NOT NECESSARILY PROPER: *COMSTOCK'S* ERRORS AND LIMITATIONS

Ilya Shapiro[†] and Trevor Burrus[‡]

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INTRODUCTION

It is well known, if mostly observed in the breach of late, that the powers of Congress are "few and defined."[1] Indeed, the limits on Congress's powers are often described with familiar quotes that constitutional law scholars can recite off the tops of their heads.[2] None of these is more famous in the Necessary and Proper Clause context than Chief Justice John Marshall's summation 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."[3]

In its most recent interpretation of the Necessary and Proper Clause, the Supreme Court in *United States v. Comstock* ruled that civilly committing prisoners who have finished their prison terms yet

† Senior Fellow in Constitutional Studies, Cato Institute, and Editor-in-Chief, *Cato Supreme Court Review*; J.D., University of Chicago Law School; M.Sc., London School of Economics; A.B., Princeton University. I was a signatory to Cato's Supreme Court *amicus* brief in the *Comstock* case.

‡ Legal Associate, Cato Institute; J.D., University of Denver Sturm College of Law; B.A., University of Colorado.

1. THE FEDERALIST NO. 45, at 328 (James Madison) (Benjamin Fletcher Wright ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined.").

2. *E.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").

3. 17 U.S. (4 Wheat.) at 421.

are deemed "sexually dangerous" is a valid exercise of federal power.[4] Although we disagree with this ruling—for the reasons articulated in Justice Clarence Thomas's dissent, as well as in Cato's amicus brief—we do not think it is particularly significant, let alone a monumental expansion of congressional power.

In this Essay, we sketch how *Comstock* builds on *McCulloch* and other Necessary and Proper Clause cases and evaluate how seriously it has altered or affected this precedent. We note the unworkability of the majority's five-factor "test" and the significance of the limiting principles stated in the concurrences by Justices Anthony Kennedy and Samuel Alito, respectively. We also use Justice Thomas's dissent to criticize the other opinions. We conclude that, far from giving Congress a newly minted carte blanche, *Comstock*'s practical effects will be limited. More specifically, *Comstock* will have—and is having—only limited influence in the legal battle over Obamacare. Properly understood, therefore, *Comstock* adds little to existing Necessary and Proper Clause jurisprudence.

I. A MUDDLED MAJORITY

Justice Stephen Breyer's majority opinion begins with an overview of the statutory provision at issue, § 4248 of the Adam Walsh Act, which authorizes the federal civil commitment of "sexually dangerous" prisoners after their prison terms have been served.[5] A "sexually dangerous" prisoner is one who (1) "has engaged or attempted to engage in sexually violent conduct or child molestation"; and (2) "is sexually dangerous to others"[6] because he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released."[7] If an individual has been certified as sexually dangerous by a federal district judge, the release of the prisoner is halted and a full hearing is held in which the government attempts to prove its claim and the prisoner has an opportunity to rebut.[8]

Upon proof of the claim by "clear and convincing evidence," the Attorney General will hold the prisoner and "'make all reasonable efforts to cause' the State where that person was tried, or the State where he is domiciled, to 'assume responsibility for his custody, care,

4. 130 S. Ct. 1949, 1954 (2010).
5. 18 U.S.C. § 4248 (2006).
6. *Id.* § 4247(a)(5).
7. *Id.* § 4247(a)(6).
8. *Id.* §§ 4247(b)-(d), 4248(b)-(c).

and treatment.'"[9] In the event that a state will not take custody, the Attorney General is to place the person for treatment in a suitable facility.[10]

Tellingly, Breyer begins his evaluation of § 4248's constitutional propriety not with the common disquisition on the "few and defined" powers of Congress, but with the statement that the "Necessary and Proper Clause grants Congress broad authority to enact federal legislation."[11] Specifically, the justification of this grant, as it applies to the civil commitment of prisoners, is determined by five considerations:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this area, (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 that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal law, 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.[12]

Breyer did not state how his five factors inter-relate, which carry more weight, or what to do when different factors point in different directions. Nevertheless, he spoke for five justices—including, surprisingly, Chief Justice John Roberts—in finding that these five factors, considered together, justified this assertion of congressional power.

II. CABINING CONCURRENCES

Justices Alito and Kennedy filed short but significant concurrences. While agreeing that § 4248 is justified by the Necessary and Proper Clause, both justices took a clear stand against the expansive interpretation of the Clause that arguably comes from the majority's opinion. "The inferences must be controlled by some limitations," wrote Justice Kennedy, "lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of 'this is the house

9. *Comstock*, 130 S. Ct. at 1954 (quoting 18 U.S.C § 4248(d)).
10. *See* 18 U.S.C § 4247(i).
11. *Comstock*, 130 S. Ct. at 1965.
12. *Id.* at 1965.

that Jack built.'"[13]

Kennedy lays out two reasons for writing separately. One is to "withhold assent from certain statements and propositions of the Court's opinion."[14] The second betrays his misgivings about the possible scope of the majority's opinion, expressing a "caution that the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances."[15]

This latter quote is particularly disturbing in light of the truism that the Constitution places limits on congressional power—or rather that it contains a finite list of those powers. These explicit constitutional limitations, if at all meaningful, would make—*should* make—Justice Kennedy's mention that there are "some instances" where Congress could overstep its authority a banality. Unfortunately, the idea that there are limits to federal power has been in retreat for most of the past century. Those who question Congress's authority to enact certain legislation are often the outliers rather than, as the Founders intended, the mainstream.[16]

Justice Kennedy fears that the majority's "rationally related," or "rational basis" terminology edges perilously close to *Williamson v. Lee Optical of Oklahoma*,[17] a decision many consider to be the height of judicial deference to legislators. *Lee Optical*, however, dealt with the Fourteenth Amendment's Due Process and Equal Protection Clauses, not the Necessary and Proper Clause. But, as Kennedy points out, in discussing the "rationally related" test, the majority cites a litany of Commerce Clause rather than Due Process Clause cases.[18] "There is an important difference between the two questions, but the Court does not make this distinction clear. *Raich*, *Lopez*, and *Hodel* were all Commerce Clause cases. Those precedents require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee*

13. *Id*. at 1966 (Kennedy, J., concurring) (quoting Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), *in* 31 THE PAPERS OF THOMAS JEFFERSON ONLINE EDITION 547 (B. Oberg ed., Rotunda 2004) *available at* http://rotunda.upress.virginia.edu/founders/TSJN-01-31-02-0460.

14. *Comstock*, 130 S. Ct. at 1966.

15. *Id.*

16. Recall Nancy Pelosi's incredulous response to a reporter's question about the constitutional warrant for the individual mandate. *See, e.g.*, Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans To Buy Health Insurance, Pelosi Says: 'Are You Serious?'*, CSN NEWS (Oct. 22, 2009) http://www.cnsnews.com/news/article/55971.

17. *Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring) (citing *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955)).

18. *Id*. at 1966-67.

Optical."[19] He adds that the "rational basis" used in Commerce Clause jurisprudence "is a demonstrated link in fact, based on empirical demonstration. While undoubtedly deferential, this may well be different from the rational-basis test as *Lee Optical* described it."[20]

Justice Kennedy also raises a concern with how the majority glosses over the significance of the Tenth Amendment by considering it essentially coextensive with Necessary and Proper Clause analysis.[21] Quoting *New York v. United States*—in which Congress was found to have unconstitutionally "commandeered" state legislatures—the majority reiterates that,

> it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.[22]

In Kennedy's eyes, this analysis goes too far toward destroying our federal system:

> The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions. The Court's discussion of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government's power, as it proceeds by first asking whether the power is within the National Government's reach, and if so it discards federalism concerns entirely.[23]

That is, for Kennedy, federalism concerns are distinct from the breadth of congressional powers—and § 4248 fits within the allowable interstice between Article I and the Tenth Amendment. Kennedy writes that § 4248 "does not supersede the right and responsibility of the States to identify persons who ought to be subject to civil confinement."[24] He goes on to distinguish certain usurpations of the states that violate the principles of federalism:

> This is not a case in which the National Government demands that a State use its own governmental system to implement federal commands. It is not a case in which the National Government relieves the States of their own primary responsibility to enact laws and

19. *Id.* at 1967.
20. *Id.*
21. *Id.* at 1967-68.
22. *Id.* at 1962 (majority opinion) (quoting 505 U.S. 144, 159 (1992)).
23. *Comstock*, 130 S. Ct. at 1968 (Kennedy, J. concurring).
24. *Id.*

> policies for the safety and well being of their citizens. Nor is it a case in which the exercise of national power intrudes upon functions and duties traditionally committed to the State.[25]

Thus, because § 4248 neither commandeers state officials nor intrudes on state police powers, Kennedy can concur with *Comstock*'s outcome.

As we will see, Justice Kennedy's discussion of both the proper standard of review for the Necessary and Proper Clause and the limits on national power supplied by the Tenth Amendment give a valuable window into how he may vote in future cases concerning the extent of congressional power, particularly the Obamacare cases.

Justice Alito begins his concurrence on the same note as Justice Kennedy: "I am concerned about the breadth of the Court's language, and the ambiguity of the standard that the Court applies."[26] While he (narrowly) concurs in the Court's judgment, Justice Alito takes his time to "entirely agree" with Justice Thomas's dissent that "the Necessary and Proper Clause empowers Congress to enact only those laws that 'carr[y] into Execution' one or more of the federal powers enumerated in the Constitution."[27]

In Alito's view, the link between the enumerated powers of Congress and § 4248 is "appropriate"—hearkening to Chief Justice Marshall's famous line in *McCulloch* about "all means which are appropriate."[28] "This is not a case," says Justice Alito, "in which it is merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the federal criminal statutes and the challenged civil commitment provision," but rather *Comstock* presents a "substantial link to Congress' constitutional powers."[29]

III. A *COMSTOCK* CRITIQUE

As discussed above, the majority offers five factors to consider in evaluating the federal assertion of power at issue in *Comstock*. Although many commentators—including Justice Thomas in his dissent—have stylized these factors as a "test," the majority does not describe it as such. As Justice Breyer writes, "[w]e base this conclusion

25. *Id.* (citations omitted).

26. *Id.* (Alito, J., concurring) (citations omitted).

27. *Id.* at 1969 (quoting *Comstock*, 130 S. Ct. at 1970 (Thomas, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 18)).

28. *Id.* at 1970 (Alito, J., concurring); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819).

29. *Comstock*, 130 S. Ct. at 1970.

on five considerations, taken together."[30] Indeed, an analysis of the majority opinion shows that, rather than introducing a novel method for analyzing future Necessary and Proper cases, the majority adopts a "jumble of *unenumerated* 'authorit[ies]'" that essentially boil down to *McCulloch*'s means-end analysis.[31] It is a jumble, moreover, that focuses on the necessity of the means and largely ignores the legitimacy of the end.

The first "consideration," the breadth of the Necessary and Proper Clause, is not a factor to be considered but the precise question at issue. By itself, this aspect of the "test" shows that the majority's five reasons should not be considered a test. As any first-year law student knows, a balancing test is a group of factors into which one feeds the facts of the case at hand to yield the outcome of a legal question. The Court's discussion of the historical breadth afforded to Congress under the Necessary and Proper Clause cannot be considered anything but a historical exegesis with little jurisprudential value.

Offering a similar critique, Justice Thomas depicts the majority's opinion as offering a vague test that "raises more questions than it answers."[32] He asks if "each of the five considerations" must exist before legislation is sustained under the Necessary and Proper Clause.[33] What if a future piece of legislation "support[s] a finding of only four considerations? Or three? And if three or four will suffice, which three or four are imperative?"[34] These points are certainly valid, but that hypothetical future inquiry won't even go that far given that no piece of legislation, present or future, can either "satisfy" or "fail" the Court's first consideration.

To be sure, the extent to which the clause had been extended in the past is relevant to whether the clause should be extended in a given instance, but it cannot be a freestanding factor that weighs in favor of such extension. To make the historical breadth of a clause a "consideration" in whether to extend the clause is to stand at the top of a slippery slope and jump.

The second consideration—the "long history of federal involvement in this area"—is functionally allied with the first. A "long history of federal involvement" is the same as a long history of congressional actions that fit within the Necessary and Proper Clause's

30. *Id.* at 1956 (majority opinion).
31. *Id.* at 1974 (Thomas, J., dissenting) (quoting *id*. at 1965).
32. *Id.* at 1975.
33. *Id.*
34. *Comstock*, 130 S. Ct. at 1975.

executory authority (or at least that have not been held to go beyond it). In this sense, the second consideration is also a subset of the first—that the Necessary and Proper Clause is generally broad (the first consideration) and that it is specifically broad in this area (the second consideration). As Justice Thomas points out, "[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."[35]

Justice Breyer acknowledges that a history of federal involvement has only limited significance for a statute's constitutionality, but suggests that it "can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme.'"[36] What is most vague about the second consideration, however, is the scope of the historical inquiry. Future courts will struggle with the whether the relevant historical inquiry is broad (e.g., the federal government's long history of running a penal system) or narrow (e.g., the federal government's history of confining prisoners after the completion of their sentences). This vagueness shows the difficulty of applying the *Comstock* factors to the Obamacare litigation: Is the relevant history Congress's regulation of health insurance, or is it Congress's non-history of compelling individuals to purchase products from private businesses?

Throughout the rest of the majority opinion, a meaningful connection between § 4248 and any enumerated power is noticeably lacking. The majority acknowledges that "[n]either we nor the dissent can point to a single specific enumerated power 'that justifies a criminal defendant's arrest or conviction.'"[37] Nevertheless, the Court is willing to find the necessary constitutional hook in a bundle of attenuated connections to enumerated powers. Only a passing mention is given to how post-prison civil confinement is within the enumerated powers of Congress.

Justice Thomas doesn't dispute, and neither do we, that Congress has the power to set up penal institutions to punish those who interfere with Congress's exercise of its enumerated powers. As Justice Marshall said in *McCulloch*, an implied power to punish "those who steal letters from the post-office, or rob the mail" can be inferred from Congress's power to establish post offices.[38] Civilly committing a prisoner after his term has ended does nothing, however, to further any of Congress's enumerated powers in that the punishment for the offense has, by

35. *Id.* at 1976.
36. *Id.* at 1958 (majority opinion) (quoting Gonzales v. Raich, 545 U.S. 1, 21 (2005)).
37. *Id.* at 1964.
38. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819).

definition, already been completed. Moreover, as Justice Thomas points out, it is clear from both the face of the law and the government's briefing that § 4248 is "aimed at protecting society from acts of sexual violence, not toward 'carrying into Execution' any enumerated power or powers of the Federal Government."[39] If, as generally thought, Congress does not have the power to create general criminal statutes prohibiting sexual violence—even if those laws are prudent measures to safeguard the people—then it does not have the power to civilly commit "sexually dangerous" inmates for precisely the same reason.

Justice Alito makes the same mistake as the majority in arguing that post-term detention furthers the federal government's constitutionally warranted power to manage its prisons. For him, the "only additional question presented here is whether, in order to carry into execution the enumerated powers on which the federal criminal laws rest, it is also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems."[40] As obvious as the answer to this question seems—that it is not necessary, or even convenient, that the federal government extend commitment beyond a prison term in order to ensure that laws passed under its enumerated powers are followed—it is not the answer that Justice Alito chooses.

Alito goes on to analogize § 4248 to Congress's ability to "provide for the apprehension of escaped . . . prisoners."[41] Again, however, the disconnect is clear: Post-term detention may be a good idea, but is certainly not like the power to round-up escapees, without which a penal institution would not be able to perform its primary mission of confining and punishing prisoners for the duration of their terms. Indeed, prisons would be very different places if escapees were awarded their freedom for their slipperiness and cunning. In Justice Thomas's words, the prisons would "lack force and practical effect."[42] Prisons would not be different places, however, if those who have served their terms were released. Granted, the outside world might be a more dangerous place, but, as Justice Thomas said, "the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it."[43]

For these reasons, all of the opinions, save Justice Thomas's

39. *Comstock*, 130 S. Ct. at 1974 (Thomas, J., dissenting) (quoting U.S. CONST. art. 1, § 8, cl. 18).

40. *Id.* at 1970 (Alito, J., concurring).

41. *Id.*

42. *Id.* at 1977 (Thomas, J., dissenting).

43. *Id.* at 1974.

dissent of course (joined by Justice Antonin Scalia), focus on the means Congress has chosen rather than the legitimacy of the end. Justice Thomas, once again, explains this perfectly: "By starting its inquiry with the degree of deference owed to Congress in selecting means to further a legitimate end, the Court bypasses *McCulloch*'s first step and fails carefully to examine whether the end served by § 4248 is actually one of those powers."[44]

IV. A CASE STUDY OF *COMSTOCK'S* CONSEQUENCES

In March 2010, Congress passed, and the president signed, one of the most significant pieces of legislation in American history, the Patient Protection and Affordability Act, or, as it has become popularly known, Obamacare.[45] The highest-profile and most constitutionally vulnerable aspect of the health care law is the so-called individual mandate.[46] Under this provision, nearly every U.S. citizen and legal resident will be required to purchase health insurance or pay a civil penalty.[47]

More than twenty lawsuits have been filed challenging the constitutionality of various Obamacare provisions, including especially the individual mandate.[48] While even a summary of the arguments in these cases is beyond the scope of this Essay, Necessary and Proper Clause doctrine does play a role in determining whether the federal government has exceeded its powers.[49] To that end, the government has been citing *Comstock* in its briefs defending the legislation against legal challenge.[50] It is initially telling, however, that the case has merited little more than a passing mention in this briefing. *Comstock* is simply not a case that the government is hanging its hat on, not even in the narrow context of the claimed Necessary and Proper Clause justification

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

45. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 18001).

46. *See, e.g.*, Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded In Law—And Pose Serious Challenges*, 29 HEALTH AFF. 1229, 1229 (June 2010).

47. PPACA §§ 5000A(a)-(b) (to be codified at 26 U.S.C. § 5000A).

48. *See, e.g.*, HEALTH CARE LAWSUITS, http://www.healthcarelawsuits.org (last visited Jan. 30, 2011).

49. *See, e.g.*, Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 CATO SUP. CT. REV. 239, 260-67 (2010) (assessing implications of *Comstock* for Obamacare litigation).

50. *See, e.g.*, Def's. Mot. to Dismiss at 47-48, Florida v. Dept. of Health and Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-91 RV/EMT); Def's. Mot. to Dismiss at 34-35, Virginia *ex. rel* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010) (No. 3:10CV00188-HEH).

for the individual mandate.

And for good reason: Looking at the five considerations offered by the *Comstock* majority, it is not at all clear that the case favors the government's defense of Obamacare.[51] As mentioned, the first factor is essentially irrelevant; while *Comstock* and other cases have already established that Congress's powers under the Necessary and Proper Clause are broad, whether they are so broad as to encompass the individual mandate is the very question at issue.

Comstock's second consideration—a history of federal regulation in the area—does not clearly weigh to either side. As previously mentioned, the scope of the historical inquiry is crucial to determining this question. The government has regulated insurance for many decades (although, in the grand scheme of things, "[f]ederal involvement in health is a fairly new occurrence in U.S. history . . ."[52]). It does not, however, have a long history of mandating that private individuals enter the marketplace to buy particular goods or services, whether for health care regulatory purposes or otherwise. An individual economic mandate is simply unprecedented. By contrast, Justice Alito provides a long footnote in his concurrence explaining exactly how "precedented" § 4248 is. The scope of inquiry he chooses, however, is the general history of the United States creating and administering prisons. A more narrow history of whether the federal government has long confined prisoners after their terms have expired may have yielded a different result. Similarly, the scope (and characterization) of the history which the Court chooses to look at in the Obamacare suits may influence the outcome.

The third factor—whether Congress had "sound reasons" for enacting the mandate—is at the very least debatable. Many economists believe, for example, that it is possible to provide coverage for preexisting conditions without resorting to massive compulsion.[53] Regardless of all the other legal disagreements, it seems to be an objective statement that the "sound reasons" underlying the individual mandate are not nearly as clear as those supporting § 4248.

Factors four and five—the accommodation of state interests and the narrow scope of the law—are also exceedingly difficult for

51. *See, e.g.*, Brief of Washington Legal Foundation and Constitutional Law Scholars As Amici Curiae Supporting Plaintiff's Motion for Summary Judgment at 25-28, *Virginia ex. rel Cuccinelli*, 702 F. Supp. 2d 598 (No. 3:10-cv-188-HEH).

52. JENNIE JACOBS KRONENFELD, THE CHANGING FEDERAL ROLE IN U.S. HEALTH CARE POLICY 67 (1997).

53. *See, e.g.*, John H. Cochrane, *What to Do About Preexisting Conditions*, WALL ST. J., Aug. 14, 2009, at A13.

Obamacare to satisfy. The new law presents a sweeping change to our health care system that not only commands the citizens of every state to purchase health insurance but radically reshapes states' health care bureaucracies. Moreover, states rather than individuals (as in *Comstock*) are spearheading the legal push against Obamacare: twenty-eight states are already plaintiffs, which number may grow further as newly elected governors, attorneys general, and legislatures take stock of a changed political landscape. And whereas twenty-nine states filed amicus briefs in favor of § 4248,[54] only nine have yet filed a brief supporting Obamacare.

As intimated by Justice Kennedy's concurrence, the federalist relationship between the states and the national government is an important qualification to some of the justices. Kennedy partially concurred in the outcome because he felt that § 4248 maintained this relationship.[55] While the Adam Walsh Act does make some attempt to balance those concerns that are traditionally left to the states and those that are traditionally left to the federal government, Obamacare upsets this relationship to a far greater degree. Where the Adam Walsh Act may be considered a surgical strike, Obamacare carpet bombs the fields of federalism.

Which brings us to the final aspect of *Comstock* that makes us skeptical about the case's place in the Necessary and Proper Clause pantheon: noticeably lacking in all the opinions except the dissent is a discussion of the word "proper." Instead, analysis centers on whether § 4248 is "necessary" to executing a valid power of Congress. But by definition, that which is necessary is not necessarily proper. The two concepts do travel together in our constitutional discourse, but they are distinct.

The Obamacare cases will almost certainly bring these separate identities to the fore. Perhaps "proper" has received less attention because it is an arguably more vague term than "necessary," but the Court will need to explore whether, regardless of necessity, it is proper for the federal government to commandeer people and take away from us some of our most important life choices.[56] Whether it is proper for Congress to act in a way that essentially destroys the principle of enumerated and limited powers is a question that will one day need to

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

55. *See id.* at 1980 (Kennedy, J. concurring).

56. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & Liberty (forthcoming, 2011), *available at* http://ssrn.com/abstract=1680392.

be answered—but *Comstock* neither faced nor resolved it.

CONCLUSION

The *Comstock* decision, while regrettable, neither changed the course of Necessary and Proper Clause doctrine nor established a groundbreaking legal framework for future analysis. Instead, it expanded on existing jurisprudence within the narrow boundaries of civil commitment law. Whatever the effects of the case, moreover, *Comstock* has not come close to eroding the boundaries of federal power (as some may cheer and others lament). Still, even as *Comstock* broke little new ground, important battles remain to be fought on the old.