

# TAKING CARE OF COMSTOCK: AN ORIGINALIST INTERPRETATION OF THE TAKE CARE CLAUSE AND ENFORCEMENT OF THE COMSTOCK ACT POST-*DOBBS*

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## ABSTRACT

This Comment explores the originalist reading of the Article II Take Care Clause and how it affects the enforcement of the Comstock Act post *Dobbs v. Jackson Women’s Health Organization*.

First, this Comment explores the history of the Comstock Act and its constitutionality. Second, this Comment takes an originalist approach to understanding the meaning of the Take Care Clause by looking at documents written by the Nation’s Founding Fathers and the ratification debates. Third, this Comment examines the concept of prosecutorial discretion and how the Take Care Clause imposes limits on it. Fourth, this Comment investigates how the Comstock Act was historically enforced, or the lack thereof. Finally, this Comment concludes that the Take Care Clause imposes on the President the duty to execute the laws and that failure to do so is a violation of the Constitution and the separation of powers.

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the bookseller.<sup>5</sup> Though his endeavors against vice began alone, he soon became a member of New York's chapter of the Young Men's Christian Association ("YMCA"), an organization founded in England to spread Christianity among businessmen and prevent men from succumbing to the vices of the times.<sup>6</sup> In 1868, the YMCA sent a delegation to New York's capital and successfully passed legislation to suppress obscene materials that would corrupt the morals of the community.<sup>7</sup>

After the successful suppression of obscene material in New York, Comstock went to Washington, with the YMCA president's encouragement, to lobby Congress to pass a similar law for all states.<sup>8</sup> From December 1872 to March 1873, Comstock lobbied Congress, displaying exhibits and talking individually with Congressmen.<sup>9</sup> Congress passed, with unanimous approval in the Senate and under suspension of the rules in the House, a federal statute prohibiting, among other things, the circulation through mail of obscene materials or medicine for procuring an abortion:<sup>10</sup>

That no obscene . . . or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, . . . shall be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things, . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge.<sup>11</sup>

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<sup>5</sup> Craig L. LaMay, *America's Censor: Anthony Comstock and Free Speech*, 19 COMM'NS & L. 1, 12 (1997).

<sup>6</sup> *Id.* at 12–13.

<sup>7</sup> *Id.* at 13.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> *Id.*

<sup>10</sup> Comstock Act of 1873, ch. 258, § 1, 17 Stat. 598, 598 (1873); see CONG. GLOBE, 42d Cong., 3d Sess. 2004–05 (1873); S. JOURNAL, 42d Cong., 3d Sess. 424 (1873).

<sup>11</sup> § 2, 17 Stat. at 599.

While in Washington, Comstock was appointed Special Agent of the U.S. Post Office Department, which gave him authority to both interpret and enforce the new law (inspecting mail, arresting suspected violators, etc.).<sup>12</sup> This new federal law, officially known as the Federal Anti-Obscenity Act, became commonly known as the Comstock Act of 1873 because of Anthony Comstock's efforts to pass the law and his zealous commitment to improving morals and condemning vices.<sup>13</sup>

Over time, the Comstock Act remained largely unchanged, with some minor modifications, until around the 1950s,<sup>14</sup> when Congress amended the Comstock Act to remove the prohibition on contraceptives.<sup>15</sup> Additionally, in 1994, Congress updated the outdated fines and increased the maximum fine for those found guilty of violating Title 18 crimes (the Comstock Act was included in this section) to \$10,000 from \$5,000.<sup>16</sup>

Today, most of the Comstock Act is codified in Title 18 of the United States Code. The sections of most relevance and concern, for purposes of this Comment, are the sections pertaining to the prohibition of mailing or importing drugs or medications for procuring an abortion.<sup>17</sup> Section 1461, among other things, prohibits mailing obscene materials and articles for producing an abortion:

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; . . .

. . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office . . . .

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<sup>12</sup> LaMay, *supra* note 5, at 16–17.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> See, e.g., Act of Aug. 28, 1958, Pub. L. No. 85-796, §§ 1–2, 72 Stat. 962, 962.

<sup>15</sup> Act of Jan. 8, 1971, Pub. L. No. 91-622, §§ 3–4, 84 Stat. 1973, 1973.

<sup>16</sup> Act of Sep. 13, 1994, Pub. L. No. 103-322, ch. 601, § 330016(1)(K)-(L), 108 Stat. 2146, 2147.

<sup>17</sup> 18 U.S.C. §§ 1461–62.

Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . nonmailable, or knowingly causes to be delivered by mail according to the direction thereon [anything nonmailable] . . . shall be fined under this title or imprisoned not more than five years, or both, for the first such offense, and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.<sup>18</sup>

Section 1462, among other things, prohibits the importation into the United States or use of a common carrier to send obscene materials and medicine or drugs designed for abortions interstate:

Whoever brings into the United States . . . or knowingly uses any express company or other common carrier . . . for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious . . . or other matter of indecent character; or

. . . .

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; . . .

Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service . . . which is herein made unlawful—

Shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.<sup>19</sup>

Both sections of the Comstock Act, codified into §§ 1461 and 1462, although not routinely used, remain good law today.

## 1.2. Constitutionality of the Comstock Act

Our federal government is one of limited, enumerated powers. Although at times it may not appear so limited, it is nevertheless limited by the

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<sup>18</sup> *Id.* § 1461.

<sup>19</sup> *Id.* § 1462.

United States Constitution. Our Founding Fathers vested legislative powers in Congress, composed of the House of Representatives and the Senate.<sup>20</sup> The process for passing a law is dictated by the Constitution.<sup>21</sup> To pass a bill into law that binds all fifty states, the Constitution requires it to pass both Houses and be signed by the President of the United States: “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”<sup>22</sup> After being presented to the President, if he should sign the bill, it is passed into law; if he should veto it, it returns to the chamber in which it originated to consider the President’s objections.<sup>23</sup>

When determining whether a law passed by Congress is constitutional, it is important to keep in mind that the inquiry is one of whether Congress has the power, not the wisdom, to pass such a law. Although certain laws may seem unwise, unpopular, or highly controversial, the question is whether Congress possessed the Constitutional power to pass such a law, not whether it is wise or practical.<sup>24</sup> If Congress does not have an enumerated power to pass such a law, then the inquiry ends because the law is unconstitutional.<sup>25</sup> But if Congress is deemed to have the enumerated power to pass such a law, then the inquiry continues to determine if it violates some other constitutional right.<sup>26</sup> Finally, if the law does not violate any other Constitutional right, then the law is enforceable.<sup>27</sup>

Thus, the constitutionality of the Comstock Act begins with whether Congress followed the constitutional process for passing a bill into law. The Comstock Act (“the Act”) was passed with unanimous approval in the Senate and under suspension of the rules in the House and was signed into law by President Ulysses S. Grant.<sup>28</sup> It was therefore passed through the bifurcated

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<sup>20</sup> U.S. CONST. art. I, § 1.

<sup>21</sup> U.S. CONST. art. I, § 7.

<sup>22</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>23</sup> *Id.*

<sup>24</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 531–32 (2012).

<sup>25</sup> *United States v. Morrison*, 529 U.S. 598, 607 (2000).

<sup>26</sup> *New York v. United States*, 505 U.S. 144, 156–57 (1992).

<sup>27</sup> See *id.*

<sup>28</sup> LaMay, *supra* note 5, at 16; see CONG. GLOBE, 42d Cong., 3d Sess. 2004–05 (1873); S. JOURNAL, 42d Cong., 3d Sess. 424 (1873).

process established by the Constitution. On that basis, the Act passes the structure outlined in the Constitution and is presumed constitutional.<sup>29</sup>

Next is whether the Constitution grants Congress the power to regulate the entirety of the postage system. The Constitution explicitly gives Congress authority to “establish Post Offices and post Roads,”<sup>30</sup> which presumably includes running post offices and regulating materials that are sent through the mail. The Supreme Court generally addressed the constitutionality of Congress’s power to regulate the mail with regard to the Act in *Ex parte Jackson* when it answered whether Congress could regulate the mailing of lottery tickets.<sup>31</sup> The Court brought up the Act as the basis for forbidding the mailing of lottery tickets, as the mail should not be used to corrupt the people.<sup>32</sup> The Court relied on the Postal Clause, or Article I, Section 8, Clause 7, which gave Congress the power to not only regulate the routes of mail, but the transportation of mail and “all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.”<sup>33</sup> Thus, Congress had the power to determine what should be excluded from the mail.<sup>34</sup>

The Court even addressed Fourth Amendment infringement concerns.<sup>35</sup> It emphasized that searching visible mail, such as newspapers and magazines, does not infringe on the Fourth Amendment, but that sealed mail should not be opened, as opening it might constitute an infringement.<sup>36</sup> Evidence to support a search under the Act came from recipients who received the items and from agents who dropped off letters and items.<sup>37</sup> Thus, the Act survived constitutional objections.

Based on the changes to the Act and its codification, §§ 1461 and 1462 of the U.S. Code cover not only the sending of drugs intended for abortion through the United States Postal Service, but also a “common carrier or interactive computer service” in interstate or foreign commerce, capturing

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<sup>29</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>31</sup> See *Ex parte Jackson*, 96 U.S. 727, 736 (1877).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 732.

<sup>34</sup> *Id.* at 736–37.

<sup>35</sup> *Id.* at 733.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 735.

the more modern forms of transportation.<sup>38</sup> Thus, the constitutional power shifted from that of the Postal Clause to that of the Commerce Clause.

In *United States v. Orito*, the Court addressed whether Congress had the constitutional power to regulate the transportation of obscene materials.<sup>39</sup> The Court upheld the Act because Congress has the power under the Interstate Commerce Clause to impose conditions and requirements on the channels so they may not be used for “promoting or spreading evil, whether of a physical, moral or economic nature.”<sup>40</sup> The Court reminded the petitioners that the legislature may determine its own purpose or motive for regulating interstate commerce, “which the Constitution places no restriction and over which the courts are given no control.”<sup>41</sup> The Constitution empowers Congress to regulate interstate commerce and does not require Congress to justify that regulation with a good reason. Even if Congress were required to justify its reasoning, which it is not, the Comstock Act provides a very valid reason: protecting both morals and the lives of the people.

Recently, the Supreme Court had an opportunity to address the constitutionality of the Act that was specifically concerned with the prohibition of mailing abortion related medicine, but the Court dismissed the case for lack of standing.<sup>42</sup> But as of now, the Supreme Court has never addressed the constitutionality of enforcing a ban on mailing abortion medications.

Even though the Supreme Court never ruled on the constitutionality of the ban on mailing abortion medication, the Act as a whole is constitutional, and it has been enforced with regard to obscene material and things corrupting the morals of the people. There is no reason to believe the Act is unconstitutional only with regard to abortion. Although there might have been an issue under *Roe v. Wade* because there was a constitutional right to abortion for the first trimester, after *Dobbs v. Jackson Women’s Health Organization*, there is no constitutionally protected right to abortion, meaning

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<sup>38</sup> 18 U.S.C. §§ 1461–62.

<sup>39</sup> 413 U.S. 139, 140–41 (1973).

<sup>40</sup> *Id.* at 144 (quoting *N. Am. Co. v. SEC*, 327 U.S. 686, 705 (1946)).

<sup>41</sup> *Id.*; *McCray v. United States*, 195 U.S. 27, 61 (1904); *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937); *United States v. Darby*, 312 U.S. 100, 115 (1941).

<sup>42</sup> *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 396–97 (2024).

there is no potential for the Act violating a fundamental right by prohibiting its access.<sup>43</sup>

Furthermore, prohibiting the mail of medicine used for abortion is very similar to prohibiting obscene material, as they are both immoral (abortion being immoral because it ends the life of an innocent human being), and prohibiting the circulation through mail would protect morals by limiting access to such immoral materials.

Thus, because Congress has the constitutional power to regulate mail and interstate commerce, the Comstock Act is constitutional in regulating the transport of certain items, including medicine used for abortion.

## 2. ARTICLE II, SECTION 3: THE TAKE CARE CLAUSE

### 2.1. Origins of the Executive Branch

Our Founding Fathers greatly debated the structure and role of the federal government in the founding of our country. While some wanted a very strong or energetic federal government, others wanted a more limited one. Various ratification debates highlighted the advantages and disadvantages of both, but ultimately ended in the federal government being one of limited, enumerated powers.<sup>44</sup>

The federal government's enumerated powers were to be separated.<sup>45</sup> If one branch or individual were to hold all the power, it would certainly prove hard to keep a free form of government from tyrannically ruling the people.<sup>46</sup> There had to be a separation of powers between those who made the law, enforced the law, and interpreted the law.<sup>47</sup> Thus, the legislative

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<sup>43</sup> See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022); *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

<sup>44</sup> See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012).

<sup>45</sup> See Letter from William Symmes to Capt. Peter Osgood, Jr. (Nov. 15, 1787) [hereinafter Letter from William Symmes], in 4 THE COMPLETE ANTI-FEDERALIST 55, 56 (Herbert J. Storing ed., 1981).

<sup>46</sup> William Penn expressed the clear notion that no free government can be maintained without "the DIVISION OF POWER among those who are charged with the execution of it." William Penn, Essay No. II (Jan. 3, 1788), in 3 THE COMPLETE ANTI-FEDERALIST 171, 172 (Herbert J. Storing ed., 1981).

<sup>47</sup> *Id.*

branch was to make the law, the executive branch was to enforce the law, and the judicial branch was to interpret the law.<sup>48</sup>

Along with other aspects of America's governmental structure, the executive branch's structure was influenced by England and figures like Sir William Blackstone and John Locke.

Blackstone wrote about the concept of the King's prerogative being limited in that the King had the power to act, but only as long as it was for the public good, and anything beyond that was not legitimate power.<sup>49</sup> Even though his writing might not have accurately reflected the King's power, the concept of the law's enforcer having limited power was incorporated in the Constitution: the Executive, being part of the federal government, is one of limited power.

Similarly, John Locke wrote that the power to enforce the law needed to be vested in a single person for consistency and uniformity.<sup>50</sup> The vesting of executive power in one individual is reflected in the ratification debates.<sup>51</sup> As Alexander Hamilton wrote in *Federalist No. 70*, it was better to have executive power vested in one person so he could make quick decisions when needed, such as war, and be held accountable.<sup>52</sup> Multiple Executives could blame others without knowing who was truly responsible for the decisions.<sup>53</sup> Executive power being vested in one person is reflected in the Constitution.<sup>54</sup>

The executive pardoning power in our Constitution was also a concept that John Locke wrote about as a tool to ensure justice in certain cases.<sup>55</sup>

Another aspect that has English roots is the rule of law. The rule of law, seen throughout the ratification debates on the role of the Executive, is

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<sup>48</sup> U.S. CONST. arts. I–III.

<sup>49</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*237, \*251–52.

<sup>50</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 83–84 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

<sup>51</sup> THE FEDERALIST NO. 70, at 471–73 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); Speech by James Wilson to the Pennsylvania Convention (Dec. 4, 1787) [hereinafter James Wilson Speech], in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 453, 480 (Jonathan Elliot ed., 2d ed. 1836).

<sup>52</sup> THE FEDERALIST NO. 70, *supra* note 51.

<sup>53</sup> *Id.*

<sup>54</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>55</sup> LOCKE, *supra* note 50, at 84.

a concept that is older than England itself.<sup>56</sup> The rule of law predates even Aristotle, who wrote on the topic in his *Politics*.<sup>57</sup> Aristotle debated the rule of law versus the rule of men and ultimately concluded that the rule of law was superior to the rule of men and the final sovereign.<sup>58</sup> English common law, encapsulated by Sir William Blackstone's *Commentaries on the Laws of England*, adopts the rule of law and sovereignty of law, which was re-emphasized in the English Bill of Rights.<sup>59</sup> Among other things, the English Bill of Rights acknowledged that the laws in England were even over the King.<sup>60</sup> American jurisprudence adopts the rule of law and establishes it in our Constitution, as the Constitution, laws of the United States, and treaties are the supreme law of the land.<sup>61</sup>

Although many aspects of England's structure influenced our Constitution in positive ways (taking roles from the king and positing them in the Executive), there were also aspects of England's monarch that our Founding Fathers did not incorporate and strayed away from. One of these being the hereditary monarch. The President was to be elected and not pass through lineage.<sup>62</sup>

Thus, England served as a model to contrast aspects of the executive branch that America wanted to emulate and others that we wanted to reject.

## 2.2. Originalist Definition

Originalist interpretation, like many other forms of constitutional interpretation, begins with the text of the Constitution itself.<sup>63</sup> The meaning of

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<sup>56</sup> See THE FEDERALIST NO. 70, *supra* note 51, at 471–75 (Alexander Hamilton); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147–50 (2d ed. 1829).

<sup>57</sup> See John O. Tyler, Jr., *The Necessity of the Rule of Law*, in THE ORIGINS OF OUR FOUNDING PRINCIPLES 171, 171 (2020).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 172, 174.

<sup>60</sup> *Id.* at 173–75.

<sup>61</sup> *Id.* at 172, 176; U.S. CONST. art. VI, cl. 2.

<sup>62</sup> U.S. CONST. art. II, § 1; *Essays of An Old Whig*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 46, at 17, 37–38.

<sup>63</sup> See GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 17 (6th ed. 2023).

the words, however, is given the same meaning it had when enacted.<sup>64</sup> This is accomplished through analyzing the dictionary meaning of the words at the date of enactment and the context the Founders gave to the meaning in their essays debating the Constitution.<sup>65</sup> Thus, this objective approach applies the same meaning the words had at the time they were enacted to the meaning today.

### 2.3. Originalist Interpretation of the Take Care Clause

#### 2.3.1. Meaning of “shall take care”

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; . . . he *shall take Care that the Laws be faithfully executed*, and shall Commission all the Officers of the United States.<sup>66</sup>

Beginning with the text itself, “shall” appears to be mandatory language or requires that something take place in the future. It is not “may” or any other word that might mean the Constitution grants the President discretionary power. “Take care” is not as straightforward as “shall,” but it still indicates a form of duty as the President is charged to mandatorily (shall) watch over (take care) the execution of the laws.

Next, a more precise definition of the meaning of these terms comes from the understanding of the words at the time they were written. One Founding Father, Noah Webster, wrote an American English dictionary.<sup>67</sup> Noah Webster’s dictionary traces the origins of the word “shall” to mean

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<sup>64</sup> *Id.*

<sup>65</sup> BRANDON J. MURRILL, CONG. RSCH. SERV., R45129, *MODES OF CONSTITUTIONAL INTERPRETATION* 7–8 (2018).

<sup>66</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>67</sup> *See generally* NOAH WEBSTER, 2 *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) (writing on the English language in the American context).

“ought, it is a duty, it is necessary” in some languages.<sup>68</sup> But in Webster’s time, it had a few different meanings depending on the grammatical perspective used (first, second, or third).<sup>69</sup> Noah Webster defines “shall” used in the second or third person to mean “a promise, command or determination.”<sup>70</sup> Thus, both the text itself and the definition at the time define it as a sort of command or telling of what is to happen.

“Take” is defined by Noah Webster as gaining or receiving into one’s possession.<sup>71</sup> Specifically, “take” is “to get into one’s power for keeping. . . . To agree to.”<sup>72</sup> This definition of “take,” given the context of the word “care” used after it, sheds light on the meaning of both “take” and “care.” Care is defined by Noah Webster as concern, caution, or charge or oversight.<sup>73</sup> Thus, “take care” is to get into one’s power to oversee. Taken altogether, the President “shall take care” is a duty to oversee the laws.

Furthermore, the ratification debates shed light on the meaning behind the clause. William Rawle believed that the Take Care Clause specifically charged the President with the duty to execute the law: “It declares what is [the President’s] duty,” and he is “bound to enforce them.”<sup>74</sup> Alexander Hamilton also wrote that it was the Executive’s power to execute the laws: “While the execution of the laws . . . [is] the function[] of the executive . . . .”<sup>75</sup>

Additionally, George Washington used the phrase “take care” when sending letters of orders to his army, writing that all officers are required to keep their quarters clean and that they should “take care that Necessarys be provided in the Camps and frequently filled up to prevent their being offensive and unhealthy.”<sup>76</sup> Confirming that this language was commonly used at

<sup>68</sup> *Id.* at 565 (emphasis removed).

<sup>69</sup> *Id.* at 565–66.

<sup>70</sup> *Id.* at 566.

<sup>71</sup> *See id.* at 722. Noah Webster gives an overview of the term by saying “[take] more generally denotes to gain or receive into possession in a peaceable manner, either passively or by active exertions.” *Id.* Then he gives examples of all the different ways “take” can be used. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> NOAH WEBSTER, 1 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 336 (1828).

<sup>74</sup> RAWLE, *supra* note 56, at 149.

<sup>75</sup> THE FEDERALIST NO. 75, *supra* note 51, at 504 (Alexander Hamilton).

<sup>76</sup> George Washington, *General Orders*, 4 July 1775, NAT’L ARCHIVES, <https://perma.cc/V5BJ-EPFK>.

the time of ratification and was used as a form of charging a duty. Thus, in the Constitution, the phrase “shall take care” imposes a duty on the president to faithfully execute the laws.

### 2.3.2. Meaning of “faithfully execute”

Next, the phrase “faithfully execute” still conveys the meaning of a duty charged upon the President to enforce the laws. Again, beginning with the text, these words are not difficult to define or understand. “Faithfully” means to adhere to or serve continually. “Execute” means to carry out.

History must also inform our understanding of the phrase and words. Noah Webster’s dictionary defines “faithfully” as “[w]ith strict adherence to allegiance and duty.”<sup>77</sup> “Execute” was synonymous with “to follow out or through. . . . To carry into effect.”<sup>78</sup> Thus, together, “faithfully execute” means to strictly adhere to allegiance to carry into effect the laws.

Looking at the context in which this was ratified into our Constitution, there is a deeper and greater understanding of the President’s role to faithfully execute the laws that confirms and expounds on the definitions of the words at the time. During the ratification debates, there was concern that this phrase was too brief and general.<sup>79</sup> William Symmes was one of those concerned with the power of the Executive and how it did not define “how far a faithful execution of the laws may extend.”<sup>80</sup> Symmes worried that the President would abuse this power by not enforcing the law on himself, making him like a king: above the law, picking and choosing which laws to enforce.<sup>81</sup> But William Rawle addressed this issue by reminding our Founding Fathers about the rule of law in that the President is not above the law but subject to obey it: “Every individual is bound to obey the law, however objectionable it may appear to him: the executive power is bound not only to obey, but to execute it.”<sup>82</sup> Every individual means every individual, including the President. Further, the President is bound to execute it. As Alexander Hamilton also noted, the law is a “rule which those to whom it is prescribed

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<sup>77</sup> 1 WEBSTER, *supra* note 73, at 721.

<sup>78</sup> *Id.* at 700.

<sup>79</sup> Letter from William Symmes, *supra* note 45, at 60–61.

<sup>80</sup> *Id.* at 60.

<sup>81</sup> *Id.* at 59–60.

<sup>82</sup> RAWLE, *supra* note 56, at 147.

are bound to observe.”<sup>83</sup> The rule of law was the very foundation of keeping a republic, for in a monarchy, the king is not bound by the law like the rest of the people.

Thus, the faithful execution of the law charges the President with the duty to enforce it, as he is also bound by it.

### 2.3.2.1. Discretion in Execution Does Not Include Refusal to Enforce

The President has some discretion that the founders noted and debated over in the ratification convention. This discretion comes from the ability of the Executive to interpret the law, so long as such interpretation is still within the law’s prescription by Congress. As noted by Hamilton defending the Proclamation of Neutrality by the President, “The President is the constitutional Executor of the laws. . . . He who is to execute the laws must first judge for himself of their meaning.”<sup>84</sup> The President must first understand the law and its requirements set forth by Congress in order to enforce it. But the President’s discretion on how to enforce the law is confined to Congress’ prescription in the law. Practically speaking, the President should be able to discern how to enforce the law as passed by Congress.

Additionally, the President has prescribed powers to pardon certain offenders and veto laws that the President deems unfit.<sup>85</sup> These powers are specific to certain cases where an offender has already been found guilty by some law (excluding impeachment), in cases of pardoning, or before the law has been passed, in cases of vetoing a bill.<sup>86</sup> However, these powers do not extend to refusing to enforce existing law.<sup>87</sup>

The Executive’s discretion in enforcement does not, however, include the power to refuse enforcement. William Rawle noted, “The office of executing a law, *excludes the right to judge of it*, and . . . does not require that the

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<sup>83</sup> THE FEDERALIST NO. 33, *supra* note 51, at 207 (Alexander Hamilton).

<sup>84</sup> ALEXANDER HAMILTON, PACIFICUS NO. 1 (1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 8, 16–17 (Morton J. Frisch ed., Liberty Fund 2007).

<sup>85</sup> U.S. CONST. art. II, § 2; *id.* art. I, § 7.

<sup>86</sup> U.S. CONST. art. II, § 2; *id.* art. I, § 7.

<sup>87</sup> *See* U.S. CONST. art. II, § 2; *id.* art. I, § 7; *id.* art. II, § 3.

executive power should concur in opinion on its utility.”<sup>88</sup> The meaning of judge, as used here, does not mean judgment in interpretation, but judgment as condoning or disapproving of a law, as the President need not agree with the law. Thus, the Executive’s power to enforce the law excludes the right to judge its merits or usefulness.

Further, Rawle notes that Article II, Section 3 of the Constitution, “declares what is his duty, and it gives him no power beyond it.”<sup>89</sup> The President must enforce the law, regardless of whether the President thinks it unwise, does not agree, etc., and “if he attempts to carry his power further, he violates the Constitution.”<sup>90</sup> This statement is a clear intention for the separation of powers, as the executive branch does not choose which laws to enforce but is obligated to uphold all constitutional laws in good faith.

The tension among scholars today between the constitutional validity of the executive’s power to exercise discretion in enforcement of the law (prosecutorial discretion) and the Take Care Clause will be discussed later in this Comment.<sup>91</sup>

### 2.3.3. Meaning of “the Laws”

The President “shall take Care that *the Laws* be faithfully executed.”<sup>92</sup> “The Laws” at first glance seem to mean the laws passed by Congress, as the Constitution specifies how laws are to be passed: by Congress, signed by the President. Context of the sentence in Section 3 of Article II also confirms this interpretation of “the Laws.” It discusses how the President will give Congress information on the State of the Union from time to time, recommend measures for consideration, call special sessions, adjourn Congress if they cannot agree on the adjournment day, and receive ambassadors.<sup>93</sup> Given the context in the Take Care Clause is nestled, it shows the interaction and relationship between the President and Congress. Thus, “the Laws” would mean the laws passed by Congress.

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<sup>88</sup> RAWLE, *supra* note 56, at 147 (emphasis added).

<sup>89</sup> *Id.* at 149.

<sup>90</sup> *Id.*

<sup>91</sup> *See infra* Section 3.2.

<sup>92</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>93</sup> U.S. CONST. art. II, § 3.

There is some debate that “the Laws” in the Take Care Clause includes the Constitution and gives the President discretion in the enforcement. Thus, a valid exercise of the executive branch’s power is the president’s nonenforcement of a law deemed to be unconstitutional by the President, because it would be an invalid law.<sup>94</sup> There is evidence of “the Laws” used to include the Constitution, as Alexander Hamilton refers to the Constitution as a fundamental law, “A constitution is in fact . . . a fundamental law.”<sup>95</sup> Thus, the word “Laws” includes the Constitution because the Constitution is a law and is the supreme law of the land.

Though there is some evidence to support the use of “the Laws” to include the Constitution, with regard to the Take Care Clause, more evidence tends to weigh in favor of “the Laws” excluding the Constitution. Looking at the Constitution’s broader context, “the Laws” and the “Constitution” are not used synonymously. The Supremacy Clause notes that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”<sup>96</sup> The Founders distinguish between the laws passed by Congress and the Constitution, further supporting the interpretation that “the Laws” does not include the Constitution.

Turning to the wider context of the ratification debates, we also see evidence supporting the view that “the Laws” means the laws passed by Congress. The Founders were constantly emphasizing and debating the roles of the legislative and executive branches and the separation of them. When addressing the Executive’s power to execute the laws, Founders like Alexander Hamilton wrote that the Legislature passes the laws and the Executive enforces those laws, “[t]he essence of legislative authority is to enact laws, or in other words to prescribe rules for the regulation of society. While the execution of the laws . . . seems to comprise all the functions of the executive magistrate.”<sup>97</sup> Thus, in the context of discussing the Executive’s power to enforce the laws, the laws are those that are passed by the Legislature.

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<sup>94</sup> Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RESV. L. REV. 905, 919–20 (1989).

<sup>95</sup> THE FEDERALIST NO. 78, *supra* note 51, at 525 (Alexander Hamilton).

<sup>96</sup> U.S. CONST. art. VI, cl. 2.

<sup>97</sup> THE FEDERALIST NO. 75, *supra* note 51, at 504 (Alexander Hamilton).

Therefore, “the Laws” refers to laws passed by Congress and not the Constitution because of the context of Article II, Section 3 referring to the relationship between Congress and the President, the greater context of how the Founders used “the Laws” and the Constitution separately, and the role of the executive branch itself in enforcing the laws passed by the legislative branch.

### 3. ARTICLE II AND ENFORCEMENT OF THE COMSTOCK ACT

#### 3.1. Historical Enforcement of the Comstock Act Relating to Abortions

From its inception, the Comstock Act has not been enforced with respect to the mailing of abortion drugs. Other provisions, however, have been enforced. Thus, it is noteworthy to examine how the Act was enforced.

The Act was passed into law in 1873. Thus, our inquiry into presidential enforcement of the Comstock Act starts with the serving president in 1873 until the present day.<sup>98</sup> Ulysses S. Grant served as President of the United States from 1869 to 1877.<sup>99</sup> In Ulysses S. Grant’s presidency, the Comstock Act was enforced. Particularly in the case *Ex parte Jackson*, which challenged the enforcement of the Act with regard to controlling the mail of immoral things.<sup>100</sup> The Supreme Court upheld the Act, and it was enforced.<sup>101</sup> There were, however, no cases where the Act was enforced for mailing abortion drugs or medicine.

From presidents Rutherford B. Hayes through William McKinley (years 1877–1901), there was some dwindling, but it was still enforced with

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<sup>98</sup> LaMay, *supra* note 5, at 16.

<sup>99</sup> *Chronological List of Presidents, First Spouses, and Vice Presidents of the United States*, LIBR. OF CONG., <https://perma.cc/J7M7-CUZX>.

<sup>100</sup> 96 U.S. 727, 736–37 (1877).

<sup>101</sup> *Id.*

regard to mailing obscene materials, immoral materials, and contraceptives.<sup>102</sup> In *United States v. Popper*, the jury indicted the defendant for knowingly depositing a package that contained an article for the prevention of conception.<sup>103</sup> Defendant's motion to dismiss was overruled.<sup>104</sup>

Under President Woodrow Wilson, there was a seventh circuit case that addressed the abortion aspect of the Comstock Act.<sup>105</sup> In *Bours v. United States*, a doctor was indicted for sending information on what means could be used to prevent conception or produce abortion.<sup>106</sup> The court wrote that the language in the letter must indicate that an abortion will be performed.<sup>107</sup> Thus, if someone were willing to perform "abortions for destroying life, he is guilty."<sup>108</sup> The letter in question only provided information on abortion, and not on performing the abortion.<sup>109</sup> This case did address the enforcement of the abortion aspect of the Comstock Act, but did not involve an indictment for the mailing of drugs or medicine intended for an abortion.

Presidents Warren G. Harding through John F. Kennedy (1921–1963) did enforce the Comstock Act, but only with regard to obscene or immoral materials.<sup>110</sup> Continuing through the years of President Lyndon B. Johnson until President Donald J. Trump (1963–2020), there were cases enforcing the Comstock Act, but they were again related to obscene material.<sup>111</sup>

Recently, under President Joseph R. Biden, there were challenges to the Food and Drug Administration's (FDA) approval of an abortion drug called mifepristone.<sup>112</sup> This was not a case of executive enforcement of the

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<sup>102</sup> *United States v. Popper*, 98 F. 423, 423–24 (N.D. Cal. 1899).

<sup>103</sup> *Id.* at 424.

<sup>104</sup> *Id.* at 425.

<sup>105</sup> *Bours v. United States*, 229 F. 960, 963–64 (7th Cir. 1915).

<sup>106</sup> *Id.* at 963.

<sup>107</sup> *Id.* at 964.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 963.

<sup>110</sup> *See Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103, 108–09 (2d Cir. 1930); *Davis v. United States*, 62 F.2d 473, 474–75 (6th Cir. 1933); *United States v. One Package*, 86 F.2d 737, 739–40 (2d Cir. 1936); *Consumers Union of U.S., Inc. v. Walker*, 145 F.2d 33, 35–36 (D.C. Cir. 1944); *Roth v. United States*, 354 U.S. 476, 485–86, 492–94 (1957).

<sup>111</sup> *See Hamling v. United States*, 418 U.S. 87, 91, 97 (1974) (holding that the petitioners were correctly convicted for mailing obscene materials (pornography)).

<sup>112</sup> *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 372–73 (2024).

Comstock Act with regard to abortion, but a federal district court noted that the Comstock Act would be applicable to the illegality of sending Mifepristone through the mail intended for an abortion, as the Comstock Act is still good law.<sup>113</sup> The Supreme Court decided there was a lack of standing, so nothing binding about the Comstock came from that decision besides the plaintiffs' lack of standing to challenge the FDA's approval of mifepristone.<sup>114</sup>

### 3.2. Prosecutorial Discretion

Today, the President executes the law through the Department of Justice.<sup>115</sup> Congress created departments that carry out certain functions of the executive branch for the President.<sup>116</sup> One of those is the President's Cabinet, whose members are appointed by the President and confirmed by the Senate.<sup>117</sup> Within the Cabinet are departments, such as the United States Department of Agriculture (DOA), Department of Defense (DOD), Department of Education (DOE), and Department of Justice (DOJ).<sup>118</sup> The DOJ enforces the laws that Congress passes and ensures the public's safety from threats and crimes.<sup>119</sup> The head and chief law enforcement officer of the DOJ is the Attorney General.<sup>120</sup>

The purpose of federal prosecutorial discretion is to ensure "the fair, evenhanded administration of the federal criminal laws."<sup>121</sup> Prosecutorial discretion ensures that the laws are faithfully executed as a department of the executive branch, but also that justice be done. Deciding to prosecute involves the recognition that both serious violations of federal law must be prosecuted and some profound consequences in certain cases might warrant

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<sup>113</sup> *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 538–43 (N.D. Tex. 2023), vacated, 117 F.4th 336 (2024).

<sup>114</sup> *FDA*, 602 U.S. at 374.

<sup>115</sup> See *The Executive Branch*, THE WHITE HOUSE, <https://perma.cc/C9VZ-GM6D>.

<sup>116</sup> E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 169–70 (2018). Whether or not the departments are Constitutional through an originalism lens is a discussion for another time.

<sup>117</sup> *The Executive Branch*, *supra* note 115.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> U.S. Dep't of Just., Just. Manual § 9-27.001 (2023).

non-prosecution.<sup>122</sup> Usually, this involves case-by-case discretion from the prosecutor for a particular violation of the law, which is generally acceptable. Because of this discretion, the DOJ has principles that guide the prosecution in order to promote the reasoned and consistent exercise of power by prosecutors.<sup>123</sup>

Additionally, prosecutorial discretion is a heavily guarded right that the Supreme Court has routinely deferred to.<sup>124</sup> This deference is due to the constitutional separation of powers doctrine, as the Executive has the power to enforce the law.<sup>125</sup> However, prosecutorial discretion is not wholly unfettered; the Supreme Court has stepped in to confirm it has constitutional constraints which include, but are not limited to, the prohibition of selective prosecution deliberately based on arbitrary classifications.<sup>126</sup>

From a constitutional perspective, there is some tension between the Take Care Clause and prosecutorial discretion. The tension exists in that there is a duty for the executive to enforce the law, but there is also the aspect that the power to execute the law was solely vested in the executive and no other branch. One theory is the Unitary Executive Theory, and the other is the nondelegation doctrine. Both find their roots in the Constitution.

There are varying definitions of the Unitary Executive Theory, but it is most commonly defined as vesting all executive power within the executive branch.<sup>127</sup> Thus, the Executive must be able to control the execution of the laws and decide which to prioritize—no one else.<sup>128</sup> Founded in Article II of the Constitution, “[t]he executive Power shall be vested in a President of the United States of America.”<sup>129</sup> This theory is argued to be consistent with the Constitution in that it holds the executive accountable for all ac-

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 9-27.110.

<sup>124</sup> *See, e.g.,* *United States v. LaBonte*, 520 U.S. 751, 762 (1997); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

<sup>125</sup> *See* U.S. CONST. art. II., §§ 1, 3.

<sup>126</sup> *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979).

<sup>127</sup> James Gattuso, *The Rulemaking Process and Unitary Executive Theory*, HERITAGE FOUND. (May 6, 2008), <https://perma.cc/AYS6-MERY>.

<sup>128</sup> *Id.*

<sup>129</sup> U.S. CONST. art. II, § 1.

tions. The executive is therefore unable to hide behind the excuse of someone else making the mistake. As noted by James Wilson and Alexander Hamilton,

[T]he plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power . . . [including] the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment . . . .<sup>130</sup>

Additionally, the Unitary Executive Theory argues that the Executive is not without accountability, as Congress has the power to make laws clearer if the executive branch promulgates rules that Congress believes to be inconsistent with the law.<sup>131</sup> But it is not in the judiciary or another entity's job to tell the Executive how to enforce the laws, as it would violate the separation of powers because the Executive alone is vested with the authority to enforce the law.

On the other hand, both the Take Care Clause and the nondelegation doctrine argue that the Executive has a duty to enforce the law, and prosecutorial discretion is inconsistent with the Constitution.<sup>132</sup> From the perspective of the Take Care Clause, the Constitution vests the Executive with the duty to enforce the law, whether he agrees with it or not.<sup>133</sup> If the Executive were not to enforce the law, he would be acting contrary to the law passed and the Constitution. From the nondelegation perspective, prosecutorial discretion is too broad and gives legislative power to the President.

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<sup>130</sup> THE FEDERALIST NO. 70, *supra* note 51, at 477–78 (Alexander Hamilton). James Wilson also noted,

The next good quality that I remark is, that the *executive authority* is one. . . . The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes.

James Wilson Speech, *supra* note 51, at 480.

<sup>131</sup> Gattuso, *supra* note 127.

<sup>132</sup> Andrew Yablonksy, *Runaway Prosecutorial Discretion*, 102 TEX. L. REV. ONLINE 1, 6–10, 14–15 (2023).

<sup>133</sup> See RAWLE, *supra* note 56, at 149.

The nondelegation doctrine is the idea that the legislative branch cannot delegate power to the executive branch (the prosecutor), because some aspects of prosecutorial discretion are legislative acts.<sup>134</sup> Such an example is Attorney General Eric Holder, who relied on precedent that protects broad prosecutorial discretion and published a policy forbidding “prosecutors from charging defendants under statutes that would make them eligible for mandatory minimum penalties in certain circumstances.”<sup>135</sup> There is, of course, the normal prosecutorial discretion in deciding in a particular case whether to subject a defendant to a charge demanding a longer sentence, but telling all “federal prosecutor[s] to comply with . . . sweeping policies,” which could potentially affect thousands of cases, is another thing.<sup>136</sup> Mandatory sentencing is well within the legislative’s power because it affects the defendant’s rights, but allowing a federal prosecutor to promulgate their own policy contrary to legislative law is stepping into the legislative power.

If the two powers of making and enforcing were joined into one power, the power would be used to suppress the people. As James Madison noted in *Federalist No. 47*, “The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>137</sup> If the President were to judge the law and disagree with its writing or enforcement, the President would be rewriting the law by picking, contrary to the text of the law, when he would enforce the law as he saw fit, instead of how the law was written, simply because he disagreed with it.

Thus, the Constitution requires the executive to enforce the law. If the executive refuses to enforce the law through offering broad categories of non-enforcement, it violates the Constitution.

Although there is this tension between the two theories, resolving the issue would appear to depend on which constitutional aspect is to be given more weight: the duty of the Executive to enforce the law or the sole power to enforce the law being in the Executive. One theory argues that the execu-

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<sup>134</sup> Yablonksy, *supra* note 132, at 11–14.

<sup>135</sup> *Id.* at 22.

<sup>136</sup> *Id.* at 24.

<sup>137</sup> THE FEDERALIST NO. 47, *supra* note 51, at 324 (James Madison).

tive is rewriting the law to insert non-enforcement criteria and thereby stepping into the legislative role. The other argues that having another branch of government—namely, the Judiciary, as the states sue the executive to enforce the laws—step into the executive’s role and dictate when to enforce the law, threatens balance. If it is the case that both would be a violation of the separation of powers, it appears the latter would be more beneficial, because if there is going to be a violation of the separation of powers, it would be better to have the enforcement of law rather than the lack thereof.

However, as noted earlier in the originalism analysis of the Take Care Clause, the Constitution does impose a duty on the executive to enforce the law and that refusing to enforce entire laws or carving out categories of non-enforcement not prescribed by Congress is a violation of the Constitution and the separation of powers (because the executive would be stepping into the legislature’s role).

Additionally, as the Executive branch has expanded its power, it is beneficial to view the nondelegation doctrine and the constitutional duty of the executive to enforce the law as reining in executive power, not expanding it. As John Locke noted, even the expansion of power by a good prince is bad because there will be a bad prince who follows and can use the expanded power for more evil.<sup>138</sup>

### 3.3. Prosecutorial Discretion and the Comstock Act Post *Dobbs*

The history of non-enforcement regarding the mailing of drugs or medicine intended for an abortion throughout the years emphasizes the lack of true execution of the law in the way the Founders intended. The President is charged with the duty to faithfully execute the laws passed by Congress, and when the President fails to do so, the President fails the Constitution.<sup>139</sup>

Even though we have seen historical failure to prosecute the mailing of drugs or medicine intended for abortion, there is an even heavier burden to enforce the Comstock Act today, post-*Dobbs*. Before the *Dobbs* decision, the Supreme Court held that there was a constitutional right to abortion for the first trimester of pregnancy, but after that, there were reasons that a state might want to impose certain restrictions for the health and safety of both

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<sup>138</sup> See LOCKE, *supra* note 50, at 86–87.

<sup>139</sup> U.S. CONST. art. II, §§ 1, 3.

the mother and the baby.<sup>140</sup> From 1973 to 2022, there might have been excuses for the DOJ not to bring cases. For there might have been legitimate economic reasons, as there was difficulty in determining which trimester the recipient of the abortion pills was in. As well as legitimate constitutional reasons for the right to an abortion in the first trimester, which might have run afoul of the provision of the Comstock Act preventing the mailing of drugs or medicine used for abortions. But now, post *Dobbs*, there certainly remains no such excuse. Because there is no longer a fundamental right to abortion,<sup>141</sup> the Comstock Act's prohibition against mailing drugs or medicine intended for abortion no longer runs the risk of potentially being unconstitutional.

Additionally, the DOJ's recent interpretation of the Comstock Act posits law into the statute. The DOJ published a memorandum opinion with an interpretation of the Comstock Act post *Dobbs*, assuring that the abortion drugs referred to in the Comstock Act are only those sent with the intention they be used in an *unlawful abortion*, and thus, Mifepristone (a common abortion drug) can still be mailed.<sup>142</sup> This memorandum, coupled with President Biden's statements addressing the availability of Mifepristone, confirms they were positing new law into existing law: "We will continue to fight to ensure that women in every state get the health care they need and we will continue to call on Congress to restore the protections of *Roe v. Wade* in federal law—that is our commitment."<sup>143</sup> There is no requirement in the text of the Comstock Act that the abortion drug be illegal.<sup>144</sup> Thus, the President's statement suggests picking a certain group to not enforce the law in general, instead of a case-by-case analysis.

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<sup>140</sup> See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

<sup>141</sup> See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022).

<sup>142</sup> Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, *supra* note 1, at 3 n.6.

<sup>143</sup> *Statement from President Joe Biden on Supreme Court Decision on FDA v. Alliance for Hippocratic Medicine*, THE WHITE HOUSE (June 13, 2024), <https://perma.cc/BS67-TA88>.

<sup>144</sup> 18 U.S.C. §§ 1461–62.

#### 4. RETURN TO THE ORIGINAL MEANING OF THE TAKE CARE CLAUSE

The President must return to the original meaning of the Take Care Clause to restore the separation of powers. The President is charged with the duty to faithfully execute the laws, whether he agrees with them or not. When the President steps outside of his constitutional limits and encroaches on the legislative branch, it destroys the separation of powers, and in the words of James Madison, “there can be no liberty.”<sup>145</sup>

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<sup>145</sup> THE FEDERALIST NO. 47, *supra* note 51, at 326 (James Madison).