REPEALING COMSTOCK[†]

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INTRODUCTION

Comstockery[1] presents an important intervention into one of the most pressing abortion issues after *Dobbs v. Jackson Women's Health Organization*:[2] the revival of the Comstock Act, an 1873 obscenity law that makes mailing anything that "produces" an abortion a federal crime. 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, based on how the language was used over one hundred fifty years ago when the statute was first adopted and how it has been interpreted since, that the unqualified language banning mailing items that can be used to "produce abortion" never applied to abortions provided by a physician.[3]

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

To make this case, this short response to *Comstockery* proceeds in three parts. First, we review why Comstock is a pressing issue and how *Comstockery* responds to this urgent matter. Second, despite agreeing with the analysis in *Comstockery*, we posit that *Dobbs* and the recent case of *FDA v. Alliance for Hippocratic Medicine*[4] teach us that we cannot rely on the federal courts to apply both the history and interpretation of the Act that *Comstockery* so masterfully illustrates. Third, we argue that the only way to foreclose the radical

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[†] 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 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751.

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[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 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751.

[2] 597 U.S. 215 (2022).

[3] *See* 18 U.S.C. § 1461.

[4] 602 U.S. 367.

reinterpretation of the Comstock Act is to repeal it. We conclude by explaining that while we wait for the conditions in which repeal will be possible, we must educate and vote as if Comstock is the threat the revivalists say it is.

REVIVING COMSTOCK

Since a majority of the Supreme Court overturned *Roe v. Wade*, abortion's legality in this country has become a matter of state law. At present, thirteen states ban abortion entirely (some subject to very narrow exceptions), and another eight states ban abortion prior to viability, ranging from six weeks to eighteen weeks.[5]

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, including increased access to telehealth and mailed medication abortion, new avenues for care by abortion providers and supporters, decreased price for abortion pills, intense efforts to support abortion travelers moving across state lines, and abortion-supportive policy reforms in states where abortion remains legal.[6] All in all, the best research we have demonstrates that abortion increased approximately 10% nationwide,[7] despite it being illegal or heavily restricted in almost half the country.

Lurking in the background, however, is 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.[8] Section 1461 of the U.S. Code declares as non-mailable matter every "article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use," and every "article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose."[9]

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 to the Supreme Court in which a leading antiabortion group argued that the Comstock Act bans

[5] *After Roe Fell: Abortion Laws by State* fig. 1, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/WJW6-U6F3] (last visited Dec. 11, 2024).

[6] *See* DAVID S. COHEN & CAROLE JOFFE, AFTER *DOBBS*: HOW THE SUPREME COURT ENDED *ROE* BUT NOT ABORTION (forthcoming Mar. 2025).

[7] *#WeCount*, SOC'Y OF FAM. PLAN., https://societyfp.org/research/wecount/ https://perma.cc/38K4-XV4R (last visited Dec. 11, 2024).

[8] *Id*.

[9] *Id*.

mailing "abortion drugs (or devices or equipment)."[10] A separate amicus brief, signed by 145 Republican members of Congress, made the same argument in the same case.[11] And the much-discussed Project 2025 instructs a Republican-led Department of Justice to enforce Comstock against "providers and distributors" of medication abortion.[12]

The revivalist interpretation contravenes federal court jurisprudence going back almost a century.[13] Nonetheless, revivalists urge that the Department of Justice and federal courts apply Comstock to effectively ban abortion nationwide, without Congress having to pass a new law. All abortion access everywhere would be at risk under this interpretation because 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.

Abortion providers have relied on the Biden Administration's interpretation of the law as applying to unlawful abortion only.[14] However, given the clear support for a much broader interpretation from the antiabortion movement writ large and the Republican party specifically, the second Trump Administration could attempt to enforce Comstock as a de-facto abortion ban, despite Trump's campaign pledge to leave the Act alone.[15]

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[10] 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).

[11] 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).

[12] MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE PROJECT 2025 562 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_mandateforleadership_full.pdf.

[13] *See* United States v. One Package, 86 F.2d 737, 739 (2d Cir. 1936) (holding that the Comstock Act's design "was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients."); *see also* Davis v. United States, 62 F.2d 473, 475 (6th Cir. 1933) (explaining that the Comstock Act "must be given a reasonable construction").

[14] 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.

[15] We originally wrote this piece before the 2024 election but provided final edits in the weeks afterward. What we write here remains true despite Donald Trump winning the presidency and Republicans taking control of both houses of Congress. Repeal is an even longer shot, but we believe it should remain the focus of advocacy, though obviously the horizon for this is further away now. Keeping repeal front and center in the abortion debate not only can remind the public of the consequences of Comstock enforcement, but also of President-elect Trump's campaign promise that he has no intention of enforcing the Comstock Act. Alice Miranda Ollstein, *'It's Not a Pro-Life Position': Anger After Trump Says No to*

Comstockery offers a compelling defense to such an approach. Professors Siegel and Ziegler offer detailed historical evidence to show that revivalists' interpretation of Comstock has never been supported by the language or the interpretation of Comstock since its inception. Contrary to the argument that the modern revivalists are making, that the language "producing abortion" does not have any words limiting its force to unlawful abortion, *Comstockery* shows that this language was understood by Anthony Comstock 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 the time of its adoption, does not apply broadly.

If adopted by the courts, this interpretation would go a long way to understanding why this law, like others criminalizing adultery or extramarital sex, has been relegated to the history books.

HISTORY AND TRADITION AFTER *DOBBS*

Despite Professors Siegel and Ziegler's compelling evidence, we have reason to believe that some courts will not find Siegel and Ziegler's arguments as persuasive as we do. In fact, we have contemporary examples that judges with explicit antiabortion views will ignore history and tradition to approve of using the Comstock Act as a de facto national 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."[16] To support this assertion, he included an appendix[17] to the opinion with the language of every statute from 1868 that banned abortion. To Justice Alito and 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.

Yet the history is not straightforward at all. As Professor Aaron Tang has shown in his own meticulous historical analysis, "as many as 12 of the 28 states on the majority's list actually continued the centuries-old common law tradition of permitting pre-quickening abortions."[18] 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-quickening abortions.[19] Other states, such as Louisiana, Nebraska, and

Comstock, POLITICO (Aug. 20, 2024), https://www.politico.com/news/2024/08/20/trump-comstock-enforcement-00175068.

[16] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 248 (2022).

[17] *Id.* at 302-30.

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

[19] *Id.* at 1129.

New Jersey, limited their abortion provisions to dangerous methods of abortion only.[20] Others, such as California, Illinois, and Nevada, had a long public history of non-enforcement of their statute.[21] Oregon had prosecutors who announced publicly that pre-quickening abortions were not a crime in the state.[22] 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."[23] 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.

Professor Tang's detailed analysis of the historical context for these abortion bans and its importance to statutory interpretation is in conversation with the historical analysis provided by Professors Siegel and Ziegler of the Comstock Act. As Professor Tang explains, this should matter in how we, as modern readers looking back, discern the meaning of these statutes. As Tang explains,

> Few modern readers would think the phrase [in the Alabama statute] "any pregnant woman" actually refers only to *some* pregnant women—namely, those whose fetuses had quickened. But if one is committed to an originalist approach to legal interpretation, faithful historical analysis forbids one to view historical sources from a present-day lens.[24]

Rather, Tang argues, quoting Professor Lawrence Solum, that a modern reader must "immers[e] oneself in the 'linguistic and conceptual world of the authors and readers' of the legal provision being studied."[25]

Although purporting to hew to an originalist methodology, the majority in *Dobbs* did *not* immerse itself in the linguistic and conceptual realities of the abortion bans in place at the time of the ratification of the Fourteenth Amendment. Rather, Justice Alito's analysis of these bygone statutes started and ended with a literal, decontextualized reading of the language in the law applying their current understanding of the laws' words. When considering the Comstock Act, would current Justices ignore historical and contextual understandings of statutory language as they did in *Dobbs*?

More recently, we have seen a lack of interest in the meaning of Comstock's language at the time of adoption in the case *FDA v. Alliance for Hippocratic Medicine*.[26] In that case, the antiabortion group Alliance for Hippocratic Medicine sued to remove mifepristone, the first drug in a medication abortion, from the market by claiming that it was unlawful for the FDA to approve the

[20] *Id.* at 1135.

[21] *Id.* at 1148-49.

[22] *Id.* at 1138.

[23] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 248 (2022).

[24] Tang, *supra* note 18, at 1129.

[25] *Id.*

[26] FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024).

drug in the first place—in 2000, about a quarter of a century ago.[27] Judge Matthew Kaczmaryk agreed; in April 2023, the district court issued a preliminary injunction suspending mifepristone's approval.[28] On emergency appeal, the Fifth Circuit stayed the district court's suspension of mifepristone's approval, but affirmed the injunction's suspension of FDA action starting in 2016.[29] Before the injunction could take effect, the Supreme Court stayed the order until final disposition.[30]

The Fifth Circuit went on to hold that the plaintiffs likely failed to timely challenge the 2000 FDA approval and likely failed to plead an injury regarding mifepristone's generic approval in 2019.[31] However, the court found that the agency's changes to the regulation of mifepristone after 2016, including lifting the in-person pickup rule, were arbitrary and capricious, and thus unlawful.[32] At the Supreme Court, a unanimous Court held that Alliance did not have standing to bring its claims because neither the organization nor its members could show that the FDA's actions caused them actual injury. But the issues at the heart of the case are unresolved.[33]

One of the substantive claims made from the start of the case involved the Comstock Act. Both the district court and the Fifth Circuit addressed Comstock and the possibility that the FDA could not have lifted the in-person pickup requirement if the Comstock Act prohibits mailed pills. At the district court level, Judge Kaczmaryk ruled that the "plain text" of the Comstock Act prevailed and that it was a clear prohibition on mailing all items that can produce abortion without any qualification. He looked at modern amendments to the law but not what the law meant at the time it was initially adopted in 1873.[34] On appeal to the Fifth Circuit, in a separate concurring opinion, Judge James Ho did not consider the original understanding of the terms of the Act. Rather, he looked only at the current language, a series of older cases applying it, and subsequent attempts by Congress to change the law.[35]

At the *Alliance* oral arguments before the Supreme Court,[36] both Justices Thomas and Alito asked questions about Comstock that relied on a reading of the text based on modern understandings of the statute's language. Justice Thomas posited in a question to the drug company that "the statute doesn't have

[27] *Id.*

[28] All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023).

[29] All. for Hippocratic Med. v. FDA, 78 F.4th 210 (5th Cir. 2023).

[30] Danco Lab'ys, L.L.C. v. All. for Hippocratic Med., 143 S. Ct. 1075 (2023).

[31] All. for Hippocratic Med. v. FDA, 78 F.4th 210 (5th Cir. 2023).

[32] *Id.*

[33] FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024).

[34] All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 541-42 (N.D. Tex. 2023).

[35] All. for Hippocratic Med. v. FDA, 78 F.4th 210, 267-70 (5th Cir. 2023) (Ho, J., concurring).

[36] Transcript of Oral Argument at 26-27, 48-49, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (No. 23-235).

the sort of safe harbor that you're suggesting, and it's fairly broad, and it specifically covers drugs such as yours."[37] 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."[38]

The treatment of the Comstock Act at the various levels of *Alliance* indicates that none of these judges, who consistently invoke history and tradition to assist in interpretation, felt that understanding the history of the Comstock Act mattered in interpreting its language today. Of course, we cannot rule out the possibility that a future case would cite the evidence in *Comstockery* and follow Professor Siegel and Ziegler's analysis. However, the majority opinion in *Dobbs* and the *Alliance* litigation, which is already being repackaged for courts to rehear,[39] do not give us much confidence.

REPEALING COMSTOCK

Thus, though being persuaded by Professors Siegel and Ziegler about the meaning of the text of the Comstock Act, the Comstock Act nonetheless poses a threat. Rather, repeal of the Comstock Act, in part or in whole, is the only way to stymie revivalists' efforts.

To that end, 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[40] of Comstock, rather than repealing the whole Act. 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[41] to repeal the abortion language in Comstock.

With the filibuster in place, and Republicans set to control both houses of Congress starting in January 2025, repeal is unlikely to succeed soon. And 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 a dead letter, regardless of its appearance 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, making enforcement futile. But after *Roe*'s reversal, we remain skeptical that the

[37] *Id* at 49.

[38] *Id.* at 27.

[39] *See* Complaint, Missouri v. FDA, No. 2:22-cv-00223-Z (N.D. Tex. 2024).

[40] Dan Diamond & Caroline Kitchener, *Democrats Seek to Repeal Comstock Abortion Rule, Fearing Trump Crackdown*, WASH. POST, https://www.washingtonpost.com/health/2024/06/20/comstock-abortion-repeal-tina-smith-senate/ (last updated June 20, 2024).

[41] 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].

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. Both Judge Kaczmaryk and Judge Ho used this argument in their opinions to support their expansive interpretations of the Comstock Act as a ban on mailing all things producing abortion. For example, to support his interpretation, Judge Ho reviewed all of the bills that have been introduced in past Congresses that attempted to limit the Comstock Act and concluded that, with each failing, "Congress declined to remove 'abortion' from the statute. To the contrary, it chose to repeal only the Act's prohibition on the shipment of contraceptives."[42] To Judge Ho, the failure of these repeal efforts was further evidence that the Act had a broad meaning now.

Insofar as revivalists might adopt Judge Ho's position, 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 revivalists claim.

If future legislators were to choose to include such a preamble, text like the following could make clear the history and interpretation of Comstock:[43] "The Comstock Act was originally adopted in 1873, when women could not vote, and has been an unconstitutional encroachment on fundamental rights since inception. The Comstock Act was never intended to interfere with lawful medical care and has never been interpreted to cover lawful abortions, as defined by state law and as explained by the Office of Legal Counsel's 2022 memorandum. Nevertheless, since *Roe v. Wade* was overturned, some antiabortion advocates have argued that the Comstock Act applies criminal punishment to all items that can bring about an abortion regardless of legality and without exception. This interpretation of the Comstock Act is inconsistent with the text's original understanding as well as all precedent interpreting its language. Though repeal of Comstock should not be necessary given the Act's history and interpretation, repeal provides a safeguard against applications of the Act that could prohibit abortion even in states where it is legal, a de-facto ban without Congressional action and outside of democratic processes, and encroachment on the privacy rights of all people. Removing the Comstock Act's abortion language is necessary in order to prevent this deeply flawed law from being interpreted and applied incorrectly by courts and other state actors today." Such language would be an indication that the legislators supporting the bill do not agree with the revivalists and that a failed repeal effort is not an indication that the revivalists claim have prevailed.

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[42] *All. for Hippocratic Med.*, 78 F.4th at 269.

[43] We developed this language with Professor Greer Donley and have previously shared it with legislators. So far, it has not been included in repeal bills.

A preamble, moreover, would also 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,[44] even more so after the 2024 election. In the meantime, and until repeal becomes a reality, public awareness and voting are crucial. Polls indicate that the public, when informed about the issue, does not want Comstock to be interpreted in this manner; every effort must be made to educate people about the Comstock Act and the risk it poses from the revivalists. Then people need to vote accordingly to put people who do not want Comstock revived in office.

Ideally, the lessons of *Comstockery* would permeate the executive branch and the judiciary, but we cannot rely on *Comstockery* alone. Other strategies must make salient what *Comstockery* teaches us: educate, repeal, and vote.

[44] 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 [https://perma.cc/VLG5-B66B] (last updated Jan. 22, 2024, 3:24 PM).