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ObamaCare, the Necessary and Proper Clause, and *U.S. v. Comstock*

Damon W. Root | April 20, 2011

In last year's *U.S. v. Comstock*, the Supreme Court was confronted with the Adam Walsh Child Protection and Safety Act of 2006, which had empowered federal officials to order the indefinite civil commitment of "sexually dangerous" individuals who had already finished serving their prison sentences. According to Congress, the power to enact this sweeping legislation stemmed from the Constitution's Necessary and Proper Clause, which grants the legislative branch the authority "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."

Unfortunately, the Supreme Court agreed, voting 7-2 in favor of Congress' "broad authority" under the clause. But perhaps even more notable was the decision's winning line-up. In addition to the liberals who joined Justice Stephen Breyer's majority opinion, Chief Justice John Roberts signed on as well, while Justice Samuel Alito and Justice Anthony Kennedy both concurred (leaving Justice Clarence Thomas and Justice Antonin Scalia in dissent).

For anyone who's been closely following the legal battle over the Patient Protection and Affordable Care Act, *Comstock's* significance should come as no surprise. In addition to resting its legal case for ObamaCare on a broad interpretation of the Commerce Clause, the federal government has also relied on a broad reading of the Necessary and Proper Clause, the very sort

of broad reading that Chief Justice Roberts just wholeheartedly endorsed in *Comstock*.

So how much of an impact will *Comstock* have on the Court's seemingly inevitable ObamaCare ruling? It may be too soon to say, though in a fascinating new paper forthcoming from the *Syracuse Law Review*, the Cato Institute's Ilya Shapiro and Trevor Burrus argue that *Comstock* may have no impact at all. Here's how they sum it up in the paper's abstract:

[Comstock] dealt with that most basic of constitutional questions: Where does Congress find its authority to enact a particular law? Justice Breyer, writing for the majority, found warrant for § 4248 [of the Adam Walsh Act] in Congress's power "to make all Laws which shall be necessary and proper for carrying into Execution" its other powers. But which of Congress's enumerated powers does § 4248 execute? And is § 4248 necessary and proper for executing that power? Unfortunately, the Court focused mainly on the second question, arguing that Congress has "broad authority" to enact laws to further its enumerated powers. Moreover, the five-factor "test" Breyer offered asked not whether § 4248 was necessary and proper for executing an enumerated power but for "a jumble of unenumerated 'authorities,'" as Justice Thomas put it in a searching dissent joined by Justice Scalia. Fortunately, Justice Breyer's opinion was joined in full by only four other justices — with Justices Kennedy and Alito writing separately to emphasize the strict requirements that federal laws invoking the Necessary and Proper Clause must meet (even if those requirements were satisfied here). These concurrences, along with an impracticable majority opinion and a logically powerful dissent, suggest that *Comstock* may have limited application beyond the four corners of civil commitment law. Most prominently, *Comstock* seems to have little effect on the ongoing Obamacare litigation.

Download the paper [here](#). Read *Reason's* coverage of the ObamaCare legal debate [here](#).