

What Roman Mars Can Learn About Con Law Comstock Zombies

Roman Mars [00:00:00] So we're talking on Friday, May 12th at about 11:00 a.m. And what is our subject today?

Elizabeth Joh [00:00:06] So, Roman, are you familiar with the word "Comstockery?"

Roman Mars [00:00:10] No.

Elizabeth Joh [00:00:12] Well, it refers to over-the-top, excessive, and kind of puritanical forms of censorship. And it actually refers to Anthony Comstock. And he was one of the most famous anti-vice crusaders of the late 19th century. Comstock looked around at the New York of the 19th century, and he just thought it was filthy, filthy, filthy, filthy. He saw prostitution, pornography, gambling, ads for sex toys, and birth control. People were just insufficiently pious. So, in 1873, Comstock founded the New York Society for the Suppression of Vice. And that was to enforce public morality. But the reason why Anthony Comstock is famous today is because of 18 U.S.C. § 1461.

Roman Mars [00:01:06] And that's the Comstock Act. As you started talking, I remember the idea of the Comstock Act, maybe from *The Untouchables*. I don't know.

Elizabeth Joh [00:01:15] Oh, yeah, that might have been it. That's right. I mean, that's the kind of anti-vice laws. And it's called the Comstock Act because it was actually Anthony Comstock who went to Washington and successfully persuaded Congress to pass this anti-vice law in 1873. And in fact, he was so successful, he persuaded also a number of states to pass their own state versions of the Comstock Act. So, the original Comstock Act criminalized a lot of supposedly obscene materials, including materials that we consider today protected by the First Amendment. But I want to just focus on one part. The original act said it was a federal crime to send in the mail "any article, instrument, substance, drug, medicine, or thing that could be used for preventing conception or producing abortion." So, in other words, the Comstock Act originally punished the mailing of basically anything that could be tied to birth control or abortion. But remember, in 1873, the kind of constitutionally protected rights that we're familiar with today didn't exist at all. And over time, the Supreme Court and other courts actually limited the reach of the Comstock Act. In 1965, the Supreme Court recognized a constitutionally protected right for married people to use birth control. And actually, they struck down Connecticut's version of the Comstock Act. That's a case called *Griswold versus Connecticut*. And that meant that the federal Comstock Act couldn't simply ban birth control completely. And in 1971, Congress removed that birth control language from the act. And in 1973, the Supreme Court recognized a constitutionally protected right to abortion. And that meant the Comstock Act couldn't just ban the distribution of things associated with abortion. And so, the Comstock Act became something of a dead law. Congress didn't repeal it because, well, it didn't need to, right? But, of course, in 2022, the Supreme Court overturned *Roe*. And the Comstock Act, of course, is still on the books. And anti-abortion activists saw a new way to limit abortion. In Texas, a group of anti-abortion medical associations and doctors filed an unusual lawsuit. They're suing the Federal Food and Drug Administration, attacking the agency, and relying on the Comstock Act. So, what is happening in this case? What could it mean for abortion access across the United States? And what exactly is going on? Time to find out.

Roman Mars [00:03:50] Let's do it. This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length, where we look at zombie laws and the

unhinged decisions of circuit court judges and use them to examine our Constitution like we never had before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. Whether you're starting a new business or growing an old one, if you want to be successful, you need the most talented people on your team. This is the entire secret to my success. I hire people who are better than me. That's where ZipRecruiter comes in. And right now, you can try ZipRecruiter for free at ziprecruiter.com/conlaw. Why should you let ZipRecruiter help you hire for your business? ZipRecruiter's powerful matching technology finds highly qualified candidates for a wide range of roles. If you got your eye on one or two people who'd be perfect for your job, ZipRecruiter lets you send them a personal invite so they're more likely to apply. Let ZipRecruiter fill all your roles with the right candidates. Four to five employers who post on ZipRecruiter get a quality candidate within the first day. See for yourself. Go to this exclusive web address to try ZipRecruiter for free. It's ziprecruiter.com/conlaw. Again, that's ziprecruiter.com/conlaw. ZipRecruiter--the smartest way to hire.

Elizabeth Joh [00:05:42] Before we talk about the abortion pill case, why don't we talk a bit about medication abortion basics--some facts about it. So, when we talk about medication abortion in the United States, that usually means ending a pregnancy by taking two drugs--mifepristone and misoprostol. Mifepristone is sometimes itself called the "abortion pill," or sometimes it's called "RU486." That drug is taken first, and it works to prevent an existing pregnancy from going any further. And then misoprostol is taken about a day or two later to complete the entire process. I'm just going to focus on mifepristone because it's the only drug that was challenged in this lawsuit. But, you know, just so we don't screw it up or I don't screw it up, let's call it "medication abortion" to make things easier. So, the FDA--that's the Federal Food and Drug Administration--they approved medication abortions in the year 2000 for pregnancies up to seven weeks. So, let's do the math. That's 23 years ago. And so, it's proven to be a very safe and effective method of ending a pregnancy. There is something like a 0.4% risk of major complications and a mortality rate of less than 0.001%. Very, very safe. So as a result of this, medication abortion today accounts for more than half of all abortions in the United States. So just as a fact, that means literally millions of women have safely used medication abortion. Now, after that initial approval, the FDA made some additional changes over the years that actually expanded access to medication abortion. So, in 2016, the agency expanded its legal use from seven to ten weeks of pregnancy so more women could access the medication. And then when the pandemic hit, remember how telemedicine became widely available for everybody for all kinds of reasons? And December of 2021, the FDA decided that the abortion pill didn't have to be dispensed in person. So that meant that if you wanted a medication abortion, you could either ask a provider in person, or you could get a telehealth appointment and then receive the pills in the mail. But then in 2022, of course, the Supreme Court decided the Dobbs case, which overturned Roe versus Wade. And we're still sorting out exactly what that means, state by state. Okay. So that's sort of the background. And now we can talk about the lawsuit, which I think you'll see is as much about procedure as it is about abortion. But I promise it's interesting. So, let's talk about the challengers in this lawsuit. The case is called Alliance for Hippocratic Medicine versus FDA. And the Alliance appears to be a group of anti-abortion doctors. It's a medical association.

Roman Mars [00:08:37] Yeah, yeah, yeah. A really fishy name.

Elizabeth Joh [00:08:39] Yeah. And the origins of the lawsuit itself are kind of interesting. Alliance IS based in Tennessee. But in August of 2022, they incorporated in Amarillo, Texas.

Roman Mars [00:08:52] Why would one do that?

Elizabeth Joh [00:08:55] Well, here's just some speculation, but I think it's pretty good speculation. Now, when you have federal courts, states divide federal trial courts into districts in the state. And those districts are then divided into divisions. So, if you file a lawsuit, you'll usually get a randomly assigned judge from a group of judges who hear federal lawsuits in that division. But sometimes there's just one judge in a particular division, and so you're virtually guaranteed to get that judge. And in the Amarillo district of the Northern District of Texas, that federal judge is Matthew Kacsmaryk. Now, Judge Kacsmaryk was nominated by President Trump and confirmed by the Senate in 2019. And it's totally fair to say--based on what he's said and written--that he is a very religious conservative and has been outspoken about his anti-gay marriage beliefs, his anti-LGBTQ beliefs, and his anti-abortion beliefs. So, I think it's pretty clear that the Alliance was betting that on filing this lawsuit--two abortion pills before a federal judge in Amarillo--they were virtually guaranteed to get Judge Kacsmaryk and they were hoping that Judge Kacsmaryk would be sympathetic to their claims. So, the lawsuit here has sort of two big legal claims. First, it's a challenge to the FDA approval of mifepristone. That's the original approval 23 years ago and all of the modifications the FDA allowed afterwards. And second, it's an argument that actually no abortion medications can be mailed because of the Comstock Act.

Roman Mars [00:10:43] Wow.

Elizabeth Joh [00:10:43] So let's talk about each of these claims. Now, the first argument is really about the FDA's legal authority. So, in a way, it's not really an abortion law case. Like, specifically, there is no constitutional right to abortion anymore. But remember, the FDA has the power to approve and regulate drugs in the United States, and that power comes to them from Congress. Everybody agrees on those facts. The regulatory arguments here are pretty technical, but the basic idea here is that the FDA supposedly acted beyond its authority when it first approved of the drug in the year 2000. So, I mean, again, here the technical argument is that the FDA relied on what's called "Subpart H," which is kind of a fast-track way to approve certain kinds of drugs. And it was originally for HIV drugs. And the challengers say something like, "Well, this isn't in the same category as those drugs, and the FDA should never have approved of the mifepristone under these particular guidelines." So, it's about the scope of agency power and action. Now, as far as the other legal argument goes, the government here has argued, "Well, the Comstock Act doesn't really bar anything here because over the years courts have interpreted the Comstock Act." So, it only stops people from sending materials where they intend for that material to be unlawfully used. So, in the case of abortion, it shouldn't bar anybody from sending abortion medications where the abortion is legal--or at least that early abortion is legal--or where the person or the entity sending the information or the products doesn't intend for it to be used in some unlawful way. So, like, you know, they can't deny that the Comstock exists. It clearly does. But they're saying, "Over time, nobody believes that the Comstock Act actually bars all of this." Okay. So, the challengers in the Texas lawsuit asked Judge Kacsmaryk for a preliminary injunction. So that just means, you know, they don't want them to decide immediately the case is going on. But they wanted the judge to order the FDA to stop its approval of the abortion medications--all of their approvals--while the case was being decided. And Judge Kacsmaryk agreed to do just that. He agreed that

the FDA went beyond its authority in approving mifepristone 23 years ago. He also rejected the argument that courts, Congress, and the FDA had assumed that the Comstock Act actually allows the mailing of abortion medication--that everybody so far has kind of thought this didn't apply to legal abortions, at least in places where states today in 2023 consider it legal. His reading? "I just read the Comstock Act, and it just means what it says. And it says, 'No mailing of anything related to abortion.' So that means no mailing of anything related to abortion." So, his decision is really just what happens in the short term. He ordered the FDA to withdraw or suspend its approval of abortion medication, which of course--even though this is one judge in the Amarillo Division of the Northern District of Texas--meant no medication abortions anywhere in the United States. If you're ordering a federal agency to stop doing something, it affects everybody in the United States. But then there's an equally surprising part of this case besides just focusing on what the FDA should have done or if it did anything that was improper. And it's not related to abortion necessarily. And that is: Why can this lawsuit happen at all? So, let's go back to these challengers. The challengers are, you know, the Alliance for Hippocratic Medicine--and there are also some other anti-abortion medical associations and three individual doctors. So, here's the question. They clearly don't support abortion. They don't support reproductive rights. But why can they bring a lawsuit? So, in federal court, we'd ask, "Well, why do these challengers have standing?" So, standing means that these particular challengers have to have been injured in some way, so that if the court rules in their favor, they can give them some kind of legal relief. So, in federal court, it's actually a constitutional requirement that you have to have a sort of personal stake in the case so that if the court says, "Okay, you win," then they're doing something for you and your personal already-happened injury or about-to-happen injury. So, if there's any question about standing and the stake that any challenger has in a lawsuit, we ask whether the challenger has personally suffered some kind of injury that the courts call "concrete and particularized." It doesn't have to have happened; it could be an imminent injury--an about-to-happen injury. But you have to have some kind of personal stake here. So that really means that you can't sue in federal court, for instance, because you just don't agree with something the federal government does. We'd say, "You lack standing." You can't just, like, shout at the TV and file a lawsuit. right? You know, you don't have a personal stake in the outcome. And that's important because if a federal court says the challenger of a law or a government action lacks standing, then the case is tossed out of court. It doesn't matter how compelling the underlying legal claim is, if you elect standing, you simply aren't the right person or entity to bring the lawsuit at all--no matter how good your claims are.

Roman Mars [00:16:34] Sure. So, what is this Alliance's claim when it comes to standing?

Elizabeth Joh [00:16:40] Well, that's the surprising thing. So, Judge Kacsmaryk's analysis of the challenger's standing is--I want to be charitable here--unusual.

Roman Mars [00:16:50] Unhinged maybe?

Elizabeth Joh [00:16:52] Yeah, the medical association says that they are suing on behalf of their doctor members and on their own behalf, too. And here's the argument. They're basically saying, "Look, some women will suffer complications from medication abortions, and then this avalanche of patients will eventually come to these doctors who will then be forced to treat them. And that will be very stressful." So, the problem is that the legal concept of standing means you don't have an injury if it's purely speculative. And this supposed avalanche of mifepristone complications sounds pretty speculative. It hasn't happened in the previous 23 years of use. And so why would that happen now? And in fact, the FDA has relied on years of studies, looking at tens of thousands of patients who

have used medication abortion. And the agency itself says that the hospitalization rate is between zero and 0.7%. And as far as a court's responsibility, judges are supposed to defer or, in other words, kind of assume that the agencies are right. They're supposed to defer to the findings of these agencies. But in this case and the abortion pill case, Judge Kacsmaryk didn't do that. Instead, he chooses to side with the challengers, the associations and the doctors, because they assert on their own that the abortion pill is dangerous--dangerous based on their own findings--and that at some point in the future, these doctors will be overwhelmed with possible complications from patients, who they cannot identify just yet. So, his analysis, I think, deviates pretty far from what we normally think of as the constitutionally required concept of standing because if these kinds of challengers can raise a challenge to abortion pills, then there are a whole lot of other kinds of lawsuits that should never have been thrown out of court in the first place.

Roman Mars [00:19:05] Yeah. Yeah. And it also brings into question every drug that's ever existed, right? Like, approved by FDA. There's a chance of complications with all of them. You see the fine print, they have to say them really fast in the commercials, and you could say that dealing with those side effects would cause doctors stress. I mean, that's absurd argument.

Elizabeth Joh [00:19:27] Yeah, I mean, absolutely it does. You know, if this is some new interpretation--a novel way that doctors and medical associations can bring a challenge because they think there might be bad things that happen in the future--then yeah, basically anybody can sue about any kind of drug because who knows? You'll never know that maybe the federal agency in charge of approving drugs is absolutely dead wrong and you're right based on your internet research, right? So, there's a standing argument. And then there's another big procedural problem, and that is this lawsuit is challenging an agency decision that is 23 years old. And so, timeliness is a pretty standard objection in the lawsuit. There are laws called "statutes of limitations," and they say that if you want to bring a lawsuit, you only have a certain period of time to raise your challenge or otherwise you forfeited your chance. Now, the law here, when it comes to challenging agency actions, says that you have six years to challenge this kind of agency decision. So that seems pretty untimely. That would have been 2006, right? But in this case, Judge Kacsmaryk decided that each time the FDA expanded access to the abortion pill, it was actually reopening its original decision. So, it's kind of resetting the clock each time. And as we already discussed, the last change was 2021. So, the lawsuit is not too late. It's not barred by the statute of limitations. But this, too, is kind of a weird conclusion because the FDA itself never treated those changes like they were reopening their original decision each and every time. But Judge Kacsmaryk concludes otherwise. So, all of this sounds like, well, it's kind of dry and procedural, right? But these procedural parts of the decision are extremely important because courts often dismiss cases, even when the main legal arguments seem important and compelling, on these kinds of grounds--that the challenger lacks standing, or the statute of limitations has run out. And that's the end of the case. And in fact, it can be a pretty easy way for a court to get rid of a case that it doesn't want to decide. But if a judge wants to decide a case, of course, it can certainly interpret these procedural hurdles in a way that's favorable to the challengers. And it kind of looks like what happened in the abortion pill case.

Roman Mars [00:21:57] Yeah. It kind of does.

Elizabeth Joh [00:21:58] Kind of does. So, if you think about what happened, the judge said, "Well, the challengers can stay in court. Their lawsuit is timely. And I agree this is beyond the scope of what the FDA could have done." Now, they asked for a preliminary

injunction. And that means they wanted the FDA to be ordered to just pull back on all of its approval, even the 23-year-old one. So that's exactly what happened. Judge Kacsmaryk said, "Yep, I agree. There's a preliminary injunction. But I'm going to give the federal government one week to ask for emergency relief in the Federal Court of Appeals." That's what the Biden administration did. But on April 12th, the appeals court took a look at the abortion decision that was issued by Judge Kacsmaryk. They disagreed that the original year 2000 approval could be challenged, but everything else could. So that meant that the abortion pill was available as a general matter. But it agreed with Judge Kaczmarek that the later amendments expanding access to mifepristone could be put on hold until the appeals court considered the entire legal case. So, this is all going up as sort of emergency orders. So, if you just look at the Fifth Circuit, that means, again, one court of appeals in the United States is making a decision about access to medication abortions that has nationwide effects. So, then the Biden administration goes up another level. They decide to seek emergency relief with the Supreme Court. And on April 21st, the Supreme Court agreed to block the Fifth Circuit order. So, it's not a major decision in that it decides something about whether abortion medication is legal or not. It just means that they decide, "Look, let's go back to the status quo while the case is being decided."

Roman Mars [00:23:51] Okay.

Elizabeth Joh [00:23:51] So what that means practically is that the current FDA rules about abortion medications are in effect as if the lawsuit had never happened. Mifepristone and misoprostol, together as an abortion medication regime, are still available in all of those places where abortions are still legal. So, for now, it's as if the lawsuit didn't happen. And that also includes things like telemedicine consultations for medication abortions--those can continue, too. But all of this is just temporary. This is just deciding nothing has to change. But the Fifth Circuit is still going to consider the underlying lawsuit. The Fifth Circuit will have oral arguments in that case on May 17th. Most people think that this will almost certainly end up back at the Supreme Court as a regular case for the next term.

Roman Mars [00:24:48] Wow, that's intense.

Elizabeth Joh [00:24:50] And so, yeah, you see one of the ironies of Dobbs, right? You might remember when we've talked about Dobbs a lot, one of the main points from the Dobbs majority is, "Look, the court has been involved in abortion too much. Let's leave abortion back to the states and to the people." But of course, we're just back in the courts again.

Roman Mars [00:25:08] Of course. It's almost as if the Dobbs decision wasn't well thought out either.

Elizabeth Joh [00:25:14] Yeah, in terms of, "Well, would this result in a kind of chaos with a lot of uncertainty in the lives of ordinary people?"--I didn't think that that was properly addressed in the case.

Roman Mars [00:25:23] Yeah, for sure. So, what happens if the challengers win? What does that mean?

Elizabeth Joh [00:25:31] So, you know, what the challengers really want is they don't want medication abortion to be available to anybody in the United States. I mean, that's a pretty, you know, explicit goal of theirs. But it's actually kind of unclear what's happening

nationwide because there's this suit which we've talked about today. But then there are also other lawsuits in other courts in the United States arguing kind of the opposite--that the FDA should not stop what it's doing, and that court should order the FDA to not stop what it is doing. So, you have these simultaneously opposite conclusions by different courts. And that actually makes it even more likely, I think, that the Supreme Court will have to step in and say something. And there are implications--you've already hinted at this--far beyond abortion, right? So, either the FDA is acting lawfully, and abortion medications can be accessible where states allow it--or not, which results effectively in a nationwide ban on medication abortions. And that by itself would be almost like a nationwide ban on abortions completely since more than half of abortions in the United States are by medication. Or we might find out that the Comstock Act, which is not the subject of the preliminary injunction, is actually a zombie law that actually alternatively bans all abortion medication no matter what because you can't mail anything that has to do with abortion. And then more ominously, if this kind of lawsuit is successful, it is really destabilizing not just for ordinary people in their access to abortion medication but for any kind of drug--and also, like, for the economy. So, imagine, you know, any time there's a new drug on the market, it is the result of years and years of research and millions or billions of dollars. And then the FDA process for approval for a new drug also takes years and years and years. And so, if you're allowed to at some point--any time in the future--challenge the lawfulness of a drug that was already approved by the FDA, why as a pharmaceutical company, would you bother bringing new drugs to the market? Why would you bring that kind of investment? And in fact, there was an open letter by several pharmaceutical companies saying, "Please do not allow this to happen because you're ruining our model of business."

Roman Mars [00:27:56] Yeah. Yeah. It seems like there's a lot of really powerful people invested in this--the challengers not winning--in a way that seems a little heartening just because it's so bad in so many ways beyond its sort of stated badness of denying abortion. You know what I mean? It's so bad in so many ways. And so many people with a lot of different interests in this would be against it.

Elizabeth Joh [00:28:22] Yeah. And there are just so many different interests also, cutting across the board, with what the Supreme Court might be interested in here. It's not just about abortion. It's not just about maybe resurrecting this federal law that we thought was dead. But a majority on the court is particularly interested in cutting back the power of federal agencies in general. And so, this could be another vehicle. Such a case could be another vehicle for the court to say, "Maybe the FDA is too powerful." And that, of course, would be a different kind of major decision for the court.

Roman Mars [00:28:58] It's incredible to me. Is there any way to cut the legs out from under our zombie law--the Comstock Act? I mean, like, why can't that just be, you know, repealed by Congress? Like, why is that not someone's mission along this front?

Elizabeth Joh [00:29:14] Well, you have to convince the Congress to do something, which nobody seems particularly inclined to do. And I suppose there are folks who would love to see it be repealed. But strangely enough, we have this kind of zombie law. Even in the states and not just the federal government, there are always laws that legislatures just don't bother to repeal because they think, like, "Well, nobody's complaining about it." So, they just leave it be. And so that's kind of where we are with the Comstock Act. Until Dobbs, people pretty much ignored it because it wasn't really enforceable anyway.

Roman Mars [00:29:48] Yeah. But is that an avenue, like a legislative avenue, if you're trying to be creative? To just sort of, like, begin to knock some of these arguments down before they happen is just to attack the Comstock Act rather than, you know, move people's opinion about abortion?

Elizabeth Joh [00:30:05] Yeah, it definitely could be. Well, it would remove one possible weaponized part of it in the legal arguments. It still doesn't, you know, get to "let's attack the administrative state."

Roman Mars [00:30:20] I agree. Yeah. That's so interesting. Okay. Well, thank you so much. I always love old laws.

Elizabeth Joh [00:30:28] Thanks, Roman.

Roman Mars [00:30:39] This show is produced by Elizabeth Joh, Jeyca Maldonado-Medina, and me, Roman Mars. You can find us online at learnconlaw.com. All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are part of a Stitcher and SiriusXM podcast family.