Taking Stock of *Comstock*: The Necessary and Proper Clause and the Limits of Federal Power

*Ilya Somin**

Introduction

Constitutional limits on federal government power are once again a major focus of political debate. Those who argue that the federal government has nearly unlimited authority often cite the Necessary and Proper Clause to justify their view. That clause gives Congress the power to ''make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.''[1] The Supreme Court's recent decision in *United States v. Comstock* is a step in the direction of interpreting the clause as a virtual blank check for Congress to regulate almost any activity it wants.[2] Justice Stephen Breyer's opinion for the Court , however, is vague on several key points. Moreover, it is difficult to say whether the coalition of justices that made up the *Comstock* majority will hold together in future cases. The ultimate impact of *Comstock* therefore remains to be seen.

Unlike much earlier litigation on the rights of potential ''sexual predators,'' *Comstock* did not consider the defendants' individual rights under the Bill of Rights or the Due Process Clause of the Fourteenth Amendment. Rather, the case turned solely on the question of whether the Necessary and Proper Clause gives Congress the power to detain ''sexually dangerous'' former federal prisoners

* Associate Professor of Law, George Mason University School of Law. For helpful suggestions and comments, I would like to thank Randy Barnett, Roger Pilon, Ilya Shapiro, and Corey Young. I would also like to thank Desiree Mowry for her work as a research assistant for this article.

[1] U.S. Const. art. I, § 8, cl. 18.

[2] 561 U.S. ____, 130 S. Ct. 1949 (2010).

even after they have finished serving their sentences. In 1997, the Court had previously ruled that the Due Process Clause does not forbid the indefinite civil detention of mentally ill individuals who are considered likely to commit ''predatory acts of sexual violence'' in the future.[3] Thus, the *Comstock* defendants could not argue that their continued confinement violated an individual constitutional right. They could only claim that structural limits on federal government power precluded the federal government from detaining them even if a state government potentially could do so.

Part I of this article discusses Section 4248 of the Adam Walsh Act, the provision the Court upheld in *Comstock*. It also summarizes the Court's majority opinion, the two concurring opinions, and the dissent by Justice Clarence Thomas. Part II criticizes the Court's reasoning. The majority's extremely broad interpretation of the Necessary and Proper Clause may render much of the careful enumeration of congressional power in Article I of the Constitution superfluous. In addition, it tries to link the statute to a nebulous congressional authority to act as a ''custodian'' for federal prisoners that is itself not enumerated anywhere in the Constitution.

Part III considers the implications of *Comstock* for the future. The decision could strengthen the government's case in the ongoing litigation over the massive health care bill passed by Congress in March 2010. Lawsuits by 21 states, the National Federation of Independent Business, and various others have challenged the statute in court, arguing that key elements exceed Congress's powers under the Constitution.[4] *Comstock*'s broad interpretation of the Necessary and Proper Clause could be used to buttress the government's constitutional justifications for the new health care law's ''individual mandate.'' Indeed, the government has already cited *Comstock* in its briefs urging dismissal of the state lawsuits.[5] Still, the mandate might run

[3] Kansas v. Hendricks, 521 U.S. 346, 352 (1997).

[4] Among the other lawsuits against the individual mandate is one undertaken by the conservative Thomas More Legal Center on behalf of itself and several individuals who refuse to obey the mandate. See Associated Press, 13 Attorneys General Sue Over Health Care Overhaul, Mar. 23, 2010, available at http://politics.usnews.com/news/articles/2010/03/23/13-attorneys-general-sue-over-healthcare-overhaul.html.

[5] See, e.g., Defendant's Motion to Dismiss at 47–48, Florida v. Department of Health and Human Services, No. 3:10-cv-91-RV/EMT (N.D. Fla. filed June 16, 2010), available at http://op.bna.com/hl.nsf/id/sfak-86hslb/$File/dojbrieflacase.pdf; Defendant's Motion to Dismiss at 34–35, Virginia ex. rel Cuccinelli v. Sebelius, No. 3:10-cv-00188-

afoul of the vague five-factor test that was a key element of *Comstock.* The ultimate impact of the decision on the health care litigation and other future cases may depend on how that test is interpreted and applied.

I. The Adam Walsh Act and the *Comstock* Decision

The litigation that culminated in the *Comstock* decision involved Section 4248 of the Adam Walsh Act, which gives the federal Bureau of Prisons the power to detain ''sexually dangerous'' federal prisoners even after they have served out their entire sentences.[6] The act marked a major expansion in the federal government's involvement in efforts to combat sexual predators.[7]

In late 2006, the federal government sought to use Section 4248 to confine Graydon Earl Comstock and four other soon-to-be-released federal inmates after their sentences ended.[8] The five defendants claimed that Section 4248 is unconstitutional because it exceeds the scope of Congress's authority under the Constitution. The U.S. Court of Appeals for the Fourth Circuit endorsed their argument.[9] It concluded that the provision went beyond Congress's authority under both the Commerce Clause (which gives Congress the authority to regulate interstate commerce) and the Necessary and Proper Clause.[10] It reached that decision despite the Supreme Court's

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HEH, (E.D. Va. filed May 24, 2010), available at http://www.scribd.com/doc/31923230/Commonwealth-of-Virginia-v-Sibelius-Memorandum-In-Support-Of-Motion-To-Dismiss. It may be noteworthy, however, that both of these government briefs rely on *Comstock* to only a very limited degree.

[6] 18 U.S.C. § 4248(a) (2006). The Bureau's determination of ''sexual dangerousness'' must be confirmed by a court. See *id*. at § 4248(c).

[7] For detailed discussion of the Adam Walsh Act, see Corey Rayburn Yung, The Emerging Criminal War on Sex Offenders, Harv. C.R.-C.L. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456042.

[8] Comstock, 130 S. Ct. at 1955.

[9] United States v. Comstock, 551 F.3d 274 (4th Cir. 2009), rev'd, 130 S. Ct. 1949 (2010). The Fourth Circuit upheld a previous district court ruling to the same effect. See United States v. Comstock, 507 F. Supp. 2d 522 (E.D. N.C. 2009), aff'd, 551 F.3d 374, rev'd, 130 S. Ct. 1949 (2010).

[10] Comstock, 551 F.3d at 277–84.

extremely broad interpretation of the commerce power in the 2005 case of *Gonzales v. Raich*.[11]

In a 7–2 decision, with Justice Breyer writing for the majority, the Supreme Court reversed the Fourth Circuit and upheld Section 4248, relying exclusively on the Necessary and Proper Clause. The Court did not address the question of whether the provision might also be upheld under any of Congress's other powers, probably because then-Solicitor General Elena Kagan chose to focus her arguments exclusively on the Necessary and Proper Clause and did not press the Commerce Clause argument that federal prosecutors had raised in the lower courts.[12]

Justices Anthony Kennedy and Samuel Alito wrote concurring opinions where they agreed with the Court's bottom-line conclusion that Section 4248 was constitutional, but argued that the majority interpreted Congress's powers under the Necessary and Proper Clause too broadly. Interestingly, Chief Justice John Roberts joined the majority opinion in full, rather than signing onto either of the concurrences or writing separately. He was the only one of the five most conservative justices to embrace the majority's reasoning.[13]

A. The Majority Opinion

The main argument the majority relied on in upholding Section 4248 was that it was ''necessary and proper'' to the implementation of Congress's power to operate a penal system and act ''as the custodian'' of its prisoners.[14] The Court advanced several variations on this argument. First, it analogized the detention of ''sexually dangerous'' individuals after their sentences have ended to Congress's power to provide mental health and other services for federal prisoners during their incarceration.[15] It noted the possible precedent provided by numerous earlier statutes that provided for the hospitalization and care of mentally ill prisoners.[16] The Court described

[11] 545 U.S. 1 (2005). I have analyzed *Raich* in Ilya Somin, *Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs, 15 Cornell J. L. & Pub. Pol'y 507 (2006) (symposium on the war on drugs).

[12] See Brief for Petitioners, United States v. Comstock, 130 S. Ct. 1949 (2010) (No. 08-1224), 2009 WL 2896312.

[13] I discuss the implications of Chief Justice Roberts's position *infra* § III.A.4.

[14] Comstock, 130 S. Ct. at 1958–64.

[15] *Id*. at 1958.

[16] *Id*. at 1958–61.

Section 4248 as merely ''a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades.''[17] However, as the opinion itself noted, those earlier federal statutes provided for civil commitment of ''dangerous'' mentally ill prisoners only in cases that began during their term of incarceration, though the civil commitment could potentially continue afterward.[18] The Court also emphasized the extent to which Section 4248 ''accommodat[es]'' state interests by allowing state governments the option to detain the ''sexually dangerous'' persons themselves.[19] Section 4248 requires that the federal government consult with the state government in the area, and allow the state to assume custody of the former prisoner in question if state officials so choose.[20]

More generally, the Court concluded that the Necessary and Proper Clause authorizes any exercise of congressional power that ''constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.''[21] In other areas of constitutional law, this ''rational basis'' test is usually applied in a way that is extremely deferential to the government.[22] Perhaps to reinforce this point, the *Comstock* opinion cites highly deferential Commerce Clause and Spending Clause decisions as relevant examples of the application of rational basis scrutiny.[23]

The majority lists five factors that determined their decision in this case:

> We take these five considerations *together*. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this 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. *Taken together*, these considerations lead us to conclude

[17] *Id*. at 1958.

[18] *Id*. at 1958–60.

[19] *Id*. at 1961–62.

[20] 18 U.S.C. § 4248(d) (2006).

[21] Comstock, 130 S. Ct. at 1956.

[22] For discussion, see Somin, *supra* note 11, at 518–19.

[23] See Comstock, 130 S. Ct. at 1956–57 (citing Sabri v. United States, 541 U.S. 600, 605 (2004) and Gonzales v. Raich, 545 U.S. 1, 22 (2005)).

> that the statute is a ''necessary and proper'' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.[24]

It is noteworthy that the majority emphasized that these ''five considerations'' determined the outcome when ''[t]aken together.''[25] This immediately raises the question of what happens in a case where one or more of the five cuts the other way. Does the government still win if, say, only three of the five considerations support its position? If not, the five-part test significantly undercuts the pro-government implications of the Court's use of the rational basis test. As discussed below, it also raises the possibility that *Comstock* could hurt the government's position in the present health care litigation, or at least not help it.[26] Unfortunately, the *Comstock* Court says very little about how the five-part test should be applied to future cases. As Justice Clarence Thomas asks in his dissent:

> Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress' Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, *which* three or four are imperative? At a minimum, . . . [the] five-consideration approach warrants an explanation as to . . . which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions.[27]

A final noteworthy element of the majority decision is the absence of any discussion of the meaning of the word ''proper'' in the Necessary and Proper Clause. While the Court explained in some detail why Section 4248 may be considered ''necessary,''[28] it did not even

[24] *Id*. at 1965 (emphasis added).

[25] *Id*.

[26] See *infra* § III.A.1.

[27] Comstock, 130 S. Ct. at 1975 (Thomas, J., dissenting) (emphasis in original).

[28] Comstock, 130 S. Ct. at 1956–61.

consider the possibility that it might be ''improper.'' This is notable because the fate of the state challenge to the newly enacted health care bill may depend in large part on how future decisions define ''proper.''[29]

B. Justice Kennedy's and Justice Alito's Concurring Opinions

Justice Kennedy's concurring opinion agrees with the majority's view that Section 4248 is constitutional under the Necessary and Proper Clause. Kennedy wrote separately, however, in order to express disagreement with some of the majority's arguments and ''to caution that the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances.''[30] Kennedy's views are potentially significant because he is most often the Court's swing voter on important ideologically charged issues.

Kennedy argued against the use of the ''rational basis'' test adopted by the majority:

> The terms ''rationally related'' and ''rational basis'' must be employed with care, particularly if either is to be used as a stand-alone test. The phrase ''rational basis'' most often is employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause. Referring to this due process inquiry, and in what must be one of the most deferential formulations of the standard for reviewing legislation in all the Court's precedents, the Court has said: ''But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough 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 . . . .'' This formulation was in a case presenting a due process challenge and a challenge to a State's exercise of its own powers, powers not confined by the principles that control the limited nature of our National Government. The phrase, then, should not be extended uncritically to the issue before us.[31]

[29] See *infra* § III.A.3.

[30] Comstock, 130 S. Ct. at 1966 (Kennedy, J., concurring).

[31] *Id*. at 1966.

Justice Kennedy emphasized that Section 4248 should be upheld primarily because ''this is a discrete and narrow exercise of authority over a small class of persons already subject to the federal power,'' which ''involves little intrusion upon the ordinary processes and powers of the States.''[32] He criticized the majority for asserting an excessively broad scope of federal power and ''ignor[ing] important limitations [on congressional power] stemming from federalism principles.''[33]

Justice Alito's concurring opinion also emphasized the narrow scope of Section 4248 and took the majority to task for ''the breadth of [its] language.''[34] He contended that ''[t]he Necessary and Proper Clause does not give Congress *carte blanche*. Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress . . . . And it is an obligation of this Court to enforce compliance with that limitation.''[35]

Nevertheless, Justice Alito argued that Section 4248 can be upheld as a necessary and proper adjunct to Congress's authority to operate a federal prison system because ''[j]ust as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.''[36] He cited evidence indicating that ''in a disturbing number of cases, no State was willing to assume the financial burden of providing for the civil commitment of federal prisoners who, if left at large after the completion of their sentences, would present a danger to any communities in which they chose to live or visit.''[37] States may be unwilling to detain these released federal prisoners because ''having been held for years in a federal prison, [they] often had few ties to any State; it was a matter of speculation where they would choose to go upon release; and accordingly no State was

[32] *Id*. at 1968.

[33] *Id*.

[34] *Id*. at 1969 (Alito, J., concurring).

[35] *Id*. at 1970 (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819)).

[36] *Id*. at 1970.

[37] *Id*.

enthusiastic about volunteering to shoulder the burden of civil commitment.''[38]

C. Justice Thomas's Dissent

Justice Clarence Thomas wrote a forceful dissent, most of which was joined by Justice Antonin Scalia. Thomas's dissent emphasized that the Necessary and Proper Clause does not give Congress unconstrained authority to address whatever problems it sees fit. Rather, ''Congress may act under that Clause only when its legislation 'carr[ies] into Execution' one of the Federal Government's enumerated powers.''[39] Thomas argued that Section 4248 does not do so because it does not accomplish any ''legitimate end'' that implements one of Congress's other enumerated powers.[40] He concluded that ''[n]o enumerated power in Article I, § 8 [of the Constitution], expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Accordingly, § 4248 can be a valid exercise of congressional authority only if it is 'necessary and proper for carrying into Execution' one or more of those federal powers actually enumerated in the Constitution.''[41] Thomas argued that Section 4248 fails this test because ''[t]he Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable.''[42]

Thomas rejected the majority's argument that Section 4248 can be justified as an extension of Congress's power to operate a prison system and control its inmates because ''[t]he Necessary and Proper Clause does not provide Congress with authority to enact any law simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority.''[43] Rather, it can enact the additional law only insofar as that law facilitates the use of the previous law in implementing Congress's other enumerated powers. Even if the initial imprisonment of a given offender was necessary for the

[38] *Id*.

[39] *Id*. at 1974 (Thomas, J., dissenting) (quoting U.S. Const. art I, § 8, cl. 18).

[40] *Id*. at 1972–75.

[41] *Id.* at 1973 (quoting U.S. Const. art I, § 8, cl. 18).

[42] *Id*.

[43] *Id*. at 1976 (emphasis in original).

implementation of some other congressional power, it does not follow that civil confinement of the inmate after his sentence expires also facilitates that same purpose.

It is significant that Justice Thomas's opinion was joined by Justice Scalia, who endorsed all but one subsection of his colleague's dissent.[44] This may indicate a retreat by Scalia from the extremely broad interpretation of the Necessary and Proper Clause that he advanced in his concurring opinion in *Gonzales v. Raich*.[45]

II. Critique of the Court's Decision

In this part, I analyze several flaws in the Court's decision and the reasoning justifying it. As Justice Thomas's dissent showed, the majority failed to connect Section 4248 of the Adam Walsh Act to the implementation of any of Congress's enumerated powers. Justice Alito's more subtle argument for a connection between Section 4248 and enumerated powers also fails. And the Court's approach to the Necessary and Proper Clause is further flawed because it potentially renders many of Congress's enumerated powers redundant. Finally, the decision cannot be defended on the basis of precedent, including Chief Justice John Marshall's landmark decision in *M'Culloch v. Maryland*.[46]

A. Is There an Enumerated Power in the House?

The Necessary and Proper Clause does not give Congress a blank check to adopt any laws that might advance some useful purpose. Rather, it grants only the power to enact ''Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [listed in Article I], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.''[47] This means that Section 4248 can be upheld only if it somehow ''carrie[s] into Execution'' some other power granted to the federal government elsewhere in the Constitution.

[44] The relevant section did not include most of Thomas's discussion of ''legitimate'' as opposed to impermissible ends, which forms the heart of his argument.

[45] Raich, 545 U.S. at 34–42 (Scalia, J., concurring). I criticized Scalia's *Raich* opinion in Somin, *supra* note 11, at 529–33.

[46] 17 U.S. (4 Wheat.) 316 (1819).

[47] U.S. Const. art. I, § 8, cl. 18.

Unfortunately, neither the majority opinion in *Comstock* nor the federal government in its brief shows any such connection.

The majority tries to justify Section 4248 by reference to the federal government's supposed power to act as a ''custodian'' for federal prisoners and protect the population against the danger posed by mentally ill federal inmates.[48] However, there is no independent congressional power to create ''custodians'' for federal prisoners. As the majority opinion points out, ''[n]either Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution.''[49]

Rather, this authority exists only insofar as it ''executes'' whatever enumerated federal power is implemented by the incarceration of the inmates in question. Even if we assume that Graydon Comstock and the other former inmates involved in the case were originally imprisoned for violating laws that Congress had the power to enact under its enumerated powers, confining these individuals after they have served their sentences does nothing to facilitate enforcement of those laws. By definition, those former prisoners have already been fully punished for their violations of federal law. Their continued confinement has no connection to their previous violations of federal law. Instead, it is justified solely on the ground that they are ''sexually dangerous'' persons who might commit unspecified crimes in the future.

The power to incarcerate ''sexually dangerous'' inmates who have completed their sentences does nothing to assist in the enforcement of federal laws that are actually authorized by any of Congress's enumerated powers. Not only does their confinement do nothing to implement any enumerated power, it may actually make it more difficult for the federal government to do so. The confinement and care of the ''sexually dangerous'' former inmates tie up federal penal system resources that could instead be used to facilitate the incarceration of inmates who have violated federal laws that actually implement one of Congress's enumerated powers. For these reasons, the majority's claim that ''the same enumerated power that justifies the

[48] See *supra* § I.A..

[49] Comstock, 130 S. Ct. at 1958.

creation of a federal criminal statute . . . justifies civil commitment under § 4248 as well,'' is misguided.[50]

The government's brief relies on Congress's power to establish and operate a federal penal system.[51] This argument is vulnerable to the same textual objection as the majority's very similar ''custodian'' theory. Congress's power to operate a penal system is not an independent grant of constitutional authority. Rather, it exists only insofar as it enforces one of Congress's other enumerated powers by punishing offenders who violated laws enacted to implement those authorities.

To put the point in a more general way, let us assume that A is one of Congress's enumerated powers under the Constitution. Let us also assume that B is at least sometimes a permissible ''necessary and proper'' means to the implementation of A. Finally, let us posit that C is a power that is somehow connected to B. It does not follow from this that Congress has the authority to enact laws that do C any time there is some connection between C and B. Indeed, it *does not* have that power in cases where C's connection to B does nothing to facilitate A. Since B itself is permissible only insofar as it facilitates A, C is permissible only insofar as its connection to B assists the latter in a way that helps implement A. In this case, A is the power to implement Congress's enumerated powers, B is the authority to establish a federal penal system, and C is the supposed authority to confine ''sexually dangerous'' federal inmates after they have completed their sentences.

The majority tries to escape this conundrum by analogizing Section 4248 to previous statutes that enabled federal penal authorities to regulate and treat mentally ill inmates during the period of their incarceration.[52] These statutes are much more closely connected, however, to the enforcement of whatever laws the inmates in question violated in the first place. If mentally ill inmates can't be controlled in ways that prevent them from becoming a threat to guards or fellow prisoners, the operation of federal prisons becomes much more difficult or—in extreme cases—even impossible. This

[50] *Id*. at 1964.

[51] Brief for Petitioners at 22–48, United States v. Comstock, 130 S. Ct. 1949 (2010) (No. 08-1224), 2009 WL 2896312.

[52] Comstock, 130 S. Ct. at 1958–61.

in turn would make it hard to punish violators of federal laws by incarceration.[53] By contrast, Section 4248 does nothing to facilitate the punishment of inmates who violate federal law. Instead, it requires confinement of former prisoners who have *already* received their full punishment. If released from the federal penal system, they also pose little if any threat to its continued operation with respect to other inmates. Indeed, their release might actually make such operation easier by freeing up federal resources.

Justice Alito advances a more subtle argument connecting Section 4248 to enumerated federal power. As he puts it, it is ''necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems,'' in the same way that ''it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners.''[54] In this case, the relevant ''danger created by the federal . . . prison system'' is the risk created by ''dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.''[55]

The main flaw in Justice Alito's reasoning is that the supposed risks posed by ''sexually dangerous'' former federal inmates are not in fact ''created'' by the federal prison system. Unless incarceration by the federal government turned formerly nonviolent prisoners into ''sexually dangerous'' ones, they would have posed just as great a risk of becoming sexual predators had they never been incarcerated by the federal government in the first place. As Justice Thomas explains in his dissent: ''A federal criminal defendant's 'sexually dangerous' propensities are not 'created by' the fact of his incarceration or his relationship with the federal prison system. The fact that the Federal Government has the authority to imprison a person for the purpose of punishing him for a federal crime—sex-related or otherwise—does not provide the Government with the additional power to exercise indefinite civil control over that person.''[56]

Justice Alito's analogy to preventing prisoners from escaping is also off the mark. Forestalling escapes is essential to ensuring that

[53] Obviously, this assumes that the laws in question are themselves permissible exercises of congressional power. But none of the former inmates in the *Comstock* litigation challenged the validity of the statutes under which they were originally convicted.

[54] Comstock, 130 S. Ct. at 1970 (Alito, J., concurring).

[55] *Id*.

[56] *Id*. at 1979 (Thomas, J., dissenting).

prisoners are fully punished for violating federal laws that enforce Congress's enumerated powers. There is no such connection to the enforcement of enumerated powers when former inmates are civilly confined after they have already served their sentences.

Justice Alito does make a reasonable policy point when he notes that states might hesitate to confine potentially dangerous former federal inmates if it is not clear what state the ex-prisoners would otherwise settle in.[57] Rather than undertaking the expense of paying for their confinement, self-interested states might leave such individuals free in the hope that they will move somewhere else. This concern, however, may be overstated. After all, many former federal inmates probably do have significant connections to some particular state or region. In addition, it is not clear that either state or federal authorities can do a good job of predicting whether a particular former inmate is likely to become a dangerous sexual predator.[58] Federal officials might misclassify nonviolent prisoners as ''sexually dangerous,'' just as state officials often do.[59] There are also serious moral objections to imprisoning people merely because we believe that they might commit a crime in the future.[60] Preventing the confinement of persons on the grounds that they might commit future crimes may therefore not be such a bad thing.

Even if Section 4248 does help solve a genuine problem, it does not necessarily follow that it is constitutional. The Necessary and Proper Clause gives Congress the authority to address only such problems as can be attacked using Congress's enumerated powers. Justice Thomas's dissent correctly reminds us that ''[t]he Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.''[61]

[57] *Id*. at 1970 (Alito, J., concurring).

[58] See Yung, *supra* note 7, at 49–50 (noting evidence showing that authorities often misclassify innocent people who pose no danger, as sexual offenders).

[59] *Id*.

[60] See, e.g., Thomas Szasz, Psychiatry and the Control of Dangerousness: On the Apotropaic Function of the Term ''Mental Illness,'' 29 J. Med. Ethics 227 (2003). See also the literature cited in Stephen J. Morse, Preventive Confinement of Dangerous Offenders, 32 J.L. Med. & Ethics 56 (2004).

[61] *Id*. at 1974 (Thomas, J., dissenting).

B. Rendering the Rest of Congress's Powers Redundant?

An additional problem with the Court's reasoning in *Comstock* is that it may render the vast majority of Congress's other enumerated powers redundant. As discussed above, the majority decided that Section 4248 is permissible because it helps the federal government act as a ''custodian'' of federal prisoners, which improves the operation of the federal prison system, which in turn is needed to enforce federal laws that implement Congress's enumerated powers.[62] At the same time, the Court fails to explain how Section 4248 improves the operation of the federal prison system in such a way as to actually assist in the enforcement of laws that implement enumerated powers.

If the Court's reasoning is valid, then the Necessary and Proper Clause gives Congress the power to enact any law that might be connected to an ancillary power that is in turn somehow connected to an enumerated power, even if the challenged law does not actually do anything to enforce any enumerated power. Moreover, even the required connection between the first ancillary power and the enumerated power is subject only to a weak ''rational basis'' test that imposes little if any constraint.[63]

This approach to the Necessary and Proper Clause makes most of Congress's enumerated powers under Article I completely superfluous. For example, Article I of the Constitution gives Congress the power to coin money and establish a system of weights and measures.[64] But under *Comstock*'s interpretation of the Necessary and Proper Clause, Congress already has these powers. After all, coining money and setting weights and measures can sometimes help implement Congress's power to regulate interstate commerce.[65] For example, a common set of weights and measures might make it easier for merchants to purchase and ship goods across state lines. And under *Comstock*'s reasoning, this is enough to give Congress the power to set weights and measures or coin money even in situations where doing so does *not* facilitate the regulation of interstate commerce.

[62] See *supra* § I.A.

[63] See *id*.

[64] U.S. Const. art. I. § 8. cl. 5.

[65] *Id*. at cl. 3.

Similarly, Congress is given the specifically enumerated power to establish post offices and post roads.[66] This power too becomes superfluous under *Comstock*. After all, post offices and post roads sometimes facilitate interstate commerce, and under *Comstock*, this gives Congress the power to establish and operate them even in situations where they don't, as when a post office is used for noncommercial mail. Similar reasoning renders superfluous even some of Congress's most important powers, such as the power to raise and support armed forces.[67] After all, the establishment of an army and navy could help protect interstate commerce against a variety of threats, and the armed forces can sometimes be used to enforce commercial regulations.[68] Under *Comstock*, this is potentially sufficient to authorize Congress to raise and support even those military forces that don't actually do anything to protect interstate commerce or enforce commercial regulations.

In sum, under the majority's reasoning in *Comstock*, Congress would have almost as much authority as it currently has even if the Constitution gave Congress only two enumerated powers: the power to regulate interstate commerce and the Necessary and Proper Clause itself. The rest of the enumerated powers in Article I become surplus verbiage.

There is an important caveat to this criticism of *Comstock*: the potential impact of the five-part test elaborated in the last part of the Court's opinion.[69] The more strictly this test is applied, the less likely it is that *Comstock* will render various other Article I powers redundant. For example, it could be that the majority's otherwise ultra-deferential approach to assertions of congressional power applies only in cases where the challenged statute addresses a field with a ''long history of federal involvement'' and has ''a narrow scope'' (factors two and five in the five-part test).[70] If so, then most of Congress's other enumerated powers would not be superfluous, since *Comstock*'s reasoning would apply only to relatively small-scale measures. However, the majority does not make clear how the

[66] *Id*. at cl. 7.

[67] *Id*. at cl. 12–13.

[68] For example, when the Coast Guard is used to combat the smuggling of illegal drugs.

[69] See discussion in *supra* § I.A.

[70] Comstock, 130 S. Ct. at 1965.

five factors should be weighed in cases where they do not all cut the same way.[71]

C. Arguments from Precedent

The majority's rationale for its decision relies heavily on three types of precedents: Chief Justice John Marshall's famous 1819 opinion in *M'Culloch v. Maryland*,[72] various federal statutes predating the Adam Walsh Act, and the Supreme Court's 1956 decision in *Greenwood v. United States*.[73] None of them provides much support for the Court's decision.

1. M'Culloch v. Maryland

Much ink has been spilled over *M'Culloch* since the case was decided in 1819, upholding the constitutionality of the Bank of the United States.[74] It is not possible to consider that debate in detail here. Instead, I confine myself to making the narrower point that nothing in that precedent required the Court to uphold Section 4248 in *Comstock*, or significantly strengthened the argument for doing so.

The *Comstock* majority cites *M'Culloch* for the proposition that ''the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'''[75] It is indeed true that *M'Culloch* gives Congress considerable discretion in selecting the means by which its enumerated powers are to be implemented. For example, Chief Justice Marshall famously wrote that the means in question need not be ''absolutely necessary'' to the implementation of an enumerated power, but need only be ''useful'' or ''convenient'' to that end.[76] At the same time, however, *M'Culloch* also noted several important limitations on the scope of the power granted by the Necessary and Proper Clause. Consider Marshall's most famous formulation of the clause's meaning:

[71] See *supra* § I.A.

[72] 17 U.S. (4 Wheat.) 316 (1819).

[73] 350 U.S. 366 (1956).

[74] For a recent discussion of the longstanding debate over *M'Culloch*, see Mark Robert Killenbeck, M'Culloch v. Maryland: Defining a Nation (2006).

[75] Comstock, 130 S. Ct. at 1956 (quoting M'Culloch, 17 U.S. (4 Wheat.) at 413, 418).

[76] M'Culloch, 17 U.S. (4 Wheat.) at 413–15.

> 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.[77]

This passage suggests at least four constraints on the range of statutes authorized by the Necessary and Proper Clause: (1) the ''end'' pursued must be ''legitimate'' and ''within the scope of the constitution,'' (2) the means must be ''appropriate'' and ''plainly adapted to that end,'' (3) the means must ''not [be] prohibited'' elsewhere in the Constitution, and finally (4) they must be ''consist[ent] with the letter and spirit of the Constitution.''

At least two of these constraints are implicated in *Comstock*: the first and the fourth. For an end to be ''legitimate'' and ''within the scope of the Constitution,'' it must presumably implement one of Congress's enumerated powers. As Marshall put it, ''[t]he judiciary . . . must see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority.''[78] Yet, as discussed above, Section 4248 does not satisfy this requirement. At most, it is connected to an ancillary power—the operation of a federal penal system—that is itself sometimes useful for implementing enumerated powers; but it is connected in a way that does not help promote that implementation.

Section 4248 also may not be ''consist[ent] with the letter and spirit of the Constitution.'' As just argued, the Court's reasoning upholding it might render most of Congress's enumerated powers redundant. If so, that goes against both the letter of the Constitution and its spirit. It consigns much of the ''letter'' to uselessness by making it superfluous, and also undercuts the ''spirit'' at least insofar as that spirit includes the principle that ''[t]his government is acknowledged by all, to be one of enumerated powers.''[79]

[77] *Id*. at 421.

[78] *Id*. at 389; see also *id*. at 423 (''[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.'').

[79] M'Culloch, 17 U.S. (4 Wheat.) at 405.

Finally, Section 4248 could also run afoul of Marshall's third requirement: that the means chosen by Congress must be ''appropriate'' and ''plainly adapted to that end.''[80] It is difficult to tell if it does, however, because neither the majority nor the government provides any argument connecting Section 4248 to an actual enumerated power. Thus, it is hard to tell what the relevant ''end'' is.

I do not mean to suggest that *M'Culloch* definitively required the Court to strike down Section 4248. Chief Justice Marshall's language was sufficiently vague that it could potentially be interpreted in a wide range of ways. It is clear, however, that the language of *M'Culloch* at least did not require *Comstock* to come out the way it did. Indeed, an interpretation of *M'Culloch* broad enough to uphold Section 4248 would render Marshall's limiting language almost meaningless. If a ''legitimate end'' includes just about any purpose that legislators might wish to pursue, it is not clear why Marshall bothered to list it as a supposed limiting factor in the first place.

2. Statutory Precedents

The Court relies in part on statutory precedents to buttress its case, citing various earlier federal statutes that provided for the care and management of mentally ill federal prison inmates.[81] The use of nonjudicial precedents in constitutional law is far from unknown. Courts and others have often relied on legislative and executive branch practice as evidence of constitutional meaning.[82]

Some of statutory precedents the Court cites are inapt because they involve regulation of the treatment of mentally ill inmates who have not yet completed their sentences. As discussed above, these regulations are readily distinguishable from Section 4248 because they help enforce Congress's power to punish violators of laws that enforce its enumerated powers.

However, the Court is on much stronger ground in citing statutes that permit the civil confinement of mentally ill federal prison

[80] *Id*. at 421.

[81] Comstock, 130 S. Ct. at 1958–60.

[82] See, e.g., Philip Bobbit, Constitutional Fate ch. 2 (1982) (describing longstanding use of appeals to tradition and history); Steven G. Calabresi & Christopher Yoo, The Unitary Executive (2008) (describing resort to executive branch practice to explicate the structure and scope of executive power).

inmates to continue even after their sentences have ended.[83] For example, there is a longstanding federal statute that, in its current form, permits the civil confinement of mentally ill inmates whose ''release would create a substantial risk of bodily injury to another person or serious damage to the property of another.''[84] While this statute and others like it refer to confinement that begins before the inmate completes his sentence, it can continue afterward.[85]

These statutes are relevantly similar to Section 4248 insofar as they permit confinement of mentally ill inmates even after they have completed their sentences, on the grounds that their release might pose a threat to others. As in the case of Section 4248, they do not have any clear connection to the enforcement of Congress's enumerated powers. That similarity, however, leaves them vulnerable to the same constitutional objections that have been leveled at Section 4248. Given the very strong textual case against Section 4248 described above, it is reasonable to conclude that these earlier statutes are also unconstitutional. As the Court admits, ''even a longstanding history of related federal action does not demonstrate a statute's constitutionality.''[86]

Less relevant are the Court's citations to various non-penal federal statutes that have been upheld under the Necessary and Proper Clause. For example, the majority refers to 19th century precedent holding that the clause gives Congress the power to provide pensions for former military servicemen and their dependents.[87] This policy, however, clearly helps implement Congress's enumerated power to raise and support armies.[88] The provision of pensions creates incentives for citizens to join the armed forces, which in turn enables Congress to raise a larger and more capable army than would otherwise be possible.

3. Greenwood v. United States

The *Comstock* majority also relied substantially on the 1956 case of *Greenwood v. United States*,[89] a precedent that was much cited in

[83] *Id*. at 1959–60.

[84] 18 U.S.C. § 4246(d) (2006).

[85] Comstock, 130 S. Ct. at 1959–60.

[86] *Id*. at 1958.

[87] *Id*. at 1964 (citing United States v. Hall, 98 U.S. 343 (1878)).

[88] U.S. Const. art. I. § 8, cl. 12.

[89] 350 U.S. 366 (1956). For the *Comstock* opinion's discussion of *Greenwood*, see Comstock, 130 S. Ct. at 1963–64.

the government's brief.[90] This case is arguably closer to *Comstock* than any previous Supreme Court decision. However, there are crucial distinctions between the two that undercut the parallel drawn by the Court and the government.

Greenwood upheld Congress's power to authorize detention of a suspect accused of violating federal law who was ruled incompetent to stand trial.[91] It did not create any freestanding congressional power to regulate anything that is in some way connected to the operation of a federal penal system. Rather, *Greenwood* merely addressed ''the narrow constitutional issue'' raised by Congress's authorization of federal authority to detain persons accused of federal crimes who are incompetent to stand trial, but could potentially be tried in the future.[92] According to the *Greenwood* Court, ''[t]he power that put [the defendant] into such custody—the power to prosecute for federal offenses—is not exhausted'' because the incompetent defendant might still be tried later if his psychiatric condition changes or psychiatrists change their diagnosis of the case.[93]

In *Greenwood*, the civil commitment at issue was simply an application of ''the power to prosecute for federal offenses,'' which in turn rests on whatever Article I power is implemented by the initial criminalization of the offense in question.[94] As Justice Thomas noted in his dissent, ''that statute's 'end' reasonably could be interpreted as preserving the Government's power to enforce a criminal law against the accused.''[95]

By contrast, Section 4248 authorizes continued detention of former federal prisoners for reasons unconnected with the federal crimes with which they had previously been charged. Thomas correctly emphasizes that it ''authorizes federal detention of a person even *after* the Government loses the authority to prosecute him for a federal crime.''[96] In order to prove that Section 4248 is constitutional,

[90] Brief for Petitioners at 33–37, United States v. Comstock, 130 S. Ct. 1949 (2010) (No. 08-1224), 2009 WL 2896312.

[91] Greenwood, 350 U.S. at 374–80.

[92] *Id.* at 375.

[93] *Id*.

[94] *Id*. *Greenwood* did not claim that the underlying substantive criminal law under which he was charged exceeded the scope of congressional power.

[95] Comstock, 130 S. Ct. at 1978 (Thomas, J., dissenting).

[96] *Id*. (emphasis in original).

the government should have been required to show that it independently carries into execution one of Congress's enumerated Article I powers. It cannot rely on whatever authority might justify the substantive criminal law under which the ''sexually dangerous'' persons were previously convicted. As the Fourth Circuit decision in *Comstock* pointed out, ''[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls. For example, although the Government may regulate assaults occurring in federal prisons, the Government cannot criminalize all assaults committed by *former* federal prisoners.''[97]

III. Implications for Future Cases

The *Comstock* case itself addressed the constitutionality of a relatively minor statute. Its long-term significance resides in its potential impact on future cases. In the near future, the most important of these is likely to be the litigation over the constitutionality of the Obama administration's health care plan, enacted by Congress in March 2010. *Comstock* could eventually also influence litigation over other issues.

A. Comstock *and ObamaCare*

Soon after the enactment of the new health care law, its constitutionality was challenged in court in two major lawsuits by 21 state governments, the National Federation of Independent Business, and others.[98] The most vulnerable provision in the new bill is the so-called individual mandate, under which most U.S. citizens and legal residents will be required to either purchase health insurance that meets federally mandated standards or to pay a fine of up to $695 per year, which by 2016 will rise to a maximum of $750 per year.[99]

[97] United States v. Comstock, 551 F.3d 274, 281 (4th Cir. 2009), rev'd, 130 S. Ct. 1949 (2010) (emphasis in original).

[98] See cases cited in note 5.

[99] Patient Protection and Affordable Care Act, Pub.L. No. 111-148, 124 Stat. 119, § 1501 (2010). Some American Indians, people with religious exemptions, and the very poor are exempt from the mandate. *Id*.

The government has already cited *Comstock* in arguing that the ''individual mandate'' created by the plan is constitutional.[100] Some academic and media commentary also suggests that *Comstock* will be an important precedent supporting the government's position in the health care cases.[101]

Defenders of the constitutionality of the individual mandate have mostly justified it as an exercise of Congress's power to regulate interstate commerce or its power to tax.[102] However, both the government in its briefs and some scholars have also cited the Necessary and Proper Clause as an alternative justification for the mandate.[103] Cornell law professor Michael Dorf argues that *Comstock* embraces the proposition that ''federal power extend[s] to areas that are not independently regulable, so long as regulation in those areas is reasonably related to regulation that is within the scope of congressional power.''[104] This rule, he contends, easily encompasses the individual mandate:

[100] Defendant's Motion to Dismiss at 47–48, Florida v. Department of Health and Human Services, No. 3:10-cv-91-RV/EMT (N.D. Fla. filed June 16, 2010), available at http://op.bna.com/hl.nsf/id/sfak-86hslb/$File/dojbrieflacase.pdf; Defendant's Motion to Dismiss at 34–35, Virginia v. Sebelius, No. 3:10-cv-00188-HEH (E.D. Va. filed May 24, 2010), available at http://www.scribd.com/doc/31923230/Commonwealth-of-Virginia-v-Sibelius-Memorandum-In-Support-Of-Motion-To-Dismiss.

[101] See, e.g., Michael 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, available at http://writ.news.findlaw.com/dorf/20100519.html; Abdon M. Pallasch, New Ruling Suggests High Court May Uphold Health Care Law, Chi. Sun-Times, July 12, 2010.

[102] See, e.g., Erwin Chemerinsky, Health Care Reform Is Constitutional, Politico, Oct. 23, 2009, available at http://www.politico.com/news/stories/1009/28620.html; Ruth Marcus, An ''Illegal'' Mandate? No, Wash. Post, Nov. 27, 2009; Robert A. Schapiro, Federalism Is No Bar to Health Care Reform, Atlanta Journal-Constitution, Nov. 2, 2009; David B. Rivkin Jr., Lee A. Casey & Jack M. Balkin, A Healthy Debate: The Constitutionality of an Individual Mandate, 158 U. Pa. L. Rev. PennUMBRA 93, 102 (2009), available at http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf. I have criticized these types of arguments in Ilya Somin, The Individual Health Insurance Mandate and the Constitutional Text, Engage, March 2010, at 49. For a good recent critique of several of them, see Ilya Shapiro, State Suits against Health Reform Are Well Grounded in Law—and Pose Serious Challenges, 29 Health Aff. 1229 (2010).

[103] See briefs cited in note 100; Dorf, *supra* note 101.

[104] Dorf, *supra* note 101.

> Applying that principle to the individual mandate to purchase health insurance is straightforward. The federal law forbids health insurers from refusing or dropping coverage based on pre-existing conditions. That prohibition is undoubtedly a regulation of "economic activity" [authorized by Congress' power under the Commerce Clause]. But the prohibition by itself would create an incentive for uninsured healthy people to game the system: They could take their chances without health insurance unless and until they got sick; at that point, they could buy health insurance without fear of being turned down for a pre-existing condition; and as a result, the system would not function, because a pool composed exclusively of sick people would not produce sufficient premiums to cover the cost of their medical treatment. Thus, Congress had a reasonable basis for including the individual mandate in the health care legislation as a means of effectuating the prohibition on refusing or dropping coverage for pre-existing conditions.[105]

Dorf's analysis might turn out to be correct. It is certainly possible that the Supreme Court will ultimately uphold the individual mandate based on the Necessary and Proper Clause. The Court's four most liberal justices (including the newly confirmed Elena Kagan) are highly unlikely to strike down the mandate on any basis. If even one of the five more conservative justices endorses the Necessary and Proper Clause rationale for the mandate, a decision upholding it becomes almost inevitable.

1. The Five-Part Test

Dorf and the government fail to consider, however, the possible effect of the five-factor test developed by the *Comstock* majority. To recall, the five ''considerations'' were ''(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this 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.''[106]

[105] *Id.*

[106] Comstock, 130 S. Ct. at 1965.

Unlike Section 4248 of the Adam Walsh Act, the individual mandate is potentially vulnerable on at least three of these five criteria. Since it forces millions of people to buy a product they may not want, it is certainly not ''narrow in scope.'' It also does not ''accommodate state interests'' to the extent that the Court claims the *Comstock* legislation does. The majority concluded that Section 4248 accommodated state interests because it gives states the option of confining the ''sexually dangerous'' former prisoners themselves.[107] Indeed, the Court even suggested that Section 4248 gives states the option of assuming custody of the former prisoners and then releasing them.[108] Under the majority's interpretation of Section 4248, the federal government can only confine ''sexually dangerous'' former federal inmates if the state government consents to it. If it prefers, the state can instead assume custody of the person in question and immediately set him free.

By contrast, the individual mandate applies throughout the country, even in areas where the state government opposes it and would prefer a different system of health insurance regulation. Moreover, states are not given any right to avoid the mandate or exempt any of their citizens from it. At the very least, this is a much lesser degree of ''accommodation'' of state interests than the Court found with respect to Section 4248.

The individual mandate may also lack a comparable ''long history of federal involvement.'' Although the federal government has often regulated health care, it has never previously forced private individuals to purchase health insurance or other health care products against their will. Congress has never enacted and the Court has never upheld a statute requiring private individuals to purchase a product merely because they happen to be citizens or permanent residents of the United States.[109] Whether the health insurance mandate is supported by a ''long history of federal involvement'' depends on the relevant frame of reference. If it is health care policy as a whole, then the requisite history is there. If it is regulations

[107] *Id*. at 1962–63.

[108] *Id*. at 1963.

[109] This point is effectively documented in Randy E. Barnett, Nathaniel Stewart & Todd Gaziano, Why the Personal Mandate to Ban Health Insurance Is Unprecedented and Unconstitutional, Heritage Foundation, Dec. 9, 2009, at 6–8, available at http://www.heritage.org/Research/LegalIssues/lm0049es.cfm.

forcing individuals to purchase products (health-related or otherwise), then it is not.

Finally, it is difficult to say whether a court would find ''sound reasons for the statute's enactment in light of the Government's . . . interest.'' Whether the government's reasoning on this point is ''sound'' is likely to be judged differently by people with diverging ideologies and political allegiances. Pro-market economists have proposed ways to cover preexisting conditions that do not require either an individual mandate or forcing insurers to accept customers they prefer to reject.[110] In an effort to avoid assessing the details of policy issues, courts could potentially interpret this prong of the test in a way that is highly deferential to the legislature. But the *Comstock* opinion does not make clear whether such deference is required.

2. The Proper Meaning of ''Proper''

An additional reason why *Comstock*'s significance for the health care litigation is difficult to assess is that the Supreme Court did not consider the meaning of the key term ''proper'' in the Necessary and Proper Clause. The Court has never clearly defined the meaning of ''proper'' but there is a strong textual and historical argument that ''proper'' legislation cannot upset the overall structure of the Constitution or infringe on reserved state prerogatives.[111] It is arguable that a law is not ''proper'' if upholding it requires an interpretation of the Necessary and Proper Clause so broad that it renders many of Congress's other enumerated powers redundant.[112] The individual mandate can certainly be attacked as potentially ''improper,'' and the state plaintiffs may well raise this point as the litigation proceeds. As Professor Randy Barnett pointed out in an

[110] See, e.g., John H. Cochrane, Health Status Insurance: How Markets Can Provide Health Security, Cato Institute Policy Analysis no. 633, Feb. 18, 2009; John H. Cochrane, What to Do about Preexisting Conditions, Wall St. J., Aug. 14, 2009, available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052970203609204574316172512242220.html.

[111] See Randy E. Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 215–20 (2003) (discussing the relevant evidence); Gary Lawson & Patricia Granger, The ''Proper'' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 297 (1993) (arguing that the evidence shows that ''proper'' means that laws ''must be consistent with principles of separation of powers, principles of federalism, and individual rights'').

[112] See discussion in *infra* § II.B.

early comment on *Comstock,* ''[t]he problem with the mandate is whether it is a 'proper' means to achieve a constitutional end.''[113] *Comstock* provides little or no guidance in addressing that issue.

3. The Recent Virginia Decision Denying the Federal Government's Motion to Dismiss

As this article went to press, federal district court Judge Henry Hudson had just issued a ruling denying the federal government's motion to dismiss the Virginia lawsuit against the individual mandate.[114] Hudson's opinion only briefly mentions *Comstock,* and does not discuss either the rational basis framework or the Court's five-part test.[115] Hudson did rule, however, that the Virginia's case was strong enough to reject the government's motion to dismiss the suit on the ground that Virginia's argument ''lacks legal vitality and therefore fails to state a cause of action.''[116] Moreover, he emphasized that the individual mandate ''literally [sic] forges new ground'' and that ''[n]either the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue.''[117] At the very least, therefore, Judge Hudson seems to have concluded that *Comstock* does not clearly resolve the mandate case in the government's favor.

This ruling is not, of course, a final decision on the case. It merely denies the federal government's motion to dismiss Virginia's suit. Moreover, any decision the trial court makes will surely be appealed to the Fourth Circuit Court of Appeals and ultimately to the Supreme Court. Appellate judges may or may not interpret *Comstock* differently from Judge Hudson.

In sum, the fate of the Necessary and Proper Clause rationale for the health insurance mandate remains unclear after *Comstock.* Much will depend on how the Court interprets *Comstock*'s five-factor test and how this test relates to the deferential ''rational basis'' review outlined elsewhere in the Court's opinion.[118]

[113] Posting of Randy E. Barnett to Volokh Conspiracy Preliminary Thoughts on *Comstock*, June 17, 2010, available at http://volokh.com/2010/05/17/preliminary-thoughts-on-comstock/.

[114] Virginia ex rel. Cuccinnelli v. Sebelius, (E.D. Va. Aug. 2, 2010), 2010 WL 2991385.

[115] *Id*. at *11–12.

[116] *Id*. at *2.

[117] *Id*. at *10, 16.

[118] See *supra* § I.A.

4. The Pivotal Role of Chief Justice Roberts

A crucial question in the application of *Comstock* to the health insurance mandate will be the position taken by Chief Justice John Roberts. Only five justices endorsed the majority opinion in *Comstock*, and he was one of them. Justices Thomas and Scalia dissented, while Justices Alito and Kennedy concurred in the decision on narrow grounds that would not apply to the health care mandate. Roberts's vote was therefore pivotal.

The four most liberal justices are likely to conclude that the health care mandate is constitutional under *Comstock*'s interpretation of the Necessary and Proper Clause. However, it is not clear whether the more conservative Chief Justice will go along with this view. One possible reason for the vagueness and imprecision of the five-factor test is that it represents a lowest-common-denominator compromise between the four liberals and the Chief Justice. It is possible that he differs with the rest of the *Comstock* majority in his interpretation of vague phrases such as ''narrow scope,'' ''accommodation of state interests,'' and ''long history of federal involvement.''

Section 4248 was a relatively narrow statute that few if any justices objected to on ideological grounds. By contrast, the individual mandate is a far broader law that may well split the Court along classic right-left lines. This is not to suggest that either liberal or conservative justices will simply vote their ideological preferences. However, ideology does sometimes influence judicial decisionmaking on closely contested, politically divisive cases.[119]

It is possible that both *Comstock* and the Necessary and Proper Clause will turn out to be irrelevant to the ultimate outcome of the health care litigation. The Supreme Court might well uphold the individual mandate based on the Commerce Clause or the Tax Clause. However, the government's arguments on both of these clauses have important shortcomings. The Commerce Clause argument is weakened by the reality that even cases such as *Raich* that give Congress almost unlimited power to regulate ''economic activity'' still do not cover a regulation that forces people to purchase a product even if they haven't engaged in any ''activity'' at all.[120] The

[119] For a recent survey of the evidence, see Eileen Braman, Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning (2009).

[120] This point is emphasized in Barnett et al. *supra* note 113.

Tax Clause argument has a variety of logical flaws, including the fact that it is difficult to show that a financial penalty for failing to comply with a regulatory mandate counts as a tax.[121] In September 2009, President Barack Obama himself made the commonsense point that ''for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase.''[122] And even if the mandate is a tax, it may not be a constitutionally permissible one.[123] If the Commerce Clause and tax arguments fail, the Necessary and Proper Clause rationale could take center stage.

B. Potential Impact on Other Cases

Comstock's influence is unlikely to be confined to the health care litigation. It could potentially affect other cases as well. One area where *Comstock*'s impact is mostly likely to be felt is in the field of constitutional challenges to various federal criminal statutes. Over the last several decades, federal criminal law has expanded to cover a bewildering array of conduct, to the point where the average American adult may commit as many as three federal felonies per day.[124] Many of these statutes have at best weak connections to enumerated federal powers. Thus, *Comstock*'s relatively broad interpretation of the Necessary and Proper Clause could potentially be used to defend them against constitutional challenges.

In the short run, *Comstock*'s impact may be limited by the fact that the Court has also adopted an extraordinarily broad interpretation of the Commerce Clause in *Gonzales v. Raich.* However, *Raich*'s more extreme language could potentially be pared back by the Supreme Court, especially if the Court ends up invalidating the individual mandate.

That said, the vagueness of the Court's reasoning makes it extremely difficult to make any forecast about the ultimate effect of

[121] See Somin, *supra* note 102, at 50.

[122] *Id*.

[123] See Steven Willis & Nakku Chung, Of Constitutional Decapitation and Health Care, Tax Notes, 128 Tax Notes No. 2, 169 (2010) (arguing that if the mandate is a tax, it is an unconstitutional capitation tax that has not been properly apportioned among the states, as required by the Constitution).

[124] Harvey Silverglate, Three Felonies a Day (2009); see also Alex Kozinski & Misha Tseytlin, You're (Probably) a Federal Criminal, in In the Name of Justice 43, 44–48 (Timothy Lynch, ed. 2009) (pointing out that most American adults have probably violated a federal criminal statute at some point in their lives).

Comstock. Much depends on how lower courts and the Supreme Court itself will choose to interpret *Comstock*'s five-factor test. A relatively restrictive interpretation might end up significantly constraining the use of the Necessary and Proper Clause as a rationale for expansive assertions of federal power. It could, for example, confine heavy judicial deference to cases where the challenged statute is ''narrow,'' ''accommodates'' state interests, and is backed by a ''long history of federal involvement.''[125] On the other hand, a lax application of the test could turn *Comstock* into a virtual blank check for Congress.

Conclusion

United States v. Comstock is a severely flawed decision. One of its most important shortcomings is the uncertainty surrounding the application of the five-factor test used to rationalize the Court's ruling. As a result, it is difficult to predict the effect of this precedent on other cases. The one certain result is that there will be more Necessary and Proper Clause litigation in our future as courts struggle to define the limits of federal power.

[125] Comstock, 130 S. Ct. at 1965.