

NOTE

HAVE NO FEAR (OF “PILING INFERENCE UPON INFERENCE”): HOW *UNITED STATES V. COMSTOCK* CAN SAVE THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT

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INTRODUCTION

As a general matter, the question of whether the federal government may keep sexually dangerous individuals in custody past their prison sentences would seem sufficiently controversial to keep the public from asking “what’s next?” But in the wake of *United States v. Comstock*, which upheld Congress’s power to create such a civil-commitment scheme,¹ this question has taken center stage. Noting the Court’s reliance on a fungible “five-consideration test” and its explicit rejection of the principle that any valid exercise of federal power under the Necessary and Proper Clause may be no more than one step from an enumerated power,² scholars have wondered how courts might apply *Comstock*’s reasoning to dramatic effect.³

With the national debate over the proper role of the federal government intensifying, those predicting the impact of *Comstock* may not have to wait very long. Indeed, one need not look much beyond the context in which *Comstock* arose—the federal criminal justice system—to see one of its most potentially controversial areas of application: federal hate-crime laws.

Since their inception, federal hate-crime laws have been the subject of debate. For their opponents, federal hate-crime laws are but one more example of the federal criminal-justice system’s encroachment on state power and a threat to the bedrock federalism principle⁴ that the Constitution requires the separation between “what is truly national and what is truly local.”⁵ This threat is particularly strong, so the argument goes, when it comes to those federal laws penalizing conduct almost identical to that which is punishable under state law—such as hate crimes.⁶ On the other side, supporters of federal hate-crime laws emphasize that the realities of these crimes—the difficulty of prosecuting them under existing federal law and the less-than-

¹ See 130 S. Ct. 1949, 1965 (2010).

² Indeed, Justice Thomas in his dissent criticized the five-consideration test as one that “raises more questions than it answers.” See *id.* at 1975 (Thomas, J., dissenting).

³ See, e.g., Michael C. Dorf, *The Supreme Court’s Decision About Sexually Dangerous Federal Prisoners: Could It Hold the Key to the Constitutionality of the Individual Mandate to Buy Health Insurance?*, FINDLAW (May 19, 2010), <http://writ.news.findlaw.com/dorf/20100519.html> (arguing that *Comstock* supports the constitutionality of a federal individual mandate to purchase health insurance).

⁴ See generally Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839–42 (1996) (noting Chief Justice Rehnquist’s concern that the “unchecked growth of federal criminal law threatens to create a crisis in the federal justice system”).

⁵ See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000). For further discussion, see *infra* Part III.C.3.b and text accompanying notes 194–95.

⁶ See discussion *infra* Part II.A.

favorable track record of some states in doing so—make such laws a necessity.⁷

In October 2009, Congress significantly revised existing federal hate-crime law by enacting the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA).⁸ In addition to removing the requirement that victims of hate crimes based on race, color, religion, or national origin be engaged in a “federally protected activity,” the HCPA broadened the definition of a federal hate crime to include acts that are both motivated by the victim’s gender, sexual orientation, gender identity, or disability and satisfy a jurisdictional element connecting the act to interstate or federal activity.⁹ As with many federal criminal laws, Congress relied upon the Commerce Clause as its authority for enacting the HCPA.¹⁰

But relying on the Commerce Clause as the only source of constitutional authority for the HCPA should give us pause. The limits of Congress’s power to legislate under the Commerce Clause doctrine have been the subject of considerable debate¹¹ and, therefore, uncertainty. With the healthcare and other recent policy controversies focusing attention once more on this question,¹² Commerce Clause

⁷ See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1230 n.7, 1236–37 (2000) (discussing congressional testimony from government officials and others on the inadequacies of pre-HCPA federal hate-crime legislation).

⁸ Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2835, 2835–44 (2009) (codified in scattered sections of 18 and 42 U.S.C. (Supp. III 2009)).

⁹ See discussion *infra* Part II.B.

¹⁰ See 18 U.S.C. § 249 note (detailing various ways in which violent crime motivated by bias “substantially affects interstate commerce”); Letter from Ronald Weich, Assistant Att’y Gen., U.S. Dep’t of Justice, Office of Legislative Affairs, to Senator Edward M. Kennedy 7–8 (June 23, 2009), available at www.justice.gov/ola/views-letters/111-1/062309-s909-shepard-hate-crimes-prevention-act.pdf (last visited Mar. 16, 2012) (noting federal hate crimes under § 249(a)(2) must occur “in at least one of a series of defined ‘circumstances’ that has a specified connection with or effect upon interstate or foreign commerce”); Letter from Robert Raben, Assistant Att’y Gen., U.S. Dep’t of Justice, Office of Legislative Affairs, to Senator Edward M. Kennedy 10 n.15 (June 13, 2000), available at www.justice.gov/ola/views-letters/111-1/062309-s909-shepard-hate-crimes-prevention-act.pdf (last visited Mar. 16, 2012) (“The jurisdictional elements in § 249(a)(2)(B) would ensure that each conviction under § 249(a)(2) would involve conduct that Congress has the power to regulate under the Commerce Clause.”).

¹¹ *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1268–69 (11th Cir.), cert. granted in part *sub nom.*, *Florida v. Dep’t of Health & Human Servs.*, 80 U.S.L.W. 3294 (U.S. Nov. 14, 2011) (No. 11-400) (“Seven words in the Commerce Clause—‘[t]o regulate Commerce . . . among the several States’—have spawned a 200-year debate over the permissible scope of this enumerated power.” (alteration in original) (citation omitted)).

¹² This uncertainty is manifest in the current debate over the significance of the distinction between “activity” and “inactivity” in the Commerce Clause jurisprudence as it relates to challenges to the individual-mandate provision of the Patient Protection and Affordable Care Act. Compare *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010), *rev’d on other grounds*, 656 F.3d 253 (4th Cir. 2011) (rejecting definition of “economic activity” that would include requirement to purchase health insurance

doctrine is ripe for further clarification and refinement. More specifically, justifying the HCPA as an exercise of Congress's Commerce Power is also problematic because current Commerce Clause precedent does not permit federal regulation of gender-motivated violence, even in the aggregate,¹³ and the HCPA extends the protection of hate-crime laws to those who are victimized because of their actual or perceived gender or gender identity, among other groups.

In light of the increased controversy and uncertainty surrounding the Commerce Clause, this Note will consider whether *Comstock's* interpretation of the Necessary and Proper Clause may provide an alternate avenue of constitutionality for the HCPA. In order to situate *Comstock* in its broader doctrinal and historical context, Part I provides a brief history of federal criminal laws and an overview of major decisions affecting the scope of congressional authority to pass such laws, including *United States v. Lopez*,¹⁴ *United States v. Morrison*,¹⁵ and *Gonzales v. Raich*.¹⁶ Part II traces the development of federal hate-crime law and discusses the important differences between the HCPA and prior hate-crime legislation. Part III explains why the Commerce Clause alone does not provide a firm constitutional foothold for the HCPA, arguing instead that courts may uphold the HCPA under the Commerce Clause and the Necessary and Proper Clause as interpreted in *Comstock*.

I

BACKGROUND ON FEDERAL CRIMINAL LAW

A. History of Federal Criminal Law

To understand the relationship between *Comstock* and the HCPA, a brief history of the development of federal criminal law and its sources of constitutional authority is necessary. The Supreme Court has long recognized the validity of Congress's implied power to impose criminal sanctions for violations of federal law.¹⁷ Discussion of

as "lack[ing] logical limitation and . . . unsupported by Commerce Clause jurisprudence"), with Michael C. Dorf, *Judge Hudson's Misguided Focus on "Activity,"* DORF ON LAW (Dec. 14, 2010, 12:01 AM), <http://www.dorfonlaw.org/2010/12/judge-hudsons-misguided-focus-on.html> ("There is no constitutional prohibition on Commerce Clause regulation of inactivity Consider . . . the provisions of federal labor law and federal antitrust law that have been construed to forbid secondary boycotts. A boycott, of course, is economic inactivity—a refusal to purchase goods or services from the target—in exactly the same way that the non-purchase of health insurance is economic inactivity." (emphasis omitted)).

¹³ See *infra* Part I.B (discussing *United States v. Morrison*, 529 U.S. 598 (2000)).

¹⁴ 514 U.S. 549 (1995).

¹⁵ 529 U.S. 598 (2000).

¹⁶ 545 U.S. 1 (2005).

¹⁷ See *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) ("All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among

this authority, however, has always gone hand in hand with the recognition of one of its greatest limitations—the “police power” of the states.¹⁸ The police power, which the Constitution reserves to the states,¹⁹ is the broad authority to pass laws to protect public health, public morals, and public safety.²⁰ The principle that the police power belongs to the states and thus limits the actions of the federal government figured significantly in the drafting of the Constitution²¹ and continues to play a role in modern controversies over the scope of federal power under the Constitution.²²

Though federal criminal statutes date back to the late 1700s,²³ the federal government did not significantly enter the domain of criminal law until the early twentieth century.²⁴ During this period, Congress enacted such legislation as the Mann Act,²⁵ which forbid the interstate transportation of women for purposes of prostitution; the Dyer Act,²⁶ which forbid driving a stolen car across state lines and related offenses; as well as laws restricting the transportation of lottery tickets²⁷ and obscene materials.²⁸ In addition to improvements in interstate transportation, Prohibition was also a major contributor to the growth of the federal criminal law,²⁹ resulting in the passage of the

the enumerated powers of Congress.” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819)).

¹⁸ See Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 53–54 & n.10 (2008) (citing *New Orleans Gas Co. v. La. Light Co.*, 115 U.S. 650, 661 (1885)).

¹⁹ See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²⁰ See Logan, *supra* note 18, at 53.

²¹ See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (describing this allocation of power between the federal government and the states as “adopted by the Framers to ensure protection of our fundamental liberties” (internal quotation marks omitted)).

²² See *Comstock*, 130 S. Ct. at 1964 (rejecting notion that its holding conferred a general police power on the federal government); *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (“[T]he principle that [t]he Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.” (internal quotation marks omitted)).

²³ See I SARAH N. WELLING ET AL., *FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO* 2–3 (1998).

²⁴ See Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 1993–94 (2008).

²⁵ *Id.* at 1994 (citing White-Slave Traffic Act (Mann Act), ch. 128, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421–2424 (2006))); see also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 327 (1993).

²⁶ *Id.* (citing National Motor Vehicle Theft Act (Dyer Act), ch. 89, 41 Stat. 324 (1919) (codified as amended in scattered sections of 18 U.S.C.); see also FRIEDMAN, *supra* note 25, at 265).

²⁷ Rehn, *supra* note 24 (citing *Champion v. Ames* (Lottery Case), 188 U.S. 321, 363 (1903)).

²⁸ See *id.*

²⁹ See FRIEDMAN, *supra* note 25, at 265–66.

Volstead Act, which enforced the Eighteenth Amendment's ban on the production, shipment, and sale of liquor.³⁰ Federal criminal law continued to grow into the latter half of the twentieth century. Today, by some estimates there are more than 3,200 federal criminal laws.³¹

B. Scope of the Federal Criminal Legislative Power

The Constitution grants Congress almost no explicit power to make criminal laws.³² The Supreme Court, however, has interpreted this authority to rest implicitly in a number of constitutional provisions.³³ One such provision, and the basis upon which the Court upheld the civil-commitment statute in question in *Comstock*, is the Necessary and Proper Clause.³⁴ The Clause grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁵ The controlling interpretation of the Necessary and Proper Clause remains that of Chief Justice Marshall in *McCulloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”³⁶ In this context, the Court has emphasized that the meaning of “necessary” is not “*absolutely* necessary” and that statutes that are “plainly adapted” to the execution of a valid power satisfy this requirement.³⁷ But because the Clause is only a means for Congress to execute its enumerated powers and not an independent source of power itself,³⁸ courts have relied upon the

³⁰ See Volstead Act, ch. 85, 41 Stat. 305 (1919); FRIEDMAN, *supra* note 25, at 339.

³¹ DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 9 (2008).

³² The exceptions are those provisions granting Congress the explicit authority to create the crimes of “counterfeiting,” “treason,” “[p]iracies and [f]elonies committed on the high [s]eas,” or offenses “against the Law of Nations.” See *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) (citing U.S. CONST. art. I, § 8, cls. 6, 10; art. III, § 3).

³³ See *id.* at 1957 (providing examples of Congress’s exercise of authority to pass laws “in furtherance of . . . its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, [and] to regulate naturalization”).

³⁴ See *id.* at 1956.

³⁵ U.S. CONST. art. I, § 8, cl. 18.

³⁶ 17 U.S. (4 Wheat.) 316, 421 (1819).

³⁷ See, e.g., *Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003) (holding federal statute prescribing tolling period for state-law claims as “plainly adapted” to the “due administration of justice” in federal courts (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 417, 421)).

³⁸ But see Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 925 (2005) (“There are two ways of looking at the Necessary and Proper Clause: as an independent source of power for Congress, or as an adjunct—relating to means—in serving the ends spelled out in Congress’s enumerated

Clause to uphold a wide variety of legislation,³⁹ including federal criminal laws.⁴⁰

Another major source of authority for federal criminal law is the Commerce Clause.⁴¹ The Commerce Clause permits Congress “[t]o regulate Commerce . . . among the several States.”⁴² Throughout the history of the interpretation of the Clause, courts have wrestled with the question of its precise scope and meaning. For most of the twentieth century, Congress enjoyed broad authority to enact legislation under this provision.⁴³ An often cited and powerful piece of evidence for this proposition is that for most of the twentieth century, the Supreme Court did not invalidate a single law as exceeding the scope of the Commerce Clause.⁴⁴

The Court’s Commerce Clause jurisprudence changed dramatically, however, with its 1995 decision in *United States v. Lopez*. In *Lopez*, the Court invalidated a criminal statute prohibiting gun possession in school zones on the grounds that it exceeded the scope of Congress’s authority to legislate under the Commerce Clause.⁴⁵ This abrupt enforcement of the limits of the Commerce Clause for the first time in over half of a century precipitated academic controversy,⁴⁶ as well as a flood of challenges to existing federal criminal legislation.⁴⁷ Furthermore in 2000, the Supreme Court held strong to the case’s reasoning, striking down the civil-liability provision of the Violence Against Women Act (VAWA) in *Morrison* because it shared some of the same constitutional infirmities as the statute in *Lopez*.⁴⁸ Together, these

powers. Marshall . . . suggested that it was the latter, but interpreted things so expansively that it has become, essentially, the former.”)

³⁹ See, e.g., *Watters v. Wachovia Bank*, 550 U.S. 1, 22 (2007) (upholding federal banking regulation on the ground that “[r]egulation of national bank operations is a prerogative of Congress under the . . . Necessary and Proper Clause[]”).

⁴⁰ See *United States v. Comstock*, 130 S. Ct. 1949, 1969 (2010) (Alito, J., concurring) (noting the Clause “provides the constitutional authority for most federal criminal statutes”); see also *Sabri v. United States*, 541 U.S. 600, 604–05 (2004) (upholding federal statute prohibiting bribery of officials of recipient organizations of federal funds as a necessary and proper exercise of Congress’s Spending Power).

⁴¹ See *1 WELLING ET AL.*, *supra* note 23, at 5 (noting that “[m]ost of the federal statutes that are not aimed at protecting direct federal interests have been based on the commerce power”).

⁴² U.S. CONST. art. I, § 8, cl. 3.

⁴³ See *United States v. Lopez*, 514 U.S. 549, 556 (1995) (referring to mid-twentieth century precedents that “ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause”); *1 WELLING ET AL.*, *supra* note 23, at 8.

⁴⁴ See Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 8 (2001).

⁴⁵ See *Lopez*, 514 U.S. at 567–68.

⁴⁶ See Elizabeth S. Saylor, *Federalism and the Family After Morrison*, 25 HARV. WOMEN’S L.J. 57, 64–65 (2002).

⁴⁷ See *1 WELLING ET AL.*, *supra* note 23, at 13 (“There have been *Lopez* challenges to virtually every criminal statute founded on the Commerce Clause.”).

⁴⁸ See *United States v. Morrison*, 529 U.S. 598, 613–14 (2000).

decisions seemed to mark the end of the era of plenary legislative authority under the Commerce Clause.

But in 2005, the Court changed course again in *Gonzales v. Raich*, in which it rejected a challenge to the Controlled Substances Act's (CSA) prohibition on possession of Class I drugs as applied to the legal possession and noncommercial cultivation of marijuana for medical purposes.⁴⁹ While acknowledging *Lopez* and *Morrison*, *Raich* largely bypassed the reasoning of these decisions; instead, it upheld the application of the CSA under earlier precedents that established Congress's power to reach local activities under the Commerce Clause, so long as these activities were part of an "economic 'class of activities' that have a substantial effect on interstate commerce" and were the kind that absent regulation would affect a national market.⁵⁰ Most recently, uncertainty over Commerce Clause doctrine has arisen in the context of challenges to the individual-mandate provision of President Obama's healthcare legislation, the Patient Protection and Affordable Care Act.⁵¹ A closer look at *Lopez*, *Morrison*, and *Raich* is thus necessary to understand the relationship between the Commerce Clause and federal criminal law.

In *Lopez*, the Supreme Court faced the issue of whether Congress had the authority under the Commerce Clause to enact the Gun-Free School Zones Act of 1990 (GFSZA), which made knowing possession of a firearm on or within 1,000 feet of a school a federal offense.⁵² Alfonso Lopez, Jr., a twelfth-grade high-school student, was charged and convicted under 18 U.S.C. § 922(q) of the GFSZA after bringing a handgun and several bullets to school.⁵³ Lopez challenged his conviction on the ground that the GFSZA exceeded the bounds of Congress's authority to legislate under the Commerce Clause.⁵⁴

Writing for the majority, Chief Justice Rehnquist began by invoking the principle that the powers of the federal government are "few

⁴⁹ See *Gonzales v. Raich*, 545 U.S. 1, 24–26 (2005).

⁵⁰ See *id.* at 17–18, 32–33.

⁵¹ As of the publication of this Note, the Supreme Court had granted certiorari to resolve this very question. Adam Liptak, *Justices to Hear Health Care Case as Race Heats Up*, N.Y. TIMES, Nov. 15, 2011, at A1, available at [http://www.nytimes.com/2011/11/15/us/supreme-court-to-hear-case-challenging-health-law.html?_r=1&scp=4&sq=supreme court health care&st=cse](http://www.nytimes.com/2011/11/15/us/supreme-court-to-hear-case-challenging-health-law.html?_r=1&scp=4&sq=supreme%20court%20health%20care&st=cse); *Compare Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1311 (11th Cir.), cert. granted in part sub nom., *Florida v. Dep't of Health & Human Servs.*, 80 U.S.L.W. 3294 (U.S. Nov. 14, 2011) (No. 11-400) (holding the Act's "individual mandate" provision requiring the purchase of insurance exceeded Congress's authority under the Commerce Clause), with *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 549 (6th Cir. 2011) (upholding the Act as a facially valid exercise of the Commerce Power).

⁵² See *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating 18 U.S.C. § 922(q)(1)(A)(2006)).

⁵³ See *id.*

⁵⁴ See *id.*

and defined,” whereas those of the states are “numerous and indefinite.”⁵⁵ The Court then emphasized that even its most generous interpretations of the Commerce Clause recognized its “outer limits.”⁵⁶ Next, the Court grouped valid Commerce Clause legislation into three categories: (1) regulation of the “channels” of interstate commerce, (2) regulation of the “instrumentalities” of interstate commerce, and (3) regulation of activities that “substantially affect” interstate commerce.⁵⁷ After ruling out the “channels” and “instrumentalities” categories as possible bases upon which to uphold the GFSZA, the Court concluded that the statute must pass constitutional muster, if at all, under the third category—regulation of activities that “substantially affect” interstate commerce.⁵⁸ Here, the Court noted that because the statute targeted criminal conduct and facially “ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise,” it was different from other statutes that the Court had upheld under the “substantially affects” category.⁵⁹ Next, the Court pointed to two critical defects in the statute: (1) a lack of a jurisdictional element limiting its reach and (2) the absence of congressional findings specifying the nature of the effect of the activities targeted by the statute on interstate commerce.⁶⁰ The lack of a jurisdictional element was problematic because it allowed the statute to reach beyond “a discrete set of firearm possessions that . . . have an explicit connection with or effect on interstate commerce.”⁶¹ Similarly, the Court viewed the absence of congressional findings on the relationship between intrastate gun possession in school zones and interstate commerce as troublesome because it hindered the Court from determining whether gun possession in school zones substantially affected interstate commerce.⁶² In concluding the answer was no, the Court rejected the Government’s argument that gun possession by increasing violent crime overall affected “national productivity” and in turn interstate commerce.⁶³ The Court refused to accept such a theory, arguing that to do so would make it “difficult to perceive any limitation on federal power,” which would be particularly problematic in traditional areas of state sovereignty such as education and the criminal law.⁶⁴

⁵⁵ See *id.* at 552 (quoting THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).

⁵⁶ See *id.* at 556–57.

⁵⁷ See *id.* at 558–59.

⁵⁸ See *id.* at 559.

⁵⁹ See *id.* at 561.

⁶⁰ See *id.* at 561–63.

⁶¹ *Id.* at 562.

⁶² *Id.* at 563.

⁶³ See *id.* at 563–64.

⁶⁴ See *id.* at 564–66.

The second important case limiting the scope of the Commerce Clause was *United States v. Morrison*. As in *Lopez*, the Court struck down legislation targeting “noneconomic activity” on the ground that Congress failed to show the activity substantially affected interstate commerce.⁶⁵ The legislation at issue was the Violence Against Women Act of 1994 (VAWA),⁶⁶ which created a civil-liability⁶⁷ remedy for victims of “crime[s] of violence motivated by gender.”⁶⁸ Relying heavily on *Lopez*, the Court pointed to several defects shared by the GFSZA and the VAWA’s civil-remedy provision: first, the “noneconomic” and “criminal nature of the conduct at issue”; second, the lack of an express jurisdictional element; third, the absence or deficient nature of the congressional findings; and fourth, the attenuated link between the targeted conduct and the effect on interstate commerce.⁶⁹ The *Morrison* Court, however, went beyond *Lopez* in limiting the role of congressional findings, stating that the mere presence of such findings “is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”⁷⁰ Though the VAWA contained numerous findings detailing the effect of gender-motivated violence on interstate travel, employment in interstate business, and demand for interstate products, the Court rejected these findings as embodying the same deficient reasoning put forth in defense of the GFSZA in *Lopez*.⁷¹ The Court pointed to the danger of accepting this type of “but-for causal chain” of reasoning, whereby the federal government could demonstrate that virtually any act of violence would substantially affect interstate commerce.⁷² Such an approach would impermissibly greenlight federal encroachment into traditional areas of state concern, such as the regulation of violent conduct and domestic matters.⁷³ Thus, in holding that the VAWA’s civil-liability provision exceeded the scope of the Commerce Clause, the *Morrison* Court made clear that a

⁶⁵ See *United States v. Morrison*, 529 U.S. 598, 613, 617 (2000).

⁶⁶ Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941–42 (codified at 42 U.S.C. § 13981 (2006)).

⁶⁷ Even though the provision of the VAWA before the Supreme Court provided for civil and not criminal liability, it is still relevant to the discussion of the scope of federal criminal law under the Commerce Clause because of the criminal nature of the conduct giving rise to liability and the concerns that federal involvement in this area—whether by the imposition of criminal or civil sanction—was a clear encroachment on the police power of the states. See *Morrison*, 529 U.S. at 605–06, 615.

⁶⁸ See 42 U.S.C. § 13981(b), (c).

⁶⁹ See *Morrison*, 529 U.S. at 610–12.

⁷⁰ See *id.* at 614.

⁷¹ See *id.* at 615.

⁷² See *id.*

⁷³ See *id.* at 615–17 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”).

congressional determination of whether a given activity substantially affects interstate commerce was not decisive as to this question.⁷⁴

Despite predictions that *Lopez* and *Morrison* would drastically change the Court's Commerce Clause jurisprudence,⁷⁵ the Court's 2005 decision in *Raich* blunted the impact of these decisions. In *Raich*, the Court rejected an as-applied Commerce Clause challenge to the application of the CSA's prohibition of the possession of Class I drugs to the intrastate possession of marijuana for medical purposes that was legal under California law.⁷⁶ Writing for the majority, Justice Stevens first noted that long-standing Commerce Clause precedents recognized Congress's authority to regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."⁷⁷ Distinguishing the CSA provision at issue from those invalidated in *Lopez* and *Morrison*, the Court emphasized that the CSA provision was one of the "essential" elements of a "larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."⁷⁸ Relying principally on *Wickard v. Filburn*,⁷⁹ which upheld Congress's power to regulate intrastate wheat production because of its effect on the national wheat market, the Court reasoned that the presence of the regulatory scheme permitted Congress to view intrastate drug possession in the aggregate in order to demonstrate a substantial effect on interstate commerce.⁸⁰ Otherwise, as the Court argued, "excis[ing]" off those parts of the regulatory scheme reaching intrastate activity could compromise the effectiveness of the scheme altogether.⁸¹

Together, *Lopez*, *Morrison*, and *Raich* demonstrate the unpredictability of the Court's Commerce Clause jurisprudence. This may in part explain why the Court chose to uphold the civil-commitment provision in *Comstock* under the Necessary and Proper Clause rather than the Commerce Clause⁸²—perhaps to avoid complicating its jurisprudence with another strand of Commerce Clause analysis. More impor-

⁷⁴ See *id.* at 614 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (alteration in original) (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995))).

⁷⁵ See Saylor, *supra* note 46, at 64 & n.48, 76 (noting that some courts and commentators viewed *Lopez* as touching off no less than a "federalism revolution" and that *Morrison* showed *Lopez* was "not an aberration").

⁷⁶ See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

⁷⁷ See *id.* at 17.

⁷⁸ See *id.* at 17, 23–25 (quoting *Lopez*, 514 U.S. at 561).

⁷⁹ 317 U.S. 111 (1942).

⁸⁰ See *Raich*, 545 U.S. at 18–19.

⁸¹ See *id.* at 22, 24–25.

⁸² The parties in the case argued for and against the constitutionality of the statute on both grounds. See Brief for the United States at 42–43, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08-1224), 2009 WL 2896312.

tantly, the uncertainty in the current Commerce Clause doctrine shown by these cases, particularly with respect to legislation targeting violent crime after *Morrison*, underscores the need to consider the HCPA under *Comstock's* interpretation of the Necessary and Proper Clause, as well as the Commerce Clause. This Note will discuss this argument in greater detail in Part III.A.

II

MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT (HCPA)

With the relevant background on federal criminal law development and its sources of constitutional authority set forth, this Note proceeds to a discussion of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, including a brief overview of prior hate-crime laws and their differences from the HCPA. This Note will then argue why it is necessary to analyze the HCPA's constitutionality under *Comstock*.

A. History of Federal Hate-Crime Laws

A hate crime, or bias-motivated crime as it is also known, is a crime in which an individual is targeted because of his or her actual or perceived identity as a member of a particular group or category of individuals.⁸³ The principal difference between hate crimes and other offenses is that hate crimes typically require a showing that the defendant acted with the motive to commit the crime against the particular individual because of the defendant's belief in that individual's membership in a particular group.⁸⁴ Though jurisdictions vary in terms of which groups qualify for protection under hate-crimes laws,⁸⁵ common categories include race, color, national origin, ethnicity, religion, gender, sexual orientation, and disability.⁸⁶ Hate-crime laws generally penalize conduct that is punishable under other criminal laws⁸⁷ but impose steeper penalties because bias is the motive for the

⁸³ See *Hate Crime Regulation and Challenges*, 10 GEO. J. GENDER & L. 279, 280 (David Hong ed., 2009).

⁸⁴ See *id.*

⁸⁵ See Troy A. Scotting, Comment, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 869 (2001).

⁸⁶ See *Hate Crime Regulation and Challenges*, *supra* note 83, at 280.

⁸⁷ Scholars have argued, however, that while the elements of bias-motivated and non-bias-motivated crimes are nearly identical, the harm resulting from the former is much greater. See Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421, 422-24 (2004) (discussing unique harms of hate crimes such as stigmatization, psychological distress, and feelings of victimization).

crime.⁸⁸ Numerous rationales have been offered to support the passage of special hate-crime legislation. These rationales include deterrence, the necessity to differentiate such crimes because of their severity, and the imperative to signal to potential offenders society's strong disapproval of such conduct.⁸⁹

The Civil Rights Act of 1968 (CRA) marked Congress's first major foray into the domain of hate-crime legislation.⁹⁰ It punished the threat or use of force resulting in the injury, intimidation of, or interference with individuals because of their race, color, religion, or national origin and engagement in certain federally protected activities,⁹¹ such as attending a public school, traveling in or using interstate commerce, or enjoying a state-provided benefit or activity.⁹² The next two significant pieces of federal hate-crime legislation were the Hate Crime Statistics Act of 1990⁹³ (HCSA) and the Hate Crimes Sentencing Enhancement Act of 1994⁹⁴ (HCSEA), which, respectively, required federal collection and publication of hate-crime statistics and revised the Federal Sentencing Guidelines to allow for enhancement of at least three offense levels for hate crimes.⁹⁵ Notably, the HCSEA also provided for enhancement in the cases of crimes motivated by bias based upon gender, sexual orientation, and disability, as well as the categories of groups covered in the CRA.⁹⁶

B. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act

Following the murders of Matthew Shepard and James Byrd, Jr., both of which involved evidence of bias as a motivation, calls increased for broader federal hate-crime legislation covering instances in which individuals were victimized because of sexual orientation and

⁸⁸ See *id.* at 424–25. A jurisdiction may impose harsher penalties through two mechanisms: (1) “specific acts” hate-crime statutes and (2) sentencing enhancements. Whereas “specific acts” statutes create a separate offense for when bias is the motive, sentencing enhancements merely increase the offender’s sentence for an offense not defined in terms of bias. See *Hate Crime Regulation and Challenges*, *supra* note 83, at 281–82.

⁸⁹ See Gellman & Lawrence, *supra* note 87, at 425, 428.

⁹⁰ See *Hate Crime Regulation and Challenges*, *supra* note 83, at 280. Prior to the CRA, a victim of a hate crime could recover damages through a federal statute imposing civil liability upon those individuals who conspired to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.” See 42 U.S.C. § 1985(3) (2006).

⁹¹ See 18 U.S.C. § 245(b)(2) (2006); Scotting, *supra* note 85, at 876.

⁹² See 18 U.S.C. § 245(b)(2)(A), (B), (E).

⁹³ Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 note (2006)).

⁹⁴ Congress enacted this law as part of the Violent Crime Control and Law Enforcement Act of 1994. See Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994) (codified at 28 U.S.C. § 994 note (2006)); Scotting, *supra* note 85, at 875.

⁹⁵ See Scotting, *supra* note 85, at 873–75.

⁹⁶ See *Hate Crime Regulation and Challenges*, *supra* note 83, at 282.

gender.⁹⁷ In 2000, building upon the momentum produced by public outrage to the Shepard and Byrd murders, Senator Edward Kennedy introduced legislation to fill the critical gaps in the existing federal hate-crime regime.⁹⁸ Though the 2000 bill failed to pass the first time around, in April of 2009 a nearly identical bill was reintroduced in Congress.⁹⁹ The following October, Congress enacted the Local Law Enforcement Hate Crimes Prevention Act of 2009,¹⁰⁰ also known as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.¹⁰¹

The HCPA, codified as 18 U.S.C. § 249, differs from existing hate-crime legislation in two important ways.¹⁰² First, § 249 lacks 18 U.S.C. § 245's "federally protected activities" requirement for conduct motivated by the victim's actual or perceived race, color, religion, or national origin, imposing liability without a further showing of a causal relationship between the offense and the victim's involvement in a federally protected activity.¹⁰³ Second, § 249(a)(2) extends protection to more categories of individuals by imposing criminal liability on whoever either willfully causes bodily injury or attempts to cause such injury through the use of fire, a firearm or explosive device because of not only the victim's "actual or perceived religion [or] national origin," but also "gender, sexual orientation, gender identity, or disability."¹⁰⁴ For individuals targeted because of their actual or perceived gender, sexual orientation, gender identity, or disability, the HCPA also requires proof that either the injury or attempt to injure occurred in connection with one of the following circumstances:

- (1) "the conduct . . . occurs during the course of, or as a result of, the travel of . . . the victim [] across a State line or national border [] or using a channel, facility, or instrumentality of interstate or foreign commerce" (2) "the defendant uses a channel . . . or instru-

⁹⁷ See Scotting, *supra* note 85, at 853–54 nn.4–5.

⁹⁸ See *id.* at 854–56; Letter from Ronald Weich to Senator Edward M. Kennedy, *supra* note 10, at 2–3.

⁹⁹ See Letter from Ronald Weich to Senator Edward M. Kennedy, *supra* note 10, at 3 n.2.

¹⁰⁰ Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2835, 2835–44 (2009) (codified in scattered sections of 18 and 42 U.S.C. (Supp. III 2009)).

¹⁰¹ 9 FREDERICK K. GRITNER, WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 11342, at 64 (3d ed. Supp. 2011).

¹⁰² See Letter from Ronald Weich to Senator Edward M. Kennedy, *supra* note 10, at 1–2.

¹⁰³ Compare 18 U.S.C. § 249(a)(1) (2006) ("Whoever . . . willfully causes bodily injury to any person or . . . attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person . . . shall be imprisoned not more than 10 years, fined in accordance with this title, or both."), with 18 U.S.C. § 245(b)(2) (requiring that conduct be "because of [the victim's] race, color, religion or national origin and because he is or has [participated in a federally protected activity]").

¹⁰⁴ See 18 U.S.C. § 249(a)(2)(A).

mentality of interstate or foreign commerce” (3) “the defendant employs a firearm . . . or other weapon that has traveled in interstate or foreign commerce” (4) “the conduct . . . interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct” or (5) “[the conduct] otherwise affects interstate or foreign commerce.”¹⁰⁵

III

UNITED STATES V. COMSTOCK AND THE HCPA

A. Why the Commerce Clause Alone Cannot Save the HCPA

This Note will examine the effect of *Comstock* on the constitutionality of the second change to existing federal hate-crime law embodied in § 249(a)(2)(A), which addresses offenses based upon gender, sexual orientation, gender identity, or disability. The provision states:

Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both¹⁰⁶

Before analyzing *Comstock*'s impact on the HCPA, an explanation is owed as to why. If *Comstock* upheld the civil-commitment statute under the Necessary and Proper Clause,¹⁰⁷ and § 249(a)(2) rests on Congress's authority to legislate under the Commerce Clause,¹⁰⁸ why apply *Comstock* to the HCPA at all? After all, if there is a valid basis for upholding the law under the existing Commerce Clause jurisprudence, why should courts reach the issue of how the legislation would fare under *Comstock*'s interpretation of the Necessary and Proper Clause?

First, this question assumes a premise that is not necessarily true—that in determining the constitutionality of the provision under the Commerce Clause, the Court will analyze § 249(a)(2) by only applying Commerce Clause precedents. Though such an approach

¹⁰⁵ See *id.* § 249(a)(2)(B)(i)-(iv). Section 249(a)(3) also criminalizes conduct described in § 249(a)(2)(A) that occurs “within the special maritime or territorial jurisdiction of the United States,” regardless of whether any of the five circumstances are present. See *id.* § 249(a)(3).

¹⁰⁶ 18 U.S.C. § 249(a)(2)(A).

¹⁰⁷ See *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).

¹⁰⁸ See *supra* note 10 and accompanying text.

would not be uncommon,¹⁰⁹ the Court has also acknowledged another possibility: analyzing whether a statute falls within Congress's authority to act within the Commerce Clause *in conjunction* with the Necessary and Proper Clause.¹¹⁰ For example, Justice Scalia's concurrence in *Raich* suggested that legislation justified exclusively under the Commerce Clause warranted distinct analytical treatment from legislation justified as a *necessary and proper* exercise of the Clause.¹¹¹ In addition, before *Comstock*, district courts followed this approach in determining the constitutionality of the Adam Walsh Child Protection and Safety Act.¹¹² Therefore, the use of both approaches at a minimum suggests there is an open question as to whether courts will treat the HCPA as an exercise of Congress's power stemming from the Commerce Clause, the Necessary and Proper Clause, or both.

Second, relying upon the Commerce Clause as constitutional *terra firma* for the HCPA overlooks the uncertain status of bias-motivated violence under the Commerce Clause. Though whether the HCPA exceeds the scope of the Commerce Clause may not be the most readily apparent constitutional question presented by the stat-

¹⁰⁹ Indeed, this was the Court's approach in both *Lopez* and *Morrison*. See *United States v. Lopez*, 514 U.S. 549, 551 (1995) (framing the issue as merely whether the "[GFSZA] exceed[ed] the authority of Congress [t]o regulate Commerce . . . among the several States" without mentioning the Necessary and Proper Clause (internal quotation marks omitted) (second alteration in original)); *United States v. Morrison*, 529 U.S. 598, 607 (2000) (same).

¹¹⁰ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 5 (2005) (framing the question presented with both the Necessary and Proper Clause and Commerce Clause); *Morrison*, 529 U.S. at 666 (Breyer, J., dissenting) (arguing the VAWA civil-liability provision was a "necessary and proper exercise" of Congress's Commerce Clause authority (internal quotation marks omitted)).

¹¹¹ See *Raich*, 545 U.S. at 34 (Scalia, J., concurring) ("[T]he power to regulate [activities that substantially affect interstate commerce] cannot come from the Commerce Clause alone. Rather . . . Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.").

¹¹² E.g., *United States v. Abregana*, 574 F. Supp. 2d 1123, 1132 (D. Haw. 2008) ("[T]he interplay between the Commerce Clause and the Necessary and Proper Clause may permit Congress to regulate categories of activity beyond those that substantially affect interstate commerce." (quoting *United States v. Waybright*, 561 F. Supp. 2d 1154, 1163 n.6 (D. Mont. 2008))); *United States v. Shields*, 522 F. Supp. 2d 317, 328 (D. Mass. 2007) (holding the provisions of the Act at issue were a "a necessary and proper exercise of the federal government's power under the Commerce Clause to prevent the commission of federal sex crimes"); see also *United States v. Carta*, 592 F.3d 34, 42 (1st Cir. 2010) (noting a prior determination of the Act's validity under the Commerce Clause and the Necessary and Proper Clause).

ute,¹¹³ it is far from settled either.¹¹⁴ In *Morrison*, the Court made clear that the Commerce Clause did not permit Congress to “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce” and that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”¹¹⁵ The determination that gender-motivated violence is noneconomic played a significant role in the *Morrison* Court’s analysis. It counted as both an independent factor weighing against the determination that gender-motivated violence substantially affects interstate commerce and the basis for the Court’s conclusion that the congressional findings were also inadequate.¹¹⁶ Moreover, the fact that § 249(a)(2) contains a jurisdictional element¹¹⁷ does not immunize the statute from constitutional attack. Although the Court in both *Lopez* and *Morrison* identified a jurisdictional element as a factor weighing in favor of a statute’s constitutionality under the Commerce Clause,¹¹⁸ it is not settled that the “mere presence of a jurisdictional element . . . in and of itself insulate[s] a statute from judicial scrutiny.”¹¹⁹ Section 249(a)(2)’s particular jurisdictional element, which at a minimum requires only a showing that the activity in question “otherwise affects interstate or foreign commerce,”¹²⁰ may prove especially problematic in this regard because courts interpret such language as evincing congressional intent to reach the bounds of the Commerce Clause.¹²¹ This wide-ranging jurisdictional element coupled with § 249(a)(2)’s focus on noneconomic violence may cause courts to discount the weight of the jurisdictional element as evidence of the activity’s substantial effect on interstate commerce. Thus, the

¹¹³ Most of the debate over the statute’s constitutionality concerns the First and Thirteenth Amendments. See, e.g., *United States v. Beebe*, No. 10-cr-03104 BB, 2011 WL 3416734, at *10–11 (D.N.M. Aug. 4, 2011) (holding § 249(a)(1) of the HCPA did not exceed Congress’s Thirteenth Amendment power to enact laws eliminating the “badges and incidents of slavery”); *Glenn v. Holder*, 738 F. Supp. 2d. 718, 728–29, 733–34 (E.D. Mich. 2010) (dismissing First Amendment challenge on standing grounds); see also Letter from Ronald Weich to Senator Edward M. Kennedy, *supra* note 10, at 8 (dismissing First Amendment concerns surrounding § 249).

¹¹⁴ See Christopher DiPompeo, Comment, *Federal Hate Crime Laws and United States v. Lopez: On a Collision Course to Clarify Jurisdictional-Element Analysis*, 157 U. PA. L. REV. 617, 671–72 (2008).

¹¹⁵ 529 U.S. at 613, 617.

¹¹⁶ See *id.* at 613–16.

¹¹⁷ See *supra* note 105 and accompanying text. A jurisdictional element is a “fact included in a statute that . . . serv[es] as a nexus between a particular piece of legislation and Congress’s constitutional power to enact that legislation.” Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 679 (2005).

¹¹⁸ See *Morrison*, 529 U.S. at 611–12.

¹¹⁹ See *United States v. Rodia*, 194 F.3d 465, 471–73 (3d Cir. 1999) (quoting *United States v. Bishop*, 66 F.3d 569, 585 (3d Cir. 1995)).

¹²⁰ 18 U.S.C. § 249(a)(2)(B)(iv)(II) (2006).

¹²¹ See *United States v. Morales-De Jesús*, 372 F.3d 6, 12–13 (1st Cir. 2004).

HCPA's uneasy fit with *Morrison's* insistence that gender-motivated violence is beyond the reach of the Commerce Clause demonstrates the need to consider whether *Comstock's* interpretation of the Necessary and Proper Clause provides an alternate avenue of constitutionality.

B. *United States v. Comstock*

In *Comstock*, the issue before the Court was the constitutionality of the provisions of the Adam Walsh Child and Safety Protection Act of 2006 that created a federal post-sentence civil-commitment scheme for individuals in federal custody, who, among other things, were determined to be “sexually dangerous.”¹²² To qualify for civil commitment, the individual in federal custody must “(1) ha[ve] previously engaged or attempted to engage in sexually violent conduct or child molestation, (2) currently suffer[] from a serious mental illness, abnormality, or disorder, and (3) as a result . . . [be] sexually dangerous to others, in that he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”¹²³ The scheme operates as follows: First, the federal government must certify that the individual meets the above requirements and prove those facts in federal court by “clear and convincing evidence.”¹²⁴ Assuming the federal government meets its burden of proof, the court orders the individual to remain in the custody of the U.S. Attorney General.¹²⁵ Next, the Attorney General must “make all reasonable efforts to cause” the state(s) in which the individual was tried or domiciled to take custody of the individual and must release the individual if either state accepts.¹²⁶ If neither state should accept, however, the individual remains in federal civil confinement until either a state assumes responsibility for his or her “custody, care, and treatment” or the individual is no longer deemed “sexually dangerous.”¹²⁷

The case arose when Graydon Comstock and four other individuals also certified as “sexually dangerous” petitioned for dismissal of their certifications in the U.S. District Court for the Eastern District of North Carolina, challenging the constitutionality of the civil-commitment scheme under both the Necessary and Proper Clause and the Commerce Clause, among other constitutional provisions.¹²⁸ The Dis-

¹²² See *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010) (citing 18 U.S.C. § 4247(a)(5)–(6)).

¹²³ See *id.* (internal quotation marks omitted).

¹²⁴ See *id.* (citing 18 U.S.C. § 4248(d)).

¹²⁵ See *id.* (citing 18 U.S.C. § 4248(a)–(d)).

¹²⁶ See *id.* at 1954–55.

¹²⁷ See *id.* at 1955 (citing 18 U.S.C. § 4248(d)(1)–(2)).

¹²⁸ See *United States v. Comstock*, 507 F. Supp. 2d 522, 526 (E.D.N.C. 2007).

trict Court held the statute unconstitutional on both grounds and the Fourth Circuit affirmed.¹²⁹

The Supreme Court, however, disagreed. It concluded that the statute was within Congress's authority to legislate under the Necessary and Proper Clause.¹³⁰ In summarizing its analysis, the Court pointed to five considerations supporting the statute's constitutionality:

- (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in th[e] arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.¹³¹

Regarding the first factor, Justice Breyer, writing for the majority, began by emphasizing that the Necessary and Proper Clause gives Congress the "broad authority" to make all legislation that is either "appropriate" to executing or that demonstrates a "means-ends rationality" with an enumerated power.¹³² For example, because Congress has the power to pass laws pursuant to its enumerated powers, it also has the power to enforce those laws through criminal sanctions, to create federal prisons to house violators of those laws, and to administer those prisons by preventing harm to prisoners, prison employees, and visitors.¹³³ Next, the Court pointed to the federal government's long history of involvement in the fields of civil commitment and regulation of prisoner mental health as the second consideration supporting the statute's constitutionality under the Necessary and Proper Clause. Third, the Court concluded that the statute, in reaching mentally ill and sexually dangerous individuals already in federal custody, was a reasonable extension of the federal government's existing civil-commitment scheme, which entailed the power for the federal government to act as a "custodian" of federal prisoners with a corresponding duty to protect the public from any harm those prisoners may create.¹³⁴ Fourth, the Court pointed to the statute's accommodation of state interests in its requirement that the U.S. Attorney General notify the states where the individual was either domiciled or tried of the individual's detention and to return the individual to either state if it wished to assume custody.¹³⁵ Lastly, the Court concluded that the link between the power to civilly commit

¹²⁹ See *United States v. Comstock*, 551 F.3d 274, 284–85 (4th Cir. 2009).

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

¹³¹ See *id.* at 1965.

¹³² See *id.* at 1956–57 (internal citations omitted).

¹³³ See *id.* at 1957–58.

¹³⁴ See *id.* at 1961–62.

¹³⁵ See *id.* at 1962.

and the power to pass criminal laws was not too attenuated, noting the federal government's well-established power to criminalize activity and the statute's effect on only a "small fraction" of prisoners.¹³⁶

C. *Comstock* and the HCPA

Applying *Comstock* to the HCPA raises a number of threshold questions. First, because the lower courts have only recently begun to apply the *Comstock* test,¹³⁷ it is unclear whether and to what extent this analysis will control all subsequent interpretations of the Necessary and Proper Clause. Given *Comstock's* explicit articulation of the factors underpinning its analysis,¹³⁸ however, it seems reasonable to assume that each of the five considerations will have some influence in subsequent Necessary and Proper Clause jurisprudence.¹³⁹ Second, courts applying *Comstock* to § 249(a)(2) must decide whether to seek to justify the statute as a necessary and proper exercise of an implied power, such as the power to pass criminal laws or create prisons as in *Comstock*, or as an exercise of the enumerated Commerce Power. Though this Note need not decide this question, as both interpretations will likely involve application of the *Comstock* test, it argues that courts will employ the latter approach. Again, the *Comstock* test is comprised of the following five considerations:

- (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in th[e] arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.¹⁴⁰

Thus, this Note will apply each in turn to § 249(a)(2) of the HCPA.

¹³⁶ See *id.* at 1964–65.

¹³⁷ See, e.g., *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1280–82, 1304 (11th Cir.), *cert. granted in part sub nom.*, *Florida v. Dep't of Health & Human Servs.*, 80 U.S.L.W. 3294 (U.S. Nov. 14, 2011) (No. 11-400) (describing the five-consideration *Comstock* test and referencing those considerations in its analysis); *United States v. Kebodeaux*, 647 F.3d 137, 142–46 (5th Cir. 2011), *reh'g en banc granted*, 647 F.3d 605 (5th Cir. 2011) (applying each *Comstock* factor in upholding provision of the Sex Offender Registration and Notification Act). Other courts have merely cited to *Comstock* in discussing the Necessary and Proper Clause without applying the decision's five-consideration test. See, e.g., *United States v. Yelloweagle*, 643 F.3d 1275, 1286–88 (10th Cir. 2011) (noting inquiry under Necessary and Proper Clause was whether federal statute criminalizing sex offender's failure to register was "rationally related" to the enforcement of Congress's sex offender registration scheme").

¹³⁸ See *Comstock*, 130 S. Ct. at 1965.

¹³⁹ *But see Kebodeaux*, 647 F.3d at 142 (noting that while "[*Comstock's*] five considerations must be part of [the court's] assessment here . . . *Comstock* does not require that every one of these considerations be present in every case").

¹⁴⁰ *Comstock*, 130 S. Ct. at 1965.

1. *Breadth of the Necessary and Proper Clause*

In *Comstock*, the Court began its analysis of the “breadth” factor by reiterating a number of key principles for interpreting the scope of the Necessary and Proper Clause. First, courts must examine whether the statute in question “constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”¹⁴¹ Second, other constitutional provisions besides the Necessary and Proper Clause must not prohibit the statute in question.¹⁴² Third, courts must examine the nature of the connection between the statute and the constitutional power to determine “whether the means chosen are reasonably adapted to the attainment of a legitimate end under [an enumerated power] or under other powers that the Constitution grants Congress the authority to implement.”¹⁴³ Lastly, the Court stressed its deference to Congress’s judgment on the “choice of means” by which it effectuates the stated goal of the legislation.¹⁴⁴ The Court then noted several examples of well-recognized implicit powers authorized by the Necessary and Proper Clause, such as the powers to pass criminal laws, to create prisons for violators of such laws, and to safely and responsibly administer those prisons by regulating prisoner health and safety and prison access.¹⁴⁵

The “breadth” factor will probably weigh in favor of § 249(a)(2)’s constitutionality under the Necessary and Proper Clause. By inferring Congress’s power to civilly commit sexually dangerous individuals already in federal custody from the implicit power to enact criminal laws in furtherance of its enumerated powers,¹⁴⁶ *Comstock* strongly reinforced the validity of the federal criminal legislative power. Moreover, in explicitly rejecting the argument that every implicit power may be no more than one inferential step from an enumerated power,¹⁴⁷ the Court may have signaled a willingness to view federal power more expansively, or at least, to not assign critical weight to the fact that a statute does not fall unambiguously within the ambit of an enumerated power to the “naked eye” in assessing its constitutionality.¹⁴⁸ In

¹⁴¹ See *id.* at 1956–57.

¹⁴² See *id.* at 1957. Here, the Court explicitly noted that the issue of whether the civil commitment scheme violated the Due Process Clause was not before it. *Id.* at 1956.

¹⁴³ See *id.* at 1957 (internal citations omitted).

¹⁴⁴ See *id.* (internal quotation marks omitted) (describing past jurisprudence addressing the scope of congressional power as applying a “presumption of constitutionality” to legislative action).

¹⁴⁵ See *id.* at 1957–58.

¹⁴⁶ See *id.* at 1956–58.

¹⁴⁷ See *id.* at 1963–64 (maintaining its holding did not violate the principle that courts must not “‘pile inference upon inference’ in order to sustain congressional action under Article I” (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995))).

¹⁴⁸ This is markedly different from the *Lopez* Court’s approach in determining whether the Gun-Free School Zones Act fell within the scope of the Commerce Clause. There, the

other words, the fact that a statute may fall *close* to the limit of a federal power may matter less to a court deciding whether the statute in fact exceeds that limit.

One objection to this interpretation of the “breadth” factor is that it lacks a clear limiting principle. If the breadth of the Necessary and Proper Clause counts in favor of constitutionality whenever Congress exercises its implied power to pass criminal statutes, would it not amount to a “plus” factor whenever a criminal statute is at issue? Such an interpretation seems arbitrary, if not also inconsistent with the Court’s view of the primacy of the states in the domain of criminal law. Moreover, interpreting this factor as an automatic “plus” for a whole category of laws would seem to gut the chief advantage of a balancing test as a judicial rule of decision, which is that it permits a closer accounting of the specific facts of a case than a bright-line rule.¹⁴⁹

But the lack of a clear limiting principle does not necessarily render the preceding interpretation of the “breadth” factor unworkable. Rather, it merely suggests that the factor will not be very helpful in distinguishing cases and that courts will likely discount its weight in order to avoid a mechanical validation of federal criminal laws. Thus, though it will not likely count for much, the breadth factor will likely support the constitutionality of § 249(a)(2), regardless of whether courts consider the Clause in conjunction with the Commerce Power or an implied power.

2. *Long History of Federal Involvement in the Arena*

The Court began its discussion of this factor by noting that a “set of federal prison-related mental-health statutes . . . ha[s] existed for many decades.”¹⁵⁰ While acknowledging that a history of federal involvement in a given arena was not dispositive as to whether that involvement was constitutional in the first place, the Court nevertheless considered such history to be “helpful in reviewing the substance of a congressional statutory scheme.”¹⁵¹ The Court traced federal involvement in the arena of mental health treatment and confinement back to the establishment of Saint Elizabeth’s Hospital in Washington, DC

Court emphasized that the lack of congressional findings demonstrating how gun violence substantially affected interstate commerce was problematic precisely because “no . . . substantial effect [of gun violence] was visible to the naked eye.” See 514 U.S. at 563.

¹⁴⁹ See Michael C. Dorf, *Brennan and Unstructured Balancing*, DORF ON LAW (Nov. 18, 2010, 12:03 AM), <http://www.dorfonlaw.org/2010/11/brennan-and-unstructured-balancing.html> (suggesting some legal questions are best decided by a kind of “all-things-considered judgment” typical of unstructured balancing tests).

¹⁵⁰ *Comstock*, 130 S. Ct. at 1958.

¹⁵¹ See *id.* at 1958 (internal quotation marks omitted).

in 1855 for insane members of the army and navy and other individuals.¹⁵² The Court went on to discuss the extension of the federal civil-commitment regime between 1948 and 1949 to cover insane or mentally incompetent individuals with prison terms about to expire who posed a threat to the “safety of the officers, the property, or other interests of the United States”¹⁵³ and for whom “suitable arrangements for the custody and care of the prisoner are not otherwise available.”¹⁵⁴ Viewing the principal difference between 18 U.S.C. § 4248 and those civil-commitment statutes in existence since 1949 as the focus on “sexually dangerous” mentally ill persons, as opposed to just mentally ill persons, the Court concluded that § 4248 was no more than a “modest addition” to the existing federal civil-commitment scheme.¹⁵⁵

This factor should also weigh in favor of § 249(a)(2). First, given the Court’s broad approach in defining the area of federal involvement in *Comstock* and under related Commerce precedent in *Raich*, courts will likely also do so with respect to § 249(a)(2). In assessing the “reasonableness of the relation between the new statute and pre-existing federal interests” in *Comstock*, the Court began by noting not only Congress’s long history in the arena of civil commitment but also “the delivery of mental health care to federal prisoners.”¹⁵⁶ Rather than merely examining Congress’s involvement in civil commitment, the Court placed the government’s effort in the broader context of mental health care and treatment of prisoners.¹⁵⁷ Similarly, in *Raich*, when considering the validity under the Commerce Clause of the application of provisions of the CSA criminalizing marijuana possession to intrastate possession of the drug for medical use,¹⁵⁸ the Court looked not only to past federal regulation of marijuana, but to the broader history of the CSA as “a comprehensive framework for regulating the production, distribution, and possession of five classes of controlled substances.”¹⁵⁹ Thus, with respect to § 249(a)(2) of the HCPA, courts will likely take a similarly broad view, defining the arena of federal involvement as hate-crime legislation generally and not

¹⁵² See *id.* at 1958–59.

¹⁵³ See *id.* at 1960 (quoting Act of Sept. 7, 1949, Pub. L. No. 285, 63 Stat. 686, 687 (codified as amended at 18 U.S.C. § 4241–4247) (2006)). As *Comstock* noted, Congress amended this statutory language in 1984 to allow for civil commitment where “release would create a substantial risk of bodily injury to another person or serious damage to the property of another.” See *id.* (quoting 18 U.S.C. § 4246(d)).

¹⁵⁴ *Id.* (quoting 18 U.S.C. § 4247 (1952) (amended 1984)).

¹⁵⁵ See *id.* at 1961.

¹⁵⁶ See *id.* at 1958.

¹⁵⁷ See *id.*

¹⁵⁸ See *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

¹⁵⁹ See *id.* at 24 (internal quotation marks omitted).

merely laws targeting crimes motivated by bias based upon gender or sexual orientation.¹⁶⁰

Like in the arenas of civil commitment and prisoner mental-health care, Congress's efforts to combat hate crimes date back to the nineteenth century with the passage of the Ku Klux Klan Act in 1871, which prohibited conspiracies to deprive individuals or classes of individuals of "equal protection of the laws, or of equal privileges and immunities under the laws."¹⁶¹ The "federally protected activities" statute created through the Civil Rights Acts of 1968,¹⁶² which parallels Congress's overhaul of the civil-commitment regime upon recommendation of the Judicial Conference in 1945,¹⁶³ also serves as evidence of long-standing involvement, along with the HCSA and the HCSEA.¹⁶⁴

One aspect of the "long history of federal involvement" factor that remains in question after *Comstock* is whether courts should take into account the corresponding degree of state involvement in that arena.¹⁶⁵ While the majority did not discuss the role of states in civil commitment much beyond noting their failure on occasion to "assume responsibility" for insane individuals about to be released from federal custody,¹⁶⁶ state involvement was a concern for both the dissenting and concurring Justices.¹⁶⁷ The dissent, written by Justice Thomas and joined in part by Justice Scalia, noted the historic powers of the states "to care for the mentally ill" and "to protect the community from the dangerous tendencies of some mentally ill persons."¹⁶⁸ Justice Thomas was particularly troubled by the fact that the use of federal civil commitment at issue "closely resemble[d] the involuntary civil-commitment laws that States have enacted under their *parens patriae* and general police powers."¹⁶⁹

¹⁶⁰ However, even if courts were to narrow the arena of involvement to only criminal legislation targeting gender- or sexual-orientation-based violence, it could still look to the *criminal* provision of the Violence Against Women Act as evidence of similar, if not identical, prior federal involvement in the field. See *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000) (citing 18 U.S.C. § 2261(a)(1) (2006)).

¹⁶¹ See *Hate Crime Regulation and Challenges*, *supra* note 83, at 280 (citing 42 U.S.C. § 1985 (2006)).

¹⁶² See 18 U.S.C. § 245 (2006).

¹⁶³ See *United States v. Comstock*, 130 S. Ct. 1949, 1959 (2010).

¹⁶⁴ See *supra* notes 93–94 and accompanying text.

¹⁶⁵ State involvement in the arena should be distinguished from a specific statute's accommodation of state interests, which is a separate consideration in the test.

¹⁶⁶ See *Comstock*, 130 S. Ct. at 1959.

¹⁶⁷ See *id.* at 1974 (Thomas, J., dissenting); *id.* at 1967–68 (Kennedy, J., concurring) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause")

¹⁶⁸ See *id.* at 1974 (Thomas, J., dissenting) (internal quotation marks omitted).

¹⁶⁹ See *id.*

Though such concerns did not sway the majority in *Comstock*, they could be material under a different set of facts. This is a distinct possibility with respect to § 249(a)(2) because nearly every state has some form of hate-crime legislation, and as of 2008 over twenty states include gender, sexual orientation, and disability among their protected categories.¹⁷⁰ Many states, however, also have civil-commitment statutes,¹⁷¹ a fact that did not appear to substantially counteract the evidence of the federal government's involvement in the arena in *Comstock*. Thus, while difficult to predict exactly how, courts' consideration of the degree of state involvement in applying this factor will likely play a greater role in the future.

3. *Sound Reasons for the Statute's Enactment in Light of the Government's Custodial Interest*

In the third part of the *Comstock* test, the Court concluded that Congress "reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence" because 18 U.S.C. § 4248 was both (1) within the scope of "Congress' power to act as a responsible federal custodian" and (2) a "reasonably adapted" exercise of that power.¹⁷² With respect to the first point, the Court, drawing upon past precedent and the common law of torts, reasoned that the federal government's civil commitment of sexually dangerous persons was similar enough to other legitimate actions taken in its custodial role, such as restraining prison residents or delaying the release of federal prisoners with infectious diseases until the threat subsides, to qualify as a necessary and proper exercise of congressional legislative authority.¹⁷³ On the second point, the Court concluded that the statute was a "reasonably adapted" means of exercising this power because Congress reasonably determined that the federal government's failure to provide for the continued confinement of sexually dangerous persons in federal custody would result in those individuals' release into the public in a reasonable number of cases.¹⁷⁴

Because this factor requires evaluating the connection between the constitutional power and the statute as the means for exercising

¹⁷⁰ See *State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html (last visited Mar. 16, 2012).

¹⁷¹ See Brief of the Nat'l Ass'n of Criminal Defense Lawyers & Nat'l Ass'n of Fed. Offenders as Amici Curiae in Support of Respondents at 23, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08-1224), 2009 WL 3727683 (noting that nineteen states currently authorize civil commitment of sexually violent persons).

¹⁷² See *Comstock*, 130 S. Ct. at 1961 (internal quotation marks omitted).

¹⁷³ See *id.*

¹⁷⁴ See *id.*

that power, it turns more closely than the other factors on whether courts will analyze the statute as an exercise of the Necessary and Proper Clause in furtherance of the Commerce Power or in furtherance of an implied power, like the power to act as a custodian of federal prisoners in *Comstock*. Therefore, this Note will analyze this factor under each approach separately below.

a. *Section 249(a)(2) as an Exercise of the Necessary and Proper Clause and an Implied Power*

One notable aspect of the *Comstock* decision is that it upholds the civil-commitment statute as an exercise of an implied power that is more than one degree from an enumerated power.¹⁷⁵ Though this analysis may open the door to the recognition of a limited number of implied powers, courts will most likely not use this approach with respect to § 249(a)(2) for two reasons. First, the “custodial power” over federal prisoners is distinct in its link to the well-established federal power to pass criminal laws.¹⁷⁶ It is difficult to envision another implied power that would have a similarly close link to an implied power of nearly incontrovertible validity.¹⁷⁷ Thus, courts will likely use this approach sparingly.

Second, courts are also unlikely to recognize an implied power in the case of the § 249(a)(2) because the most likely candidate for such a power—something akin to the role of the federal government as a historic protector of civil rights¹⁷⁸—would run headlong into the Court’s jurisprudence on Congress’s enumerated power to enforce the guarantees of the Fourteenth Amendment. Under Section Five of the Fourteenth Amendment, Congress has the power to “enforce, by appropriate legislation”¹⁷⁹ the provisions of the Amendment, including its guarantee to all persons of the “equal protection of the laws.”¹⁸⁰ The Supreme Court has traditionally interpreted the Section Five power broadly, permitting Congress to deter and remedy constitutional violations “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.”¹⁸¹ More recently, however,

¹⁷⁵ See *id.* at 1963–64.

¹⁷⁶ See *id.* at 1957 (noting Congress’s “broad authority” and “routine[] exercise[]” of its power to enact criminal laws).

¹⁷⁷ See discussion *supra* note 145 and accompanying text.

¹⁷⁸ See ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 172–75 (2008).

¹⁷⁹ U.S. CONST. amend. XIV, § 5.

¹⁸⁰ *Id.* § 1.

¹⁸¹ *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (internal quotation marks omitted).

the Court imposed additional limitations on its exercise.¹⁸² For example, in *Morrison*, the Supreme Court reaffirmed the proposition that the Fourteenth Amendment only applies to state action, and thus the civil-remedy provision of the VAWA, which targeted private gender-motivated violence and not the actions of state officials, was not within Congress's Section Five authority to enforce the Amendment's guarantees.¹⁸³ The Court also reiterated the requirement that Section Five legislation must demonstrate "congruence and proportionality" between the means adopted and the constitutional violation sought to be remedied or prevented and concluded that remedies for victims of gender-motivated violence were not sufficiently directed to remedying discrimination by state officials to satisfy this standard.¹⁸⁴ Thus, because it is doubtful that Section Five of the Fourteenth Amendment, the chief provision by which Congress enforces constitutional guarantees against discrimination, authorizes the enactment of § 249(a)(2), it seems unlikely that the courts would justify it under a substantively similar implied power.

b. *Section 249(a)(2) as an Exercise of the Necessary and Proper Clause and the Commerce Power*

It is more likely that courts will apply *Comstock* in the context of determining whether § 249(a)(2) is a necessary and proper exercise of the enumerated Commerce power rather than a more remote implied power. Again, since the Court in *Comstock* took the latter approach in upholding § 4248 and did not discuss other circumstances in which courts should apply the five-consideration approach, it is not clear if or how *Comstock* will bear on this kind of analysis.

One possible understanding of *Comstock* in this context is that it merely reiterates the long-standing Necessary and Proper Clause requirement that the statute be "reasonably adapted" to the exercise of the enumerated power.¹⁸⁵ The Court's explanation of this requirement as amounting essentially to a "means-end rationality" test¹⁸⁶ is somewhat problematic in the context of the Commerce Power because, as Justice Kennedy noted in his concurring opinion, the Court's prior jurisprudence has required the somewhat different test of a "tangible link" between the targeted activity and interstate commerce.¹⁸⁷ Perhaps the Court's affirmation of the means-ends ration-

¹⁸² Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1952–53 (2003).

¹⁸³ See *United States v. Morrison*, 529 U.S. 598, 625–26 (2000).

¹⁸⁴ See *id.*

¹⁸⁵ See *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010).

¹⁸⁶ See *id.* at 1962.

¹⁸⁷ See *id.* at 1966–67 (Kennedy, J., concurring).

ality test as the appropriate standard under the Necessary and Proper Clause suggests that this formulation of the test will prevail, despite any apparent discrepancies with past Commerce Clause jurisprudence.¹⁸⁸

If courts should follow this approach and treat the third factor of *Comstock* as a means–end rationality test in analyzing § 249(a) (2) as an exercise of the Commerce Power, this factor would also weigh in favor of the statute’s constitutionality. As Justice Kennedy noted in his concurrence in *Comstock*, rationality review is a highly deferential standard, requiring only that “there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”¹⁸⁹ In light of Congress’s findings in the HCPA that bias-motivated crime substantially affects interstate commerce by impeding the movement of target groups and their participation in commercial activities and that such crimes often involve either crossing of state lines or the use of the channels of or materials that have traveled in interstate commerce,¹⁹⁰ a court could easily conclude that the HCPA was at least a rational exercise of Congress’s authority to regulate interstate commerce.

This conclusion, however, does not square well with the Court’s analysis of congressional findings on the effect of gender-motivated violence on interstate commerce in *Morrison*. There, the Court discounted the weight of a similar set of findings¹⁹¹ because of their reliance on the kind of “but-for causal chain” of reasoning the Court found so problematic in *Lopez*.¹⁹² As in *Lopez*, the *Morrison* Court rejected the argument that gender-motivated violence in the aggregate could substantially affect interstate commerce because such a position would presumably permit Congress to regulate other types of violent crime and unduly intrude upon the police power of the states.¹⁹³ The Court reasoned this kind of intrusion was impermissible because, as in

¹⁸⁸ See generally Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL’Y 761, 779–85 (2008) (discussing the Court’s differing treatments of the relationship between the rational basis test and the Commerce Clause in *Lopez, Morrison, and Raich*).

¹⁸⁹ *Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955)).

¹⁹⁰ See Pub. L. No. 111-84, §§ 4701–13, 123 Stat. 2835, 2835–44 (2009) (codified in scattered sections of 18 and 42 U.S.C. (Supp. III 2009)).

¹⁹¹ See *United States v. Morrison*, 529 U.S. 598, 615 (2000) (noting congressional findings that, among other things, gender-motivated violence impacts interstate commerce “by deterring potential victims from traveling interstate [and] from engaging in employment in interstate business” and “by diminishing national productivity” (internal quotation marks omitted)).

¹⁹² See *id.*

¹⁹³ See *id.* at 615–16.

Lopez, “[t]he Constitution requires a distinction between what is truly national and what is truly local.”¹⁹⁴

Although the Court’s explicit rejection of the application of the aggregation principle to violent conduct in order to demonstrate a substantial effect upon interstate commerce¹⁹⁵ would appear to cast doubt on the strength of the HCPA’s findings, this may not necessarily be the case. The notion of distinct and nonoverlapping spheres of national and local activity that the Court relied upon in *Morrison* has become increasingly problematic as a workable principle of constitutional interpretation in federalism cases.¹⁹⁶ Though often repeated, this principle reflects less and less the nuanced reality of increased federal involvement over time in areas of traditional state sovereignty, such as criminal and family law,¹⁹⁷ and in particular the regulation of sex-offenders.¹⁹⁸ Indeed, the *Raich* Court’s decision to uphold the application of a federal statute prohibiting possession of medical marijuana against a contrary legislative judgment by California in the realm of drug policy, a traditional area of state control, is a recognition of this point.¹⁹⁹

As the preceding analysis illustrates, there are a number of open questions as to how courts should apply the “sound reasons” factor of the *Comstock* test to exercises of the Necessary and Proper Clause in conjunction with the Commerce Clause, particularly given *Morrison*’s insistence that gender-motivated violence may not be aggregated to show an activity substantially affects interstate commerce. However, courts will probably assess the HCPA under *Comstock* for means–end rationality, since to do otherwise would greatly diminish the influence of *Comstock*, virtually limiting the case to its facts. Moreover, given the *Comstock* Court’s willingness to apply a means–end rationality level of scrutiny to Congress’s exercise of an implied power, it seems likely that courts would apply at least the same, if not a more deferential level of scrutiny, to the exercise of an enumerated power such as the Commerce Clause.

¹⁹⁴ See *id.* at 617–18.

¹⁹⁵ See *id.* at 617.

¹⁹⁶ See *id.* at 645 (Souter, J., dissenting) (“[T]he theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once.”); *Graglia*, *supra* note 188, at 762 (arguing that “divided supremacy is an oxymoron” and federalism cannot be “maintained as a matter of constitutional law enforceable by courts”).

¹⁹⁷ See *1 WELING ET AL.*, *supra* note 23, at 3 (“The accumulation of [federal criminal] statutes has now reversed the pattern that held for this nation’s first century: the bulk of the federal criminal code now treats conduct that is also subject to regulation by the states.”); *Saylor*, *supra* note 46, at 58–60 (discussing complications arising from viewing family law as the exclusive domain of the states).

¹⁹⁸ See *Logan*, *supra* note 18, at 84–88.

¹⁹⁹ See 545 U.S. 1, 32–33 (2005); *id.* at 11 (noting the relatively late entry of the federal government into the field of marijuana regulation).

i. *Statute's Accommodation of State Interests*

The fourth consideration in the *Comstock* test was that the civil-commitment scheme “properly account[ed] for state interests.”²⁰⁰ First, the Court rejected the argument that § 4248 violated the Tenth Amendment on the ground that the states have long been involved in the commitment of mentally ill individuals.²⁰¹ The Court emphasized that the Tenth Amendment explicitly assigns to the states those powers not prohibited to it by the Constitution as well as “[t]he powers *not delegated to the United States* by the Constitution,” a category which includes both Congress’s enumerated and implied powers.²⁰² Second, while maintaining that federal involvement in a traditional area of state sovereignty did not doom the statute under the Tenth Amendment, the Court noted favorably the statute’s requirements that the U.S. Attorney General encourage the state or states where the individual was either tried or domiciled to take custody for the individual and transfer the individual immediately if an official of either state at any time exercised this right.²⁰³ Since this feature of the statute showed more deference to state interests than the statute’s predecessor, which the Court upheld in *Greenwood v. United States*,²⁰⁴ the Court thus concluded that it must meet the minimum threshold of accommodation of state interests required by the Tenth Amendment.²⁰⁵

Like the civil-commitment scheme in *Comstock*, the HCPA similarly protects state interests by limiting the circumstances in which the federal government may prosecute hate crimes.²⁰⁶ It permits the federal government to prosecute crimes in only one of four circumstances: when (1) “the State does not have jurisdiction,” (2) “the State has requested that the Federal Government assume jurisdiction,” (3) “the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence,” or (4) “a prosecution by the United States is in the public interest and necessary to secure substantial justice.”²⁰⁷

One might object that the latter two circumstances, which allow federal prosecutions when it is necessary to vindicate a federal interest or to “secure substantial justice,” are much less narrow than the conditions in *Comstock*, which permit civil commitment only after the state or states where the individual was tried or domiciled have refused to

²⁰⁰ See *United States v. Comstock*, 130 S. Ct. 1949, 1962–63 (2010).

²⁰¹ See *id.* at 1962.

²⁰² See *id.* (quoting U.S. CONST. amend. X).

²⁰³ See *id.* at 1962.

²⁰⁴ 350 U.S. 366 (1956).

²⁰⁵ *Comstock*, 130 S. Ct. at 1963.

²⁰⁶ See 18 U.S.C. § 249(b)(1) (2006).

²⁰⁷ See *id.*

take custody for the individual.²⁰⁸ Indeed, the HCPA's language regarding vindication of federal interests closely resembles that of the U.S. Department of Justice's Petite Policy, an internal directive that limits federal prosecutions successive to a state prosecution for the same conduct to cases in which the federal government has a compelling interest in the prosecution and the Assistant U.S. Attorney General approves it.²⁰⁹ Some criticize the broad "compelling federal interest" language of the Policy as leading partially to its "erratic and inconsistent" application.²¹⁰ The HCPA is susceptible to the same objection; that is, that the language limiting federal involvement is too open-ended to qualify as solid evidence of the statute's accommodation of state interests.

But this objection overlooks two important aspects of *Comstock's* reasoning. The first is that *Comstock's* treatment of the Tenth Amendment illustrates a movement away from the "traditional spheres of sovereignty" approach for deciding questions of constitutional allocation of power. Rather than give substantial weight to the fact that the subject matter of the contested federal action fell in a traditional sphere of state sovereignty, the Court examined the degree to which the *specific* statute recognized state interests.²¹¹ Thus, an objection based largely on a concept of mutually exclusive spheres of federal and state legislative action with rigid boundaries will not likely be persuasive.²¹² Second, the appropriate degree of accommodation may vary from statute to statute. In the area of hate-crime prosecutions, there may be less need for accommodation than in the area of civil commitment because the law already recognizes the coexistence of overlapping zones of state and federal action in criminal law through the dual-sovereignty doctrine of the Double Jeopardy Clause of the Fifth

²⁰⁸ See *Comstock*, 130 S. Ct. at 1962–63.

²⁰⁹ See U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-2.031 (2007), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031 (last visited Mar. 16, 2012) (identifying the purpose of the Policy as "vindicat[ing] substantial federal interests"); see also *Rinaldi v. United States*, 434 U.S. 22, 27 (1977) (describing purpose of Petite Policy as "protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct").

²¹⁰ Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?*, 69 N.D. L. REV. 915, 918–19 & n.80 (1993).

²¹¹ See *Comstock*, 130 S. Ct. at 1962 ("Nor does this statute invade state sovereignty or otherwise improperly limit the scope of powers that remain with the States." (internal quotation marks omitted)).

²¹² Cf. *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1287 (11th Cir.), cert. granted in part sub nom., *Florida v. Dep't of Health & Human Servs.*, 80 U.S.L.W. 3294 (U.S. Nov. 14, 2011) (No. 11-400) ("[T]he [Supreme] Court's attempts throughout history to define by 'semantic or formalistic categories those activities that were commerce and those that were not' are doomed to fail." (quoting *United States v. Lopez*, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring))).

Amendment.²¹³ The Double Jeopardy Clause prohibits successive prosecutions for the same offense.²¹⁴ There is an exception, however, where the federal government seeks to prosecute an individual already prosecuted by a state because the federal government and the individual states are different sovereigns, and thus cannot prosecute the defendant for the “same” offense.²¹⁵ Thus, while the HCPA may not quite reach *Comstock*’s level of accommodation of state interests, courts will likely view this discrepancy more than anything else as a function of the different levels of existing state and federal involvement in the area of civil commitment as opposed to criminal-law enforcement.

ii. *Statute’s Narrow Scope*

The fifth and final consideration of the *Comstock* test was that the civil-commitment statute was “narrow in scope” and that the “links between [it] and an enumerated Article I power [were] not too attenuated.”²¹⁶ Here, the Court notably rejected the respondents’ argument that any exercise of Congress’s implied power may be no more than one step away from an enumerated power because such a limitation was at odds with Congress’s undisputed authority to “imprison people who violate . . . (inferentially authorized) laws” and “provide for the safe and reasonable management of . . . prisons.”²¹⁷ It concluded the statute was sufficiently narrow in scope, pointing out that it “ha[d] been applied to only a small fraction of federal prisoners.”²¹⁸ This narrowness was significant, according to the Court, because it provided a safeguard against future courts interpreting *Comstock* as a grant

²¹³ See Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 281–82 (1992) (“Th[e] [dual sovereignty] doctrine . . . justifies re prosecution by state authorities of defendants tried before federal courts, re prosecution by federal authorities of defendants tried before state courts, and re prosecution by state authorities of defendants tried before the courts of another state.” (footnotes omitted)).

²¹⁴ See U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

²¹⁵ See *Heath v. Alabama*, 474 U.S. 82, 86–87 (1985); *Abbate v. United States*, 359 U.S. 187, 195–96 (1959).

²¹⁶ See *Comstock*, 130 S. Ct. at 1963–64. Since the inquiry into the adequacy of the link between the statute and an enumerated power seems much more salient when the statute is justified by a more remote implied power—like the power to act as a custodian of prisoners—than when it is a more direct exercise of an enumerated power—like the power to regulate interstate commerce—it will probably not make much of a difference in the case of the HCPA, where, assuming courts analyze the statute under the Commerce Clause in conjunction with the Necessary and Proper Clause, the latter is the case.

²¹⁷ See *id.* at 1964.

²¹⁸ See *id.* (noting that the statute had been applied to only 105 individuals out of 188,000 federal inmates).

to the federal government of the general police power reserved to the states.²¹⁹

This *Comstock* factor will likely pose the greatest obstacle for § 249(a)(2). Unlike the civil-commitment statute in *Comstock*, which the Court noted had been applied to only 105 out of a total of 188,000 federal prisoners,²²⁰ it is not clear that § 249(a)(2) will reach a similarly narrow group of individuals. On the contrary, by expanding the definition of federal hate-crime offenders to those who commit crimes on account of an individual's gender, gender identity, disability, or sexual orientation *in addition to* race, color, national origin or religion, § 249(a)(2) could result in a not-so-insignificant expansion of the federal hate-crime regime. As Attorney General Eric Holder noted in his testimony on the HCPA before the Senate Judiciary Committee, sexual-orientation-motivated hate crimes are the third most common kind of hate crime besides those motivated by either racial or religious bias.²²¹ Moreover, some research on hate-crime statistics demonstrates that gay individuals are more likely than members of other victimized groups to report hate crimes,²²² which suggests § 249(a)(2) might also lead to more hate-crime prosecutions. Though the Justice Department's Petite Policy could restrain this expansion,²²³ this seems at odds with the rationale for the statute, which is that the existing number of prosecutions under state-level hate-crime legislation does not sufficiently serve the federal interests at stake when a hate crime is committed.²²⁴

Section 249(a)(2) is also less narrow than the *Comstock's* civil-commitment scheme in that it potentially brings more individuals into federal criminal justice system rather than merely providing for continued custody of those already there. This distinction may prove important in analyzing § 249(a)(2) given the Court's emphasis in *Comstock* that the statute at issue would *not* permit the federal government to civilly commit those who had served their sentences and finished their terms of supervised release.²²⁵ In the case of § 249(a)(2), however, which extends the federal government's criminal jurisdiction to a new set of crimes and potential offenders, there is no custodial or other special relationship between the federal government and

²¹⁹ See *id.* at 1964–65.

²²⁰ *Id.* at 1964.

²²¹ *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 6 (2009) [hereinafter *Hearing*] (statement of Eric H. Holder, Jr., Att'y Gen. of the United States).

²²² See William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1233–34 (2004) (“[G]ay people are therefore about eight times more likely to report a hate crime than are non-gay persons.”).

²²³ See *Hearing*, *supra* note 221, at 4 & n.3; *supra* note 209 and accompanying text.

²²⁴ See *Hearing*, *supra* note 221, at 5–6.

²²⁵ See *Comstock*, 130 S. Ct. at 1964–65.

the offender that courts could point to as evidence of the statute's "narrow" quality. Thus, the "narrowness" factor will most likely not weigh in favor of the HCPA.

Although *Comstock* provided little guidance on how its five-consideration test should be applied, on balance § 249(a)(2) of the HCPA should pass muster under the Necessary and Proper Clause in conjunction with the Commerce Clause for several reasons. First, four of the five considerations specified in *Comstock* favor the constitutionality of § 249(a)(2). The breadth of the Necessary and Proper Clause, history of federal involvement in the arena, means–end rationality between the statute and its purpose, and accommodation of state interests all support the conclusion that Congress acted within its authority in enacting the HCPA.²²⁶ Though reasonable counterarguments exist for why each of these factors weigh against the constitutionality of the statute, they all share the same fatal flaw: reliance on the traditional notion of separate zones of state and federal activity for deciding federalism questions—an approach the Court has deployed increasingly less in recent years.

But unlike the first four considerations, the "narrowness" factor is problematic for § 249(a)(2) of the HCPA; it is not clear that the statute will have a similarly limited application, both in terms of the quantity and type of individuals it reaches. However, because much of the Court's analysis under this factor focused on the requisite strength of the connection between chains of multiple implied powers and because the courts most likely will analyze the HCPA under the Necessary and Proper Clause in conjunction with the enumerated Commerce Power, this factor may be less relevant in this case and therefore less likely to override the weight of the other four factors supporting the constitutionality of the scheme.

CONCLUSION

Despite the initial controversy sparked by *Comstock*'s validation of the federal government's power to civilly commit sexually dangerous individuals in federal custody, the case may ultimately be remembered for the question it did not answer: namely, how should courts relate the five considerations underlying the *Comstock* test and in which circumstances apply them?²²⁷ With the scope of federal power a topic of national debate once more²²⁸ and doctrinal uncertainty over the Commerce Clause growing, the lower courts will likely not have to wait very long to address this question.

²²⁶ See *supra* Part III.C.

²²⁷ See *supra* note 2 and accompanying text.

²²⁸ See cases cited *supra* notes 12 & 51.

The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act could prove to be the vehicle through which the lower courts come to terms with *Comstock's* gaps. Though some maintain that the statute falls within the scope of the Commerce Clause alone, this conclusion is open to doubt given the doctrinal uncertainty surrounding the Commerce Clause jurisprudence and, in particular, its dictate that gender-motivated violence may not be aggregated to show a substantial effect on interstate commerce.

As this Note argues, however, *Comstock's* interpretation of the Necessary and Proper Clause coupled with the Commerce Clause may provide an alternate avenue of constitutionality for the HCPA. Four of the five considerations of the *Comstock* test clearly weigh in favor of the statute: First, whatever minimal weight the "breadth of the Necessary and Proper clause" factor will have, it will likely support the constitutionality of the statute. Second, like in *Comstock*, there is a long history of federal involvement in the relevant arena, with federal hate-crime laws dating back to the late nineteenth century. With respect to the third and fourth factors, the statute is also likely "reasonably adapted" to Congress's power to regulate interstate commerce, and, though perhaps not to the extent of the civil-commitment scheme in *Comstock*, sufficiently accommodates state interests. Lastly, though the fifth consideration of the *Comstock* test, the narrowness inquiry, will likely not add to the balance for the HCPA, the weight of this factor will not be significant given its uneasy fit with criminal statutes generally and not just the HCPA. Thus, considering the weight of the four factors against one, *Comstock* should place § 249(a) of the HCPA on firmer constitutional ground.

