

## Legal Theory Blog

"All the theory that fits."

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### Shapiro & Burris on United States v. Comstock

Ilya Shapiro (Cato Institute) & Trevor Burrus (Cato Institute) have posted [Not Necessarily Proper: Comstock's Errors and Limitations](#) (Syracuse Law Review, Vol. 61, 2011) on SSRN. Here is the abstract:

In *United States v. Comstock*, the Supreme Court upheld § 4248 of the Adam Walsh Act, which allows for the civil commitment of federal prisoners deemed “sexually dangerous” for an indefinite period after they’ve completed their sentences. The case 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 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.

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