

Spring 2011

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Recommended Citation

Michael J. Gerhardt, *A Modest Decision*, 46 *Tulsa L. Rev.* 379 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol46/iss3/1>

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A MODEST DECISION

Michael J. Gerhardt*

INTRODUCTION

Ever since the confirmation hearings for John Roberts' nomination as Chief Justice of the U.S. Supreme Court, commentators have been obsessed with his avowed preference for judges to be modest.¹ His opinions, as well as those of the Supreme Court that bears his name, have been routinely scoured for indicia of their modesty or immodesty. Presumably, the focus of this Symposium on the assertiveness of the Roberts Court is aimed at illuminating the extent to which the Court has embraced a bolder, less modest approach to deciding cases.

Assertiveness is in some tension with modesty. Assertiveness is commonly understood to be a disposition to make "bold or confident" declarations.² Modesty is usually understood to be something quite different, an expression or exhibition of shyness, reticence, or humility.³ An assertive Court might be immodest; modesty is, technically speaking, not the direct opposite. Assertiveness and modesty are not necessarily concerned with truth or validity; however, in the right context, either could be a description or aspect of a particular outcome. Modesty might seem to be more in accordance with the notion of judicial restraint in the sense that this notion suggests a disinclination to reach beyond the facts or the law, which is more likely to occur with an attitude of assertiveness, especially to the extent that it lacks or is indifferent to proof. Nonetheless, modesty and assertiveness are each not necessarily about the correctness of the outcome, but rather the style, or a perceived style, of judicial decision-making. Even if modesty were understood to mean not doing more than what was necessary to decide a case or not to overreach, we still need to have a technique or means by which we know what was necessary or required for deciding a particular case. Neither modesty nor assertiveness necessarily points to the correct answer. Each could be unprincipled or mistaken, particularly if it were bending over backwards to uphold a constitutionally dubious (or defenseless) federal or state action. The focus on style might mask or obscure whether the Court actually reached the right decision or result in a particular

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1. Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 23 (2007). See, e.g., Stuart Taylor, Jr., *In Praise of Judicial Modesty*, THE ATLANTIC (Mar. 2006), <http://www.theatlantic.com/magazine/archive/2006/03/in-praise-of-judicial-modesty/4769/>.

2. See MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/assertive> (defining "assertiveness" as "disposed to . . . bold or confident statements.").

3. See MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/modesty> (defining "modesty" as "freedom from conceit or vanity").

case. It would be a focus that places form over substance, if we are not careful.

Perhaps no recent decision of the Roberts Court better illustrates the costs and benefits of a focus on the style of a decision — on its assertiveness or modesty — than *United States v. Comstock*,⁴ in which the Supreme Court described its efforts twice therein as “modest.”⁵ Any Supreme Court decision that characterizes itself as “modest” is asking for trouble, because modesty usually does not call attention to itself. In this case, the justices’ opinions are not nearly as modest as they have supposed (or perhaps as boldly assertive as critics might maintain). It is possible that many people might have hoped that the case would turn out to be the first in a series to narrow the Court’s construction of the Constitution’s Necessary and Proper Clause.⁶ Yet the Court did just the opposite, construing the Necessary and Proper Clause more broadly than it ever has before. The decision was all the more remarkable because of the vote; it was a 7-2 decision, and the opinions in the case tell us a lot about where the justices currently stand on not only the Necessary and Proper Clause but also the Commerce Clause. Consequently, the Court’s decision, and the path by which it got there, has serious ramifications for its decisions in other contexts, including the constitutionality of the individual mandate provision in the health care bill.⁷

My comments on *Comstock* are set forth in four parts. In part I, I briefly sketch the opinion. In part II, I briefly sketch the indicia of a modest opinion and examine how each of the opinions fit these criteria. In part III, I consider the ways in which the justices’ opinions were immodest or brazenly assertive. In the final part, I suggest how a modest, less assertive opinion might have looked.

I.

The issue in *Comstock* can be easily stated, and was regarded as perfectly straightforward by the majority. The question before the Court was whether it was constitutional for a federal statute to authorize a federal district court, pursuant to a request from the Department of Justice, to detain “a mentally ill, sexually dangerous federal prisoner beyond the date he would otherwise be released.”⁸ The majority

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

5. See *infra* note 11 and accompanying text at 1958, 1961.

6. U.S. CONST. art. I, § 8, cl. 18.

7. President Barack Obama signed the Patient Protection and Affordable Care Act into law on March 23, 2010. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Many critics of the law call it, *ObamaCare*. See Editorial, *Embracing His Inner ‘Obamacare’*, N.Y. TIMES, Oct. 8, 2011, at A18. President Obama, however, has also indirectly embraced the term, “*Obamacare*,” in order to foster support for the law. *Id.* The United States Supreme Court granted one writ of certiorari to the state of Florida to challenge the law in November 2011 and will hear oral arguments on the constitutionality of at least the individual mandate provision in March 2012, with a decision to be made by late June 2012. Adam Liptak, *Justices to Hear Healthcare Cases As Race Heats Up*, N.Y. TIMES, Nov. 15, 2011, at A1. Additionally, the case’s oral arguments will be five and a half hours long — which could be a record. Andrew Cristy, *‘Obamacare’ Will Rank Among the Longest Oral Arguments Ever*, NPR: IT’S ALL POLITICS BLOG, (Nov. 15, 2011, 5:11 PM), <http://www.npr.org/blogs/itsallpolitics/2011/11/15/142363047/obamacare-will-rank-among-the-longest-supreme-court-arguments-ever>. The challenges to the individual mandate currently before the Supreme Court are as follows: *Seven-Sky v. Holder*, ___ F.3d ___ (D.C. Cir. 2011), *petition for cert. filed*, (U.S. Nov. 30, 2011) (No. 11-679); *Florida v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, (U.S. Nov. 14, 2011) (No. 11-400); *Liberty University v. Geithner*, ___ F.3d. ___ (4th Cir. 2011), *petition for cert. filed*, (U.S. Oct. 7, 2011) (No. 11-438).

8. *Comstock*, 130 S. Ct. at 1951.

concluded that it was constitutional, based on “five considerations, taken together.”⁹ In particular, the Court found that the statute “constitutes a means that is rationally related to the implementation of a constitutionally enumerated power,”¹⁰ that the statute was “a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades,”¹¹ that the statute properly accommodated the States’ interests in protecting its populace from sexually dangerous people,¹² and that the statute was “narrow in scope.”¹³

Justices Kennedy and Alito each wrote separately and concurred only in the Court’s judgment. Justice Kennedy rejected the majority’s application of its “rational basis” test derived from its economic due process cases as “one of the most deferential formulations of the standard for reviewing legislation in all of the Court’s precedents.”¹⁴ Instead, he insisted that:

[U]nder the Necessary and Proper Clause, application of a ‘rational basis’ test should be at least as exacting as it has been in the Commerce Clause cases if not more so. . . . The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration [of the regulated activity’s substantial affect on interstate commerce].¹⁵

He explained further that the law at issue in the case “is a discrete and narrow exercise of authority over a small class of persons already subject to the federal power.”¹⁶ Similarly, Justice Alito expressed concerns about “the breadth of the Court’s language.”¹⁷ He suggested that the Necessary and Proper Clause did “not give Congress *carte blanche*” in this case but rather that there must be “an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.”¹⁸ He concluded that, “[h]ere, there is a substantial link to Congress’ constitutional powers” “to provide for the civil commitment of dangerous federal prisoners who otherwise escape civil commitment as a result of federal imprisonment.”¹⁹

In dissent, Justice Thomas, joined in all but one section of Justice Scalia, read the Court’s Necessary and Proper Clause more narrowly and its jurisprudence as much more

9. *Id.* at 1956.

10. *Id.* at 1956.

11. *Id.* at 1958. A few pages later, the Court reiterated that the challenged statute “is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.” *Id.* at 1961.

12. *Comstock*, 130 S. Ct. at 1961.

13. *Id.* at 1964. In acknowledging the fifth consideration, the Court accepted then-Solicitor General Elena Kagan’s assurances that the statute’s

reach is limited to individuals already ‘in the custody of the’ Federal Government Indeed, the Solicitor General argues 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.’ Thus, far from a ‘general police power,’ [the law] is a reasonably adapted and narrowly tailored means of pursuing the Government’s legitimate interest as a federal custodian in the responsible administration of its prison system.

Id. at 1964–65 (citations omitted).

14. *Id.* at 1966 (Kennedy, J., concurring in the judgment) (citations omitted).

15. *Id.*

16. *Comstock*, 130 S. Ct. at 1968.

17. *Id.* (Alito, J., concurring).

18. *Id.* at 1970 (citation omitted).

19. *Id.*

restrictive than the majority. For him, the Clause required that a law's means must have some connection to its ends but that its ends must satisfy the "limitation" of being "legitimate." ²⁰ He noted that Congress, in enacting this law, had not specified any "enumerated power or powers as a constitutional predicate[,] . . . and none are readily discernible."²¹ Justice Scalia did not join his further suggestion that in order for a law to be "legitimate" it must be because it has some "connection to an enumerated power" rather than "simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority . . ."²²

II.

A judicial opinion is likely to qualify as "modest" if it does some or all of five things. First, it should not decide more than it has to in order to resolve the case before the Court. A modest opinion does not reach too far or decide too much. Second, a modest opinion exhibits restraint by grounding itself in a legitimate or proper source of legal authority outside of, or apart from, the justices' personal or political preferences. A modest judicial opinion hews as closely as possible to authoritative sources, such as precedent or original meaning. Third, a modest judicial opinion acknowledges its possible limits or weaknesses. Such acknowledgment includes explaining or clarifying ways in which the court extends or deviates from legitimate sources of decision such as precedent. Fourth, a modest judicial opinion exhibits respect for contrary views. A modest judicial opinion is respectful of dissent and disagreement. Last, but not least, a judicial decision might be modest if its results or its consequences are relatively inconsequential. The change that it produces in the status quo is relatively minor.

The majority opinion in *Comstock* is modest in each of these ways. First, the majority seems to take pains to narrow the scope of its decision. It leaves the question of due process (conceivably a big one in this case) for another day, and it only reaches the *ex post facto* question because it seems to have had no choice. The opinion is framed to underscore its limited reaches, and emphasizes, more than once, that its scope is deliberately "narrow."²³

Second, the majority opinion acknowledges its limitations. It dutifully acknowledges that the question it considers is not straightforwardly or definitively answered by the case law as it stands. So, it needs to make a "modest" extension, or adaptation to, the Court's doctrine.

Third, the majority's tone is respectful of the Court's precedents and relevant historical practices. The majority examines in detail the historical support for its decision, both in the longstanding precedent and historical practices of the government. These are two widely regarded authoritative sources of decision to which the majority appears to be trying to hew as closely as possible.²⁴

Fourth, the majority treats the other opinions in the case with respect. It is

20. *Id.* at 1972 (Thomas, J., dissenting) (citation omitted).

21. *Comstock*, 130 S. Ct. at 1973 (Thomas, J., dissenting).

22. *Id.* at 1976, 1977.

23. *Id.* at 1965 (majority opinion).

24. *See id.* at 1956.

noteworthy that the majority refrains from taking pot shots at the other opinions in the case or knit-picking those opinions. It gives them space.

Last, the impact of the decision seems “modest,” as, indeed, the Court tells us.²⁵ The Court notes that the statute in question “has been applied to only a small fraction of federal prisoners” and that “its reach is limited to individuals already ‘in the custody of the’ Federal Government.”²⁶ The statute is “a reasonably adapted and narrowly tailored means of pursuing the Government’s legitimate interest as a federal custodian in the responsible administration of its prison system.”²⁷

What may be especially modest about the Court’s opinion is the fact that Chief Justice Roberts joins it without a hint of hesitancy or concern. In fact, his participation in the case is entirely silent — with the exception of his unqualified vote to join the majority opinion. It is possible that some people might expect the Chief Justice to be more skeptical of broad constructions of federal power and perhaps even opposed to a broad construction of either the Necessary and Proper Clause or the Commerce Clause. Nonetheless, there is no indication of that skepticism or opposition here. He makes good on his promise to avoid unnecessary concurrences and dissents and to favor consensus as much as possible on the Court. Though it is unclear what his vote might portend for the future, he is, at the very least, acting as narrowly as possible, thereby leaving room for himself, and perhaps the Court, to address any problems with its decisions in appropriate cases in the future.

The concurring opinions also seem similarly modest. To begin with, they are both respectful of the majority and the dissent. They make clear in their respective opinions the need to clarify or sharpen the opinion further, but neither opinion expresses disdain or anything disrespectful about any of the other opinions in the case. The opinions are mildly critical of the majority opinion but not offensively so. Second, Justices Kennedy and Alito ground their respective concurrences in the text and structure of the Constitution as well as the Court’s precedents. Third, Justices Kennedy and Alito do not go further than either has to; the focus of each opinion is strictly on the constitutionality of this statutory regime.

Each makes clear both what is at stake and not at issue in this case. Justice Alito, for example, emphasizes in the very first paragraph of his concurrence that he is “persuaded, on narrow grounds, that it was ‘necessary and proper’ for Congress to enact the statute at issue in this case . . . in order to ‘carry into Execution’ powers specifically conferred on Congress by the Constitution.”²⁸ Both justices emphasize what “this case” is not about. Moreover, they emphasize, as Justice Kennedy noted near the end of his concurrence, that “this is a discrete and narrow exercise of authority over a small class of persons already subject to the federal power.”²⁹ Fifth, they both appear aware of the need to be more rigorous than the majority in their respective opinions because of the corresponding need to ensure proper enforcement of the limitations on federal power.

25. *Id.* at 1961.

26. *Comstock*, 130 S. Ct. at 1953.

27. *Id.* at 1953.

28. *Id.* at 1968-69 (Alito, J., concurring) (citations omitted).

29. *Id.* at 1968 (Kennedy, J., concurring).

While the tone of the dissent is not as respectful as that of either the majority or concurrences (as is the case often with dissents), it seems modest in its own way. Perhaps most importantly, Justice Thomas makes clear that he is grounding his arguments not in anything personal but rather in a close reading of the Court's precedents. He hews closely to both the Court's seminal opinion in *McCulloch v. Maryland*³⁰ on the Necessary and Proper Clause and the framers' and ratifiers' objective "that the Necessary and Proper Clause is not an independent fount of congressional authority, but rather 'a caveat that Congress possesses all the means necessary to carry out the specifically granted 'foregoing powers' of §8 'and all other Powers vested by this Constitution.'"³¹ Justice Thomas does not urge the Court to cast aside any precedents, but instead tries to demonstrate simply and straightforwardly the fact that, "no enumerated power in Article I, §8, 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."³²

As for Justice Scalia, he appears, perhaps surprisingly to some people, to be every bit as modest as the Chief Justice. He silently joins Justice Thomas' dissent and foregoes any opportunity to castigate any of the other justices — or call for the overruling of any of the Court's other precedents. He even declines to join the portion of the dissent that seems to pose the most serious problem for the constitutional status quo, the portion in which Justice Thomas insists that the only "legitimate" objective for which the Congress may legislate is to implement one of its enumerated powers. For a justice known for his bold assertions of law and quickness to take issue with opinions with which he disagrees, Justice Scalia seems to have assumed an unusually modest posture in this case.

III.

Merely saying something is modest does not, of course, make it so. It is entirely possible that what claims to be modest, in fact, might not be. Indeed, there are signs of immodesty in *Comstock*, for a close reading of each opinion indicates ways in which it either deviates from the sources on which it relies or goes further than it acknowledges.

First, Justice Breyer's majority opinion is conceivably immodest in several respects. First, it does not faithfully apply the Court's precedents, but rather extends them. The fact that it construes the federal law at issue as modestly extending the reach of federal laws already upheld is of no moment, for the question presented in the case is whether such an extension is constitutional. Once the Court fails to hew closely to an authoritative source, such as precedent, it has crossed a line. Here, the line crossed is actually a modest reading of the Court's precedents. A modest reading of the Court's precedents would be that they did not reach the question in the case — not whether they could be easily extended to cover the case in question. Because the precedents are generally very supportive of (and deferential to) Congress, extending them is not an insignificant act. In fact, the Court is stretching these precedents more than it has ever

30. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

31. *Comstock*, 130 S. Ct. at 1972 (Thomas, J., dissenting) (citations omitted).

32. *Id.* at 1973.

done before. It is hard to accept this as something merely modest in scope.

Moreover, it is not entirely accurate to think of the Court's deference as merely modest. It is extreme deference, because it is doing an important part of the Congress's work for it. Usually, we expect the Congress to specify the constitutional authority from which its disputed law derives, including its connection to enumerated powers and the legitimate objectives for which it may legislate. In this case, the Congress left these matters blank, and the Court goes to extreme lengths to fill in the blanks for the Congress.

There is another aspect of immodesty to the majority opinion. It has to do with the ease with which the Court dismisses concerns that the statute might be constitutionally unfair. It is noteworthy that the statute extending Comstock's detention was enacted AFTER his criminal conviction.³³ The Court elides any difficulty with the timing of the law by suggesting that the statute not only has procedural protections but also that the plaintiff, or others in like circumstances, still might be able to bring due process or other constitutional claims in a separate suit. This is cold comfort for someone who is already being detained beyond the length of his criminal sentence on the basis of no misconduct committed in the interim. A modest decision might not have discounted, or downplayed, the procedural peculiarities of the case but instead grappled with them more honestly or convincingly.

Moreover, the fact that the law merely affects "a small fraction of federal prisoners"³⁴ is, upon closer scrutiny, cause for some concern. These are prisoners who have had the lengths of their federal detention prolonged as a result of no new or intervening act of illegality. It is not hard to imagine circumstances in which the Court would recognize a constitutional violation, in spite of the small set of people affected. A federal law, for instance, criminalizing flag desecration was likely to affect only a few people but the Court did not hesitate to strike it down.³⁵ If a constitutional boundary is exceeded or a constitutional right is involved, the numbers of people disadvantaged can, or perhaps ought to, be largely irrelevant.

The Court's response to this criticism would no doubt be to emphasize that in *Comstock* it was balancing competing considerations. Hence, the size of the disadvantaged class was weighed or balanced against the magnitude of the federal interests, which were both to protect the public and to ensure proper administration of its prison system. It is possible that the outcome might have been different had the size of the disadvantaged class been larger.

It is also possible a change in this factor might not have affected the outcome, since it was one of five being weighed by the Court. Put differently, a possible problem with the decision is that it is unclear whether some factors were each counted the same or whether some factors mattered more or less than others, and whether the balancing in this opinion undercuts its value or utility as a precedent. It does not provide much guidance to lower courts, if any, of the factors on which the Court depended. The

33. See *United States v. Comstock*, 551 F.3d 274, 276, 277-78 (4th Cir. 2009), *rev'd*, 130 S. Ct. 1949 (2010).

34. *Comstock*, 130 S. Ct. at 1953.

35. See *United States v. Eichman*, 496 U.S. 310, 312 (1990).

balancing in this case was clearly driven in part by practical considerations, though the further suggestion that the opinion merely modestly expanded the Court's precedent was conclusory, since the Court did not explain its criteria for determining or measuring modest expansions in the law.

There are immodest aspects to the concurring opinions, too. First, they both are effectively rewriting the Court's opinions. While Justices Kennedy and Alito are trying to hew closely to their own prior opinions on the Necessary and Proper and Commerce Clauses, the majority is probably correct about the appropriate standard to use in the case based on precedent. The fact is that the Court's precedents in these realms have long accorded tremendous deference to Congress; it is immodest to suggest otherwise. Justices Kennedy and Alito each believe the standard should be stricter, though each is reluctant to make clear that this is itself an extension of the Court's precedents. Moreover, neither of the concurrences expresses concerns at all about possible constitutional problems with the law arising from provisions other than the Necessary and Proper or Commerce Clause. The concurrences leave the same impression as the majority: that this case came out as it did in large part because a disadvantaged class — federal prisoners adjudicated to be sexually dangerous — are among the most unpopular and politically powerless in American law. There is every reason to believe these prisoners should be punished to the fullest extent of the law, but the key words there are “of the law.”

Of course, similar problems apply to the dissent. While Justice Thomas maintained that his position was more faithful to the Court's earlier opinions, structure, and original meaning than the majority opinion, this was merely an assertion. In fact, he, too, has effectively rewritten *McCulloch*, as reflected in Justice Scalia's refusal to join his characterization of the case as holding that the legitimacy of a federal law depends on whether the law can be traced to or derived from an enumerated power. The Court does not say that in *McCulloch*, and it has never previously held this.

In addition, Justice Thomas fails to give the credit that is due to Congress. While the majority can be faulted for overlooking the flaws in the statutory scheme, the dissent can be faulted for its excessive formalism, and for not acknowledging it as such. It is not hard to see how this law relates to the enumerated powers of Congress, or to the objectives or ends for which the Congress may legislate. Justice Thomas suggests that Congress has no power at all to address sexually violent persons, though there are federal laws — and judicial precedents upholding them — that say the contrary, such as the Court's decision upholding the constitutionality of the Mann Act.³⁶

Perhaps most importantly, the problem with the dissent is that it made the same mistake it claimed the majority had made. Justice Thomas suggested that the majority was effectively giving Congress “*carte blanche*” in exercising its authority under the Necessary and Proper Clause. However, the dissent itself exercises judicial review “*carte blanche*.” Consistent with his overall approach to judicial decision-making, Justice Thomas presumes that as a justice he owes no deference at all to the Congress and that there are, in effect, no bounds on his review of the constitutionality of its handiwork.

36. See, e.g., *Hoke v. United States*, 227 U.S. 308, 309 (1913).

There was a legitimate objective, or two, that could be found had Justice Thomas wanted to find one. To insist that the legitimacy of a law is restricted to the enumerated powers set forth in Article I flies in the face of the Court's recognition in *McCulloch* that the federal government actually has implied powers. Moreover, such insistence, coupled with the further insistence that the Congress spell out this connection in the law itself is a new requirement, one that is a bold departure from judicial precedent and historical practices, and hard, if not impossible, to square with genuine judicial modesty.

IV.

The immodesty of each of the opinions in *Comstock* could easily have been avoided. Each could have done more to acknowledge the limits of federal power, including their own, and of the sources on which they relied.

To begin with, there are four ways in which the majority opinion could have been more modest. First, rather than minimize the burdens imposed by the federal law, it could have dealt more openly with their actual magnitude. The Court's estimation that there would not be many people affected by the law does not diminish the problems associated with those individuals' indefinite confinement after the end of their respective criminal sentences. At the very least, the Court could have considered or acknowledged the ways in which the people subject to detention could ameliorate their further loss of liberty.

Second, the majority could have done more to explain the legitimacy of the government's objective in enacting this law. The law does not specify the source of its constitutional authorization, but the majority could have done so. The majority also could also have explained why Congress was not obliged, as a matter of constitutional law, to indicate the specific constitutional authority from which the challenged law arose.

Third, the majority could have explained the basis for its extension of precedent. It seems that the principal basis for the Court's decision was not precedent itself, but practical considerations. It should have explained the legitimacy of taking these practical considerations into account.

Fourth, the majority could have explained the actual limits of federal power in this context. Justice Breyer's opinion is reminiscent of his dissent in *United States v. Lopez*,³⁷ in which it appeared that he did not believe there was any practical limit to the scope of Congress's power to regulate interstate commerce. But this law is hard if not impossible to square with the Court's Commerce Clause jurisprudence since, inter alia, the regulated activity is not economic. Thus it is like the activities over which the Court in both *Lopez* and *United States v. Morrison*³⁸ had refused to extend federal jurisdiction. In other words, the possible problem with the law was that the underlying activity being regulated was non-economic and thus conceivably not properly regulable under the Commerce Clause.³⁹ If the law cannot be justified under the Commerce Clause, no other source of

37. 514 U.S. 549, 615-31 (1995) (Breyer, J., dissenting).

38. 529 U.S. 598 (2000).

39. A few commentators have emphasized this deficiency, among others, as a problem with the federal law. See Miles Coleman, *Unwanted Advances: Civil Commitment and Congress's Illicit Use of the Commerce Clause* — U.S. v. *Comstock*, 60 S.C. L. REV. 1217, 1225-26 (2009); Garrick B. Pursley, *Penal Deference and Other Oddities in United States v. Comstock*, 6 DUKE J. CONST. LAW & PUB. POL'Y 98, 102, 114 (2010); Ilya

federal authority is readily apparent. Consequently, the power appears to be limitless, which ought to be impossible for a government of limited powers. If the power has limits, the majority at the very least ought to have explained them.

While the concurrences did a better job than the majority in explaining the precise scope of judicial review and corresponding limits of federal power, they, too, could have been more modest. First, their position is not easily grounded in precedent. They needed to have clarified in what ways they went beyond precedent and on what authority. Second, they could have explained how this more exacting standard squares with the Court's apparently deferential standard of review in *McCulloch*. Moreover, they could have specified the actual links between the federal interest and the Congress's enumerated powers. Lastly, they could have explained more clearly the space separating them from the dissent, specifically why they accepted, or even whether they accepted, the law as having a legitimate objective.

The dissent had more to do than either of the other opinions in order to be considered modest. Indeed, it is not clear at all that the dissent cared about whether the Court reached a modest decision; it cared about results. Hence, the dissent could have been more candid about why it took the position that Congress was not entitled to any deference in this case. It should have explained why the formalism of specifying a legitimate objective in the law is constitutionally required, and may not be inferred by the Court. Moreover, it should have clarified both the boundaries of its review and the irrelevance, in its view, of other, arguably similar federal laws previously upheld by the Court.

However, what ultimately helps to explain Justice Thomas' dissent is a default rule that he employs but fails to disclose. For some time, Justice Thomas has maintained, contrary to several leading precedents, that the Constitution derives its authority from the States and thus any gaps, ambiguities, or silences in the Constitution should be construed by the Court to the benefit of the States rather than the federal government.⁴⁰ Had Justice Thomas expressly deployed this default rule in this case, he would have been acknowledging not only an important premise of his reasoning but an important deviation from precedent. He could have explained, or reiterated, the constitutional predicate for the application of this default rule in this case.

CONCLUSION

As a measure of judicial performance, modesty is not just about the outcome. Some people might use modesty to describe the actual reach — or substance — of a decision, though they might not always be open in disclosing this as their understanding. It might describe the tone or style of a decision, the extent of its candor or honesty, as well as the extent to which it adhered to or deviated from an authoritative source of decision. It also can describe the impact of a decision or its effect on the doctrine or law of a particular subject.

Whatever the meaning, modesty is in tension with assertiveness, and *Comstock*

Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2010 CATO SUP. CT. REV. 239, 241-42 (2009-10).

40. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848, 857 (1995) (Thomas, J., dissenting).

illustrates this tension well. The various opinions assert constructions of sources that are not as faithful, or “modest,” as the justices would like to think. Each of the opinions leaves out a critical step of reasoning — the majority in its failure to specify the enumerated power(s) from which the challenged law arose, or whether a link to an enumerated power was required under the Constitution; the concurrences in their respective failures to reconcile their standards of review with the Court’s precedent and historical practices, and the dissent in its failure to disclose either the default rule it was employing or its basis in precedent or historical practices. While the tone of each opinion seemed reassuring and modest in tone, the ramifications of each opinion were not. Each of the opinions asserted a basis for judicial review that deviated from the law as it stands and failed to connect the dots or specify each of the steps it took to reach its desired outcome, and that kind of deviation is simply not, whatever else it may be, a decision that can fairly be described as modest.
