The Heritage Foundation

LEGAL MEMORANDUM

No. 324 | FEBRUARY 8, 2023

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

The Justice Department Is Wrong: Federal Law Does Prohibit Mailing Abortion Drugs

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KEY TAKEAWAYS

Federal law has prohibited mailing abortion drugs for more than 100 years.

The Justice Department bypassed the statutory interpretation rules to invent a version of the Comstock Act that would not hinder abortion access.

Congress has repeatedly chosen to maintain the Comstock Act's plain language, which clearly prohibits mailing abortion drugs.

First under English common law, then under American statutes, an "unbroken tradition of prohibiting abortion on pain of criminal punishment"[1] began more than seven centuries ago.[2] By 1868, "a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy."[3]

Five years later, in 1873, in the middle of this national pro-life legislative movement, Congress enacted a statute with an ambitious title: *An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use*.[4] It is often referred to as the Comstock Act after Anthony Comstock, the anti-vice crusader who championed its passage and spent more than 40 years enforcing it as a U.S. Postal Service special agent.[5] Section 2 of the Comstock Act appears today as 18 U.S.C. § 1461, prohibiting the Postal Service from delivering, and anyone from "knowingly" using the mail to send, any "article or thing designed, adapted, or intended for producing abortion."[6]

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This provision could not, as a practical matter, be enforced while the Supreme Court's decisions in *Roe v. Wade*[7] and *Planned Parenthood v. Casey*,[8] which invented and subsequently affirmed a constitutional right to abortion, remained operative precedents. That blockade lifted on June 24, 2022, when the Supreme Court in *Dobbs v. Jackson Women's Health Organization* overruled *Roe* and *Casey*, holding that "the Constitution does not confer a right to abortion."[9]

One week later, the Postal Service's general counsel asked the Department of Justice's Office of Legal Counsel (OLC)[10] whether § 1461 "prohibits the mailing of mifepristone and misoprostol, two prescription drugs that are commonly used to produce abortions."[11] In a written opinion dated December 23, 2022, the OLC concluded that "section 1461 does not prohibit the mailing, or the delivery or receipt by mail, of mifepristone or misoprostol *where the sender lacks the intent that the recipient of the drugs will use them unlawfully*."[12]

The Postal Service should not see this as good news. The OLC did not explore the additional responsibilities that its interpretation of § 1461 would impose upon the Postal Service. On its face, however, that interpretation means that, to know whether it may handle a particular mailing of abortion drugs, the Postal Service must identify its "sender" and ascertain his or her specific intent regarding unlawful use by the "recipient." Neither the original Comstock Act, nor § 1461 today, however, mentions any "sender" or "recipient," and the OLC opinion makes no attempt to define these important new terms. The opinion nonetheless concedes that "those sending or delivering mifepristone and misoprostol typically will lack complete knowledge of how the recipients intend to use them and whether that use is unlawful under relevant law."[13]

The OLC has, therefore, effectively created a new statute, intentionally neutralizing the current one so that it poses no obstacle to the Biden Administration's agenda of maximizing abortion access. This exercise cannot be called "interpretation" of an existing statute enacted by Congress.[14] This *Legal Memorandum* does what the OLC chose not to do, following the established process of statutory interpretation to properly answer the Postal Service's question.

The Comstock Act

The OLC opinion's version of § 1461 is incompatible with both the context in which the Comstock Act was first enacted and its subsequent legislative development.

Context for the Comstock Act. Writing in 1958, Professor Glanville Williams, a widely acclaimed criminal law scholar law and an advocate of legalized abortion, acknowledged that American physicians led a 19th-century campaign against abortion "primarily because they believed unborn children must not be sacrificed unless the life of the mother was truly at stake."[15] Indeed, a century earlier at its May 1859 convention, the American Medical Association unanimously adopted a resolution condemning the "slaughter of countless children" and calling for laws prohibiting abortion, "at every period of gestation," except when necessary to save the mother's life.[16]

State legislatures and courts followed the physicians' lead, abandoning outdated concepts such as quickening, which recognized the unborn child as a living being only after its movement in the womb could be discerned.[17] As a result, during the 19th century, "the vast majority of the States enacted criminal statutes criminalizing abortion at all stages of pregnancy."[18] Congress enacted the Comstock Act (the Act) in this cultural and legal context.

In *Bours v. United States*, which reversed a Comstock Act conviction because of the indictment's wording, the U.S. Court of Appeals for the Seventh Circuit observed that including abortion in the original statute "indicates a national policy of discountenancing abortion as inimical to the national life."[19] In other words, the Comstock Act was Congress' contribution to the national movement toward prohibiting what the American Medical Association had called the "unwarrantable destruction of human life."[20]

This context, which the OLC completely ignored, is important because requiring proof, beyond a reasonable doubt no less, that the sender intends the recipient to use abortion drugs unlawfully virtually neutralizes the Comstock Act's application to abortion drugs. In other words, the OLC posits that Congress, at the urging of a well-known anti-vice crusader and in the middle of a national movement to prohibit abortion, enacted a statute that could not be enforced regarding abortion. That position is simply implausible on its face.

Legislative Development of the Comstock Act. Congress first prohibited the importation of obscene material in 1842 and, in the 1865 Post Office Act, prohibited using the "mails of the United States" to deliver an "obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character."[21] The Comstock Act soon followed. As first enacted, it prohibited only "materials relating to abortion and contraception from the mails; ordinary obscene publications slipped through the legislative net."[22] Congress quickly stepped in, expanding the statute's reach in 1876 to also include any written material "of an indecent character."[23]

As amended, § 1 of the Comstock Act directly prohibited such written materials and "any article whatever...for causing unlawful abortion" in any "place within the exclusive jurisdiction of the United States." Section 2 prohibited using the mail to deliver such materials elsewhere, and § 3 prohibited "all persons" from importing them into the United States.[24] After the Act's passage, Comstock was appointed a special agent of the U.S. Post Office with the express power to enforce the statute.[25] Two dozen states enacted their own version of the Comstock Act, some with provisions even harsher than the federal statute.[26]

In February 1878, groups led by the Liberal League presented a petition with some 70,000 signatures to Congress calling for the Act's repeal.[27] Later that year, however, the Supreme Court held that Congress' power to "establish post-offices and post-roads"[28] includes "the right to determine what shall be excluded"[29] from the mail. After a House committee hearing and recommendation, Congress left the Comstock Act unchanged.[30]

Each of Congress' subsequent amendments to the Comstock Act expanded its coverage and severity. In 1948, for example, Congress recodified the Act as 18 U.S.C. § 1461[31] and expanded it by adding "filthy" to "obscene, lewd, or lascivious" and three additional categories of written materials to which those descriptors applied. It also added "adapted" to "designed or intended" to describe the "article[s] or thing[s]" for producing abortion that could not be sent through the mail. Congress went further in 1955, adding the descriptor "vile" to the written materials that could not be sent through the mail[32] and, in 1958, doubled the fine for more than one violation of § 1461.[33]

The Comstock Act's context and overall legislative development point toward harsher penalties and broader application of its prohibitions on both written material and anything that can be used to produce abortion. In addition to the context in which the Act was passed, this legislative development makes the OLC's unusually narrow interpretation even more suspect. Turning to a more specific interpretive analysis of § 1461 further reveals the serious flaws in the OLC opinion.

Interpreting Section 1461

The OLC opinion appears so driven by the goal of eliminating § 1461 as an obstacle to the Biden Administration's abortion agenda that it simply bypassed the established process of statutory interpretation altogether. Instead, it immediately looked outside the statute for any basis for its pre-determined conclusion.

What the OLC Did Not Do. The OLC opinion did not even acknowledge, let alone follow, the well-established process of statutory interpretation, which is founded on the Constitution's grant of "All legislative Powers"[34] to Congress. Interpreting any written document involves "discovering...the meaning which the authors...designed it to convey to others."[35] Applied to one of Congress's statutes, interpretation requires "adhering to *Congress's* intended meaning."[36] The Supreme Court has identified principles, or canons, that help keep interpretation focused on that necessary objective.

Three of those interpretive canons are especially relevant here:

1. "In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'"[37]

2. "Absent any textual qualification, we presume the operative language means what it appears to mean."[38]

3. "[W]here...the words of the statute are unambiguous," the "judicial inquiry is complete."[39] In that case, a court "may not resort to extrinsic evidence to interpret them."[40]

If an argument existed that Congress intended the Comstock Act, either as originally enacted or as § 1461 today, to require proof of intended unlawful use, the OLC would surely have made it. If § 1461's text was even arguably ambiguous, justifying resort to extrinsic evidence of its meaning, the OLC would have made the case. The OLC opinion, however, did neither of these, failing to even mention either the obligation to determine what *Congress* intended § 1461 to mean or any of the principles necessary for meeting that obligation. In fact, the key terms at the heart of these interpretive principles—such as "plain," "ordinary," "ambiguous," or "ambiguity"—do not appear a single time in the entire OLC opinion. Instead, the OLC opinion simply bypassed the statutory interpretation process altogether.

What the OLC Should Have Done. In *Marbury v. Madison*, the Supreme Court held in 1803 that "[i]t is emphatically the province and duty of the judicial department to say what the law *is*."[41] A statute, the Court has repeatedly affirmed, "is" the meaning of its text at the time the legislature enacted it. Put simply, construing a statute requires determining what the legislature meant by what it enacted. The OLC opinion, therefore, should have begun by acknowledging its obligation to "adher[e] to Congress's intended meaning" for § 1461.

Keeping this necessary goal in mind, the OLC opinion should have then applied the interpretive canons noted above to determine whether, given its plain and ordinary meaning, the text of § 1461 remains sufficiently ambiguous to warrant reliance on extrinsic evidence for its meaning. "Absent any textual qualification," the Supreme Court has held, "we presume the operative language means what it appears to mean."[42] In fact, the Court has explained, "[i]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.... *When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete*.'"[43]

Consistent with its original title, the text of § 1461 is focused squarely on "article[s] or thing[s]" that can be used for "immoral purposes" such as abortion. It says nothing about either senders and their subjective intent or recipients and their speculated use. It simply prohibits from the mail any "*article or thing* designed, adapted, or intended for producing abortion."

Similarly, neither the original Comstock Act nor § 1461 has ever been limited to articles or things that are designed, adapted, or intended *only* for abortion. Beginning with its title, the OLC opinion actually confirms this, addressing "prescription drugs that *can* be used for abortion."[44] The fact that mifepristone and misoprostol may have other uses, therefore, is irrelevant and does not make the text of § 1461 ambiguous.

Merriam-Webster defines *design* and *intend* to mean "have as a purpose" and *adapted* as "suited by...design to a particular use."[45] The plain and ordinary meaning of § 1461 is that if abortion is a purpose for which an article or thing is suited, it may not be conveyed or delivered through the mail. Since this unambiguous meaning of these terms is plain on its face, "a court may not resort to extrinsic evidence to interpret them."[46]

The Postal Service itself takes the same approach, prohibiting items because of how they can be used rather than speculating about senders and recipients. The U.S. Postal Inspection Service's website, for example, lists various "items and substances [that] should never enter the mail system."[47] These include anything that contains mercury, household products that contain aerosol, and even lithium batteries. How these items might be used by others, or whether that use is legal or illegal, has nothing to do with labeling them as "non-mailable," the same term that appears in § 1461. In fact, the term "unlawful" does not appear on this website at all. Designating an item as non-mailable is based solely on a judgment that the item, *in and of itself*, is potentially harmful. The same is true about any "article or thing designed, adapted, or intended for producing abortion."[48]

The obvious answer to the Postal Service's question, therefore, is that yes, § 1461 prohibits mailing abortion drugs.

The OLC's Opinion. The OLC opinion did not do any of that. It never acknowledged its duty to adhere to Congress' intended meaning or mentioned any of the necessary statutory interpretation principles. This includes even the canon that the Supreme Court has held takes precedence "before all others," the presumption that Congress "means in a statute what it enacts there." Rather than attempt to draw Congress's intended meaning *from* § 1461, or to satisfy the prerequisite of finding ambiguity for relying on extrinsic evidence, the OLC started by searching outside the statute for a preferred meaning to impose *upon* it.

The OLC found what it was looking for in a "*judicial* construction of the Comstock Act,"[49] a few U.S. Court of Appeals decisions that appeared to interpret the Comstock Act narrowly. Since the judiciary has no power to legislate, however, the OLC still needed to somehow connect this interpretation to Congress. The OLC's theory is that, because Congress did not "disapprov[e] of the [judicial] interpretation"[50] after it was "brought to Congress's attention,"[51] Congress necessarily "ratified"[52] or "accept[ed] that narrowing construction."[53] In other words, while Congress had to act for § 1461 to exist at all, the statute could be effectively, and significantly, amended by the judiciary while Congress did nothing.

One Note and One Statement. The interpretation that OLC prefers, it says, was "brought to Congress's attention" in two ways. First, a "Historical and Revision Note" found in a 1945 House committee report "'invited' the 'attention of Congress'" to appeals court decisions narrowly interpreting § 1461.[54] Such notes, the OLC explains, "were written by a staff of experts hired by Congress to revise the U.S. Code in the 1940s, including the editorial staffs of the West and Thompson publishing companies."[55] Second, a statement by the Postmaster General found in a 1970 committee report explained that the Postal Service had administratively "accepted the courts' narrowing construction of the [Comstock] Act."[56]

The OLC contends, in other words, that one note and one statement by non-legislative parties, appearing in committee reports 25 years apart, were so powerful that only Congress's explicit "disapprov[al] of that interpretation"[57] could prevent the resulting transformation of § 1461. This theory is inconsistent not only with the Constitution's grant of legislative power to Congress, but with the very authority the OLC cites for this approach: *Texas Dept. of Housing and Community Affairs v. The Inclusive Housing Project, Inc.*[58]

Texas Dept. of Housing. In that case, a nonprofit organization that assists low-income families in finding affordable housing sued the Texas housing agency under the federal Fair Housing Act (FHA). The group claimed that the agency's pattern of allocating housing tax credits had a disparate racial impact. The Supreme Court had to decide whether § 804 of the FHA, which prohibited housing discrimination based on "race, color, religion, or national origin,"[59] should be interpreted as allowing not only suits for disparate *treatment*, but also for disparate *impact*.

The Court held that Congress "ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability"[60] when it amended the FHA in 1988 but retained § 804's existing language. That much of *Texas Dept. of Housing* appears supportive of how the OLC today wants to treat § 1461. There is a reason, however, why the OLC only cited—but did not discuss—this precedent. If *Texas Dept. of Housing* is instructive, as the OLC apparently thinks it is, then it establishes a standard for congressional ratification of a judicial construction that the OLC cannot possibly meet with respect to § 1461.

1. The Supreme Court had previously interpreted language to allow disparate-impact suits in two civil rights statutes that are "equivalent in function and purpose" to § 804.[61]

2. By 1988, "all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims,"[62] six of them in the previous six years.

3. Congress affirmatively demonstrated its "aware[ness] of this unanimous precedent"[63] by the same actions, such as committee hearings and floor speeches, that it takes when enacting or amending legislation.

4. Congress rejected a proposed amendment that would have eliminated disparate-impact liability.[64]

These factors support the Supreme Court describing Congress as making a "considered judgment"[65] to retain the previous language of § 804 while accepting that it would be interpreted, going forward, as allowing disparate-impact suits. None of these factors, however, exist regarding § 1461. The Supreme Court has never interpreted § 1461[66] or any comparable or equivalent statute to require proof of intended unlawful use. Far from the unanimous, and recent, interpretation of § 804 of the FHA, the OLC opinion cites appeals court decisions in four circuits during nearly 30 years.

More importantly, while Congress' actions regarding § 804 demonstrated its actual awareness and considered acceptance of the statute's judicial construction, § 1461's legislative development described above points in the opposite direction.

First, § 1 of the original Comstock Act prohibited "any drug or medicine, or any article whatever...for causing *unlawful* abortion." In contrast, § 2, which would later become § 1461, prohibited "any article or thing designed or intended for the...procuring of abortion," without the "unlawful" qualifier that the OLC today wants to impose. This distinction makes a very real difference. The Supreme Court has held that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[67] In other words, including "unlawful" in § 1 turns its absence from § 2 into an exclusion.

Second, this same principle applies between separate, but closely related, statutes.[68] The Tariff Act, for example, prohibits "importing into the United States from any foreign country...any drug or medicine or any article whatever for causing *unlawful* abortion."[69] The OLC opinion itself,[70] and appeals court decisions on which it relies,[71] note the difference in language between the Tariff and Comstock Acts but ignores the obvious implication that Congress, therefore, intended to exclude the "unlawful" qualifier from the latter.

Third, recodifying the federal criminal code in 1948[72] would have been the opportunity to add the "unlawful" qualifier to § 2 of the Comstock Act, which became § 1461. Instead, Congress repealed § 1, which contained the "unlawful" qualifier, and kept § 2, which did not.

Fourth, following the Supreme Court's decision in *Griswold v. Connecticut*,[73] which invented a constitutional right to use contraception, Congress in 1971 amended statutes such as § 1461 and the Tariff Act to remove their application to contraception.[74] Congress, however, did not do the same after the Supreme Court's decision in *Roe v. Wade*, retaining unchanged § 1461's application to "[e]very article or thing designed, adapted, or intended for producing abortion."

Fifth, on multiple occasions, Congress has considered, but has never adopted, amendments to § 1461 that would bring its text in line with the OLC's interpretation. Even suggesting such a change, of course, makes no sense if, as the OLC today claims, Congress had already ratified and accepted such a narrow interpretation. Congress' own actions show that it had not. For example:

- In 1978, when again recodifying the federal criminal code, Congress considered but did not adopt an amendment to § 1461 that would limit its application to "[e]very...drug, medicine, article, or thing *intended by the [sender]...to be used to produce illegal abortion*."[75] The House committee report confirmed that this would require "proof that the offender specifically intended that the mailed materials be used to produce an illegal abortion" under state law.[76]

- In 1996 and 1997, respectively, Representatives Patricia Schroeder (D–CO) and Barney Frank (D–MA) introduced legislation to drastically narrow the definition of "nonmailable matter" in § 1461, including eliminating any reference to abortion.[77] Neither bill, however, even had a Senate counterpart, and Congress took no action on either one.[78] As explained above, Congress including "unlawful" in § 1 of the Comstock Act and in similar statutes such as the Tariff Act created a presumption that Congress intended to exclude that element from § 2. Congress repeatedly passing up opportunities to insert a requirement of proving intended unlawful use means that nothing has rebutted that presumption.

Congress took none of the actions that, under *Texas Dept. of Housing*, would have evidenced its acceptance of the narrow judicial interpretation of § 1461 that the OLC favors. Quite the contrary. In at least these five different ways, Congress demonstrated the opposite, that it meant what it enacted in § 1461. Congress' "intended meaning" is what the statute's plain language has said from the beginning—that anything designed, adapted, or intended for producing abortion may not be sent through the mail.

Finally, the OLC opinion is problematic even on its own terms. Whether mailing abortion drugs is permissible under the OLC's preferred interpretation of § 1461 depends on whether their intended use is unlawful, which is determined by state law. The first appeals court decision cited in the OLC opinion, however, contradicts this position. In *Bours v. United States*,[79] the court held that in applying the Comstock Act "to an alleged offensive use of the mails...it is immaterial what the local statutory definition of abortion is, what acts of abortion are included, or what excluded. So the word 'abortion' in the national statute must be taken in its general medical sense."[80] The prohibition on using the mail to deliver abortion drugs, therefore, is not conditioned on the intent of the sender, the anticipated use by the recipient, or the legality of abortion in a particular state.

Conclusion

The U.S. Postal Service asked the Justice Department's Office of Legal Counsel whether 18 U.S.C. § 1461 prohibits mailing abortion drugs. Properly answering this question requires following the established process of statutory interpretation, including principles that help maintain the priority of "adhering to Congress's intended meaning."[81] Because this process inexorably provides an affirmative answer to the Postal Service's question, the OLC avoided it altogether. Instead, the OLC immediately looked outside the statute—and outside Congress altogether—to support the answer it wanted.

The Comstock Act's purpose was "to prevent the mails from being used to corrupt the public morals."[82] The context in which it was enacted and its legislative development both show that abortion was assuredly in this category. The evidence that the OLC completely ignored shows that Congress not only never limited § 1461's application to abortion, but actually intended that this application remain unchanged.

The plain, ordinary, and unambiguous meaning of § 1461 prohibits using the mail to send or deliver anything that is designed, adapted, or intended to produce abortion. The U.S. Food and Drug Administration has confirmed that mifepristone and misoprostol are in this category, approving their use for "termination of pregnancy through 10 weeks gestation."[83] The OLC opinion itself, in its opening paragraph, does the same by describing mifepristone and misoprostol as "drugs that are commonly used to produce abortions."[84] Planned Parenthood simply calls mifepristone the "abortion pill."[85] These drugs unquestionably fall within § 1461's prohibition.

Unfortunately, the Biden Administration's political priority of expanding abortion access compromised the OLC's duty to provide objective and unbiased legal analysis. As a result, the OLC wants Americans to believe that a law enacted as part of the national pro-life legislative movement and championed by an aggressive and uncompromising anti-vice crusader is today, with no change in its language, entirely unenforceable for its intended purpose. The OLC wants Americans to ignore what they can read for themselves, that the statute has clear and unqualified language, and that Congress repeatedly demonstrated its intention to keep it that way. The OLC wants Americans to believe that while enacting the Comstock Act required Congress to act, rendering it inert and unenforceable could be accomplished by Congress failing to act at all.

The Justice Department is wrong. Federal law prohibits mailing abortion drugs.

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Endnotes

1. Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2253 (2022).
2. *See id*. at 2249–54.
3. *Id*. at 2261.
4. 17 Stat. 598 (1873).
5. *See* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 William & Mary L. Rev. 741, 744–60 (1992). Comstock claimed that he successfully prosecuted more than 3,600 defendants and destroyed more than 160 tons of obscene literature in his role as a special agent with the U.S. Postal Service. *See* Comstock Law of (1873), JRank, https://law.jrank.org/pages/5508/Comstock-Law-1873.html#ixzz7qmkxsQb4.
6. 18 U.S.C. § 1461.
7. 410 U.S. 113 (1973).
8. 505 U.S. 833 (1992).
9. *Dobbs*, 142 S.Ct. at 2279.
10. The Office of Legal Counsel provides "written opinions and other advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and other components of the Department of Justice." *Office of Legal Counsel*, U.S. Dep't of Just., https://www.justice.gov/olc.
11. Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortion, O.L.C. Slip Op., at 1 (Dec. 23, 2022), https://www.justice.gov/olc/opinion/file/1560596/download.
12. *Id*. (emphasis added).
13. *Id*. at 17.
14. Instead, it does what Justice George Sutherland once warned against, amending § 1461 "under the guise of interpretation." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).
15. Glanville Williams, The Sanctity of Life and the Criminal Law 141 (1958).
16. Frederick N. Dyer, The Physicians' Crusade Against Abortion 76 (1999).
17. *See*, *e.g.*, Lamb v. State, 10 A. 208 (Md. 1887).
18. *Dobbs*, 142 S.Ct. at 2252.
19. Bours v. United States, 229 F. 960, 964 (7th Cir., 1915).
20. See Dyer, *supra* note 16.
21. 13 Stat. 504, 507 (1865). See Blanchard, *supra* note 5, at 745–46.
22. Blanchard, *supra* note 5, at 749.
23. *Id*.
24. *Id*. at 746.
25. *Id*. at 748.
26. Comstock Law of (1873), *supra* note 5. *See also* Blanchard, *supra* note 5, at 751.
27. Blanchard, *supra* note 5, at 752.
28. U.S. Const., art. I, § 8, cl. 7.
29. Ex parte Jackson, 96 U.S. 727, 732 (1878).
30. Blanchard, *supra* note 5, at 754.
31. 62 Stat. 768 (1948), ch. 645.
32. Pub. L. 95–190, 69 Stat. 183 (1955).
33. Pub. L. 85–796, 62 Stat. 768 (1958).
34. U.S. Const., art I, § 1.
35. Black's Law Dictionary 824 (7th ed. 1999).
36. Valerie C. Brannon, Cong. Rsch. Srvc., R45153, Statutory Interpretation, Theories, Tools, and Trends 2 (2022) (emphasis added).

37. Lawson v. FMR LLC, 571 U.S. 429, 440 (2014), quoting Moskal v. United States, 498 U.S. 103, 108 (1990).
38. *Id*. at 441.
39. Desert Place, Inc. v. Costa, 539 U.S. 90, 99 (2003) (internal citations omitted). *See also* Babb v. Wilkie, 140 S.Ct. 1168, 1177 (2020); Lawson v. FMR LLC, 571 U.S. 429, 440 (2014), quoting *Moskal*.
40. Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (en banc). *See also* Steimel v. Wernert, 823 F.3d 902, 912 (7th Cir. 2016).
41. Marbury v. Madison, 5 U.S. 137, 177 (1803) (emphasis added).
42. *Id*. at 441.
43. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (emphasis added), quoting Rubin, 449 U.S. 424 (1981), at 430.
44. O.L.C. opinion, *supra* note 11, at 17–18.
45. *Design* and *Intend*, MerriamWebster (Online 2023), https://www.merriam-webster.com/dictionary.
46. *Coast Fed. Bank*, 323 F.3d at 1040.
47. U.S. Postal Inspection Serv., Prohibited, Restricted, and Non-Mailable Items (2022), https://bit.ly/3HCU4sY.
48. 18 U.S.C. § 1461.
49. O.L.C. opinion, *supra* note 11, at 2.
50. *Id*. at 14.
51. *Id*. at 14–15.
52. *Id*. at 12.
53. *Id*. at 15.
54. *Id.* at 12–13. This note also appears following the text of § 1461 in the U.S. Code. See *18 U.S. Code § 1461: Mailing Obscene or Crime-Inciting Matter*, Cornell L. Sch., https://www.law.cornell.edu/uscode/text/18/1461.
55. *Id*. at 12 n.14.
56. *Id*. at 11.
57. *Id*. at 14.
58. 576 U.S. 519 (2015).
59. *See* 42 U.S.C. § 3604.
60. *Id*. at 536.
61. *Id*. at 520.
62. *Id*. at 535.
63. *Id*. at 536.
64. *Id*.
65. *Id*.
66. With the exception of *Bours*, in fact, none of the appeals court decisions cited in the OLC opinion interpreted or applied the Comstock Act with regard to abortion.
67. Russello v. United States, 464 U.S. 16, 23 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972). *See also* Riegel v. Medtronic, Inc., 522 U.S. 312, 327 (2008) (When assessing two different clauses in the same statute to discern whether the Food, Drug, and Cosmetic Act's wording was intended to pre-empt state law for both drugs and medical devices, the court wrote: "It did not…but instead wrote a pre-emption clause that applies only to medical devices.")
68. *See* Sullivan v. Stroop, 496 U.S. 478 (1990).
69. 19 U.S.C. § 1905(a) (emphasis added).
70. O.L.C. opinion, *supra* note 11, at 8 n.9.
71. *See*, *e.g.*, U.S. v. One Package, 86 F.2d 737, 738 (2d Cir. 1936). The court's decision was based on a series of speculative phrases such as "seems hard to suppose," *id*. at 739, and "seems unreasonable." *Id*. at 740.
72. 62 Stat. 768.
73. 381 U.S. 479 (1965).
74. See Pub. L. 91–662, 62 Stat. 768 (1971).
75. Report of the Subcommittee on Criminal Justice on Recodification of Federal Criminal Law, 95th Cong., 39–42 (Comm. Print 1978) (emphasis added).

76. *Id.* at 39–42 (emphasis added).
77. H.R. 3057, 104th Cong. (1996).
78. In her remarks on the House floor, Schroeder focused on the Act's effect on abortion and criminalizing distribution of abortion information. She never said anything about "unlawful" or "illegal" abortion, but identified a violation of the statute as the strict liability offense it was. Schroeder said: "The problem is, this body just allowed the Comstock Act to be enforced on the Internet vis-à-vis anything doing with abortion. Previously, the Congress did away the Comstock Act dealing with family planning, thank goodness. But the Comstock Act has never been repealed; it is still on the books. And so, as a consequence, this has been thrown up on the Internet and could be used to bring people into a criminal conviction or arraignment if they decided to discuss anything about the big A word on the Internet.... The Telecommunications Act passed this year extended the Comstock Act's prohibitions to anyone who uses an interactive computer service. This Congress, therefore, revived Comstockery by making it a crime to use the Internet to provide or receive information which directly or indirectly tells where, how, of whom, or by what means an abortion may be obtained." Archives of Women's Political Communication, Iowa State University, posted March 21, 2017, https://awpc.cattcenter.iastate.edu/2017/03/21/comstock-act-still-on-the-books-sept-24-1996/.
79. Bours v. United States, 229 F. 960 (7th Cir., 1915).
80. *Id.* at 964.
81. *See supra* note 36.
82. *See* Comstock Law of (1873), *supra* note 5.
83. Information about Mifepristone for Medical Termination of Pregnancy Though Ten Weeks Gestation, U.S. Food and Drug. Admin. (2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation. *See also Mifepristone (Oral Route)*, Mayo Clinic, https://www.mayoclinic.org/drugs-supplements/mifepristone-oral-route/proper-use/drg-20067123#:~:text=For%20oral%20dosage%20form%20(tablets,dose%20placed%20in%20the%20cheeks; *Uses*, WebMD, https://www.webmd.com/drugs/2/drug-20222-325/mifepristone-oral/mifepristone-oral/details ("Mifepristone (also known as RU 486) is used to cause an abortion during the early part of a pregnancy.").
84. O.L.C. opinion, *supra* note 11, at 1.
85. *How Do I Use the Abortion Pill?*, Planned Parenthood, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-do-i-use-abortion-pill.