
REPEALING COMSTOCK[†]

DAVID S. COHEN* & RACHEL REBOUCHÉ**

*Comstockery*¹ presents an important intervention into one of the most pressing abortion issues after [Dobbs v. Jackson Women's Organization](#):² what about the Comstock Act? In their article, Professors Reva Siegel and Mary Ziegler argue that the statute's language, which may seem obvious to a twenty-first century reader, is not actually so. Rather, using meticulous historical research, they show that the [unqualified language banning mailing items that can be used to "produce abortion"](#)³ means that only abortions outside of lawful medical care were banned, when accounting for how the language was used over one hundred fifty years ago when the statute was first adopted and how it has been interpreted since.

As much as we are convinced by the substance of Professors Siegel and Ziegler's argument, we are not convinced that some members of the current federal judiciary will care about such detailed historical analysis when it comes to reading an archaic statute. Instead, we propose the lasting solution to the problem Comstock poses: repeal.

I. REVIVING COMSTOCK

Since a majority of the Supreme Court overturned *Roe v. Wade*, abortion's legality has become a matter of state law. At present, [thirteen states ban abortion entirely \(with some permitting only very narrow exceptions\), and another eight states ban abortion prior to viability](#), ranging from 6 weeks to 18 weeks.⁴

[†] An invited response to Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751.

* Professor of Law, Drexel University Thomas R. Kline School of Law.

** Kean Family Dean and the Peter J. Liacouras Professor of Law at Temple University Beasley School of Law.

¹ Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751&download=yes.

² 597 U.S. 215 (2022).

³ Comstock Act of 1873, 18 U.S.C. § 1461.

⁴ *After Roe Fell: Abortion Laws by State* fig. 1, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited Oct. 23, 2024) [<https://perma.cc/WJW6-U6F3>].

Abortion remains legal in the rest of the country, through viability or even beyond. And, to the surprise of many, abortion numbers have paradoxically gone up since *Roe* fell. There are many explanations for this phenomenon, but all in all, the best research demonstrates that [abortion has increased approximately 10%](#),⁵ despite it being illegal or heavily restricted in almost half the country.

Lurking in the background, however, has been the Comstock Act. This law, which prohibits using the mail, any express mail service, or any interactive computer service to send any “thing designed, adapted, or intended for producing abortion,” threatens abortion access in every state, even where it remains legal. Revivalists, as *Comstockery* details, argue that this language prohibits mailing not just abortion pills but also instruments and equipment used in procedural abortion. The clearest example of this is in [an amicus brief](#)⁶ to the Supreme Court in which a leading antiabortion group asserted that the Comstock Act bans mailing “abortion drugs (or devices or equipment).” [A separate amicus brief](#),⁷ signed by 145 Republican members of Congress, made the same argument in the same case. If this interpretation were to ever gain traction, all abortion nationwide would be at risk because abortion providers do not grow pills or other supplies in their backyard; everything they use, whether for medication abortion or procedural abortion, goes through the mail, express mail, or an interactive computer service.

For now, abortion providers can rely on [the Biden Administration’s interpretation of the law as applying only to abortion with intent to act unlawfully](#),⁸ which follows court decisions from almost one hundred years ago. However, given the clear support for a much broader interpretation from the antiabortion movement writ large and the Republican party more specifically, if Trump becomes President, the risk of Comstock being enforced as a de-facto abortion ban is real. The [much-discussed Project 2025](#)⁹ urges a Republican-led Department of Justice to enforce Comstock against “providers and distributors” of medication abortion.

Comstockery offers a compelling defense to such claims. Professors Ziegler and Siegel muster detailed historical evidence to show that the broad

⁵ #WeCount, SOC’Y OF FAM. PLAN., <https://societyfp.org/research/wecount/> [<https://perma.cc/38K4-XV4R>] (last visited Oct. 23, 2024).

⁶ Brief for the American Center for Law and Justice as Amicus Curiae Supporting Respondents at 2-6, *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) (Nos. 23-235 & 23-236).

⁷ Brief for 145 Members of Congress as Amici Curiae Supporting Respondents at 19-22, *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) (Nos. 23-235 & 23-236).

⁸ Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C., 20-22 (Dec. 23, 2022), <https://www.justice.gov/olc/opinion/application-comstock-act-mailing-prescription-drugs-can-be-used-abortions>.

⁹ PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 562 (2023), https://static.project2025.org/2025_mandateforleadership_full.pdf (last visited Oct. 23, 2024).

interpretation of Comstock is not supported by the understanding of the language from the time of Comstock's adoption. Contrary to the argument that modern revivalists make, that the phrase "producing abortion" does not have any words limiting its force to unlawful abortion, *Comstockery* shows that this language was understood by Anthony Comstock himself and others at the time as applying only to abortion outside the doctor-patient relationship. In other words, the Comstock Act, properly interpreted based on language used at its adoption, does not apply broadly. This interpretation helps elucidate why this law, like others criminalizing adultery or extramarital sex, has been relegated to the history books.

II. HISTORY AND TRADITION AFTER *DOBBS*

We have reason to believe, however, that some courts will not find Siegel and Ziegler's arguments as persuasive as we do. In fact, we have concrete and contemporary evidence that motivated antiabortion judges will ignore history and tradition to enact an abortion ban.

In *Dobbs*, Justice Alito's majority opinion relied heavily on the assertion that most states' abortion laws at the time of the adoption of the Fourteenth Amendment prohibited abortion. He wrote that "[b]y 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."¹⁰ To support this assertion, he included [an appendix](#)¹¹ to the opinion with the language of every statute from 1868 that banned abortion. For the majority of the Supreme Court, the straightforward language of these abortion bans proved the point that abortion was banned in the "supermajority" of states in 1868.

But it's not that simple. As [Professor Aaron Tang has shown in his own meticulous historical analysis](#),¹² "as many as 12 of the 28 states on the majority's list actually continued the centuries-old common law tradition of permitting pre-quickenings abortions." Professor Tang walks through several different categories of states to prove this point. Some states, such as Alabama, had extant state court interpretations of their abortion statutes that limited them to post-quickenings abortions.¹³ Other states, such as Louisiana, Nebraska, and New Jersey, limited their abortion provisions to dangerous methods of abortion only.¹⁴ Yet others, such as California, Illinois, and Nevada, had a long history of non-enforcement of their statute.¹⁵ Oregon had prosecutors who announced

¹⁰ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 248 (2022).

¹¹ *Id.* at 302-30.

¹² Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1128 (2023).

¹³ *Id.* at 1129.

¹⁴ *Id.* at 1135.

¹⁵ *Id.* at 1148-49.

publicly that pre-quickenings abortions were not a crime in the state.¹⁶ In other words, the history of these statutes, at the time they were in force, shows that, for a significant number of the statutes cited by Justice Alito, abortion was not, in fact, “a crime even if it was performed before quickening.”¹⁷ And yet, Justice Alito and the majority of the Court ignored this evidence of the meaning of these statutes at the time they were adopted.

With respect to the Comstock Act, we have seen similar lack of interest in the meaning of the language at the time of adoption. At the [oral arguments](#)¹⁸ in the recent case, *FDA v. Alliance for Hippocratic Medicine*,¹⁹ both Justices Thomas and Alito asked questions that relied on a reading of Comstock’s text based on modern understandings of the statute’s language. Justice Thomas posited in a question to the intervening drug company that “the statute doesn’t have the sort of safe harbor that you’re suggesting and it’s fairly broad, and it specifically covers drugs such as yours.”²⁰ And Justice Alito repeatedly asked the Solicitor General whether the FDA should have considered Comstock, what he called “a prominent provision” that’s “not some obscure subsection of a complicated obscure law.”²¹

Nothing in their questions indicates that they understood the historical significance of the Act’s language. Of course, we can’t rule out the possibility that they would read the evidence in *Comstockery* and be convinced to follow Professor Siegel and Ziegler’s analysis. However, the majority opinion in *Dobbs* and the oral argument questions about Comstock do not give us much confidence.

III. REPEALING COMSTOCK

Thus, despite the persuasive case made by Professors Siegel and Ziegler, we should not lose sight of the threat that the Comstock Act poses. Rather, repeal of the Comstock Act, in part or in whole, is the only way to truly stymie revivalists’ efforts.

To that effect, the Stop Comstock Act was introduced in June 2024 by Senators Tina Smith (D-Minn.), Elizabeth Warren (D-Mass.), Catherine Cortez Masto (D-Nev.), and co-sponsored by 18 additional senators. The bill [removes the abortion-related sections](#)²² of Comstock, rather than repealing the whole Act.

¹⁶ *Id.* at 1138.

¹⁷ *Dobbs*, 597 U.S. at 248.

¹⁸ Transcript of Oral Argument, *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) (No. 23-235, 23-236).

¹⁹ 602 U.S. 367 (2024).

²⁰ Transcript of Oral Argument, *supra* note 18, at 49.

²¹ *Id.* at 27.

²² Dan Diamond & Caroline Kitchener, *Democrats Seek to Repeal Comstock Abortion Rule, Fearing Trump Crackdown*, WASH. POST,

Also in June, Representatives Bush (D-Mo.), Balint (D-Vt.), Escobar (D-Tex.), Scanlon (D-Pa.) and Coleman (D-N.J.) [introduced a House bill](#)²³ to repeal the abortion language in Comstock.

With the filibuster in place, and no guarantee of a Democrat-led Congress following this election, repeal may not succeed soon. Repeal efforts are not without risks, though we believe the risks are worth taking. For one, a bill could undermine the argument that the Act has been in disuse and should not be enforced because it is dead letter, regardless of the fact that it continues to appear in the U.S. Code. That argument might have had more weight while *Roe* was in force and bans on pre-viability abortion were unconstitutional, so enforcement was futile. But after *Roe*'s reversal, we remain skeptical that the existence of a repeal bill would be *the* reason that antiabortion actors believe that Comstock should ban abortion post-*Dobbs*.

For another, a failed repeal bill could signal Congressional intent to revive and enforce the law. Insofar as revivalists might point to a failed repeal before sympathetic courts to argue that Comstock lives, clearly stating the legislative intent in repealing Comstock could be an important countermeasure. At present, repeal bills do not include a preamble or a set of legislative findings. Future revisions or iterations of repeal bills could include language stating that sponsors do not accept, by proposing this legislation, that Comstock should be enforced as the revivalists claim and, were it ever, should be given the now-century old interpretation of applying to unlawful abortions. Indeed, this would be an opportunity to incorporate the insights of *Comstockery* into repeal efforts, documenting that the revivalist interpretation is inconsistent with the text's original understanding as well as an end run around the democratic process for what revivalists ultimately seek—a nationwide ban on abortion.

CONCLUSION

[We know that repeal is an uphill battle](#).²⁴ In the meantime, other strategies can fill the void until repeal becomes a reality: public awareness and voting. Every effort must be made to educate people about the unpopular Comstock Act and to have people vote accordingly. Publicly campaigning on the current repeal bills could do just that.

<https://www.washingtonpost.com/health/2024/06/20/comstock-abortion-repeal-tina-smith-senate/> (last updated June 20, 2024, 5:00 PM).

²³ Press Release, U.S. Representative Becca Balint, Rep. Becca Balint Announces the Stop Comstock Act to Repeal Antiquated Law that Could Be Misused to Implement National Abortion Ban (June 20, 2024), <https://balint.house.gov/news/documentsingle.aspx?DocumentID=321> [<https://perma.cc/697F-G5MM>].

²⁴ David S. Cohen, Greer Donley & Rachel Rebouché, *Opinion: It's Too Dangerous to Allow This Antiquated Law to Exist Any Longer*, CNN, <https://www.cnn.com/2024/01/22/opinions/abortion-threat-comstock-act-must-be-repealed-cohen-donley-rebouche/index.html> (last updated Jan. 22, 2024, 3:24 PM).

Ideally, the lessons of *Comstockery* would permeate the judiciary; however, we cannot rely on *Comstockery* alone. Instead, we must rely on other strategies for now: educate, vote, and repeal.