addington* court's concerns. Whether they abolish commitment or only alter the AWA, Congress and the Supreme Court must give alternative solutions more than a passing glance. The best solution, with the least risk, may have been argued right in front of them.

CONCLUSION

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

This Note's recommendations may keep the deprivation of liberty of sex offenders to a minimum yet still accomplish the AWA's purpose. The

249. See Enniss, *supra* note 17, 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)).

250. See Transcript of Oral Argument, *supra* note 85, at 46–47.

251. *Id.* at 47.

252. *Id.*

greatest challenge in implementing any of these recommendations is likely to be the alteration of public perception, from a view of “intolerance”²⁵³ to one of at least decreased hostility. The unfortunate truth is that all the statistics, studies, and treatment programs available are unlikely to significantly change the distasteful view of sex offenders the public generally holds. This battle will be especially hard because while members of the general public view sex offenders as “shameless monsters” of society,²⁵⁴ 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.”²⁵⁵ If President Hayes was correct, the implications and directives of § 4248 of the AWA speak a disheartening message about ours.

253. Wangenheim, *supra* note 4, at 568.

254. See *supra* note 4 and accompanying text.

255. RUTHERFORD BIRCHARD HAYES, Diary Entry, in 5 DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES, NINETEENTH PRESIDENT OF THE UNITED STATES 121 (Charles Richard Williams ed., 1891–1893), available at <http://www.ohiohistory.org/onlinedoc/hayes/chapterliv.html>.