

# PENAL DEFERENCE AND OTHER ODDITIES IN *UNITED STATES V. COMSTOCK*

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As the highest Court in the land, the Supreme Court of the United States enjoys a certain degree of freedom to meander around on the way to its conclusions. The Court’s recent decision in *United States v. Comstock*<sup>1</sup> is a good example; the *Comstock* opinion is notable as much for its reasoning as for its principal holding. Section 4248 of the federal Adam Walsh Child Protection and Safety Act<sup>2</sup> authorizes the Attorney General to civilly commit federal prisoners adjudged “sexually dangerous.”<sup>3</sup> In a seven-two decision, the Court rejected enumerated powers and federalism-based constitutional objections, and held that the commitment provision was a permissible exercise of Congress’s authority under the Constitution’s Necessary and Proper Clause.<sup>4</sup> The Court defanged the recurring argument “that, when legislating pursuant to the [Clause], Congress’[s] authority can be no more than one step removed from a specifically enumerated power”<sup>5</sup> and held, instead, that the Clause confers implied powers that aid the effective exercise of *other implied powers*.<sup>6</sup> Section 4248 was permissible, the Court concluded, because it was a reasonable way to augment the federal prison system. The federal prison system is a tool

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

2. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 18 U.S.C.A. § 4248 (West 2010)).

3. *Id.* at 620–21.

4. *Comstock*, 130 S. Ct. at 1965. The Necessary and Proper Clause is U.S. CONST. art. I, § 8, cl. 18 (conferring on 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”).

5. *Comstock*, 130 S. Ct. at 1963 (rejecting the argument as “irreconcilable with our precedents”).

6. *Id.* at 1962–63.

for effectively criminalizing violations of federal law, which in turn ensures that Congress can effectively exercise its enumerated powers.<sup>7</sup> The Court’s analytical path to that conclusion, however, has several interesting detours; those detours are the subject of this brief essay. *Comstock*’s analytic oddities may have implications in contexts other than federal penal regulation. I offer a smattering of previews.

First, the opinion’s argumentative structure is noteworthy in itself: The *Comstock* Court upheld section 4248 not on the basis of one or several independently sufficient reasons, but rather in the light of “five considerations, taken together.”<sup>8</sup> In this sense, the opinion evokes *Marbury v. Madison*<sup>9</sup> more strongly than its direct analytic ancestor, *McCulloch v. Maryland*.<sup>10</sup> *McCulloch* is the seminal case considering the scope of the Necessary and Proper Clause,<sup>11</sup> and thus is the more substantively relevant of the two for the central issue in *Comstock*.<sup>12</sup> But *Marbury* provides the closer analog to the structure of the *Comstock* Court’s reasoning. *Marbury* famously (or notoriously) contains a hodge-podge of arguments that support judicial power to review political branch actions for constitutionality—arguments that are often characterized as individually insufficient to establish the permissibility of the practice but sufficient when taken in the aggregate.<sup>13</sup> The distinguished pedigree of the *Comstock* majority’s argumentative strategy, however, did not deter Justice Thomas from characterizing it as having “perfunctorily genuflect[ed] to *McCulloch*’s framework for assessing Congress’[s] Necessary and Proper Clause authority” before “promptly abandon[ing] [it] in favor of a novel five-factor test supporting its conclusion that section 4248 is a ‘necessary and proper’

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7. See *id.* at 1963–64.

8. *Id.* at 1956.

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (relying on five justifications for judicial review).

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (addressing the scope of the Necessary and Proper Clause). See *Comstock*, 130 S. Ct. at 1956 (discussing *McCulloch*).

11. U.S. CONST. art. I, § 8, cl. 18.

12. See *McCulloch*, 17 U.S. (4 Wheat.) at 414–21 (discussing the grant of power to Congress in the Necessary and Proper Clause).

13. See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 39–40 (6th ed. 2009) (describing five arguments for judicial supremacy in *Marbury*; noting that “[p]erhaps these various arguments appear more forceful in combination than they appear when separated[.]” such that “while none is independently decisive, the various arguments together suggest that judicial review is part of the constitutional structure”).

adjunct to a jumble of *unenumerated* ‘authorit[ies]’.”<sup>14</sup> One obvious problem with “the *Marbury* strategy” is the absence of a clear explanation of how multiple insufficient reasons add up to a sufficient reason to suppose an action is constitutional. Nevertheless, the decision to uphold section 4248 drew seven of the nine votes on the Court, and the *Marbury*-style case for the provision’s permissibility attracted a five-Justice majority. *Comstock* demonstrates both the continuing validity of “the *Marbury* strategy”—the combination of several independently insufficient factors that, sometimes, suffice to establish constitutionality—and the Court’s continuing failure to explain how, exactly, that reasoning works.

Although the majority portrayed its conclusion as a fairly mundane judicial sign-off on “a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades[,]”<sup>15</sup> there is a rather pressing open question about the central holding. On the one hand, the holding might be extremely permissive if read for the proposition that any action rationally related to the exercise of an *implied* congressional power necessarily satisfies the traditional Necessary and Proper Clause requirement that “the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”<sup>16</sup> The Court’s “novel five-factor test,”<sup>17</sup> on this reading, would amount to a nonexclusive list of ways in which congressional actions may satisfy that requirement in virtue of their relationship to implied powers.<sup>18</sup> On the other hand, the five-factors might restrict the scope of the holding that actions may be justified by their relation to implied, rather than enumerated, congressional powers if read as a five-pronged test, the failure of which to satisfy any element is grounds for

14. *Comstock*, 130 S. Ct. at 1974 (2010) (Thomas, J., dissenting) (fourth alteration in original).

15. *Id.* at 1958.

16. *Id.* at 1956 (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004); *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981)).

17. *Id.* at 1974 (Thomas, J., dissenting).

18. For a post-decision discussion of possible broad and narrow readings of the Court’s holding in *Comstock*, see Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2009–2010 CATO SUPREME COURT REVIEW 239, 248–55 (forthcoming 2010), available at [http://ssrn.com/abstract\\_id=1684301](http://ssrn.com/abstract_id=1684301) (last visited Oct. 5, 2010).

invalidation.<sup>19</sup> As Justice Thomas noted in dissent, “[t]he Court provides no answer” as to which of these readings is correct.<sup>20</sup> This question about the meaning of the Court’s holding is an important one to which I return to later in this essay.

This essay focuses principally on several curious side-issues in the *Comstock* Court’s reasoning, including the Court’s discussion of a counterintuitive instance of constitutional “dialogue” between Congress and the judiciary, its cryptic invocation of common law tort duties in analyzing the scope of congressional power, and its apparent deference to the executive’s interpretation of the statute under circumstances that typically would lead courts to reject deference. The essay offers brief, preliminary speculations about the Court’s reasons for making these odd analytic moves, their effects on the *Comstock* decision, and what their implications may be for this and other areas of law.

## I. CONSTITUTIONAL ODDITIES: DIALOGUES AND COMMON LAW

One of *Comstock*’s oddities relates to the idea of constitutional “dialogue” between Congress and the judiciary.<sup>21</sup> The history of federal civil commitment legislation highlights a somewhat counterintuitive instance of such a dialogue.<sup>22</sup> Traditionally conceived, constitutional back-and-forth between courts and Congress has typecast players in predictable roles: Congress is the unprincipled policymaker that must be constrained and have its over-expansive programs invalidated; the judiciary is the rule-honoring, politically insulated supervisor that must do the constraining and the invalidating. With these roles in mind, one might expect such a

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19. See Somin, *supra* note 18, at 244 (noting that if the “five factors” constitute a strict five-pronged test for constitutionality, it “significantly undercuts the pro-government implications of the Court’s use of the rational basis test”).

20. *Comstock*, 130 S. Ct. at 1975 (Thomas, J., dissenting).

21. For a sampling of the rich literature on constitutional dialogues, see generally DONALD MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966) (expounding on constitutional dialogue); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988) (arguing that the dialogue between the three branches of government may yield consensus-based constitutional principles); ROBERT A. KATZMANN, COURTS AND CONGRESS (1997) (examining the relationship between the judiciary and Congress with respect to constitutional questions); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) (discussing theories of extrajudicial constitutional interpretation and judicial supremacy).

22. See *Comstock*, 130 S. Ct. at 1960 (recounting how Congress modified law on the civil commitment of mentally incompetent individuals with input from the judiciary).

dialogue to proceed with an overly ambitious Congress enacting statute A, followed by judicial invalidation of A on the basis of constitutional deficiency X, followed in turn by a congressional response modifying A to correct for X. Examples of this kind of deferential congressional role in constitutional dialogues include Congress's responses to the Supreme Court's decisions in *United States v. Lopez*<sup>23</sup> and *Buckley v. Valeo*.<sup>24</sup> In *Lopez*, the Court struck down the federal Gun Free School Zones Act as beyond the scope of the Commerce Clause because it did not contain language limiting its scope to matters relating to interstate commerce.<sup>25</sup> And in *Buckley*, the Court invalidated provisions of the Federal Election Campaign Act on several grounds, including provisions structuring the Federal Elections Commission that violated separation-of-powers norms by subjecting an executive officer to congressional, rather than presidential, control.<sup>26</sup> In the wake of each decision, Congress modified the statute to correct the constitutional infirmities identified by the Court. Those modified statutes remain on the books.<sup>27</sup>

Another constitutional dialogue consistent with the conventional portrayal of the congressional and judicial characters might proceed as follows: A less deferential Congress enacts statute A, watches the Court invalidate A on constitutional ground X, and then responds by enacting an identical statute to challenge the Court's conclusion that X is a legitimate constitutional basis for invalidating A. The saga of the legislative veto provides an example of this sort of assertive congressional role in a constitutional dialogue: In *INS v. Chadha*,<sup>28</sup> the Supreme Court invalidated provisions of the Immigration and Nationality Act that allowed a one-house vote to "veto" the Immigration and Naturalization Service's deportation decisions.<sup>29</sup> The

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23. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

24. *Buckley v. Valeo*, 424 U.S. 1 (1976).

25. *Lopez*, 514 U.S. at 561–62 (noting that the statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

26. *Buckley*, 424 U.S. at 140. The Court also struck down several of the statute's limitations on campaign contributions as First Amendment violations. *See id.* at 58–59.

27. *See* Act of Sept. 30, 1996, Pub. L. No. 104-208, sec. 657, 110 Stat. 3009-370–71 (1996) (amending the Gun Free School Zones Act); Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (amending the Federal Election Commission Act). *See also* J. Mitchell Pickerill, *Congressional Responses to Judicial Review*, CONGRESS AND THE CONSTITUTION 151, 162–64 (Neal Devins & Keith E. Whittington eds. 2005) (discussing these congressional responses).

28. *INS v. Chadha*, 462 U.S. 919 (1983).

29. *Id.* at 959.

Court concluded that the provision violated Article I's requirement that legislative action be accomplished through bicameralism and presentment.<sup>30</sup> The Court struck down the provision even though it was aware that hundreds more federal statutes contained similar provisions.<sup>31</sup> In the wake of *Chadha*, Congress continued to use formal and informal legislative vetoes in a variety of policy contexts,<sup>32</sup> and several times enacted provisions expressly stating its view that the legislative veto is a permissible exercise of congressional rulemaking powers.<sup>33</sup> This sort of dialogic constitutional confrontation may not happen as frequently as commentators suppose<sup>34</sup>—Professor Pickerill demonstrates that dialogue between Congress and the judiciary on constitutional issues often involves congressional deference to judicial decisions.<sup>35</sup> Still, *Chadha* and its aftermath show that contentious confrontations are possible.<sup>36</sup>

The *Comstock* Court's account of the development of federal civil commitment law, however, reveals a distinct dialogic progression: At the urging of the Judicial Conference's committee on civil commitment, Congress enacted a narrowly-worded statute in 1949 designed to commit mentally-ill federal prisoners after their release if no state would take responsibility for them and they were found to pose a danger to "the officers, the property, or other interests of the

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30. *Chadha*, 462 U.S. at 952–54. See U.S. CONST., art. I, § 7 (establishing the required procedure for exercising the "legislative power of the United States").

31. See *id.* at 945 (noting that "[s]ince 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes") (quoting James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977)).

32. See generally Pickerill, *supra* note 27, at 152; Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288–91 (1993). Notably, Congress appeared to accept the Court's conclusion for the first few years after *Chadha*, but later began enacting new legislative veto provisions at a steady clip. Fisher, *supra*, at 286–88. As Fisher notes, "[f]rom the date of the Court's decision in *Chadha* to the end of the 102nd Congress on October 8, 1992, Congress enacted more than two hundred new legislative vetoes." *Id.* at 288.

33. See, e.g., Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (adding such a statement to an amended version of the Immigration and Nationality Act), as quoted and discussed in Pickerill, *supra* note 27, at 161 & n.19.

34. See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); James Meernik and Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 1997 AM. J. POL. SCI. 447.

35. Pickerill, *supra* note 27, at 161 (arguing that "congressional responses [to judicial decisions] that amend or modify laws are usually more deferential to the Court's constitutional interpretation").

36. I have discussed and proposed further study of constitutional dialogue between Congress and the courts on preemption issues at length elsewhere. See generally Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511 (2010).

United States.”<sup>37</sup> In the courts, the language about “interests of the United States” was “uniformly interpreted . . . to mean that [the prisoner’s] ‘release would endanger the safety of persons, property or the public interest in general . . .’.”<sup>38</sup> Congress then *broadened* the statutory language “to conform more closely to the then-existing judicial interpretation.”<sup>39</sup> This dialogic progression runs counter to the conventional characterizations deployed in describing “dialogic constitutionalism.” In the instance of constitutional dialogue described by the *Comstock* Court as having shaped federal civil commitment law, it seems that a *too conservative* Congress *broadened* the reach of its statutes in response to judicial signals that broader legislation was permitted by the Constitution.

That this counterintuitive sort of dialogic progression influenced the amendment history of the very statutory scheme examined in *Comstock*—Congress’s enactment of the 1949 civil commitment statute in response to the urging of a committee of judges and subsequent expansion of the statute in reaction to the judicial approach to its application—may magnify the potential impact of the Court’s holding in *Comstock* itself. The *Comstock* Court’s new contribution to the dialogue between Congress and the courts over the allowable scope of the federal civil commitment regime appears to be judicial permission to predicate legislation on implied as well as enumerated powers. Congress, thus further emboldened by the Court’s affirmation, might push the envelope in this and other policy contexts until a limiting principle—on which the *Comstock* majority did not elaborate—is forcibly established. This sort of dialogue may be limited to the single instance the *Comstock* Court identifies—it might be an aberration. But if, instead, it is an example of a pattern that is repeated with some regularity, then additional analysis of the dynamic may advance both the already rich literature on constitutional dialogues and the nascent literature on *sui generis* constitutional deliberation in Congress and other legislatures.<sup>40</sup>

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37. *United States v. Comstock*, 130 S. Ct. 1949, 1960 (2010) (quoting Law of Sept. 7, 1949, ch. 535, 63 Stat. 68 (1949)) (current version at 18 U.S.C.A. § 4247 (West 2010)).

38. *Id.* (quoting *United States v. Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969)).

39. *Id.* (noting that Congress “altered the language so as to authorize (explicitly) civil commitment if, in addition to the other conditions, the prisoner’s ‘release would create a substantial risk of bodily injury to another person or serious damage to the property of another’”) (quoting 18 U.S.C.A. § 4246(d) (West 2010)).

40. On constitutional dialogues generally, see the sources cited *supra*, note 21. For a partial bibliography of material on legislative constitutional interpretation, see Lee Epstein, *Who Shall*

A second peculiarity in *Comstock* is the Court's cryptic invocation of the common law duty of custodians to "exercise reasonable care" to prevent those in their custody from inflicting "reasonably foreseeable 'bodily harm to others'."<sup>41</sup> While it did not go so far as to hold that the need to discharge common law duties may authorize otherwise unconstitutional action, the Court did suggest that the existence of the duty illuminated, somehow, the scope of things "necessary and proper" for the federal government to do when acting in the role of custodian.<sup>42</sup> The dissent sounded the intuitive rejoinder that "federal authority derives from the Constitution, not the common law."<sup>43</sup> But the *Comstock* majority did not rely on the common law duties of custodians as a basis for concluding that section 4248 is constitutionally permissible. This discussion of the common law, then, is odd in a sense because it seems almost entirely tangential to the Court's conclusion. The existence of custodial duties at common law buttressed the Court's argument that the federal government stands in a special relationship to its prisoners, but it was the special relationship, (which, presumably, would exist even if there were no common law duties) that mattered.<sup>44</sup> But the majority seemed to view the existence of a common law duty as *relevant* to the question of congressional power—otherwise, why mention it at all? Assuming with the Court that there is some relevance between the two, the next question is how tort law is relevant to questions of constitutional power.

Tort law relates to constitutional law in a variety of ways. John Goldberg provides evidence that the constitutional right to due process of law often has been construed to include the right to access a body of law that compensates individuals for private wrongs since the early eighteenth century.<sup>45</sup> Tort law is connected to constitutional

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*Interpret the Constitution?*, 84 TEX. L. REV. 1307, 1307–08, nn.4–10 (2006) (reviewing CONGRESS AND THE CONSTITUTION, *supra* note 27).

41. *See id.* at 1961 (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1965)).

42. *See id.* ("If a federal prisoner is infected with a communicable disease that threatens others, surely it would be 'necessary and proper' for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others . . . .").

43. *Id.* at 1979 (Thomas, J., dissenting).

44. *See id.* at 1961 (observing that the special relationship of the federal government to its prisoners gives the government the unique opportunity to respond to public safety threats posed by releasing the prisoners and to respond to the problem of prisoners' severed connections to any state resulting from federal incarceration).

45. John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 559–83 (2005).



law today in the familiar context of *Bivens* and section 1983 actions against government officials for violations of constitutional rights.<sup>46</sup> The underlying legal source for government liability in such actions is tort; thus, the government is bound in at least this sense by both tort and constitutional law.<sup>47</sup> To the extent that tort duties may be applied against the government to impose liability when they are violated, those duties may add to the case for *ex ante* governmental authority to avoid the liability their violation would impose, at least where there is an otherwise plausible constitutional basis for the action and no independent constitutional constraint. Thus, perhaps, the permissibility of government action at the margins of broad power-conferring provisions like the Necessary and Proper Clause might be worked out in part by reference to tort duties. At the very least, the relationship between tort and constitutional law may be a bit more complex than the dissent would have it.

## II. PENAL DEFERENCE

A third particularly curious aspect of the *Comstock* Court's reasoning is its basis for rejecting federalism-based objections to section 4248. In choosing between two possible interpretations of the statute—one that presented federalism problems and one that did not—the Court appears to have deferred to the Solicitor General's

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46. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (permitting suits against federal officials for constitutional violations, subject to qualified immunity defenses); 42 U.S.C.A. § 1983 (West 2010) (providing a cause of action against state government officials for constitutional violations, subject to qualified immunity defenses); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 815–18 (2007) (discussing bases for tort liabilities and immunities of the federal and state governments).

47. There is no reason *in principle* that government action could not be even more broadly constrained by both tort law and constitutional law. Common-law sovereign immunity doctrines require a statutory waiver before tort suits against the federal government may proceed. See 28 U.S.C.A. § 2674 (West 2010) (providing that “[t]he United States shall be liable [in tort] . . . in the same manner and to the same extent as a private individual under like circumstances”). Sovereign immunity doctrine thus constrains the application of the full panoply of tort duties against the government, but that is a historical contingency that might have been otherwise. See *id.* at 801–04 (discussing the common-law—not constitutional—origins of federal sovereign immunity); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963) (arguing that the importation of English common law doctrines of sovereign immunity was the result of a series of historical contingencies). In any event, the federal government has waived its sovereign immunity against a large swath of tort claims by statute. The Federal Tort Claims Act (FTCA) constitutes the government's general waiver of sovereign immunity against tort actions and sets forth several exceptions according to which the government maintains its immunity. See 28 U.S.C.A. § 2674, § 2680(a)–(c), (h)–(n) (listing exceptions to the federal government's sovereign immunity waiver).

representation that the federal executive would adhere to the less problematic interpretation of section 4248. Deference, under these circumstances, seems to stand in tension with established doctrines of statutory interpretation and administrative law.

After determining that internal limits based on the text of the Necessary and Proper Clause, properly construed, did not preclude section 4248's enactment, the Court examined whether the statute nevertheless violated external federalism constraints by encroaching too much on state power.<sup>48</sup> Traditionally, state governments controlled the civil commitment of the mentally ill under the sort of general police or *parens patriae* powers<sup>49</sup> that the federal government may not exercise.<sup>50</sup> In *Comstock*, the District Court and the Court of Appeals both concluded that section 4248 contravened federalism constraints by enabling federal usurpation of these traditional state powers because the statute "provide[d] for the commitment of a person *after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted[.]"<sup>51</sup> The termination of federal prosecutory power, in principle, should cause police or *parens patriae* authority over a former federal prisoner to revert to the state government. The statutory text does make it clear that potential committed persons must be "in the custody of the Bureau of Prisons," but it also provides that if federal officials "certify that the person is a sexually dangerous person," that certification "shall stay the release of the person pending completion of [commitment] procedures . . . ." <sup>52</sup> The Court of Appeals emphasized that, "[i]n the cases at issue here, this stay has extended federal confinement well past the end of any prison term."<sup>53</sup> For example, the Attorney General certified Comstock as sexually dangerous six days before the end of a

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48. See *Comstock*, 130 S. Ct. at 1962–65 (2010) (discussing external federalism restrictions on national power).

49. See *United States v. Sahhar*, 56 F.3d 1026, 1029–30 (9th Cir. 1995) (noting the "truism that . . . the general field of lunacy . . . is reserved to the states") (citation and internal quotation marks omitted).

50. See, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."); *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (discussing authorities that forbid Congress to exercise a police power).

51. See *United States v. Comstock*, 551 F.3d 274, 281–82 (4th Cir. 2009) (quoting *United States v. Comstock*, 507 F. Supp. 2d 522, 551 (E.D.N.C. 2007)).

52. 18 U.S.C.A. § 4248(a) (West 2010).

53. *Comstock*, 551 F.3d at 277 (emphasizing that "pursuant to § 4248, the federal government has civilly confined *former* federal prisoners without proof that they have committed any new offense").

thirty-seven month sentence, staying his release for the three-plus years required for the Supreme Court’s decision to issue.<sup>54</sup>

More important, the statute may be construed to authorize the federal government to *initially* commit individuals after their federal prison and supervised release terms have ended. The initial “sexual dangerousness” certification stays release for the duration of commitment proceedings. If those proceedings take enough time, they could conclude, and the order of commitment could be issued, after the date on which federal imprisonment and supervised release originally would have ended. This possibility—that section 4248 might be read to permit a federal civil commitment action to be taken “when the [federal] power to prosecute federal offenses is exhausted” and when, in principle, authority should revert to the state government—is the usurpation that the courts below seem to have been most worried about.<sup>55</sup> Read this way, section 4248 appears to delegate to the Attorney General and federal Bureau of Prisons a portion of “general ‘police power, which the Founders denied the National Government and reposed in the States’.”<sup>56</sup>

The Supreme Court rejected the contention that section 4248 impermissibly invades state authority on two grounds. First, the majority reasoned that a special relationship arises between the federal government and its inmates when it places them in federal custody, which relationship imposes responsibilities on the federal government to prevent its prisoners from harming others. In the light of the support the federal penal system provides for Congress’s

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54. *See id.* (describing the timing of the Attorney General’s certification). If no state government agrees to take charge of the subject of commitment proceedings under section 4248, the detainee may be federally committed until either a state assumes responsibility for the detainee or the director of the federal facility certifies that the detainee “will not be sexually dangerous to others if released unconditionally,” or “under a prescribed regimen of medical, psychiatric, or psychological care or treatment.” 18 U.S.C.A. § 4248(d)–(e) (West 2010). No provision of the statute requires that commitment be terminated on the date that the detainee’s federal prison sentence and supervised release period would have ended but-for the commitment. Accordingly, interpreting section 4248 to allow commitment to extend indefinitely “after a person has completed a sentence for a federal crime” is plausible on the statute’s plain language. *Comstock*, 551 F.3d at 281 (quoting *Comstock*, 507 F. Supp. 2d at 551) (internal quotation marks omitted). Indeed, the District Court, Fourth Circuit and Supreme Court all accepted this construction of the statute. *See id.* (Fourth Circuit, quoting District Court); *Comstock*, 130 S. Ct. at 1961 (acknowledging that the operation of section 4248 may “detain[ ] [federal prisoners] beyond the termination of their criminal sentence”).

55. *Comstock*, 551 F.3d at 281.

56. *United States v. Comstock*, 130 S. Ct. 1949, 1964 (2010) (quoting *Morrison*, 529 U.S. at 618).

enumerated powers, the argument runs, the Necessary and Proper Clause should be construed to authorize the government to discharge its custodial responsibilities even if that means exercising continuing dominion over individuals after formal federal prosecutorial power is exhausted.<sup>57</sup> Second, and more important for present purposes, the Court emphasized that “the Solicitor General repeatedly confirmed at oral argument [that] section 4248 is narrow in scope” by arguing, among other things, “that ‘the Federal Government would *not* have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed’.”<sup>58</sup>

Then-Solicitor General Kagan’s reading of the statute avoids the federalism-based preclusion of federal usurpation of state *parens patriae* powers.<sup>59</sup> But Kagan’s interpretation is not the only plausible reading of the statutory language. Kagan read the statute to limit commitment proceedings in a way that Congress declined, expressly, to do itself—section 4248 does not include a clear prohibition against initiating civil commitment *after* the period of federal custody has ended; indeed, the plain language of the statute appears to permit it.<sup>60</sup> A familiar canon of administrative statutory interpretation is that an unconstitutional delegation of authority cannot be “cured” by a narrowing interpretation issued by the agency on which the statute confers implementing authority.<sup>61</sup> The rule is supported by common sense: The Attorney General and the Bureau of Prisons are Congress’s designated administrators of the federal civil commitment system. They may adhere to the Solicitor’s assurance, at oral argument, that the federal executive will not commit individuals after their term of imprisonment and supervised release has expired.<sup>62</sup> But the statute’s plain language does not *require* adherence to that limitation, and future administrations may take different approaches.

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57. *See id.* at 1961 (discussing the federal government’s role as custodian of its prisoners).

58. *Id.* at 1964–65 (quoting Transcript of Oral Argument at 9, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08–1224) (emphasis added)).

59. *See* Brief for the United States at 43–44, *Comstock*, 130 S. Ct. 1949 (2010) (No. 08–1224) (arguing that section 4248 is consistent with traditional state *parens patriae* powers because its scope is limited to a subset of persons already in federal custody).

60. *See* Brief for the United States, *supra* note 59 and accompanying text.

61. *See, e.g.,* *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 473 (2001) (describing “[t]he idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power [as] internally contradictory”).

62. *See* Brief for the United States, *supra* note 59, at 38 (arguing that the conditions of supervised release allow for limitations on the freedom of the individual that could not otherwise be imposed).

Deference to the executive here—which surely seems to be what the *Comstock* Court granted, at least on this point—runs contrary to this intuitively appealing canon of administrative law and is, therefore, puzzling.

Why did the Court simply accept the government’s guarantee that it would not enforce section 4248 in the manner that raised federalism concerns?<sup>63</sup> Perhaps the “special relationship” factor—and the related idea that section 4248’s reach is limited strictly to the group of current or former federal prisoners—was sufficient on its own to assuage federalism concerns for the Court.<sup>64</sup> Perhaps the Court concluded, *sub silentio*, that greater deference is owed the executive in penal matters than in other contexts. Such a rule also appeals to common sense: the executive has relatively more experience and expertise than Congress or the courts in managing the federal penal system. This sort of comparative institutional competence observation is a familiar justification for deference, but federal agencies’ documented tendency to engage in turf-building supports the rule against deference to agencies’ interpretations of the statutory provisions that define their jurisdiction.<sup>65</sup> These factors and others should be considered to assess the propriety of deference, but no such discussion appears in *Comstock*. If the *Comstock* Court in fact adopted a new deference rule, then it is insufficiently explained and justified thus far.

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63. The Supreme Court appears to have deferred to the Solicitor General’s interpretation of another ambiguous part of the language of section 4248: the “state custody” provision. See *Comstock*, 130 S. Ct. at 1962–63 (discussing the Solicitor’s construction, proposed at oral argument, of 18 U.S.C.A. § 4248(d) (West 2010). The statutory language leaves it unclear whether states that agree to take custody of “sexually dangerous” former federal prisoners may elect not to civilly commit them under state law. *Id.* at 1962. The respondents argued that the statute violates federalism norms by empowering the federal government to *require* commitment by states that assume custody of individuals deemed “sexually dangerous” by the Attorney General, rendering states “powerless to prevent the detention of their citizens under § 4248 even if detention is contrary to the State’s policy choices.” *Id.* at 1962–63 (quoting Brief for Respondents at 11, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08-1224)). The Court accepted, as a sufficient response to the objection, the Solicitor General’s statement at oral argument “that the Federal Government would have no appropriate role with respect to an individual covered by the statute once ‘the transfer to State responsibility and State control has occurred.’” *Id.* at 1963 (quoting Transcript of Oral Argument at 9, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08-1224)).

64. Recall that the Court disclaimed the idea that any one of its five factors is dispositive of constitutionality. *Comstock*, 130 S. Ct. at 1956.

65. See Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557, 560 (2009) (discussing these and other factors relevant to the desirability of deference) (citing William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1455 n.56 (2008) on the “turf-building” factor and Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 614–17 (2009) on the comparative institutional capacity factor).

Aside from the comparative institutional capacity consideration, the *Comstock* Court's approach also may draw justification from another familiar canon of statutory interpretation—the rule that where two interpretations of a statute are plausible—one that raises constitutional doubts and a “saving” interpretation that avoids them—the saving interpretation should be adopted.<sup>66</sup> Leave aside momentarily the observation that the *Comstock* Court seems to have reached its conclusion about the statute's meaning on this point by deferring to the executive's interpretation. All else equal, if allowing commitment to commence after the completion of imprisonment and supervised release periods raises federalism concerns, then construing section 4248 not to permit post-custodial commitment actions would be legitimate constitutional avoidance.

Now allow deference to reenter the discussion. The avoidance canon traditionally has been a rule of *judicial* statutory interpretation,<sup>67</sup> and the Court did not actually parse the text of section 4248 on this point. It apparently deferred to the executive's parsing. That deference, under these circumstances, may be justified if it allows the Court to avoid resolving constitutional doubts. That is, it is not obvious that the saving interpretation must be derived independently by a court for the avoidance canon to legitimately factor in the resolution of a challenge to the statute. Perhaps the saving interpretation may be generated by an agency. But that permutation of the avoidance canon has never been explicitly embraced by the Court and an assessment of the legitimacy of such a hybrid avoidance–deference rule requires substantially more analysis than I can provide in this limited space. But it is troubling that the *Comstock* Court's chosen method for avoiding the federalism objections to section 4248 seems to raise a different constitutional doubt about the legitimacy of deference to agency interpretations that “cure” otherwise constitutionally deficient statutes. The Court might have avoided the problem by interpreting section 4248, independently, to be as narrow as or narrower than the Solicitor's proffered interpretation at oral argument. But it didn't. The Court's strange

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66. See, e.g., Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1575 (2000) (describing the principle that “statutes should be construed in such a way as to avoid constitutional difficulties”); Pursley, *supra* note 65, at 566–67 (canvassing avoidance doctrines).

67. See Young, *supra* note 66, at 1574–78 (discussing the avoidance canon and its application).

handling of the federalism consequences of construing section 4248 to permit post-custodial initiation of commitment proceedings is another of *Comstock*'s oddities.

### CONCLUSION

I have highlighted the *Comstock* Court's account of the history of federal civil commitment legislation as a strange twist on traditional portrayals of "constitutional dialogue" between Congress and courts; the Court's discussion of the common law duties of custodians as an interesting theoretical foray into the deep connections between constitutional law and the law of torts; and the Court's acceptance of the Solicitor General's oral argument guarantees that the federal government will implement section 4248 in a manner that does not overly invade state government authority as a potentially problematic new form of deference that is both under-explained and apparently inconsistent with established deference rules and their justifications. These interesting analytic features make the *Comstock* opinion one of the most curious to be issued in recent years. Their practical implications remain to be seen, of course—future courts' views about the meaning and scope of the *Comstock* holding will, ultimately, tell the tale.

By focusing on some of the opinion's side issues, however, I do not mean to downplay the importance of *Comstock*'s holding about the scope of congressional power under the Necessary and Proper Clause. Despite efforts to downplay the impact of its conclusion, the Court dispelled the contestable yet persistent view that the Clause permits actions only one-step removed from the exercise of an enumerated power.<sup>68</sup> While the respondents, some *amici*, and Justices Thomas and Scalia appear to still believe that this is the best reading of Article I, section 8, theirs is now clearly a *dissenting* view.<sup>69</sup>

As do most important Supreme Court decisions, *Comstock* leaves some questions open. The majority did not provide a readily generalizable limitation on Congress's power to legislate in furtherance of implied powers. The meaning of the five-factor test

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

69. *E.g.*, Consolidated Brief for the Cato Institute and Prof. Randy E. Barnett as Amici Curiae In Support of Respondents at 20–21, *United States v. Comstock*, 130 S. Ct. 1949 (2010) (No. 08-1224); *Comstock*, 130 S. Ct. at 1976–77 (Thomas, J., dissenting).

remains to be worked out.<sup>70</sup> And *Comstock*'s long-term impact is difficult to predict. Some commentators argue that *Comstock*'s subtle revamping of the judicial approach to the Necessary and Proper Clause has significant implications for the survival of federal health care legislation.<sup>71</sup> Lawsuits have been initiated to challenge the constitutionality of the Patient Protection and Affordable Care Act;<sup>72</sup> the Act's individual mandate provisions—requiring individuals to either purchase health insurance or pay fines—may have to be justified as an exercise of Congress's Necessary and Proper Clause authority.<sup>73</sup> As one commentator notes, “[t]he government has already cited *Comstock* in arguing that the ‘individual mandate’ created by the plan is constitutional.”<sup>74</sup> Others view the decision as evidence that the Supreme Court's views on the scope of national power tend to shift with the political winds.<sup>75</sup>

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70. See *supra* notes 17–20 and accompanying text.

71. See, e.g., Somin, *supra* note 18, at 260–68 (discussing the implications of *Comstock* for pending litigation on the constitutionality of the individual mandate provisions of the federal healthcare legislation); Robert Schapiro, *Return of the Necessary and Proper Clause (Just in Time for Health Care)*, CONCURRING OPINIONS (May 27, 2010, 3:43 PM), <http://www.concurringopinions.com/archives/2010/05/return-of-the-necessary-and-proper-clause-just-in-time-for-health-care.html> (addressing how a broad view of the Necessary and Proper Clause justifies the exercise of federal authority to guarantee universal healthcare).

72. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). See *Florida v. Department of Health and Human Services*, No. 3:10-cv-91-RV/EMT (N.D. Fla., June 16, 2010), docket available at <http://dockets.justia.com/docket/florida/flndce/3:2010cv00091/57507/> (last visited Oct. 7, 2010); *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10-cv-00188-HEH (E.D. Va., May 24, 2010), docket available at <http://docs.justia.com/cases/federal/district-courts/virginia/vaedce/3:2010cv00188/252045/78/> (last visited Oct. 7, 2010).

73. See, e.g., Somin, *supra* note 18, at 261; 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, <http://writ.news.findlaw.com/dorf/20100519.html>; Schapiro, *supra* note 71.

74. See Somin, *supra* note 18, at 261 (citing government motions to dismiss filed in both the Florida and Virginia lawsuits).

75. See, e.g., Roderick M. Hills, Jr., *Comstock's Folly*, PRAWFSBLAWG, (May 18, 2010, 10:21 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/05/comstocks-folly.html> (discussing the Supreme Court's deferential review of laws that are not necessary, but are passed by legislators who operate under political incentives). See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (arguing that the Supreme Court has tended to reach results consistent with public opinion); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (discussing judicial decision making under the influence of other institutions and actors). The alignment of the Justices' votes in *Comstock* is an intriguing datum for students of the attitudinal model of judicial decisionmaking—that is, the view that “justices make decisions by considering the facts of the case in light of their ideological attitudes and values,” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 110 (2002). This is particularly evident in Chief Justice



The category of arguments *Comstock* ratifies—predicating implied congressional powers on other implied congressional powers—seems destined to collide with the Court’s caution in *United States v. Lopez* that one may not “pile inference upon inference” to find a constitutional basis for congressional action.<sup>76</sup> The result of that collision—whether the Court begins to systematically affirm Congress’s exercises of implied powers predicated on other implied powers or, instead, reinvigorates formalistic, judicially-enforceable, *Lopez*-like limitations on congressional authority—will go a long way toward marking *Comstock*’s true significance.

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Roberts’s decision to join Justices Breyer, Stevens, Ginsburg, and Sotomayor in the majority. See Somin, *supra* note 18, at 266–67 (noting the Chief Justice Roberts’s vote).

76. *United States v. Lopez*, 514 U.S. 549, 567 (1995).