

ABORTION AND THE MAILS: CHALLENGING THE APPLICABILITY OF THE COMSTOCK ACT LAWS POST-DOBBS

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18 U.S.C. §§ 1461 and 1462, originating in the Comstock Act of 1873, prohibit the mailing and importation of any abortion-related material within the United States. Whatever protection there was against the application of these laws by the government and private individuals from the constitutional right to an abortion was overturned by *Dobbs v. Jackson Women's Health Organization* in 2022. Recent trends from the last year show that conservative lawmakers are now eager to start enforcing the Comstock Act mailing prohibitions; some are relying on the existence of these century-old laws to justify new abortion restrictions. Pushback from the Biden Administration's Office of Legal Counsel suggests that a limiting construction should be read into the Comstock Act statutes so that the prohibition on mailing would apply only to "illegal abortions." This Note engages with the enforcement history of the statutes and criticism of OLC's interpretation to ultimately conclude that the Comstock Act Laws are unenforceable because they are unconstitutionally vague. In doing so, this Note advances a conception of the void for vagueness doctrine that would place greater emphasis on enforcement and fair notice considerations.

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INTRODUCTION

Abortion access depends so much on state law that it is easy for federal laws affecting abortion access to fall out of the spotlight. 18 U.S.C. §§ 1461 and 1462, originating in the Comstock Act of 1873,¹ prohibit the mailing and importation of “obscene” matter. The Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization*² removed the constitutional protections for abortion that the Supreme Court had previously established in *Roe v. Wade*.³ The *Dobbs* ruling thereby reopened the door for modern-day prosecutions under the Comstock Act statutes, which declare “[e]very article or thing designed, adapted, or intended for producing abortion,” and any article or written item advertising or giving information about abortion, to be nonmailable matter.⁴ Section 1461 states in relevant part:

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and [e]very 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 . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.⁵

Given the government’s history of nonenforcement under the statutes, potential private actions under the Comstock Act are more

1. See Comstock Act, ch. 258, 17 Stat. 598 (1873) (“An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use.”).

2. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment.” *Id.* at 2242. Therefore, “procuring an abortion is not a fundamental constitutional right.” *Id.* at 2283.

3. *Roe v. Wade*, 410 U.S. 113 (1973). This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. See, e.g., *id.* at 153.

4. 18 U.S.C. §§ 1461–1462.

5. 18 U.S.C. § 1461 (regulating the mailing of obscene or crime-inciting matter). Part of the statute prohibiting the mailing of papers or writings providing abortion-related information was excerpted. (“Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly... for the procuring or producing of abortion... whether sealed or unsealed.”). *Id.*

concerning.⁶ Sections 1461 and 1462 are Racketeer Influenced and Corrupt Organizations (RICO) predicate acts, meaning that even if an administration chooses not to bring prosecutions, private citizens may still bring a civil cause of action under RICO, which would levy high penalties against any person who violates these laws.⁷

Medication abortions—consisting of a regimen of two drugs, mifepristone and misoprostol, which are approved by the Food and Drug Administration (FDA) to end a pregnancy at up to ten weeks' gestation—now account for more than half the abortions in the United States.⁸ It is becoming more common for these medications to be dispensed via mail, following the 2021 FDA decision that allowed patients to receive the abortion pill by mail.⁹ The *Dobbs* decision gave states the green light to crack down on actions that would enable abortion access in state. With growing uncertainty over which procedures remain legal in which states, and the threat of state prosecutions, people with unwanted pregnancies are increasingly turning to self-managed

6. There have been no prosecutions under the abortion-related articles provision of the law, which is the only part of the statute unrelated to speech that remains on the books. There have been very few non-obscenity prosecutions under 18 U.S.C. § 1461 and related statutes since the mid-1900s. *See infra* Part I(C) (detailing the history of criminal prosecutions under these laws). The Department of Justice does not enforce the part of the statute that applies to speech, due to First Amendment concerns. *See* Letter from Janet Reno, U.S. Att'y Gen., to Albert Gore, Jr., U.S. Sen. President (Feb. 9, 1996) (acknowledging “the [Justice] Department’s longstanding policy to decline to enforce the abortion-related speech prohibitions in § 1462 (and in related statutes)”). An opinion issued by the Office of Legal Counsel on December 23 also indicates that the current administration has no interest in pursuing prosecutions for the mailing of abortion pills. *See generally OLC Opinion infra* note 14, at 2. Therefore, the real current threat of these statutes is from private action and other forms of secondary enforcement. *See infra* Part II(A).

7. *See* 18 U.S.C. § 1961 (defining “racketeering activity” as any act which is indictable under any of certain listed provisions of title 18, United States Code, including §§ 1461–1465). *See also infra* Part II(A).

8. Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> [https://perma.cc/6WZS-6YPN] (Dec. 1, 2022); Amanda D'Ambrosio, *Is the 'Abortion Pill' Restricted by State Bans?*, ABC NEWS (July 1, 2022), <https://abcnews.go.com/Health/abortion-pill-restricted-state-bans/story?id=86069230> [https://perma.cc/2W7E-UAHS].

9. *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex> [https://perma.cc/DTV2-KWWW] (Jan. 4, 2023); Pam Belluck, *F.D.A. Will Permanently Allow Abortion Pills by Mail*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html> (on file with the *Columbia Human Rights Law Review*). The FDA previously required in-person receipt of the abortion pills.

abortions, using abortion pills shipped from international telehealth providers.¹⁰

The distribution of mifepristone and misoprostol would assumptively fall under the purview of 18 U.S.C. §§ 1461 and 1462, since they are pills “intended for producing abortion.”¹¹ If courts follow the lead of the district court in *Alliance for Hippocratic Medicine v. Food and Drug Administration* and deem the Comstock Act enforceable, without the constitutional defense of abortion as a fundamental right, many standard activities currently done by abortion patients and providers would become federal crimes.¹² Although the statutes would have a doctor prosecuted for sending a woman an abortion pill by mail, the plain text of the statutes would also bar a hospital from receiving the medical instruments necessary to provide abortions from out-of-state suppliers.¹³

This Note will investigate the potential present-day application of 18 U.S.C. §§ 1461 and 1462 by both the government and private citizens. It affirms the Office of Legal Counsel’s (OLC) recent Memorandum Opinion that judicial interpretation of sections 1461 and 1462 requires the sender to have the intent that the prohibited material be used unlawfully—in other words, for an “illegal abortion.”¹⁴ Part I will lay out the history and background of the statutes at issue, including an overview of the case law that will provide context for the potential current enforceability of the laws. Part II will demonstrate why the possibility that the laws could be enforced is such a problem post-*Dobbs*. Part III will address the current administration’s response to this issue by evaluating OLC’s Opinion and relevant criticism. Part III concludes by determining that the narrow judicial construction of an “illegal abortion” should be adopted when interpreting the Comstock Act

10. Spencer Kimball, *Women in States that Ban Abortion Will Still be Able to Get Abortion Pills Online from Overseas*, CNBC (June 27, 2022), <https://www.cnbc.com/2022/06/27/women-in-states-that-ban-abortion-will-still-be-able-to-get-abortion-pills-online-from-overseas.html> [<https://perma.cc/6CU9-6JM2>].

11. 18 U.S.C. §§ 1461–1462. See also *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions*, *infra* note 14 at 2 n.5 (making this same assumption).

12. All for Hippocratic Med. v. U.S. Food and Drug Admin., No. 2:22-cv-00223, 2023 U.S. Dist. LEXIS 61474, at *53–54 (N.D. Tex. Apr. 7, 2023) (order granting preliminary injunction in part) (“[T]he Comstock Act plainly forecloses mail-order abortion.”).

13. “Every article or thing *designed, adapted, or intended* for producing abortion.” 18 U.S.C. § 1461 (emphasis added).

14. Appl. of the Comstock Act to the Mailing of Prescr. Drugs That Can Be Used for Abortions, 46 Op. O.L.C. __, slip op. at 1 (Dec. 23, 2022) [hereinafter *OLC Opinion*]. Responding to Mem. from Thomas J. Marshall, Gen. Couns., USPS, to Christopher Schroeder, Assistant Att’y Gen., Off. of Legal Counsel, Re: Request for an Interp. of 18 U.S.C. § 1461 (July 1, 2022) [hereinafter *USPS Request*].

statutes. However, in Part IV, this Note will go beyond OLC's Opinion to argue that, given the legislative and judicial history of these statutes, these statutes should be challenged for being unconstitutionally vague. One does not even have to adopt OLC's construction of the statutes' applicability to reach this conclusion. While OLC's construction is convincing, it has already received significant pushback. This Note will demonstrate why this does not matter; the statutes can be challenged for vagueness, no matter whether one accepts OLC's interpretation or not.

I. BACKGROUND

This Part will provide relevant background on the history of the Comstock Act laws, which were primarily enforced from the 1860s to the early 1900s. The parts of these laws relating to abortion have not been significantly amended since their codification. This Part will start by briefly explaining why the Comstock Act laws leapt into significance after the *Dobbs* decision. It will then provide historical and legislative context for the Comstock Act to set the scene for its potential current enforceability.

A. Abortion and the Mail after *Dobbs*

On June 24, 2022, the Supreme Court eliminated the federal constitutional right to abortion, overruling the landmark decisions *Roe v. Wade*¹⁵ and *Planned Parenthood v. Casey*.¹⁶ This decision, *Dobbs v. Jackson Women's Health Organization*, almost immediately brought up considerations of medication abortions and the mail.¹⁷ Although *Dobbs* did not make any determination as to the legality of abortion on its own, it removed the Constitution as a possible defense against any laws that restrict abortion access.¹⁸ In the 50 years since *Roe*, much about abortion practice

15. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to an abortion is protected by the Constitution).

16. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that abortion restrictions that place undue burden on persons seeking abortions are unconstitutional).

17. See, e.g., Ruth Reader, *Galvanized by Dobbs, More Doctors Are Distributing Abortion Pills By Mail*, POLITICO (Sep. 21, 2022), <https://www.politico.com/news/2022/09/21/dobbs-abortion-pills-roe-00057877> [<https://perma.cc/Z8RY-83YP>] (discussing recent moves by doctors to mail abortion medication to their patients).

18. *U.S. Supreme Court Takes Away the Constitutional Right to Abortion*, CTR. FOR REPRODUCTIVE RIGHTS (Jun. 24, 2022), <https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/> [<https://perma.cc/4ZGY-99F5>]. It is easy to imagine a constitutional challenge against 18 U.S.C. § 1461 or § 1462 under *Roe* or *Casey*. See, e.g., *Roe*, 401 U.S. at 177; see also, e.g., *Casey*, 505 U.S. at 874 (holding laws that placed an undue burden on a woman's right to decide to have a pre-viability abortion constitutionally

has changed. Medication abortions have gained acceptance from both abortion patients and providers, and they are dispensed through the mail domestically and internationally. However, the Comstock Act has a broader reach than medication abortions alone. 18 U.S.C. § 1461, if read literally, would encompass much more than the mailing of just abortion pills. Various abortion procedures use medical instruments. It is safe to assume that these are not all produced in-house at abortion clinics and, presumably, most are delivered by mail or even imported from manufacturers in other countries.¹⁹ Medical instruments used for abortion procedures presumptively fall under the statute's prohibition against mailing "article[s] or thing[s] designed, adapted, or intended for producing abortion."²⁰ Therefore, if the statute were read and enforced literally today, it could effectively make all abortion procedures infeasible.²¹

B. The Comstock Act to 18 U.S.C. §§ 1461 and 1462

Anthony Comstock crusaded against what he considered to be the vices of urban life, including obscenity, lotteries, and pornography.²² The first iteration of section 1461 (prohibiting the Mailing of Obscene or Crime-

invalid). Viability refers to the medically-determined point at which a fetus has the potential to survive outside the mother's womb. *See* *Roe v. Wade*, 410 U.S. 113, 160 (1973), overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), and holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Roe* and *Casey* were overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) and *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016). In light of *Dobbs*, it is difficult to argue that the federal government could not restrict the mailing of abortion-related articles based on any kind of substantive constitutional right. Take "articles" to mean physical objects, not anything that might be conceived as speech. This Note will not be addressing any arguments that the mailing of abortion-related material that could be conceived as speech might be protected by the First Amendment.

19. *See* HPSRX Enterprises Home Page, <https://www.hpsrx.com/mva-products> (last visited Feb. 13, 2023) (a U.S. distributor of Manual Vacuum Aspirators, that is "licensed to ship to all 50 states"); *see also* *Safe abortion: technical and policy guidance for health systems (Second Edition)*, WORLD HEALTH ORG, 71 (2012), https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf (stating that "[e]ach country has specific regulatory requirements for the registration and importation of drugs and medical equipment such as MVA instruments.").

20. 18 U.S.C. § 1461.

21. *See* David S. Cohen, Greer Donley, & Rachel Rebouché, *Abortion Pills* (Draft 7/6/2023), 76 STAN. L. REV. __ 23–24 (forthcoming 2024). ("[T]he law's plain terms could effectively ban all abortion nationwide because almost every pill, instrument, or other item used in an abortion clinic or by a virtual abortion provider moves through the mail or an express carrier at some point").

22. David Ray Papke, *Anthony Comstock*, FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1265/anthony-comstock> [<https://perma.cc/E3LR-PUFM>].

Inciting Matter) largely drew upon the Comstock Act of 1873.²³ Although the text of the current law only prohibits the mailing of abortion-related articles and writings, until 1971, 18 U.S.C. §§ 1461 and 1462 also prohibited the mailing of articles and writings related to the prevention of conception.²⁴

The original Comstock Act seemed to have intended to make a distinction between lawful and unlawful abortions. The Comstock Bill, as originally introduced in the United States Senate, included the provision “except on a prescription of a physician in good standing, given in good faith,” after “any article or medicine for the prevention of conception, or for causing abortion.”²⁵ When the Comstock Act was debated in the Senate two days later, this provision disappeared and was replaced by the word “unlawful” before abortion but not contraception. So, section 1 of the original 1873 Comstock Act prohibited in part the sale, distribution, or possession of “any drug or medicine, or any article whatever, for the prevention of conception, or for causing *unlawful* abortion.”²⁶ This version was approved on March 3, 1873. In December of 1873, the Comstock Act became § 3893 of the Revised Statutes.²⁷ The word “unlawful” before abortions was not included in this

23. An Act for the Suppression of Trade In, and Circulation of, Obscene Literature and Articles of Immoral Use, colloquially referred to by the name of its fervent advocate, supporter, and subsequent enforcer, Anthony Comstock.

24. Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. (1973); see H.R. Rep. No. 91-1472, at 3 (1970) (“preventing conception” was struck out from 1461 and 1462 where it appeared before “causing unlawful abortion” and “procuring abortion”). This Act was passed “in order to conform to today’s views and standards of acceptability.” H.R. Rep. No. 91-1105, at 4 (1970). The medical distinction between contraception and abortion is worth making to distinguish between the two types of prosecutions that were historically possible under 18 U.S.C. §§ 1461 and 1462. Contraception is “any method, medicine, or device used to prevent pregnancy”. *Birth Control Methods*, OFFICE ON WOMEN’S HEALTH, U.S. DEPT. HEALTH & HUM. SERVICES (last updated Dec. 29, 2022), <https://www.womenshealth.gov/a-z-topics/birth-control-methods> [https://perma.cc/2TTS-RAYN]. Abortion is defined as the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus. Abortion, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/abortion> [https://perma.cc/ZE5Q-RP2G] (last visited Feb. 15, 2023).

25. CONG. GLOBE, 42nd Cong., 3rd Sess. 1436 (1873).

26. 1873 Act § 1, ch. 258, 17 Stat. at 598–99 (emphasis added); see also CONG. GLOBE, 42nd Cong., 3rd Sess. 1525 (1873) (emphasis added).

27. Peter H. Flournoy & J. B. O’Donnell, *Private Correspondence and Federal Obscenity Prosecutions*, 4 SAN DIEGO L. REV. 76, 88 (1967).

text.²⁸ 18 U.S.C. §§ 1461 and 1462 include no mention of the word “illegal” today.²⁹

18 U.S.C. § 1462, first codified in 1948 (covering the Importation or Transportation of Obscene Literature), prohibits the transport of obscene material, including “any drug, medicine, article, or thing designed, adapted, or intended for producing abortion,” in interstate or foreign commerce.³⁰ It is derived from section 3 of the 1873 Comstock Act. As with the federal anti-lottery and mail fraud statutes, Congress supplemented their regulation of the transportation of non-mailable matter by deeming such matter “interstate commerce” and prohibiting the interstate carriage of this material by private companies.³¹ Now, section 1462 specifically prohibits the use of an “express company or other common carrier or interactive computer service.”³²

Although 18 U.S.C. § 1461 applies only to the use of the United States Postal Service (USPS), 18 U.S.C. § 1462 encompasses the use of popular private or commercial carriers such as FedEx or United Parcel Service (UPS) to ship prohibited materials interstate.³³ In conclusion, there are effectively two ways to violate the criminal law against mailing what the U.S. Code has deemed to be obscene nonmailable matter—by sending it in the U.S. Mail, in violation of 18 U.S.C. § 1461, or by using any private or commercial express or carrier to send the nonmailable matter interstate, in violation of 18 U.S.C. § 1462.³⁴ Both might be implicated in the routine practice of a medication or non-medication abortion.

28. See 1873 Act § 1, ch. 258, 17 Stat. at 598–99 and Comstock Act, ch. 186, 1878 Stat. 90 (1878), providing the text of the statute when codified in 1873 and the text of the statute after being amended in 1876, both reading every “article or thing designed or intended for the prevention of conception or the procuring of abortion”.

29. 18 U.S.C. § 1461; 18 U.S.C. § 1462.

30. 18 U.S.C. § 1462.

31. *Champion v. Ames*, 188 U.S. 321, 324 (1903).

32. 18 U.S.C. § 1462.

33. See *Champion*, 188 U.S. at 324 (holding that Congress is able to regulate the transportation of non-mailable matter by deeming such matter “interstate commerce” and supplementing the provisions of prior acts to prohibit the carriage of this material by private companies interstate); see also *United States v. McDowell*, 498 F.3d 308, 313 (5th Cir. 2007) (stating that where a charge under § 1461 was inappropriate since the material at issue was delivered by UPS, the government could have brought an action under § 1462: “even though the undercover Postal Inspector received the order both through UPS and the mail, the Government did not charge any of the three defendants with violating 18 U.S.C. § 1462.”).

34. However, it is important to note that the specific text of § 1462 suggests that the materials would actually have to be carried interstate, not just be delivered by an interstate carrier. 18 U.S.C. § 1462 reads “for carriage in interstate or foreign commerce,” not “delivered by any private or commercial interstate carrier,” like 18 U.S.C. § 1341 (the

1. The Contraception Mail Prohibition Removal Act

OLC's construction of the Comstock Laws' reach today builds upon the reasonability exception that courts established with respect to the part of the laws that prohibited the mailing of contraceptive-related articles. This section will detail the origins of this exception and the removal of contraception prohibitions from the federal statutes.

The Contraception Mail Prohibition Removal Act removed prohibitions on importing, transporting, and mailing articles for preventing conception.³⁵ The Act applied to sections 1462 and 1461, as well as a similar mailing prohibition in the Tariff Act of 1930.³⁶ It was passed following several decades of judicial decisions that had constrained the enforceability of the federal prohibitions, and it had the approval of the Department of Health, Education and Welfare, the Postmaster General, and the Departments of Commerce, State, Labor, and Treasury.³⁷ When this bill was read in the United States House of Representatives, where it passed with no objection, former U.S. Representative John W. Byrnes (R-WI) stated that “[p]resent law imposes severe penalties on the importation, transportation, and mailing of contraceptive articles and advertisements of such articles even when they are requested by doctors, nurses, or individuals with clinics.”³⁸ This represents an understanding that, notwithstanding the prior judicial decisions, some still thought of the federal laws as having a prohibitive effect.³⁹ This is in contrast to the report submitted to the United States House Committee on Ways and Means by the Postmaster General, which states that:

The prohibitions of our postal laws, while intending to deter unlawful delivery by mail of contraceptive, materials for indecent or immoral purposes, have made successful prosecution under the law difficult to achieve because of the rulings which allow the mailing of contraceptives under conditions described as ‘for lawful purposes.’ What is a lawful purpose within the meaning of the interpretations given, though vaguely identifiable, has with the passage of time also been considerably broadened. . . . In light of the above information it is quite clear that the cited law as

mail fraud statute). This textual distinction suggests that 18 U.S.C. § 1461 and 18 U.S.C. § 1462 may not cover the use of private carriers to ship nonmailable matter intrastate.

35. The Contraception Mail Prohibition Removal Act, H.R. 4605, 91st Cong., (1970).

36. See H.R. Doc. No. 91-1105.

37. See *infra* Part II(C).

38. 116 CONG. REC. 20630 (1970).

39. See Elizabeth Hovey, *Obscenity's Meaning, Smut-fighters, and Contraception: 1872-1936*, 29 SAN DIEGO L. REV. 13, 32 (1992) (describing the possibility that the case of the first doctor convicted under the federal Comstock Laws for distributing information about contraceptives had a “chilling effect” on other medical figures).

presently written is unenforceable. And it seems equally clear that the history compiled in the administration of the law would require a reformulation of the statute in order to conform to today's views and standards of acceptability. Otherwise, the Criminal Code will continue to carry sanctions incapable of administration.⁴⁰

These differing opinions show that there was uncertainty surrounding how far the judicial construction extended. Clarity came in the form of the Contraception Mail Prohibition Removal Act. In the House, there seemed to be more of a moral than practical thrust behind this Act, with members recognizing the use of contraceptive devices as "a matter of individual choice for each citizen," and eschewing their association with the obscene.⁴¹ Although it might seem natural to link contraception with abortion, especially as they appear side by side in the statute, no reference was made to the abortion provision of the statute, or even abortion more generally, in the House or the report to accompany H.R. 4605.

As referenced by the Postmaster General in 1970, judicial decisions interpreting the Comstock Act provisions against mailing writings and articles relating to contraception constructed these statutes to only apply when the contraception was "illegal."⁴² The legislative history of the reasonability exception is less clear. Although the version of the Comstock Bill that was first introduced in the Senate applied a physician exception to articles related to both contraception and abortion, the word "unlawful" later appeared only beside "abortion," and was ultimately dropped from the version of the Act that appeared in the Revised Statutes.⁴³

C. Case Law and Current Enforceability

This section will give an overview of the case law interpreting the articles provision of the Comstock Act. The case law, though sparse, indicates that there is a judicial construction that should be applied to either limit the

40. Report No. 91-1105 (1970).

41. 116 CONG. REC. 20630 (1970). (Mr. Byrnes quoted a letter from the Department of Health, Education and Welfare: "There no longer seems to be any justification for associating with the obscene and moral the importation, transportation and mailing of drugs and other articles for the prevention of conception, and information thereon.").

42. See Abraham Stone, *Social and Legal Status of Contraception, The - Part 1*, 22 N.C. L. REV. 212 (1944); Editors, Law Review, *Contraceptives and the Law*, 6 CHICAGO L. REV. 260 (1939) (describing these judicial decisions and supporting the reading that the statutes only apply to the mailing of "illegal" contraceptives).

43. See *supra* notes 25-29.

mailing prohibition today, or make the Comstock Act “incapable of administration.”⁴⁴

The Supreme Court has established the constitutionality of both section 1461 and section 1462 as applied to the mailing of articles.⁴⁵ *Roth v. United States* held that the obscenity mailing statutes are a valid exercise of the government’s postal powers,⁴⁶ and *Champion v. Ames* found a similar law prohibiting the mailing of lottery tickets to legitimately regulate interstate commerce.⁴⁷

As recently as 1996, former United States Senator Frank Lautenberg (D-NJ) introduced the Comstock Clean-Up Act to strike the prohibition on mailing abortion-related items.⁴⁸ The measure did not pass.⁴⁹ Organizations supporting the bill employed first amendment arguments, reasoning that the provisions that restricted mailing of abortion-related information unconstitutionally limit freedom of speech.⁵⁰ None of the advocates for the Comstock Clean-up Act raised *Roe* constitutional privacy right arguments, although this argument was available at the time.⁵¹ One explanation for this omission might lie in the case law of these statutes. Given that courts had read the statutes with a reasonability construction to apply only to “illegal” conduct, the mailing of abortion-related articles may have seemed better protected under *Roe* than the prohibitions relating to speech. So, repealing

44. HR. REP. No. 91-1105 (1970).

45. The constitutionality of the speech provisions of these statutes can be questioned under the First Amendment. In February 9, 1996, U.S. Attorney General Janet Reno stated that “the Department of Justice will not defend the constitutionality of the abortion-related speech provision of § 1462 in those cases, in light of the Department’s longstanding policy to decline to enforce the abortion-related speech prohibitions in § 1462 (and in related statutes, i.e., 18 U.S.C. § 1461 and 39 U.S.C. § 3001) because they are unconstitutional under the First Amendment.” Letter to Albert Gore, Jr., from Janet Reno (Feb. 9, 1996) (on file with the *Columbia Human Rights Law Review*). However, this does not affect the part of the statute that prohibits the mailing of abortion-related articles or things.

46. *Roth v. United States*, 354 U.S. 476, 492–93 (1957).

47. *Champion v. Ames*, 188 U.S. 321, 330 (1903). Presumably abortion medications and instruments could be deemed articles of interstate commerce. See also Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 622–23 (2007) (suggesting that abortion as whole could be validly regulated by Congress under the Commerce Clause).

48. Comstock Clean-up Act of 1996, S. 1592, 104th Cong. (1996).

49. S.1592, 104th Congress (1995-1996), CONGRESS.GOV, <https://www.congress.gov/bill/104th-congress/senate-bill/1592/actions> [<https://perma.cc/K4US-34CM>](last visited Jan. 29, 2023).

50. 104 CONG. REC. S1598-1601 (daily ed. Mar. 6, 1996). These organizations included Planned Parenthood and the Center for Reproductive Law and Policy.

51. *Roe v. Wade*, 410 U.S. 113 (1973) was not overturned until 2022, by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

the articles prohibition may have seemed unnecessary while *Roe* was in force.⁵²

This Note focuses on prosecutions of the mailing of “abortion-related articles or things,” since the mailing of “abortion-related articles or things” is what is directly brought into question after *Dobbs*. It will also address “contraception-related articles or things.” Even though prosecutions can no longer occur under this category following the Contraception Mail Prohibition Removal Act of 1970, this category of cases informs the analysis of the “abortion-related articles or things” category. Much like the analysis of “abortion-related articles or things,” the contraception cases do not implicate the first amendment and reflect changing legal and moral standards.⁵³ Furthermore, before 1970, the provision against contraception-related articles and the provision against abortion-related articles were next to each other in the Comstock Act.⁵⁴

Prosecutions under 18 U.S.C. §§ 1461 and 1462 historically fall into several categories: obscene matter, abortion-related writings, contraception-related writings, abortion-related articles or things, and contraception-related articles or things.⁵⁵ The greatest distinction that has

52. See *infra* text accompanying notes 61–70.

53. The Contraception Mail Prohibition Removal Act, H.R. 4605, 91st Cong., (1970).

54. See *id.*; 1873 Act § 1, 17 Stat. 598–99.

55. See *Roth v. United States*, 354 U.S. 476 (1957) (exemplifying a prosecution for the mailing of obscene matter); *Bours v. United States*, 229 F. 960 (7th Cir. 1915) (exemplifying a prosecution for the mailing of abortion-related writings, specifically advertisements for abortion services); *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938) (exemplifying prosecution for the importation of contraceptive-related writings, in this case a book and certain magazines); *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936) (exemplifying prosecution for the mailing of contraception-related articles or things (vaginal pessaries)). This Note will focus specifically on how the prohibition against mailing abortion-related articles should be read. The part of the statutes that implicate abortion-related writings is analyzed under the First Amendment, an analysis that this Note will not engage with. The Letter to Albert Gore, Jr., from Janet Reno (Feb. 9, 1996) indicates the Justice Department’s understanding that within 18 U.S.C. § 1462 and related statutes, the prohibitions on mailing abortion-related speech are different from the prohibitions on mailing abortion-related articles (the letter states that the “abortion-related speech prohibitions” in these statutes are “unconstitutional under the First Amendment.”). See *supra* note 45. By defining the abortion-related speech prohibition as a category of prosecutions under these statutes that is protected by the First Amendment, the Justice Department suggests that the prohibitions on mailing abortion-related articles are a separate category of potential cases that are not unconstitutional under the First Amendment. Note that at this time, the contraception-related prohibitions had already been amended out of the statutes, so the only distinction to make was that between articles and speech. The Contraception Mail Prohibition Removal Act (1970) made the distinction between the contraception-related prohibition and the abortion-related prohibition clear by amending out one prohibition and leaving the other intact. See *supra* note 53.

emerged in the statutes is between writings and articles, as the former category involves the first amendment and the latter does not. Therefore, cases involving prosecutions of prohibited writings under these statutes, mainly abortion or contraception advertisements, are largely outside the scope of this Note. Obscenity also implicates the first amendment, and also receives a different analysis.

Since the codification of 18 U.S.C. §§ 1461 and 1462 in 1948, the government has never brought a prosecution using the narrow application of the statute to bar the mailing of abortion-related articles.⁵⁶ However, there were prosecutions brought for the dissemination of abortion-related information and contraceptive articles from the 1910s to the 1960s, and others under the obscenity provision of the statute.⁵⁷ Although only one Circuit Appellate Court has weighed in on prosecutions brought under the “articles,” not “writings,” part of the statute,⁵⁸ a limited number of federal courts interpreted various other applications of 18 U.S.C. §§ 1461 and 1462.⁵⁹ These courts found that the Comstock Act laws require the defendant to have the intent that what they were sending in the mail be used “for *illegal* contraception or abortion or for indecent or immoral purposes.”⁶⁰ The Seventh Circuit originally understood section 1461 to exempt a physician who uses the mail to give information respecting abortions necessary to save a life.⁶¹ Under the construction of subsequent federal courts, this exception expanded into allowing contraceptive articles intended to promote health to

56. Revealed through an extensive search of Westlaw. The absence of cases indicates that there were at least no appellate cases. A search of related laws previous to the 1948 codification of the statutes revealed *United States v. Bott*, dealing with the prosecution of Bott for depositing in the mail “a certain powder designed and intended for the prevention of conception or procuring of abortion.” *United States v. Bott*, 24 F. Cas. 1204, 1204 (C.C.S.D.N.Y. 1873) The court in this case did not detail whether the powder was specifically for the prevention of conception or the procuring of abortion.

57. See generally Lori J. Parker, Annotation, *Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet*, 7 A.L.R. Fed. 2d 1 (2005); J.E. Leonarz, Annotation, *Validity of regulations as to contraceptives or the dissemination of birth control information*, 96 A.L.R. 2d 955 (1964).

58. The Second Circuit (*Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930) and *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936)). The Seventh Circuit (*Bours v. United States*, 229 F. 960 (7th Cir. 1915) and the Sixth Circuit (*Davis v. United States*, 62 F.2d 473 (6th Cir. 1933)) both discussed prosecutions under these statutes for mailing abortion and contraception-related writings.

59. See, e.g., *United States v. Nicholas*, 97 F.2d 510, 512 (2d Cir. 1938); *Consumers Union of the United States v. Walker*, 145 F.2d 33 (D.C. Cir. 1944); *United States v. H.L. Blake Company*, 189 F. Supp. 930 (W.D. Ark. 1960); *Sanitary Vendors, Inc. v. Byrne*, 190 A.2d 876, 878 (1963).

60. *Youngs Rubber Corp.* 45 F.2d at 108 (citing *Bours* 229 F. at 964) (emphasis added).

61. *Bours v. United States*, 229 F. 960 (7th Cir. 1915).

be lawfully sent in the mail.⁶² This section will outline this case law and show that the abortion and contraception provisions have always been treated interchangeably. Therefore, a judicially recognized limiting construction of one should apply to the interpretation of the other.

The Seventh Circuit introduced the idea of a “reasonability” construction of section 1461 in *Bours v. United States*.⁶³ The court reversed the conviction of a defendant who was prosecuted under section 1461 for advertising the services of an abortion doctor in a letter.⁶⁴ The court stated that “[t]hrough the letter of the statute would cover all acts of abortion, the rule of giving a reasonable construction in view of the disclosed national purpose would exclude those acts that are in the interest of the national life.”⁶⁵ Therefore, “a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position.”⁶⁶

Although this holding was related only to the abortion-related writings provision of the mailing prohibition, in 1930 the Second Circuit broadened the understanding of *Bours* in a trademark infringement case, *Youngs Rubber Corp. v. C.I. Lee and Co.*, where the plaintiff’s business was accused of violating federal laws against sending contraceptive articles by mail in interstate commerce.⁶⁷ The court argued that “it would seem reasonable to give the word ‘adapted’ a more limited meaning” than “suitable or fitted” for preventing conception.⁶⁸ The court wanted to “construe the whole phrase ‘designed, adapted or intended’ as requiring an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes.”⁶⁹ The court’s conception of the source of the “illegality” in this case was the local law.⁷⁰ The Second Circuit supported this interpretation with a comparison to obscenity law, arguing that the prohibition against mailing obscene books and writings has “never been thought to bar from the mails medical writings sent to or by physicians for proper purposes.”⁷¹

62. See *infra* notes 67–82.

63. *Bours* 229 F. at 960.

64. *Id.* at 960.

65. *Id.* at 964.

66. *Id.* at 964.

67. *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930).

68. *Id.* at 108.

69. *Id.* at 108.

70. If the articles “are prescribed by a physician for the prevention of disease, or for the prevention of conception, where that is not forbidden by local law, their use may be legitimate; but, if they are used to promote illicit sexual intercourse, the reverse is true.” *Youngs Rubber Corp.*, 45 F.2d at 107.

71. *Youngs Rubber Corp.*, 45 F.2d at 108.

Although this part of the opinion was dicta, it was affirmed by the Second Circuit in *United States v. One Package*, which dealt with a prosecution for importing rubber contraception devices into the United States in violation of the Tariff Act of 1930, § 305(a).⁷² Unlike 18 U.S.C. § 1462, this law actually retained the modification of “unlawful” before “abortion.” Here, the Second Circuit found that the judicial exemption covering “unlawful” abortions certainly excepted physicians from criminal liability “in the case of an abortive which is prescribed to save life, for section 305(a) of the Tariff Act only prohibits the importation of articles for causing ‘unlawful abortion.’”⁷³ The court held that this reasonability exception also applied to contraceptives, even though they were not directly modified by the word “unlawful,” by arguing that in the Comstock Act the word “unlawful” was sometimes coupled with the word abortion but sometimes omitted.⁷⁴ The court also appealed to the original wording of the Comstock Bill,⁷⁵ arguing that it would make no sense for section 305(a) to prohibit articles for producing abortions except when it was necessary to save a life but bar contraceptive articles “to protect the health of...patients or to save them from infection.”⁷⁶ The court thereby read a health-promoting reasonability exception into the Tariff Act:

We are satisfied that this statute, as well as all the acts we have referred to, embraced only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be used. It’s [sic] design, in our opinion 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.⁷⁷

It is unclear exactly how expansive this health-preserving exception was intended to be. Although physicians’ responsibility to “promot[e] the well being of their patients” could encompass a wide variety of legitimate medical uses, “such articles as Congress would have denounced as immoral” seems to indicate that this interpretation would be bound by the moral standards of 1873.⁷⁸ In 1938, the Second Circuit further legitimized this

72. *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936).

73. *Id.* at 738 (citing *Bours v. United States*, 229 F. 960 (7th Cir. 1915)). The court acknowledged that *Bours* dealt with a different statute that did not qualify the word “abortion” with the adjective “unlawful.” *Id.* at 738.

74. *Id.* at 738.

75. *Id.* at 740. *See also supra* notes 26–29 and accompanying text.

76. *One Package*, 86 F.2d at 739.

77. *Id.* at 739.

78. *Id.* at 739.

decision as applied to the mailing of contraceptive articles, stating that “we have twice decided that contraceptive articles may have lawful uses and that statutes prohibiting them should be read as forbidding them only when unlawfully employed.”⁷⁹

The Sixth Circuit also affirmed *Youngs Rubber Corp*, stating that “the soundness of its reasoning commends itself to us,” when dealing with a prosecution for mailing a circular giving information on preventing conception.⁸⁰ The court compared section 1461 to a similarly worded criminal law in the National Prohibition Act that condemned certain things when they were “designed, or intended for use in the unlawful manufacture of intoxicating liquor” to emphasize that proof of intention to commit a crime was required in order to convict and that “the design or intent to use the thing sold in an unlawful way must be in the design or intent of the seller, not of the buyer.”⁸¹ Therefore, it is the consensus of a number of courts and scholars that, at least in the context of contraception, “even in the absence of any defense of medical purpose, it must affirmatively be shown that there was an intention that it be used for purposes of illegal contraception in order to make out a violation of the Comstock Act.”⁸²

This limiting construction should apply to contraception-related articles and abortion-related articles with equal force. Contraception and abortion used to appear side-by-side in the laws, and none of the courts interpreting the limiting construction made an explicit distinction between

79. *United States v. Nicholas*, 97 F.2d 510, 512 (2d Cir. 1938) (first citing *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930); then citing *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936); and then citing *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933)).

80. *Davis v. United States*, 62 F.2d 473, 475 (6th Cir. 1933).

81. *Id.* at 475.

82. Note, *Contraceptives and the Law*, 6 U. CHI. L. REV. 260, 263 (1939) (citing *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933)). See *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103, 108 (2d Cir. 1930); *Davis v. United States*, 62 F.2d 473, 475 (6th Cir. 1933); *United States v. One Package*, 86 F.2d 737, 738 (2d Cir. 1936); *United States v. Nicholas*, 97 F.2d 510, 512 (2d Cir. 1938); *Consumers Union of United States v. Walker*, 145 F.2d 33, 36 (D.C. Cir. 1944); *United States v. H.L. Blake Company*, 189 F. Supp. 930, 935 (W.D. Ark. 1960) (“Thus it is well established that the defendants should not be convicted unless it is established beyond a reasonable doubt that at the time they mailed the sample packages of prophylactics that they intended them to be used for illegal contraception.”); *Sanitary Vendors, Inc. v. Byrne*, 40 N.J. 157, 161 (1963) (“though [the Comstock Act] was absolute in its terms, pertinent exceptions were declared in the course of its interpretation by the federal courts”); Abraham Stone, *The Social and Legal Status of Contraception*, 22 N.C. L. REV. 212, 221 (1944); Note, *Judicial Regulation of Birth Control Under Obscenity Laws*, 50 YALE L. J. 682, 684 (1941) (“Despite the all-inclusive terms in which contraceptives are outlawed in the federal [Comstock] statutes, federal courts have, without exception, held that they should not apply to use in medical practice.”).

contraception-related articles and abortion-related articles. Thus, there is nothing to indicate that the abortion provision should be excluded from the judicial construction. One early case did not even distinguish whether the defendants violated the contraception or abortion provision of the law.⁸³ Furthermore, the legislative history indicates that a lawfulness exemption was actually considered specifically for the abortion, not contraception, provision.⁸⁴ Therefore, the case law indicates that the Comstock Act prohibitions on mailing abortion-related articles should be read narrowly, limited to prohibit only those abortions that are illegal. Although there are few cases, and consequently few applications, of this limiting construction, this is due not to a disagreement among courts but rather a nationwide lack of enforcement.

II. RENEWED SIGNIFICANCE OF THE COMSTOCK LAWS

This section will show why the provisions of the Comstock Laws prohibiting the mailing of abortion-related articles pose such a threat to women's rights in the present day, despite their history of nonenforcement. This Note will then summarize OLC's argument and relevant criticism of this position to demonstrate why a more expansive argument against the statutes' enforcement should be made.

A. Growing Awareness Post-*Dobbs*

The *Dobbs* decision vastly changed the legal landscape of abortion, placing renewed significance on laws that may have been disregarded under *Roe*. *Dobbs* placed the legal status of abortion in the hands of the states.⁸⁵ Statutes enacted prior to *Roe* that remain on the books are presumably operative and enforceable unless they were repealed.⁸⁶ Since 18 U.S.C. §§ 1461 and 1462 were not officially repealed, their enforceability is up for debate. Even though the Biden Administration shows no desire to conduct federal criminal prosecutions under the Comstock Act laws, there is no guarantee that a future administration would do the same.⁸⁷ Because a plain

83. See *United States v. Bott*, 24 F. Cas. 1204, 1204-05 (C.C.S.D.N.Y. 1873) (considering whether the defendants knew that the powder designed to prevent conception or to administer an abortion was effective and whether the powders "were clearly designated as articles for the prevention of conception").

84. See *supra* Part I.B.

85. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2284 (2022).

86. Fallon, *If Roe Were Overruled*, *supra* note 47 at 612.

87. See *OLC Opinion*, *supra* note 14 (providing evidence that the Biden administration has no intention of enforcing sections 1461 and 1462; Feb. 1 Letters to Tom

reading of the statutes appears to prohibit any abortion-related thing, from the abortion pill to surgical equipment, from being sent in the mail or interstate by a private carrier, this possibility is very concerning.

A recent trend shows that conservative lawmakers are aware of these statutes and support their future enforcement. In September 2022, Utah state representatives sent a letter to the Utah Abortion Fund stating that:

Although the Biden Administration is not currently enforcing 18 U.S.C. §§ 1461–1462 or RICO against abortion funds, we will do everything in our power to ensure that the U.S. Attorney in the next Republican Administration holds abortion funds accountable for every criminal act that they aid or abet in violation of these federal statutes.⁸⁸

Direct criminal enforcement is not the only threat the Comstock Act laws pose. In a controversial decision in April, 2023, Judge Matthew Kacsmaryk in the Northern District of Texas suspended the FDA’s approval of mifepristone.⁸⁹ Judge Kacsmaryk used the supposed validity of the Comstock Act to bolster the plaintiff doctors and medical associations’ claims that the FDA’s actions violated federal law, stating that the “Comstock Act prohibits the mailing of chemical abortion drugs.”⁹⁰ When the Department of Justice (DOJ) appealed this ruling to the U.S. Court of Appeals for the Fifth Circuit, they contended that the Comstock Act was not relevant to the FDA’s exercise of its authority in approving mifepristone in 2000.⁹¹ The Fifth Circuit did not interpret the Comstock Act in resolving the stay application, stating that “the speed of our review does not permit conclusive exploration of this topic.”⁹² However, the Fifth Circuit emphasized the potential power the Comstock Act holds in the civil sphere by noting that if the Comstock Act was “strictly understood, then applicants may lose the public interest prong

Moriarty and Danielle Gray *infra* note 162 (showing that another administration may want to enforce sections 1461 and 1462).

88. Letter from Walt Brooks, Representative, Utah House of Representatives, et al. to The Utah Abortion Fund (Sept. 15, 2022) (on file with the *Columbia Human Rights Law Review*).

89. All for Hippocratic Med. v. U.S. Food and Drug Admin., No. 2:22-cv-00223, 2023 U.S. Dist. LEXIS 61474 (N.D. Tex. Apr. 7, 2023)

90. *Id.* at *37.

91. Emergency Motion Under Circuit Rule 27.3 for a Stay Pending Appeal at 21, Alliance for Hippocratic Medicine v. Food & Drug Administration, No. 23-10362, 2023 WL 2913725 (5th Cir. April 12, 2023).

92. All. for Hippocratic Medicine v. Food & Drug Admin., No. 23-10362, 2023 WL 2913725, at *21 (5th Cir. April 12, 2023).

entirely, because there is no public interest in the perpetuation of illegality.”⁹³

Lawmakers and anti-abortion activists are also beginning to use the existence of the Comstock Act to support prohibitive state and city laws. The abortion pill manufacturer GenBioPro (GBP) dropped its lawsuit against Mississippi lawmakers after they filed a memorandum that referenced 18 U.S.C. §§ 1461 and 1462, stating that “federal law prohibits the core conduct that GBP claims it is permitted to undertake.”⁹⁴ In this filing, the Mississippi Attorney General used the existence of 18 U.S.C. §§ 1461 and 1462 and their potential RICO applications to support Mississippi’s strict prohibition on medication abortions in the state.⁹⁵ In December 2022, the City Council of Pueblo, Colorado, passed a proposed ordinance that cited the Comstock Act laws and indicated that compliance with these would preempt conflicting state law.⁹⁶ Although the City Council eventually voted to indefinitely table the ordinance, in New Mexico, the City of Hobbs became the third city in New Mexico to pass an ordinance referencing compliance with section 1461 that prevented abortion providers from operating in the city.⁹⁷ The New Mexico

93. *Id.* at *20. The Fifth Circuit granted and denied in part the DOJ’s motion for a stay pending appeal. *Id.* at *1. Shortly after, the DOJ sought an emergency application for a stay pending appeal from the Supreme Court. Application to Stay the Order Entered By the U.S. Dist. Court for the N.D. of Tex. and for an Administrative Stay, U.S. Food and Drug Admin., et al. v. All. for Hippocratic Medicine, et al., No. 22A___ (stay granted April 18, 2023). The Application for Stay was granted by the Court, pending disposition of the appeal in the United States Court of Appeals for the Fifth Circuit. *Danco Lab’ys, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075 (2023). In granting this application, the Supreme Court made no comment on the enforceability of the Comstock Act laws prohibiting the mailing of abortion-related material.

94. Def.’s Memorandum in Opposition to Plaintiff’s Motion for Leave to File Amended Complaint at 16, *GenBioPro, Inc. v. Dobbs*, No. 3:20-cv-00652 (dismissed Aug. 18, 2022). GenBioPro had challenged a restrictive Mississippi abortion law under the theory that it was preempted by FDA regulations allowing for the mailing of the abortion pill. *GenBioPro, Inc. v. Dobbs*, No. 3:20-cv-00652, 2020 WL 12849083 (S.D. Miss. Nov. 20, 2020).

95. Ashton Pitman, *Mailing Abortion Pills Punishable By Five Years In Prison, Mississippi AG Argues, Mississippi Free Press* (Aug. 10, 2022), <https://www.mississippifreepress.org/26378/ mailing-abortion-pills-punishable-by-five-years-in-prison-mississippi-ag-argues> [<https://perma.cc/8GLS-UDCQ>].

96. Maggie Bryan, *Pueblo Anti-abortion Ordinance Cites 1873 Federal Law That Prohibits Mailing Abortion-related Materials*, KOAA News (Dec. 2, 2022), <https://www.koaa.com/news/covering-colorado/pueblo-anti-abortion-ordinance-cites-1873-federal-law-that-prohibits-mailing-abortion-related-materials> [<https://perma.cc/GTG5-QC7R>]. The proposed ordinance “require[es] abortion providers in Pueblo to comply with federal law,” and would give private citizens the right to sue to enforce this statute. *Id.*

97. Adebusola Abigail Bada, *New Mexico City Passes Anti-abortion Ordinance, Calls Itself “Sanctuary City for the Unborn,” Jurist* (Nov. 8, 2022),

Attorney General filed a motion with the State Supreme Court asking the court to nullify these ordinances, but a proponent of the ordinances stated that “despite the filing in the Supreme Court of New Mexico, cities and counties across the state remain on good standing to pass ordinances requiring compliance with 18 U.S.C. §§ 1461–1462—which have never been repealed by Congress or declared invalid by the Supreme Court of the United States.”⁹⁸

This indicates that the existence of these statutes prohibiting the mailing of abortion-related material and their potential validity have an effect that could extend beyond criminal prosecutions. The use of the continued statutory existence of these federal mailing prohibitions to justify eliminating abortion services within a city or state represents a different kind of secondary application that might precede cities or states calling for their enforcement.

This also suggests that there is at least some private citizen support to enforce these laws. Therefore, it would not be unreasonable to expect some private citizens to bring civil RICO suits of their own accord. Both 18 U.S.C. §§ 1461 and 1462 are listed as predicate crimes of “racketeering activity” under the federal RICO Act, passed in 1970.⁹⁹ The civil remedy provision of the RICO Act “allows private parties to sue for injuries to their ‘business or property’ caused ‘by reason of’ a defendant’s violation of RICO.”¹⁰⁰ Since numerous acts of mail fraud are enough to constitute a pattern of racketeering activity, it is reasonable to assume that numerous acts of mailing obscene material would be similarly sufficient. There have been no federal prosecutions using 18 U.S.C. §§ 1461 or 1462 as RICO predicate acts and no instances of any civil RICO suits. Critically, civil RICO

<https://www.jurist.org/news/2022/11/new-mexico-city-passes-anti-abortion-ordinance-calls-itself-sanctuary-city-for-the-unborn/> [https://perma.cc/TPL2-8NAL]; Gabriella Arsiaga, *NM AG Challenges City and County Abortion Ordinances*, News-Sun (Jan. 27, 2023) <https://www.hobbsnews.com/2023/01/27/nm-ag-challenges-city-and-county-abortion-ordinances/> [https://perma.cc/FJ4H-G9HY].

98. Arsiaga, *NM AG Challenges City and County Abortion Ordinances*, News-Sun (Jan. 27, 2023) <https://www.hobbsnews.com/2023/01/27/nm-ag-challenges-city-and-county-abortion-ordinances/> [https://perma.cc/FJ4H-G9HY]; Andrew Hay, *New Mexico Asks Court to Overturn Cities’ Abortion Bans*, Reuters (Jan. 23, 2023) <https://www.reuters.com/world/us/new-mexico-asks-court-overturn-cities-abortion-bans-2023-01-24/> [https://perma.cc/5D6L-6ZRV].

99. 18 U.S.C. § 1961(1).

100. JENNER & BLOCK LLP, A GUIDE TO CIVIL RICO LITIGATION IN FEDERAL COURTS 4–5 (Reid J. Schar et al. eds., 2021), https://www.jenner.com/a/web/taV21sfHsERD37g5Wk8dA6/4HRMZQ/2021_RICO_Guide.pdf?1625754342 [https://perma.cc/X3YQ-JJ97].

suits are predicated on criminal conduct.¹⁰¹ So, whether successful civil RICO suits could be brought under 18 U.S.C. §§ 1461 and 1462 would depend on whether they could be validly enforced as criminal laws.

Whether the mailing and importation of abortion-related material could be criminally prosecuted, with offenders facing five years imprisonment, would have incredible effects on the accessibility and feasibility of abortions in the United States. The right to choose whether to have an abortion is an integral part of a person's autonomy and freedom.¹⁰² The literal interpretation of these statutes, and the government's willingness to prosecute, would take this right away. Even if DOJ is currently unwilling to prosecute under this statute, the possibility for private citizens to undertake civil RICO actions may make medical providers unwilling to continue to send or receive abortion-related material by mail. Some clarity on whether this conduct is actually criminal is needed. This Note presents the uncertainty surrounding the application of the Comstock Act mailing laws to make an argument against their statutory enforcement.

B. A Desuetude Argument is Likely to Fail

The long period of nonenforcement under the abortion-related articles provision of 18 U.S.C. §§ 1461 and 1462 indicates that there might be a desuetude defense to be made. Desuetude is the doctrine by which criminal laws are judicially abrogated by long periods of disuse.¹⁰³ The doctrine of desuetude is especially applicable to an obsolete provision like the parts of 18 U.S.C. §§ 1461 and 1462 that relate to the mailing of abortion-related materials, which have been openly violated without prosecution for almost a

101. *Id.* at 10.

102. Brief for Human Rights Watch et al. as Amici Curiae Supporting Respondents at 4, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), (No. 19-1392) (U.S. filed September 20, 2021). ("Access to safe and lawful abortion services is firmly rooted in the rights to life; to non-discrimination; to be free from torture, cruel, and degrading treatment; and to privacy. These rights are recognized in international human rights treaties ratified by the United States..."). *See also Access to Abortion Is a Human Right*, AMNESTY INT'L, <https://www.amnestyusa.org/abortionrights/> [<https://perma.cc/PJH3-2PWK>] (last visited Feb. 15, 2023). ("Criminalization of abortion limits women's and people's right to decide whether and when to reproduce, a right which human rights authorities recognize as integral to physical and mental integrity and to their dignity and worth as human beings.").

103. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006); Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 1 (1966); *see also* Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 2 AM. CRIM. L. Q. 178, 178 (1964).

century.¹⁰⁴ In this case, the statutes' nonenforcement allowed them to elude a direct constitutional challenge, which would probably have succeeded under *Roe*.¹⁰⁵

The idea of desuetude is compelling, especially for those unenforced statutes that implicate fairness and morality, but the doctrine has no history of real application in the context of criminal law.¹⁰⁶ Although a number of scholars have argued that desuetude should be a valid doctrine,¹⁰⁷ the federal criminal courts have never recognized a desuetude defense, and such an argument has never successfully challenged the application of any federal criminal law.¹⁰⁸ Therefore, nothing about the laws' long period of nonenforcement prohibits their present-day application.

Hillary Greene (now the Zephaniah Swift Professor of Law at University of Connecticut School of Law) proposes an alternative to desuetude that could be applied to prevent civil RICO suits under 18 U.S.C. §§ 1461 and 1462 in her 1997 student note.¹⁰⁹ Under this proposed doctrine of conditional desuetude, nonenforcement of a criminal law would preclude its

104. See Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 172 (1997) (stating that one of the prerequisites of desuetude is open and notorious violation with conscious decisions not to prosecute over a long period of time); see also *supra* note 56 (evidencing the lack of prosecutions under the abortion-related articles part of the statute).

105. See Mark Peter Henriques, *Desuetude and Declaratory Judgement: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1057–58 (1990) (suggesting that, because plaintiffs must show a “real and immediate” “threat of prosecution” to establish standing in a case challenging a statute under the constitution, disused criminal laws may evade constitutional scrutiny).

106. See generally Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, RUTGERS UNIV. L. REV. COMMENTS. (Mar. 11 2014), 7, <http://rutgerslawreview.com/wp-content/uploads/archive/commentaries/2014/LarkinCommentary.pdf> [<https://perma.cc/X6GK-8E2P>] (explaining that separation of powers supports a limited application of desuetude). Cass R. Sunstein, 2003 SUP. CT. REV. 27, 30 (2003) (suggesting that the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), reflects a narrow conception of the notion of desuetude).

107. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 n.4 (2006).

108. See *id.* at 2112 & n.18 (listing cases in which a federal court discusses desuetude). In *United States v. Elliott*, the court stated that the doctrine of desuetude's “status in American law is unclear” but that “[i]n the absence of some specific objection [] we hold that non-use alone does not abrogate a statute.” *United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967). The court offered the problem of fair notice or potential for abuse that rests in any over-broad administrative discretion as examples of such a specific objection. Note that these due process concerns are similar to the motivating rationales behind the void for vagueness doctrine, another argument the defendant in this case made against enforcement of the statute.

109. Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169 (1997).

use in secondary applications.¹¹⁰ Greene argues that conditional desuetude would not only prevent the injustice of the secondary application of unenforced criminal statutes but also avoid separation of powers concerns that plague the traditional doctrine of desuetude.¹¹¹ In Part IV, this Note will argue that similar principles to those motivating the proposed doctrine of conditional desuetude should be used to form a void for vagueness challenge to the Comstock Act laws instead of a challenge under the relatively unsupported doctrine of desuetude.

C. The Office of Legal Counsel's Opinion

In December 2022, OLC responded to the United States Postal Service's request for an opinion on whether 18 U.S.C. § 1461 prohibits the mailing of mifepristone and misoprostol.¹¹² OLC determined that 18 U.S.C. § 1461 does not prohibit the mailing, delivery, or receipt by mail of mifepristone and misoprostol where the sender "lacks the intent that the recipient of the drugs will use them unlawfully."¹¹³ Their conclusion is predicated on the determination that federal judges interpreting section 1461 read a reasonability exception into the law, demonstrating an agreement "that section 1461 and related Comstock Act provisions do not categorically prohibit the mailing or other conveyance of items designed, adapted, or intended for preventing or terminating pregnancy."¹¹⁴ Instead, OLC argues that longstanding judicial construction of the Comstock Act laws limits their applicability to cases where the government can show that the defendant had the intent that the articles be used "for *illegal* contraception or abortion."¹¹⁵ They support this limiting construction by citing to the cases discussed *supra*, in Part I(C). The further cases and statements from USPS that OLC cites to support this proposition all deal with the mailing of articles intended for contraception.¹¹⁶ OLC and USPS agree that "there is no apparent

110. Secondary applications are the use of such laws in "civil, family and other non-criminal actions." *Id.* at 169–70.

111. *Id.* at 193 ("[L]egislative retention of a statute despite a protracted failure to enforce it does not constitute ongoing criminalization of the conduct prohibited by the statute. The judiciary would be ignoring the significance of executive inaction if it permitted what amounts to a form of private enforcement.").

112. *OLC Opinion, supra* note 14.

113. *Id.* at 2.

114. *Id.* at 5. *See supra* Part I(C).

115. *OLC Opinion, supra* note 14, at 10 (quoting *United States v. Gentile*, 211 F. Supp. 383, 385 n.5 (D. Md. 1962), citing *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930), *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933), and *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938)).

116. *Id.* at 10 and 15. There were no prosecutions for abortion-related articles, and the OLC Opinion states correctly that the *Roe* decision effectively rendered this part of the

reason why the case-law principles applicable to contraceptive articles (formerly) under Section 1461 would not also apply to abortion-inducing articles under the same provision.”¹¹⁷

OLC argues that this judicial limiting construction was implicitly ratified by Congress. Since Congress was aware of the judicial construction,¹¹⁸ OLC maintains that Congress’ decision to perpetuate the wording of the Comstock Act’s abortion-related provisions indicates an acceptance of this interpretation.¹¹⁹ OLC then turns to how an “unlawful use” of abortion-related articles might be defined in the present day. Since there are “many circumstances in which a sender of these drugs typically will lack an intent that they be used unlawfully,” OLC argues that unlawful intent cannot be shown from the mere mailing of certain drugs that can be used to perform abortions, even to jurisdictions with restrictive abortion laws.¹²⁰

The Opinion acknowledges that a nationally uniform construction of section 1461 might be desirable, but urges USPS to take on a construction of the mailing statutes that would look to the local “law of a given state” to determine whether the intended use was unlawful or not.¹²¹ Since most

Comstock Act statutes unenforceable when it was in effect, leaving courts with no occasion to elaborate further. *Id.* at 16.

117. *Id.* at 11, n.11 (citing the *USPS Request*, *supra* note 14).

118. *Id.* at 11–12. The OLC cites to a letter from the USPS reporting this construction to Congress, as well as the Historical and Revision Note that was included in the 1945 report of the House Committee on the Revision of the Laws when Congress enacted title 18 of the U.S. Code into positive law, which “specifically invited the attention of Congress to the courts of appeals’ decisions in *Youngs Rubber*, *Davis*, *Nicholas*, and *One Package*, and quoted at length from *Youngs Rubber*, including its conclusion that the relevant provisions of the statute should be construed to require an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion.” *Id.* at 12–13 (internal quotation marks omitted).

119. *Id.* at 11. The Comstock Act laws were amended after the *Youngs Rubber Corp.* and *One Package* decisions. See Section 1.B. for a discussion of the Contraception Prohibition Removal Act and subsequent amendments to the statutes. The OLC then cites a number of sources to support the proposition that Congress ratified the judicial construction of the abortion-related provision of the article by not changing this language of the statute. Most convincing is *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009) (holding that when Congress amended the Individuals with Disabilities Education Act without altering the text of a provision that the Supreme Court had previously interpreted, Congress “implicitly adopted [the Court’s] construction of the statute”). *OLC Opinion*, *supra* note 14, at 12.

120. *OLC Opinion*, *supra* note 14, at 17.

121. *Id.* at 18. The OLC indicates that a detailed review of state abortion laws would be helpful for the USPS to make a case-by-case determination of lawful uses of mifepristone and misoprostol in each state, but does not offer such a review, instead offering some illustrative legal uses. These include to produce an abortion within twenty

states allow for a variety of legitimate uses of mifepristone and misoprostol, OLC argues that “USPS could not reasonably assume that the drugs are nonmailable simply because they are being sent into a jurisdiction that significantly restricts abortion.”¹²² The nationally-uniform construction of the statute that OLC advocates for, as it applies to mifepristone and misoprostol, is one that takes into account the fact that there are a variety of medically lawful uses of the medications no matter where the drugs are delivered.¹²³ So, even though OLC supports a uniform policy of allowance for the mailing of these drugs, the definition of an “illegal abortion” that OLC wants the judicial construction of sections 1461 and 1462 to embody is one that looks to the local abortion laws of each state.

III. DEFINING AN ‘ILLEGAL ABORTION’

OLC’s understanding of the case law is consistent with this Note’s conclusion. Even though the word “illegal” does not appear in the text of the statutes, the case law on 18 U.S.C. §§ 1461 and 1462 requires that the government prove the defendant had the intent that the articles they sent in the mail be used for an “illegal abortion.”¹²⁴ This limiting construction has been uniformly applied by federal courts in the limited number of cases that were brought under the provision of the statute that prohibited the mailing of contraception-related articles.¹²⁵ It was even accepted by USPS and brought to the attention of Congress.¹²⁶

Whether the definition of an “illegal abortion” under this construction should take on the meaning “local” to the state in which the sender directs the mail, as suggested by OLC, is another matter.¹²⁷ In this Part, this Note explores arguments for and against adopting this “local” narrowing construction of the Comstock Act laws.

weeks’ gestation, to preserve the life of the pregnant woman, and for medical purposes other than to induce abortions. *Id.* at 18–20.

122. *Id.* at 20.

123. *Id.* at 20.

124. *See supra* Part I(C).

125. *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930); *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933); *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938). *See supra* Part I(C) for a discussion of the relevant case law, and *supra* note 82 for an overview of the consensus of the limiting construction as applied to the contraception-related provision of the Comstock Act laws.

126. *OLC Opinion, supra* note 14, at 17–20.

127. *See OLC Opinion, supra* note 14, at 20 (classifying an abortion as either “legal” or “illegal” based on the sender’s intent and the relevant state law). I refer to this understanding of when an abortion is “illegal” as the “local” construction.

A. In Defense of OLC's Local Construction

OLC adopts what this Note will call the “local” interpretation of the Comstock Act. Under the local construction, the intent to produce an “unlawful” abortion cannot be inferred from delivery of abortion pills into a state with restrictive abortion laws, since the pills likely have some lawful uses under state-specific law.¹²⁸ So, OLC concludes that the criminal intent of the seller should be evaluated in relation to the specific abortion law in place in the state in which the non-mailable material is sent.¹²⁹

This position is most defensible if one sees *Youngs Rubber Corp.* as instructive in interpreting section 1461. In *Youngs Rubber Corp.*, the court looked to local laws to conclude that the contraceptives at issue were mailed for a legitimate use. This term was not clearly defined but involved both local law and the prevention of disease. The court stated that since “[t]here is no federal statute forbidding the manufacture or sale of contraceptives[, t]he articles which the plaintiff sells may be used for either legal or illegal purposes.”¹³⁰ In particular, the *Youngs Rubber Corp.* panel pointed to preventing disease and preventing conception in instances “where that is not forbidden by local law” as examples of legitimate uses of the contraceptives.¹³¹ The court went on to conclude: “By the local law of New York, such articles are not absolutely prohibited. Section 1145 of the Penal Law authorizes the supplying of them to lawfully practicing physicians, or by their direction.”¹³²

The approach adopted by *Youngs Rubber Corp.* and the OLC suggests that unless a state outright banned the use of abortion medication for any purposes, unlawful intent could not be inferred. This reading would mean that federal law would be applied differently from state to state. In their amicus brief to the Supreme Court—opposing a stay in *Alliance for Hippocratic Medicine*, the Fifth Circuit mifepristone case—the American Center for Law and Justice attempted to imply that tying the scope of a federal statute to state law would be absurd.¹³³ But this is not in itself that

128. *OLC Opinion, supra* note 14, at 20.

129. *Id.*

130. *Youngs Rubber Corp.*, 45 F.2d at 107.

131. *Id.* at 107 (describing “promot[ing] illicit sexual intercourse” as an example of contraceptive use that would be forbidden by local law).

132. *Id.* at 107.

133. *Food and Drug Admin. v. Alliance for Hippocratic Medicine*, Brief of Amicus Curiae the American Center for Law and Justice as Amicus Curiae in Opposition to a Stay, U.S. Food and Drug Admin. v. All. for Hippocratic Med., No. 23-10362 (U.S. Apr. 14, 2023) (“The OLC opinion goes astray right off the bat when it ties the scope of § 1461 to state law.”),

<https://www.supremecourt.gov/DocketPDF/22/22A902/263735/2023041714553757>

unusual. The current federal gambling regime penalizes “illegal” gambling businesses, where the definition of “illegal” depends on state laws that vary from state to state.¹³⁴

Rev. Stat. §§ 3893 and 3894, the codification of the Comstock Act in 1873,¹³⁵ originally provided penalties for mailing obscene books (and articles or things designed for the prevention of conception or the procuring of abortion) and prohibited letters and circulars concerning *illegal* lotteries from passing through the mails.¹³⁶ The original form of the law was understood to allow for the mailing of legal lotteries, meaning that it did not bar states with legal lotteries from mailing lottery circulars within that state.¹³⁷ This shows that when the word “illegal” appeared in a federal statute relating to the mailing of lotteries, the general consensus was to adopt a state law-specific construction of the word. This is strongly supported by a House Report of the House Subcommittee on Criminal Justice from 1978, which proposed modifying section 1461 to require “proof that the offender aided in the mailing of a means of procuring an illegal abortion,” explaining that “[u]nder this provision an abortion is ‘illegal’ if it is contrary to the laws of the State in which the abortion is performed.”¹³⁸

Similarly, when the Supreme Court upheld a federal statute prohibiting the broadcast of lottery advertising by any broadcaster located

4_Danco%20and%20FDA%20v.%20AHM%20ACLJ%20amicus%20on%20S.%20Ct.%20emergency%20stay.pdf [https://perma.cc/8XBG-89P2].

134. See, e.g., 18 U.S.C. § 1955 (prohibiting illegal gambling businesses and stating that “[a]s used in this section ‘illegal gambling business’ means a gambling business which... is a violation of the law of a State or political subdivision in which it is conducted”); see also 18 U.S.C. § 1952 (making it unlawful to “[travel] in interstate or foreign commerce or [use] the mail or any facility in interstate or foreign commerce, with intent to . . . distribute the proceeds of any unlawful activity” where an “unlawful activity” under the Act is defined as “any business enterprise involving gambling . . . in violation of the laws of the state in which [the unlawful acts] are committed.”).

135. See Peter H. Flournoy & J. B. O’Donnell, *Private Correspondence and Federal Obscenity Prosecutions*, 4 SAN DIEGO L. REV. 76, 88 (1967).

136. 19 Stat. 90, Chap. 186, Prohibition on Mailing Obscene Materials and Lottery-Circulars, Rev. Stat. §§ 3893 and 3894 (1876) (emphasis added).

137. See Lottery Circulars, 15 U.S. Op. Atty. Gen. 203 (1877) (stating that “[l]egal lotteries are those established by law, like the Louisiana State Lottery, or the one authorized by the original charter of Washington”); see also CONG. REC. S. 4264 (daily ed., June 30, 1876) (statement of Sen. Wythe) (discussing the bill H.R. No. 2575 to amend sections 3893 and 3894 of the Revised Statutes). (“[I]n States like Louisiana, Kentucky, Alabama, or Georgia, and Virginia, where I think they are permitted to draw lotteries of some character, it would be highly improper, in my judgment, to allow the postmasters to prevent the circulation of lottery circulars while those States allow lotteries. The provision of the law as it now stands operates upon ‘illegal lotteries’ only, upon lotteries that are unauthorized by law.”).

138. H.R. REP. No. 95-29, at 39–40 (1978).

in a state that banned lotteries, they recognized that they could “accommodate the operation of legally authorized state-run lotteries consistent with continued federal protection to nonlottery States’ policies.”¹³⁹ Surely a similar compromise could be made with respect to the mailing of abortion-related material in abortion and non-abortion states.

B. Against a Local Construction of “Illegal”

However, there are at least three reasons to question OLC’s interpretation of the Comstock Act. This Section will address some of those arguments, ultimately showing that vagueness is the best way to challenge the applicability of these statutes.

First, it can be argued that *Youngs Rubber Corp.* is not controlling. Conservative commentator Ed Whelan criticized OLC’s opinion in this way, claiming that the cases they cited did not actually support their position.¹⁴⁰ Whelan contends that the Seventh Circuit case *Bours v. United States* actually undermines the notion that state law is relevant in the application of section 1461. There might be a good reason to think that the *Bours* opinion is more relevant to abortion cases—of all the circuit court cases dealing with section 1461, *Bours* is the only one that specifically relates to the abortion provision of the statute.¹⁴¹ The other courts apply the holding and reasoning of *Bours*

139. United States v. *Edge Broad. Co.*, 509 U.S. 418, 418 (1993). See also Fallon, *If Roe Were Overruled*, *supra* note 47 at 641 n. 118 (2007) (using *Edge Broad. Co.* and the existence of varying First Amendment rights under obscenity from state to state to argue that even if a state decided to forbid abortion and prohibit abortion advertising, the potential disparity this would create between this state and other states where such advertising would remain constitutionally protected would not be “wholly unprecedented”).

140. Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 1*, NAT’L REV. (Jan. 4, 2023), <https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs> [https://perma.cc/TM22-KLAN]; Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 2*, NAT’L REV. (Jan. 5, 2023), <https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs-part-2> [https://perma.cc/H5NW-Q7RM]; Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 3*, NAT’L REV. (Jan. 6, 2023), <https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs-part-3> [https://perma.cc/ZD7Q-35UN]; see also Amicus Brief on behalf of Ethics and Public Policy Center in Support of Respondents, *Danco Lab’s, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075 (2023) (written by Mr. Whelan) (arguing that the OLC’s stance is not supported by the cases they cite).

141. United States v. *One Package*, 86 F.2d 737 (2d Cir. 1936) deals with a prosecution for the mailing of contraception-related articles or things (vaginal pessaries). The prohibition on mailing things or writings related to contraception was subsequently amended out of the law, which is discussed further in earlier sections of this Note. See *infra* notes 35–38 and accompanying text.

to the contraception provision.¹⁴² Therefore, it might be somewhat circular to justify an expanded reading of the abortion provision with the other contraception cases, rather than looking to *Bours* itself.

Although *Bours* argued for a rule of reasonable construction, the court stated that when applying the federal law to “an alleged offensive use of the mails at a named place, it is immaterial what the local statutory definition of abortion is.”¹⁴³ Rather than examining which acts of abortion are included or excluded by the local statute, the *Bours* court stated that “the word ‘abortion’ in the national statute must be taken in its general medical sense.”¹⁴⁴ So, those acts of abortion that are not covered exclude only “those acts that are in the interest of the national life.”¹⁴⁵ This appears to reject the local construction. The repeated references to a “national” interest for a “national statute” seem to imply that enforcers of the statute should instead find some national definition of an illegal abortion and apply that to the law.¹⁴⁶

The Second Circuit in *One Package* seems to suggest something similar when they state that they assume the law at issue “exempts only such articles as the act of 1873 excepted,” but are satisfied that the Comstock laws “embraced only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be used.”¹⁴⁷ By referring to a singular congressional intent, the court implies that there was one class of uses Congress took to be prohibited by the law and another that Congress would have allowed. The court does not make any reference to state-by-state standards within this understanding.

The second reason to question the local construction is that even the legislative history could cut against OLC’s broader position. Congress’ decision to not amend the text of the law to include the word “illegal” before “abortion” could be seen as an implicit ratification of the judicial construction, or a stubborn adherence to the original text of the statute.¹⁴⁸ In

142. *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930), *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936), *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933), *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938), *Consumers Union of United States v. Walker*, 145 F.2d 33 (D.C. Cir. 1944), and *United States v. H.L. Blake Company*, 189 F. Supp. 930 (W.D. Ark. 1960) involve prosecutions under the contraception provision of § 1461.

143. *Bours v. United States*, 229 F. 960, 964 (7th Cir. 1915).

144. *Id.*

145. *Id.*

146. *Id.*

147. *One Package*, 86 F.2d at 739.

148. See Thomas Jipping & Sarah Perry, HERITAGE FOUND., *The Justice Department Is Wrong: Federal Law Does Prohibit Mailing Abortion Drugs* (Feb. 8, 2023) <https://www.heritage.org/life/report/the-justice-department-wrong-federal-law-does->

1978, a House Report of the House Subcommittee on Criminal Justice proposed modifying section 1461 to require “proof that the offender aided in the mailing of a means of procuring an illegal abortion,” explaining that “[u]nder this provision an abortion is ‘illegal’ if it is contrary to the laws of the State in which the abortion is performed.”¹⁴⁹ Although this report demonstrates a state-by-state understanding of the term “illegal,” the fact that such an amendment to the Comstock Act laws was proposed in 1978 and not acted upon might indicate an unwillingness to statutorily enact this definition.¹⁵⁰ Indeed, the Heritage Foundation argues that the absence of the word “unlawful” in the text of the original Comstock Act was a deliberate exclusion.¹⁵¹

The strongest argument against OLC’s narrowing construction of the Comstock Act is textual. Such an argument was accepted by Judge Kacsmaryk in his recent April 7, 2023 opinion: “Here, the plain text of the Comstock Act controls.”¹⁵² There is no reference to an “illegal” or “unlawful” abortion in the text of sections 1461 or 1462. And Judge Kacsmaryk additionally opined that “the relevant judicial glosses [described in the OLC Opinion] do not represent a ‘broad and unquestioned’ consensus” that would be sufficient to override the plain text of the statutes.¹⁵³

However, in an amicus brief supporting FDA’s ability to approve the mailing of mifepristone in the Northern District of Texas, former DOJ officials point out that a strictly textual reading of the statutes would conflict with section 1305(a), which prohibits the “import[ation]” of “any drug or medicine or any article whatever for causing unlawful abortion.”¹⁵⁴ The brief

prohibit-mailing-abortion-drugs [<https://perma.cc/VP5H-Q99X>] (arguing that Congress took no positive actions to evidence its acceptance of the narrow judicial interpretation proposed by the OLC).

149. H.R. COMM. ON THE JUDICIARY, 95TH CONG., REP. OF THE SUBCOMM. ON CRIMINAL JUSTICE ON RECODIFICATION OF FEDERAL CRIMINAL LAW 39–40 (Comm. Print 1978).

150. *Id.* The proposed amendment was included as a part of the Criminal Justice Improvements Act, H.R. 13959, 95th Cong. (1978). The Act included a number of other proposed changes to Title 18 of the U.S. Code.

151. Thomas Jipping & Sarah Perry, HERITAGE FOUND., *The Justice Department Is Wrong: Federal Law Does Prohibit Mailing Abortion Drugs* (Feb. 8, 2023) <https://www.heritage.org/life/report/the-justice-department-wrong-federal-law-does-prohibit-mailing-abortion-drugs> [<https://perma.cc/VP5H-Q99X>].

152. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2023 WL 2825871, at *17 (N.D. Tex. Apr. 7, 2023), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023).

153. *Id.* at *17.

154. Brief for Former U.S. Dep’t of Just. Officials as Amicus Curiae Supporting the Applicants, *Danco Lab’ys, LLC v. All. for Hippocratic Med.* at 11, 143 S. Ct. 1075 (2023) https://www.supremecourt.gov/DocketPDF/22/22A902/263639/20230414172845760_22A901%20and%2022A902%20-

argues that the statutes must be read in conjunction, and that it would be absurd and a “due process concern” to assume that Congress intended to impose a punishment for the mailing of an item that could lawfully be imported under section 1305.¹⁵⁵

A strictly textual reading of the statute cuts against the broader narrowing construction OLC wants to read into sections 1461 and 1462, as well as the local interpretation of this judicial construction. The history of anti-contraception laws in Connecticut before *Griswold v. Connecticut* might prove illustrative of how a court could defer to the text of the statute when dealing with a potential prosecution under sections 1461 or 1462.¹⁵⁶ In *Buxton v. Ullman*, the court rejected the argument that a life- or health-preserving medical exception should be read into an unenforced state anti-contraception statute by deferring to the separation of powers.¹⁵⁷ However, this textual reading might not be totally applicable given the renewed significance of the Comstock Act. In *Poe v. Ullman*, the Supreme Court dismissed an appeal from another Connecticut ruling because they thought that there was no actual threat of prosecution under the statutes.¹⁵⁸ But now there are state attorneys general explicitly stating that they will look to enforce these laws.¹⁵⁹

C. Uncertainty

There are a variety of ways courts could apply the Comstock Act laws today. The preceding sections of this Note describe the limiting

%20Former%20DOJ%20Officials%20amicus%20brief%20supporting%20applicants.pdf [https://perma.cc/46GZ-GP4V].

155. *Id.* (citing to H.R. Rep. No. 71-7, at 160 (1929) and United States v. 12 200-Ft. Reels 12 of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973) to argue that §§1461, 1462 and §1305 should be read “in conformity”).

156. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

157. *Buxton v. Ullman*, 147 Conn. 48, 57, 156 A.2d 508 (Conn. 1959). “In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is.” *Id.* at 55. The Supreme Court of Connecticut deferred to legislative intent with respect to the prohibition of contraception on multiple occasions. *See State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (Conn. 1940); *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582 (Conn. 1942); Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court before Griswold v. Connecticut*, 75 IOWA L. REV. 915, 938 (1990) (“[t]he central focus of the court’s analysis was always on deference to the state legislature.”).

158. *Poe v. Ullman*, 81 S. Ct. 1752, 1758 (1961) (“This Court cannot be umpire to debates concerning harmless, empty shadows . . .”).

159. Lauren Berg, *20 AGs Warn CVS, Walgreens Against Mailing Abortion Pills*, LAW 360 (Feb. 2, 2023) <https://www.law360.com/articles/1572353/20-ags-warn-cvs-walgreens-against-mailing-abortion-pills>.

construction of an “illegal” abortion, which might have either a local or national interpretation. But a judge could also eschew the limiting construction altogether and enforce the plain text of the laws. *United States v. Bott*¹⁶⁰ provides an example of yet another way courts could approach the statute. In this early case applying the prohibition on mailing materials “designed or intended for the prevention of conception or procuring of abortion,”¹⁶¹ the court found that, in light of differing state laws, the intent required by the statute could not require the intent to prevent conception or to procure abortion to be an element of the offense at all.¹⁶² “The prevention of abortion in the several states is not within the power which, under the constitution, belongs to the United States,” and the only power Congress has is limited to the use of the mails.¹⁶³ So, the court found that “designed or intended for the prevention of conception or procuring abortion” does not describe the intent which must be an element of the crime against the United States.¹⁶⁴ Instead, it is descriptive of the material made contraband. “The unlawful act of depositing contraband matter, coupled with the intent to deposit such matter, constitutes the crime. The guilty intent appears from the fact of the deposit of such matter by one knowing what article he deposits.”¹⁶⁵ Under such a reading of the law, whether or not the abortion was intended to comply with the relevant state law seems irrelevant.

This Note is not alone in pointing out the confusion surrounding the application of these statutes. Proponents of enforcing the Comstock Act laws today argue that OLC’s local interpretation of the judicial limiting construction is too complicated to be applied. In recent letters sent to CVS Health and Walgreens advising the corporations that their plans to provide abortion pills by mail-order pharmacy are illegal under federal law, a group of Republican attorneys general claimed that courts would defer to the plain text of the statutes.¹⁶⁶ They argued that 18 U.S.C. §1461 was

¹⁶⁰ *United States v. Bott*, 24 F. Cas. 1204 (C.C.S.D.N.Y. 1873).

161. *Id.* at 1204.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Letter from Kris W. Kobach, Kansas Att’y Gen., to Danielle Gray, Exec. Vice President of Walgreens Boots All., Inc., (Feb. 6, 2023); Letter from Andrew Bailey, Missouri Att’y Gen., Steve Marshall, Alabama Att’y Gen., Treg Taylor, Alaska Att’y Gen., Tim Griffin, Arkansas Att’y Gen., Ashley Moody, Florida Att’y Gen., Chris Carr, Georgia Att’y Gen., Todd Rokita, Indiana Att’y Gen., Brenna Bird, Iowa Att’y Gen., Daniel Cameron, Kentucky Att’y Gen., Jeff Landry, Louisiana Att’y Gen., Lynn Fitch, Mississippi Att’y Gen., Austin Knudsen, Montana Att’y Gen., Drew Wrigley, North Dakota Att’y Gen., Dave Yost, Ohio Att’y Gen., Gentner F. Drummond, Oklahoma Att’y Gen., Alan Wilson, South Carolina Att’y Gen., Marty Jackley, South Dakota Att’y Gen., Ken Paxton, Texas Att’y Gen., Sean D. Reyes, Utah Att’y

“straightforward” and criticized DOJ for issuing an opinion that “ties itself in knots trying to explain away § 1461’s prohibitions.”¹⁶⁷

The narrowing construction proposed by OLC raises complicated issues. On the other hand, the plain text seems straightforward. But to adhere to the plain text and enforce the law today would be contrary to judicial precedent and almost a century of executive action.¹⁶⁸

IV. A VAGUENESS CHALLENGE TO THE COMSTOCK ACT LAWS

The complications raised by what criminal intent would be required by sections 1461 and 1462 are more than just a hurdle to successful prosecution, as suggested by OLC. This Note will show that, when considered along with their history of nonenforcement, the lack of clarity as to what is actually prohibited by these statutes demands that they should be found void for vagueness. This is the case whether or not one accepts the local interpretation of the judicial construction advanced by OLC. So, this Note goes beyond the OLC Opinion and makes the original argument that the Comstock Act laws are unenforceable in the present day because they are too vague.

A. The Void for Vagueness Doctrine

Under the Due Process Clause of the Fifth Amendment, a criminal statute may be declared void if it is so vague that “men of common intelligence must necessarily guess at its meaning” and differ in their

Gen., Patrick Morrissey, West Virginia Att’y Gen., to Tom Moriarty, Gen. Couns. of CVS Health (Feb. 1, 2023); Letter from Andrew Bailey, Missouri Att’y Gen., Steve Marshall, Alabama Att’y Gen., Treg Taylor, Alaska Att’y Gen., Tim Griffin, Arkansas Att’y Gen., Ashley Moody, Florida Att’y Gen., Chris Carr, Georgia Att’y Gen., Todd Rokita, Indiana Att’y Gen., Brenna Bird, Iowa Att’y Gen., Daniel Cameron, Kentucky Att’y Gen., Jeff Landry, Louisiana Att’y Gen., Lynn Fitch, Mississippi Att’y Gen., Austin Knudsen, Montana Att’y Gen., Drew Wrigley, North Dakota Att’y Gen., Dave Yost, Ohio Att’y Gen., Gentner F. Drummond, Oklahoma Att’y Gen., Alan Wilson, South Carolina Att’y Gen., Marty Jackley, South Dakota Att’y Gen., Ken Paxton, Texas Att’y Gen., Sean D. Reyes, Utah Att’y Gen., Patrick Morrissey, West Virginia Att’y Gen., to Danielle Gray, Exec. Vice President of Walgreens Boots All., Inc. (Feb. 1, 2023). “We reject the Biden administration’s bizarre interpretation, and we expect courts will as well. Courts do not lightly ignore the plain text of statutes.” Feb. 1 Letters to Tom Moriarty and Danielle Gray.

167. Letter from Kris W. Kobach, Kan. Att’y Gen. to Danielle Gray, Executive Vice President of Walgreens Boots Alliance, Inc., at 2 (Feb. 6, 2023).

168. See *infra* Part I(C) and the lack of any prosecutions from 1900 to the present day under 18 U.S.C. §§ 1461 and 1462 for the mailing of surgical equipment intended for use in abortion procedures (revealed through an extensive search of Westlaw).

application of the law.¹⁶⁹ A penal statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”¹⁷⁰ The Supreme Court has applied the doctrine to statutes that are uncertain on their face, as well as those that are made unclear by judicial construction.¹⁷¹

The Supreme Court has recently expanded the void for vagueness doctrine, with *Johnson v. United States*,¹⁷² *Sessions v. Dimaya*,¹⁷³ and *United States v. Davis*,¹⁷⁴ marking a trend from the Court’s previous reluctance to void criminal statutes on this ground.¹⁷⁵ These decisions show that the void for vagueness doctrine has been taken seriously recently with respect to certain sentencing enhancements, indicating that the Court might examine vagueness within primary conduct more seriously than it has before.

There also seems to be a growing concern, articulated by Justice Gorsuch in his *Sessions* concurrence, that vague laws threaten the balance of separation of powers by granting too much power to the judges and prosecutors.¹⁷⁶ Unenforced laws with unclear application, such as sections 1461 and 1462 implicate many of these same concerns.¹⁷⁷ In 2010, in *Skilling*

169. *Winters v. New York*, 333 U.S. 507, 518 (1948) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

170. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982)); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926)).

171. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). (“There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.”). Note that this applies to a judicial expanding, not narrowing, construction.

172. *Johnson v. United States*, 576 U.S. 591 (2015).

173. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

174. *United States v. Davis*, 139 S. Ct. 2319 (2019).

175. Melissa London, *Renewing the Vagueness Challenge to Crimes Involving Moral Turpitude*, 97 WASH. L. REV. 581, 617-620 (2022) (discussing *Johnson*, 576 U.S. 591, *Sessions*, 138 S. Ct. 1204, and *Davis*, 139 S. Ct. 2319). See also Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 698 (2017) (noting that the Supreme Court only voided a law outside the First Amendment context for being unconstitutionally vague four times from 1960 until *Johnson*, 576 U.S. 591 in 2015).

176. *Sessions*, 138 S. Ct. at 1227–28 (2018) (Gorsuch, J., concurring). (“Vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute’s contours through their enforcement decisions.”).

177. See *Desuetude*, 119 HARV. L. REV. 2209, 2229 (2006) (summarizing the argument that when a prosecutor resurrects a desuete statute to bring an individual before a court, the executive essentially legislates through the reanimation of dead-letter laws).

v. *United States*, Justices Scalia, Thomas, and Kennedy supported voiding parts of the sections 1341 and 1343 mail-fraud and wire-fraud statutes for vagueness.¹⁷⁸ Concurring with the majority, Justice Scalia argued that by using a judicial construction that “transform[ed] the prohibition of ‘honest-services fraud’ into a prohibition of ‘bribery and kickbacks,’” the Court “wield[ed] a power [it] long ago abjured: the power to define new federal crimes.”¹⁷⁹ Since a “criminal statute must clearly define the conduct it proscribes, ... [a] statute that is unconstitutionally vague cannot be saved [] by judicial construction that writes in specific criteria that its text does not contain.”¹⁸⁰ Therefore, Scalia found that the defendant *Skilling* was correct to argue that the statute was unconstitutionally vague because it “fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits.”¹⁸¹ The recent trend in Supreme Court decisions suggests that an argument like the one *Skilling* proposed has a better chance of success now than it did in 2010.¹⁸²

B. The Local Interpretation of the Judicial Construction is Vague

The interpretation of the Comstock Act laws advanced by OLC shows that the Comstock Laws are too vague to be workable. A federal criminal law regime that imports state regulations into its construction of the law is not in itself vague. However, a workable statute like 18 U.S.C. § 1955, the federal gambling statute, includes the limiting language and a definition that directly appeals to state laws in the text of the statute itself.¹⁸³

See also Alexander M. Bickel, *The Supreme Court, 1960 Term-Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 58–64 (1961) (making the same argument).

178. *Skilling v. United States*, 561 U.S. 358, 415–424 (2010) (Scalia, J., concurring).

179. *Id.* at 415.

180. *Id.* at 415–16.

181. *Id.* at 416.

182. The *Skilling* majority saved the statute by applying a narrowing construction because there was “considerable disarray over the statute’s application.” *Skilling*, 561 U.S. at 405. See Joel S. Johnson, *Vagueness Avoidance* (Draft 08/12/2023), 109 VA. L. REV. (forthcoming 2024) (arguing that the Supreme Court has implicitly ratified the practice of legitimately crafting narrow judicial constructions of indeterminate statutory text, which Johnson terms “vagueness avoidance”). This implies that even if a court declines to extend the void for vagueness doctrine, in the alternative to voiding the Comstock Act laws, they should apply the judicially recognized limiting construction advanced by the OLC.

183. 18 U.S.C. § 1955 (Prohibition of illegal gambling businesses). (“As used in this section ‘illegal gambling business’ means a gambling business which... is a violation of the law of a State or political subdivision in which it is conducted....”).

By contrast, the importation of state regulations is not actually conferred in the text of the Comstock Act laws.¹⁸⁴ A court applying 18 U.S.C. § 1461 would have to read the word “illegal” into the law and decide how “illegal” should be defined. Even using the local interpretation of the judicial construction seems to invite discretionary application of exactly which state laws to apply. Interstate mailing, unlike conducting business, implicates more than one state. Congress recognized that such a construction might be confusing when dealing with the anti-lottery mailing provision in 1876. By reading the word “illegal” to modify abortion in the Comstock Act laws, courts have created precisely the controversy that Congress decided to amend out of the lottery provision of Rev. Stat. § 3893.¹⁸⁵ The object of the amendment was to “secure uniformity and prohibit lottery circulars of any kind from passing through the mails,” as the House recognized that the law as written resulted in the confusing situation where “[i]n some states lotteries are legalized, in others they are prohibited, so that we have matters mailable in one State that are not mailable in another.”¹⁸⁶ Former United States Senator Hannibal Hamlin (D-ME) stated that the then-Post Office Department “labor[ed] under [the difficulty of] determining what are and what are not legal lotteries.”¹⁸⁷

Determining the criminal intent required by the sender on a state-by-state basis would result in a similar difficulty. This would be exacerbated in cases involving importation from another country. Should the sender’s intent be determined on the final destination state? Or the first state that the mail happens to reach? The choice of venue would also seem to promote arbitrary enforcement of the law. Unlike the mail fraud statutes, sections 1461 and 1462 have no “built-in” venue provisions that would specify where a case might be brought, suggesting that a case might be brought in any state in which the mail passes through.¹⁸⁸ This would create an unacceptable

184. 18 U.S.C. §§ 1461 and 1462. The lack of any limiting words in the text of the statute makes the judicial construction of such words open to indeterminacy and discriminatory application. Some courts might want to argue that “[i]n the absence of any words of limitation, the language used must be given its full and natural significance, and held to exclude from the mails every form of notice whereby the prohibited information is conveyed.” *United States v. Foote*, 25 F. Cas. 1140, 1141 (C.C.S.D.N.Y. 1876).

185. See H.R. 2575, 44th Cong. Section 2 (1876) (amending the lottery law to strike out the word “illegal” where it appeared before “lotteries,” which reflected the concept that lotteries were legal in some states but not others). Senator Whythe from Maryland made a motion to strike out Section 2. The motion to strike out was not agreed to. 4 CONG. REC. 4262–64 (1876).

186. 4 CONG. REC. 3656 (1876).

187. 4 CONG. REC. 4262 (1876).

188. 18 U.S.C. § 3237(a) provides that in cases where the offense was begun in one district and completed in another, venue may be laid in any district through which the offense was continued, unless otherwise explicitly provided, like in the case of mail fraud.

result, as a sender might be subject to a number of differing standards of legality or illegality of an abortion.

C. The National Interpretation is also Unconstitutionally Vague

However, if one rejects OLC's construction and demands a national definition of an "illegal abortion," there are even more reasons that the statute should be void for vagueness. Since there is no determined national standard for an 'illegal abortion,' such an interpretation would not give abortion providers any notice as to what conduct is actually prohibited by the law.

There is reason to think that such a construction would interfere with state's rights in a way that makes its application unclear. If the federal definition of "illegal abortion" was more restrictive than the definition in a given state, then abortion regulation decisions would essentially be taken away from the states. The interpretation of the federal statute needs to be constrained so that it does not interfere with matters of regulation traditionally reserved to the states. Otherwise, potential defendants could object to the enforcement of the federal statutes for encroaching upon the power of the states.¹⁸⁹ Although the similar anti-lottery mailing provision of Rev. Stat. § 3894 was held to be constitutional by the Supreme Court after the word "illegal" was removed in 1877,¹⁹⁰ this action was not undertaken without some pushback from Congress.¹⁹¹ In this case, a national definition

Compare 18 U.S.C. § 1341 (carefully specificizing the locus of the offense) with 18 U.S.C. § 1461, which merely says "whoever knowingly uses the mails". U.S. Dep't of Just., Just. Manual § 966 Venue in Mail Fraud, <https://www.justice.gov/archives/jm/criminal-resource-manual-966-venue-mail-fraud> [<https://perma.cc/WBU8-NYJ7>] (updated Jan. 21, 2020).

189. See *Bond v. United States*, 564 U.S. 211, 222 (2011) (finding that the petitioner, an indicted defendant, had standing to challenge the validity of the federal law he was convicted under for conflicting with constitutional principles of federalism). "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.* And *Dobbs* did explicitly reserve the matter of abortion regulation to the states. "The authority to regulate abortion is returned to the people and their elected representatives." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2234 (2022).

190. *Ex parte Jackson*, 96 U.S. 727, 24 L. Ed. 877 (1877).

191. 4 CONG. REC. 4262 (1876) (statement of Sen. Whythe). ("The second section goes a step further, and strikes out the word 'illegal,' so that in Louisiana, in Missouri, in Kentucky, where lotteries are legalized, no circular can be mailed at Louisville for Frankfort, for instance. Certainly the Senate does not mean to decide that the citizens of a State where lotteries are legal have no right to send a lottery scheme or circular from one portion of the State to another. That seems to me to be interfering with the rights of the

of an illegal abortion that imposed a federal restriction would not only be difficult to define and implement, it would also prevent states from advancing their state interest as articulated by *Dobbs*.¹⁹²

However, this is assuming that one could even determine a national definition for an “illegal abortion.” The legislative history of the original 1873 Act, which included the word “unlawful” before abortion, indicates that the so-called lawful abortions the Comstock Act was supposed to exempt from punishment were those prescribed in good faith by a physician in good standing.¹⁹³ “Good faith” here is arguably a vague, or at least subjective, standard.¹⁹⁴

In addition, under guidance from *Bours*, an “illegal abortion” would be an abortion undertaken for some reason “inimical to the national life.”¹⁹⁵ Although this would most likely exclude abortions undertaken to preserve the life of the mother,¹⁹⁶ it is unclear what other uses it would exclude or include. Does a health-preserving abortion enter the national standard?¹⁹⁷ Although such exceptions are more common in the present day, an early law enacted in Washington, D.C. in 1901 criminalized abortion “unless when necessary to preserve [the woman’s] life or health.”¹⁹⁸

people of the States where they choose to think that the sale of lottery tickets is not criminal or improper.”).

192. See Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, *supra* note 192, at 288 (Oct. 17, 2023) (arguing that the right to a health-preserving abortion, as articulated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) would be unworkable because it would deprive a State of the ability to advance a compelling state interest). Surely allowing Congress to statutorily dictate what could be mailed to produce an abortion would also effectively limit a state’s ability to regulate the protection of “potential life.”

193. See *supra* notes 25–29 and accompanying text.

194. CONG. GLOBE, 42nd Cong., 3rd Sess. 1436 (1873).

195. *Bours v. United States*, 229 F. 960, 964 (7th Cir. 1915).

196. See Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, *supra* note 192, at 278. (“[T]he right to a life-preserving abortion has extremely strong support in our legal history and tradition”). See also *id.* at 293. (“Without exception, the 19th-century statutes compiled in the Appendix to *Dobbs* permitted life-preserving abortions, and no State subsequently prohibited them.”).

197. Such a right was recognized by the Court in *Roe v. Wade*, 410 U.S. 154 (1973) and it is uncertain whether it was overruled by *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022). See Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, *supra* note 192, at 292 (arguing that if *Dobbs* did not overrule *Roe* and *Casey in toto*, the constitutional right to a health-preserving abortion probably does not survive, while the constitutional right to a life-preserving abortion does).

198. App. B at 2297, *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

It seems as if promoting women's health would not be "inimical to the national life."¹⁹⁹ But would such a reading of the narrowing construction also render the statutes void for vagueness? In *Colautti v. Franklin*, the Supreme Court found that a Pennsylvania state statute that used almost identical wording to the language of *Roe's* life-or-health exception was unconstitutionally vague.²⁰⁰ The statute required a doctor performing an abortion post-viability to employ an abortion technique that would provide the best opportunity for the fetus to be aborted alive unless a different technique would be "necessary in order to preserve the life or health of the mother."²⁰¹ Because the statute did not specify whether the woman's life and health must always prevail over the fetus' life and health when they conflict, the Court found that this exception was so poorly defined that a doctor would not have fair warning as to what conduct was prohibited.²⁰² Similarly, 18 U.S.C. § 1461 makes no such specification, even though almost all courts would presumably allow the sending of abortion-related articles when necessary to save the woman's life as not for the purposes of an "illegal" abortion.²⁰³

Although the core vagueness the Court identified in this statute was in defining "viability," the Court found the statute unconstitutionally vague because it "conditions potential criminal liability on confusing and ambiguous criteria."²⁰⁴ Even though viability is no longer a federal standard,

199. *Bours*, 229 F. at 964.

200. *Colautti v. Franklin*, 439 U.S. 379 (1979), abrogated by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

201. *Colautti*, 439 U.S. at 379.

202. Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety*, 85 NOTRE DAME L. REV. 525, 567–68 (2010). See *Colautti*, 439 U.S. at 400–01 ("it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival.... where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.").

203. See Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, *supra* note 192, at 293 (explaining why the right to a life-preserving abortion has a powerful claim to being deeply rooted in our legal history and tradition). ("The early American statutes codifying the crime of abortion generally contained life-of-the-mother exceptions, or language from which courts could infer that a life-saving abortion would not be 'unlawful.'"). Gilles even argues that the right to a life-saving abortion is a new implied constitutional right after *Dobbs*.

204. *Colautti*, 439 U.S. at 394. Viability is no longer a federal standard. See *supra* note 18 for a definition of viability. *Dobbs* overturned *Roe's* holding that a woman has the right to choose to have an abortion before viability. "The viability line, which *Casey* termed *Roe's* central rule, makes no sense." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2282 (2022).

a number of states still use fetal viability as a limit in their abortion statutes.²⁰⁵ Does the importation of this state standard into the federal law make it void for vagueness for the same reasons as the statute in *Colautti*?²⁰⁶

To add to the confusion, FDA has “determined the use of mifepristone in a regimen with misoprostol to be safe and effective for the medical termination of early pregnancy,”²⁰⁷ leading some to argue that the FDA regulation of abortion regulation would preempt more restrictive state statutes.²⁰⁸ It is unclear how FDA regulation would interact with a restrictive federal law. However, FDA’s blessing to dispense mifepristone for medication abortions by mail-order pharmacies and other telemedicine providers would indicate that such use is permitted under federal law,²⁰⁹ despite the existence of the Comstock mailing provisions.

The very fact that there is such a debate over how the law should be interpreted indicates that this law is too vague to be enforceable. The Fifth Circuit was unable to resolve the parties’ “competing interpretations” of the Comstock Act in their *Hippocratic Medicine v. FDA* decision to grant and deny in part the Justice Department’s motion for a stay.²¹⁰ If the Fifth Circuit cannot decide which interpretation of the enforceability of the Comstock Act is correct, how could a “man of common intelligence” understand the law?²¹¹ The Fifth Circuit seemed unimpressed by the applicant’s argument that the

205. California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Montana, New York, Rhode Island, Washington, and Wyoming still use “fetal viability” as a limit in their abortion statutes. *States with Gestational Limits for Abortion*, KAISER FAMILY FOUND. (last updated Jan. 20, 2023), <https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [https://perma.cc/QJ3L-XPZD].

206. “The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself.” *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), abrogated by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

207. *OLC Opinion supra* note 14 at 17.

208. See, e.g., Peter Grossi & Daphne O’Connor, *FDA Preemption of Conflicting State Drug Regulation and the Looming Battle Over Abortion Medications*, 10 J. OF L. AND THE BIOSCIENCES 1 (2023).

209. FDA Response to American Association of Pro-Life Obstetricians and Gynecologists Citizen Petition, Docket No. FDA-2019-P-1534 (December 16, 2021) at 6. See also *Recent Guidance: Update to FDA’s Risk Evaluation and Mitigation Strategy for Mifepristone on Dec. 16, 2021, Eliminating In-Person Dispensing Requirement*, 35 HARV. L. REV. 2238 (2022) (describing the FDA’s new guidances without commenting on whether this was legal or not).

210. *All. for Hippocratic Med. v. Food & Drug Admin.*, No. 23-10362, 2023 WL 2913725, at *20 (5th Cir. Apr. 12, 2023). (“The parties vehemently dispute how their competing interpretations of the Comstock Act of 1873 might impact the validity of the district court’s order.”).

211. See *supra* note 169 and accompanying text.

Comstock Act “does not mean what it says it means” because “judicial gloss and lax enforcement over the past century act to graft relevant exceptions onto it.”²¹² However, a vagueness challenge incorporates notions of desuetude to satisfyingly explain why both judicial gloss and a long period of nonenforcement make it unclear how the law should be applied.

The problem of having to interpret the concept of an “illegal abortion” under sections 1461 and 1462 is compounded by the fact that Congress passed these laws so long ago and they were subsequently never enforced in the context of abortion-related articles. Attitudes towards the acceptability of abortion have vastly changed in the last century, along with sexual standards.²¹³ Should courts use modern standards of decency when interpreting the statute? Or should judges be forced to imagine what Congress in 1873 would have imagined as decent? These standards seem inapplicable to modern life for a multitude of reasons. Another issue with a criminal law that relies upon notions of decency is that these standards are constantly in flux. The Supreme Court has acknowledged that a criminal statute that incorporates “undeniably opaque” notions like decency into its terms “could raise substantial vagueness concerns.”²¹⁴

This struggle also reflects the desuete state of the Comstock Act laws. Since the laws have been unenforced for so long, their meaning has not had the chance to be tested or evolve. The normative values behind vagueness challenges have previously been linked to the values that motivate the doctrine of desuetude.²¹⁵ The Supreme Court should further expand the void for vagueness doctrine, in line with its recent decisions. It can do this by developing the normative basis of the vagueness doctrine to include concerns such as the lack of notice facing potential defendants that provide for the normative bases of the doctrine of desuetude.²¹⁶ This should reflect

212. All. for Hippocratic Med. v. Food & Drug Admin., No. 23-10362, 2023 WL 2913725, at *21 (citing the *OLC Opinion*).

213. R. Sauer, *Attitudes to Abortion in America, 1800–1973*, 28 *POPULATION STUDIES* 53 (1974).

214. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 571 (1998).

215. See *Desuetude*, 119 *HARV. L. REV.* 2209, 2217 & n. 52–53 (2006) (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 152–55 (Yale Univ. Press 2d ed. 1986) and Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 *SUP. CT. REV.* 27, 29–30, (2003) as examples of scholars who argue that desuetude statutes raise due process issues similar to those arising from unconstitutionally vague statutes).

216. See John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 *WM. & MARY L. REV.* 531 (2014) (summarizing Bickel and Sunstein’s contentions that fair notice and discriminatory enforcement problems are real constitutional concerns that have motivated decisions made on other grounds).

the idea that nonenforcement is a policy decision.²¹⁷ The decades of nonenforcement of the Comstock Act laws should make one uncertain about how they should be applied in the present day, for these policy reasons, in addition to the practical hurdles facing their application. The very fact that a court could apply either a local or national definition of an “illegal abortion” when deciding this law shows that it is open to arbitrary enforcement. So, what an “illegal abortion” might be under this law is an unascertainable standard.²¹⁸

A void for vagueness challenge to the criminal statute would also prevent the laws’ secondary use through civil RICO lawsuits. Because RICO is predicated on criminal conduct, plaintiffs must plead and establish that each defendant “intended to engage in the conduct with actual knowledge of the illegal activities.”²¹⁹ If the enforcement of the statutes was so vague as to obscure what conduct was actually criminal, no plaintiff could ever prove that there was such intent.

CONCLUSION

Sections 1461 and 1462 should be void for vagueness no matter which interpretation of an “illegal abortion” one adopts when applying the judicial construction of the statutes. Although this Note agrees with OLC’s assertion that the statutes should be interpreted narrowly to require the seller to have the intent that the material they sent in the mail be used for an illegal purpose, there is no guarantee that a court interpreting the Comstock Act laws would adopt this narrow construction. Only four circuit courts employed this reading, and some of the decisions dealt with different provisions of the law.²²⁰ The complicated history of limiting decisions and

217. *Poe v. Ullman*, 367 U.S. 497, 502 (1961). (“The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis.”). Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL’Y REV. 169, 185 (1997). (“When the legislature completely acquiesces to executive nonenforcement for an extended period of time, nonenforcement must be taken as the legislature’s intent as well as the executive’s.”).

218. See Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEXAS L. REV. 1049, 1049–50 (2020). (“A close look at the statutes that the Supreme Court has declared to be vague over the past century reveals that they generally share one of two defects: they require an actor to conform his conduct either to unknowable objective facts or to unascertainable normative standards. Such statutes violate Lord Coke’s ancient dictum by requiring that persons perform the impossible.”).

219. JENNER & BLOCK *supra* note 100, at 10.

220. The Seventh Circuit (*Bours v. United States*, 229 F. 960 (7th Cir. 1915)); the Second Circuit (*Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930) and *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936)); the Sixth Circuit (*Davis v. United States*,

the long period of nonenforcement coupled with open violation have created an environment of great uncertainty. A lower court could choose to fully embrace the narrow construction and find all drugs used for medication abortions, mailed for medical purposes, to be sent with legal intent, giving the statute almost no practical effect. They could alternatively follow the Connecticut Supreme Court and strictly defer to the text of the law. Even though OLC's construction attempts to make sense of the limited case law, to quote Justice Scalia, a "statute that is unconstitutionally vague cannot be saved ... by judicial construction that writes in specific criteria that its text does not contain."²²¹

The fact that there are so many directions in which courts could split when interpreting the Comstock Act laws demonstrates these laws should be void for vagueness. After all, "when we come to prohibit the transmission of any matter through the mails, we ought to understand pretty well what it is."²²² Doctors, abortion medication providers, and pregnant people need guidance on whether their conduct is lawful or not. This Note shows why the history and uncertainty surrounding the application of these laws has made clear guidance impossible. Despite their terrifying potential, the Comstock Act laws are too vague to be enforceable criminal laws today. This should put the uncertainty surrounding what might be illegal conduct under these statutes to rest, leaving the future of women's reproductive rights in the United States on more secure footing.

62 F.2d 473 (6th Cir. 1933); the District of Columbia Circuit (*Consumers Union of United States, Inc. v. Walker*, 145 F.2d 33 (D.C. Cir. 1944).

221. *Skilling v. United States*, 561 U.S. 358, 415-424 (2010) (Scalia, J., concurring).

222. 4 CONG. REC. 4263 (1876) (statement of Mr. Morton) (cited by *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 508, n.15 (1962) (Brennan, J., concurring)).