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Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It

ABSTRACT. With the overturning of *Roe v. Wade*, the antiabortion movement has focused on a new strategy: transforming the Comstock Act, a postal obscenity statute enacted in 1873, into a categorical ban on abortion—a ban that Americans never enacted and, as the movement recognizes, would never embrace today. Claims on the Comstock Act have been asserted in ongoing challenges to the approval of the abortion pill mifepristone, in litigation before the Supreme Court, and in the 2024 campaign for the presidency. This Article offers the first legal history of the Comstock Act that reaches from its enactment to its post-*Dobbs* reinvention.

Revivalists read the Comstock statute as a plain-meaning, no-exceptions, nationwide abortion ban. In countering revivalist claims, this Article recovers a lost constitutional history of the statute that explains why its understanding of obscenity and of items prohibited as nonmailable has evolved so dramatically in the 150 years since the law was enacted. We show that the Comstock law was the first federal obscenity law to include writings and articles enabling contraception and abortion, condemning them along with erotica and sex toys as stimulants to illicit sex. At no point was this ban absolute. The law, by its terms and as enforced, policed obscenity rather than criminalizing health care. Even the judges who developed the most expansive Victorian interpretation of obscenity—authorizing censors to prosecute advocates for free love and voluntary motherhood—protected the doctor-patient relationship. The public's repudiation of this expansive approach to obscenity as "Comstockery"—as encroaching on democracy, liberty, and equality—led to the statute's declining enforcement and to cases in the 1930s narrowing obscenity and expanding access to sexual education, contraception, and abortion.

These developments were not only statutory; they were constitutional. From conflicts over Comstock's enforcement emerged popular claims on democracy, liberty, and equality in which we can recognize roots of modern free-speech law and the law of sexual and reproductive liberty lost to constitutional memory. Recovering this lost history changes our understanding of the nation's history and traditions of sexual and reproductive freedom.

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INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the Court reversed *Roe v. Wade*, objecting that "a right to abortion [was] not deeply rooted in the Nation's history and traditions" of criminalizing abortion, a tradition that began in the late nineteenth century and persisted until the time of *Roe*.[1] But *Dobbs* was silent about another body of law that banned access to abortion *and* contraception in this same era. The Comstock Act, enacted in 1873, criminalized "obscene Literature and Articles of immoral Use" in the U.S. mails, including "any article or thing designed or intended for the prevention of conception or procuring of abortion."[2]

Comstock "revivalists" now seek to reinvent the Comstock statute, misreading the 1873 obscenity law as an absolute ban on abortion. But Americans never enacted such an abortion ban, and, as revivalists recognize, Americans would never enact one today.[3] Comstock's present-day champions claim to

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

2. Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598, 598-99. The law's original text included communications and articles concerning contraception and abortion in its prohibition of obscenity in publications, mailing, and importation. *See infra* text accompanying notes 133-136. The statute as amended over the years is codified at 18 U.S.C. §§ 1461-1462 (2018) and 19 U.S.C. § 1305 (2018); its current provisions generally include, in various formulations, items designed, adapted, or intended for "producing abortion" among the law's long list of communications and items deemed indecent, immoral, or obscene. *See* 18 U.S.C. § 1461 (2018). States soon adopted similar provisions. *See* MARY WARE DENNETT, BIRTH CONTROL LAWS: SHALL WE KEEP THEM CHANGE THEM OR ABOLISH THEM 268-70, 282-83 (1926) (containing appendices with state laws); Martha J. Bailey, *"Momma's Got the Pill": How Anthony Comstock and* Griswold v. Connecticut *Shaped U.S. Childbearing* 7-11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 14675, 2009), https://www.nber.org/system/files/working_papers/w14675/w14675.pdf [https://perma.cc/7ME5-DPQQ] (describing variation among state laws); Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 3-4 (1966) (describing anticontraceptive laws in forty-six states).

3. After *Dobbs*, polls have consistently shown high levels of support for abortion rights. *See Public Opinion on Abortion*, PEW RSCH. CTR. (May 13, 2024), https://www.pewresearch.org /religion/fact-sheet/public-opinion-on-abortion [https://perma.cc/2RXE-QY89] (showing that in 2024, sixty-three percent of Americans said that "abortion should be legal in all or most cases," the highest this proportion has been since 1995); Julie Wernau, *Support for Abortion Access Is Near Record, WSJ-NORC Poll Finds*, WALL ST. J. (Nov. 20, 2023, 9:00 AM EST), https://www.wsj.com/politics/policy/support-for-abortion-access-is-near-record-wsj-norc-poll-finds-6021c712 [https://perma.cc/22KU-YCQV]. Voters faced with ballot ini-tiatives to expand reproductive liberties since *Dobbs* have chosen to do so on all seven occa-sions they were given the opportunity before the 2024 election. *See infra* notes 478-479 and accompanying text. Ipsos likewise found that majorities support the availability of abortion

have discovered a statutory text whose meaning is plain and can be applied to ban shipment of abortion-related materials without exception—a claim asserted at the Supreme Court in *FDA v. Alliance for Hippocratic Medicine*,[4] in a related complaint filed before the election,[5] in Donald Trump's 2024 presidential campaign,[6] and in Project 2025, a high-profile transition plan for the next Republican president.[7] Comstock revivalists who insist the statute's meaning is plain and absolute are calling for enforcement of the statute in ways that—as we complete this Article the week of Donald Trump's election—the statute has never been enforced.[8] Like so many revivalists, they invoke the authority of a past they are inventing. Faced with repeated claims that a nineteenth-century obscenity law is a twenty-first-century abortion ban, Americans have begun to mobilize for the Comstock Act's repeal.[9]

In responding to revivalist claims, this Article offers a wide-ranging history of the Comstock Act, demonstrating how Americans debated the law's meaning from the time of its enactment in the aftermath of the Civil War until the mid-twentieth century. This history of the statute at one and the same time shows how Comstock conflict played an important role in the development of modern

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medication by mail, with more than seventy percent of Americans in favor of women being able to access the pills from their doctor or clinic. Mallory Newall, Charlie Rollason & Bernard Mendez, *Axios-Ipsos Survey: Most Americans Support Access to Medication Abortion*, IPSOS (Mar. 29, 2024), https://www.ipsos.com/en-us/most-americans-support-access-medication-abortion [https://perma.cc/X64P-S883]. For sources discussing the numerous successful ballot initiatives in the 2024 election, see *infra* note 479.

4. Brief for the Respondents at 56-58, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236). On the role of Comstock claims in the *Alliance* litigation, see *infra* notes 496-501 and accompanying text.

5. Amended Complaint for Missouri, Kansas, and Idaho as Intervenor-Plaintiffs at 5, 22, All. for Hippocratic Med. v. FDA, No. 22-cv-00223 (N.D. Tex. Oct. 11, 2024). Comstock claims have also appeared in at least one new complaint filed after the election. Complaint at 27-28, Students for Life of Am. v. Gillespie, No. 24-cv-11928 (N.D. Ill. Nov. 20, 2024) ("Every abortion provider in the United States is violating [18 U.S.C. §§ 1461–1462's] criminal prohibitions by obtaining abortion-inducing drugs or abortion related equipment through the mails . . . . The Biden Administration is refusing to prosecute abortion providers for these crimes, but they are criminal acts nonetheless.").

6. *See infra* notes 470, 503 and accompanying text.

7. *See infra* note 469.

8. *See infra* Section IV.B.

9. Dan Diamond & Caroline Kitchener, *Democrats Seek to Repeal Comstock Abortion Rule, Fearing Trump Crackdown*, WASH. POST (June 20, 2024, 5:00 PM EDT), https://www.washingtonpost.com/health/2024/06/20/comstock-abortion-repeal-tina-smith-senate [https://perma.cc/TS2Y-TS6D]. For a discussion of the Comstock repeal effort, see David S. Cohen & Rachel Rebouché, *Repealing Comstock*, 104 B.U. L. REV. ONLINE 243, 246-48 (2024).

constitutional understandings of free speech and sexual and reproductive freedom.

We analyze the Comstock Act as its contemporaries understood it—as an obscenity law—and illustrate how and why understandings of obscenity changed after the law's enactment. The 1873 postal statute was the first federal obscenity law to include writings and articles that facilitated contraception and abortion.[10] Its coverage was never absolute: those who drafted and enforced the law understood it to prohibit obscenity, not health care, a distinction that evolved over time.[11] In the late nineteenth century, Americans promoting what they called *sexual purity* seized upon the newly enacted postal statute and used it to prevent nonprocreative sex outside and inside of marriage.[12] Antivice advocates and postal inspectors prosecuted Americans who sought birth control, abortion, or information about either, targeting in particular those who called for free speech, voluntary motherhood, and the statute's reform or repeal.[13] These Victorian obscenity prosecutions earned the name "Comstockery" and aroused generations of resistance—by free lovers, suffragists, civil libertarians, and ultimately ordinary Americans who over time helped shift understandings of the obscenity that the law prohibited and the health care that it protected.[14] Resistance to Comstockery gave birth to modern understandings of democracy, free speech, and sexual and reproductive freedom—understandings that emerged first under the statute in the 1930s and then, decades later, under the Constitution.[15]

The history this Article excavates is of both statutory and constitutional significance. It enables evaluation of the statutory claims of Comstock revivalists. Yet, as the Article reconstructs generations of American struggle over Comstock's enforcement, it excavates a long-running national conversation about the government's prerogatives to use criminal law to control Americans'

10. *See infra* notes 126-132 and accompanying text (describing the Comstock Act's enactment). Before 1873, federal obscenity law made it a crime to import "indecent and obscene prints, paintings, lithographs, engravings, and transparencies," Tariff Act of 1842, ch. 270, § 28, 5 Stat. 548, 566-67, or mail any "obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character," Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 504, 507.

11. *See infra* Sections I.A, II.C-D.

12. *See infra* Section I.C. For a discussion of judicial understandings of sexual purity, see *infra* Section I.D.

13. *See infra* Section I.D.

14. *See infra* Part II.

15. *See infra* Sections II.D, III.B. For an Ngram showing how usage of "Comstockery" surged amid statutory litigation in the 1930s and constitutional litigation in the 1960s, see *infra* note 413 and Figure 1.

decision-making about sex, reproduction, and access to health care that a reader of the *Dobbs* decision would never know had occurred. As the Article reconstructs this conversation, it recovers the lost democratic roots of constitutional decisions that *Dobbs* threatened as contrary to the nation's history and traditions.[16] By including the Comstock laws in our telling of the nation's past *and* by examining the statutes with attention to the views of their proponents and disenfranchised critics, we diverge from *Dobbs* in both substance and method, producing a very different account of the nation's past than *Dobbs* did. If the past is to guide constitutional interpretation as *Dobbs* urges, it is critical to ask not only why, but also, as this Article explores, whose voices are included in an account of the past that is to guide constitutional interpretation today.[17]

There is a significant body of scholarship on the Comstock statute—written primarily outside of law and before the *Dobbs* decision—on which we have drawn in an effort to make sense of claims about the statute.[18] But there is re-

16. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 241 (2022) (looking at "state constitutional provision[s]," state and federal judicial decisions, scholarly treatises, and a "wave of statutory restrictions" to conclude that "[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion"); *id.* at 384-85 (Breyer, Sotomayor & Kagan, JJ., dissenting) (observing that "[a]ccording to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things," including "same-sex intimacy and marriage," contraceptive use, and the right "not to be sterilized without consent").

17. *See infra* text accompanying notes 561-577 (discussing, in conclusion, how the Article's account of "history and traditions" diverges in method and substance from the account provided in *Dobbs*).

18. There is a rich historiography on the antivice movement and the cultural moment to which Anthony Comstock contributed. Some work, like that of Nicola Kay Beisel, Whitney Strub, and P.C. Kemeny, tells the origin story of the antivice movement to which Comstock belonged. For a sample of this work, see generally NICOLA KAY BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA (1997); WHITNEY STRUB, OBSCENITY RULES: *ROTH V. UNITED STATES* AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION (2013); and P.C. KEMENY, THE NEW ENGLAND WATCH AND WARD SOCIETY (2018). For other examples, see generally ROBERT CORN-REVERE, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA (2021), which describes Comstock's rise in the antivice movement; GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865-1920 (2002), which traces the development of the legislative accomplishments of conservative Protestant reformers in the nineteenth century; and Jeffrey Escoffier, Whitney Strub & Jeffrey Patrick Colgan, *The Comstock Apparatus*, *in* INTIMATE STATES: GENDER, SEXUALITY, AND GOVERNANCE IN MODERN US HISTORY 40 (Margot Canaday, Nancy F. Cott & Robert O. Self eds., 2021), which maps the relationship between Comstock and the government.

markably little *legal* scholarship examining enforcement of Comstock's provisions criminalizing writings and articles "for the prevention of conception or procuring of abortion." Legal scholarship on Comstock's obscenity provisions barely addresses cases on contraception and abortion.[19] And cases conferring

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Other scholars have chronicled the work of Comstock resisters, civil libertarians, and publishers. For examples, see HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA 364-70 (2002); AMY SOHN, THE MAN WHO HATED WOMEN: SEX, CENSORSHIP, AND CIVIL LIBERTIES IN THE GILDED AGE 26 (2021); and AMY WERBEL, LUST ON TRIAL: CENSORSHIP AND THE RISE OF AMERICAN OBSCENITY IN THE AGE OF ANTHONY COMSTOCK 60-66 (2018). Still other work develops in-depth biographical portraits of key figures in the Comstock story, including Mary Ware Dennett and Margaret Sanger. For examples of this work, see generally ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA (2007); and Heather Munro Prescott & Lauren MacIvor Thompson, *A Right to Ourselves: Women's Suffrage and the Birth Control Movement*, 19 J. GILDED AGE & PROGRESSIVE ERA 542, 542-48, 550-51 (2020).

For work examining Comstock surveillance of same-sex relations, see generally Gregory Briker, *The Right to Be Heard:* ONE Magazine*, Obscenity Law, and the Battle over Homosexual Speech*, 31 YALE J.L. & HUMANS. 49 (2020); Jason M. Shepard, *The First Amendment and the Roots of LGBT Rights Law: Censorship in the Early Homophile Era, 1958–1962*, 26 WM. & MARY J. RACE GENDER & SOC. JUST. 599 (2020); and Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court*, 28 COLUM. J. GENDER & L. 229 (2014).

19. Laura Weinrib is one of the few legal scholars to identify Mary Ware Dennett, a birth-control activist prosecuted for her distribution of a sex-education pamphlet, as playing an important role in the development of modern civil liberties and to show how legal scholars have effaced her contributions. *See* Laura Weinrib, *The Sex Side of Civil Liberties:* United States v. Dennett *and the Changing Face of Free Speech*, 30 LAW & HIST. REV. 325, 340-63 (2012) [hereinafter Weinrib, *The Sex Side of Civil Liberties*]; LAURA WEINRIB, THE TAKING OF FREE SPEECH: AMERICA'S FREE SPEECH COMPROMISE 172-78 (2016). Brett Gary recently published a painstakingly researched biography of lawyer Morris Ernst, who brought key cases challenging Victorian understandings of obscenity law, including Dennett's. *See* BRETT GARY, DIRTY WORKS: OBSCENITY ON TRIAL IN AMERICA'S FIRST SEXUAL REVOLUTION 29-65 (2021). Historians of the First Amendment mention Comstock as an obscenity statute but rarely consider its enforcement in cases concerning contraception and abortion. *See* GEOFFREY STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND THE LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 157-67 (2017); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 27-37 (1997). For one of the more thorough surveys of the case law, see Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 293-309 (1986). David S. Cohen, Greer Donley, and Rachel Rebouché have recently addressed Comstock in a prominent analysis of the use of medication abortion and its legal regulation. David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317, 342-47 (2023). Other scholars have addressed Comstock's applicability in the wake of *Dobbs*. *See* Danny Y. Li, *The Comstock Act's Equal Protection Problem*, 123 MICH. L. REV. ONLINE 42, 42-47 (2025); Ebba Brunnstrom, Note, *Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-*

constitutional rights to make decisions concerning contraception and abortion scarcely mention Comstock.[20]

Our account provides a variety of historical resources for interested Americans—scholars, judges, legislators, government officials, and citizens, including but not limited to textualists—to analyze Comstock's text, first, as enacted and, then, as judicially interpreted over time.[21] This account makes clear that, contrary to revivalists' claims, the meaning of Comstock's abortion provisions, which refer to "unlawful abortion" and "procuring of abortion," has never been

Dobbs, 55 COLUM. HUM. RTS. L. REV. 1, 5-6, 26-29 (2024) (advocating for a "narrow" construction and present-day application of Comstock).

20. *See infra* Section III.B.

21. Originalists, textualists, and purposivists all take account of linguistic, doctrinal, and historical context, even as they do so in very different ways. "Because the meaning of language depends on the way a linguistic community uses words and phrases in context, textualists recognize that meaning can never be found exclusively within the enacted text." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006); *see also id.* at 91 (arguing that "[t]extualists give primacy to the *semantic* context," whereas "[p]urposivists give precedence to *policy* context"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 40 (2012) ("The soundest legal view seeks to discern literal meaning in context."); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1385 (2014) (reviewing AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012)) (explaining that for public-meaning originalists, "[t]he text of course must be understood in terms of the original public meaning of its words and phrases, in the linguistic, social, and political contexts in which they were written").
There is considerable variation in how the Justices follow textualist precepts, with individuals varying over time. *See* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1661-62 (2023) (explaining that in Indian law cases, Justices inconsistently rely upon historical and social context since, "[i]n *Navajo Nation*, Kavanaugh's opinion for the Court stuck to the language of the Treaty of 1868, while Gorsuch explored the rich social and political context of the Treaty. But in *McGirt*, Kavanaugh joined the Chief Justice's history-soaked dissenting opinion. . . . Alito and Thomas found extensive social history dispositive in *McGirt* . . . but not in *Navajo Nation*"); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266-67 (2020) (showing that Justices committed to textualism divided over how to decide *Bostock*, employing different methods in determining which contexts were relevant to interpreting the statute). And judges may bring role-based concerns to the interpretation of statutes that interpreters in academics or politics do not. *See* Manning, *supra*, at 96 (discussing concerns about legislative supremacy that may lead a judge to embrace textualism or purposivism); *see also* Clint Bolick, *The Case for Legal Textualism*, HOOVER INST. (Feb. 27, 2018), https://www.hoover.org/research/case-legal-textualism [https://perma.cc/7WD7-RCKD] (justifying textualism as promoting judicial constraint and preserving the legislature's dem-ocratic authority).

"plain" or absolute.[22] As we show, the text of the statute as enacted and as codified today contains no categorical ban on mailing materials for terminating pregnancy. At the time of enactment, "procuring of abortion" was a crime: an allegation of unlawful intent could make terminating pregnancy a crime, but not if undertaken to save a life—a question that doctors had discretion to determine.[23] The statute's postal provisions had *two* scienter requirements: requiring that a sender (1) knowingly mail items with (2) the awareness that they would be used unlawfully.[24] (These two scienter requirements remain in the text of the statute as amended and currently codified.[25]) Even at the height of a sexual-purity regime, courts reasoned that the Comstock Act's obscenity provisions did not apply to the doctor-patient relationship,[26] and the kinds of exempted health-related mailings evolved over the life of the statute.[27]

What, then, did postal inspectors and judges understand to be obscene under the statute? As we show, the answer changed dramatically over time. The Comstock Act confronted Americans with the question whether the federal government could use the criminal law to control the speech and intimate life of its citizens. As we show, their changing beliefs about this question shaped the interpretation and enforcement of the statute and, ultimately, the Constitution.

The Comstock Act destabilized understandings of obscenity by including some writings and paraphernalia related to birth control and abortion amidst

22. *See infra* notes 137-152 and accompanying text.

23. *See infra* notes 137-152 and accompanying text. The term "abortion," by contrast, applied to miscarriage and was not a crime. *See infra* notes 137-142 and accompanying text. For further discussion of Comstock's enactment and language, see *infra* Sections I.A and IV.B. Many contemporaneous accounts of unlawful abortion applied to procedures undertaken with criminal intent only after quickening. *See infra* notes 139-141 and accompanying text. As we show in Part IV, Congress later amended the statute to refer to "producing" as well as "procuring" abortion, a change that did not alter the statute's scope. *See infra* Section IV.B. For a discussion of the deference historically accorded to doctors' good-faith judgments about circumstances warranting lifesaving terminations, see Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization—A History-and-Tradition Right to Healthcare Access After* Dobbs, 111 VA. L. REV. (forthcoming 2025) (manuscript at 21-35), https://ssrn.com/abstract=4881886 [https://perma.cc/5BGJ-54VM].

24. *See infra* text accompanying notes 142, 528.

25. *See infra* note 529 and accompanying text.

26. *See infra* notes 148-149, 195 and accompanying text. We have not identified any prosecution based on direct communication within the physician-patient relationship in the first sixty years after the statute's passage.

27. *See infra* Section II.D.

prohibited erotica.[28] Enacted at a time of plummeting birth rates,[29] surging immigration,[30] and a growing movement for woman suffrage,[31] the postal censorship law inserted the federal government into Americans' sexual and reproductive lives in unprecedented ways, but its scope remained unclear even to the lawmakers who passed it. The Comstock law's convoluted and moralizing text[32] provided flexible authority for postal inspectors, antivice societies, and courts to develop and impose new understandings of sexual purity.[33] Censors

28. *See infra* notes 88-89 and accompanying text.

29. Fertility rates in the United States dropped from 7.0 in 1835 to 2.1 in 1935, with native-born couples experiencing the most significant decline. J. David Hacker & Evan Roberts, *Fertility Decline in the United States, 1850-1930: New Evidence from Complete-Count Datasets*, 138 ANNALES DE DÉMOGRAPHIE HISTORIQUE 143, 170-71 (2019) (finding that amid the decline, foreign-born couples had much higher marital fertility rates than native-born couples, though this divide narrowed or reversed by 1930); *see also* JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 2-3 (1994) (explaining that most of the decline occurred among native-born white married couples between 1840 and 1880). The extent to which this decline is attributable to contraceptive use or other methods of deliberate family limitation is debated. *Compare* BRODIE, *supra*, at 4 (describing disagreement among historians about the relative importance of "deliberate family limitation" in the country's declining birth rates), *with* Andrea Tone, *Black Market Birth Control: Contraceptive Entrepreneurship and Criminality in the Gilded Age*, 87 J. AM. HIST. 435, 456 (2000) (suggesting that contraceptives "played a critical role" in dropping fertility rates).

30. In the nineteenth century, the United States saw an influx of millions of European immigrants, with numbers of newcomers rising from 150,000 in the 1820s, to 1.4, 2.8, 2.1, and 2.7 million in the 1840s, 1850s, 1860s, and 1870s, respectively. CARL J. BON TEMPO & HASIA R. DINER, IMMIGRATION: AN AMERICAN HISTORY 65-66 (2022). On the influence of immigration on antivice activism, see BEISEL, *supra* note 18, at 109-17, 126-30.

31. Because claims for woman suffrage challenged male household headship, opponents understood women's claim to vote to threaten traditional family roles. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 977-1003 (2002).

32. *See infra* text accompanying notes 133-136. An enforcement regime that developed around the statute relied on private as well as public censors, one of the most consequential of such models in the nineteenth century. *See infra* Section I.B.

33. The mails took on massive new importance in the nineteenth century. *See* DAVID M. HENKIN, THE POSTAL AGE: THE EMERGENCE OF MODERN COMMUNICATIONS IN NINETEENTH-CENTURY AMERICA 2 (2006). While the post was not new, the way the mails operated changed fundamentally in the mid-nineteenth century, with postal access coming to seem a "fundamental condition of modern life." *Id.* at 3. Nineteenth-century commentators perceived the importance of mails in this way, as one noted: "How society in the nineteenth century could exist without mail routes and the regular delivery of letters, it is impossible to conceive." J. HOLBROOK, TEN YEARS AMONG THE MAIL BAGS: OR, NOTES FROM THE DIARY OF A SPECIAL AGENT OF THE POST-OFFICE DEPARTMENT 292 (Philadelphia, H. Cowperthwait & Co. 1855); *see also* RICHARD R. JOHN, SPREADING THE NEWS: THE

enforcing the law created an unprecedented and remarkably invasive criminal-law regime for surveilling the U.S. mails—then the primary infrastructure for commerce, politics, and communications in American life.[34]

Over the decades, there were divergent mobilizations for reforming the statute. In the first decades after its enactment, a sexual-purity movement sought to persuade the government to adopt its understanding of the law and enforce it to ban an expanding array of communications and things associated with sex, contraception, and abortion—and to target for prosecution those who advocated freedom of expression or called for the statute's repeal.[35] By the early decades of the twentieth century, woman suffragists and other opponents of the Comstock Act began conscientiously to court arrest, and growing numbers of Americans across the nation came vocally to oppose the government's increasingly extreme interpretations of obscenity.[36] In the 1930s, federal courts began to read the law with attention to its double scienter requirement and characterized more communications and things as legitimate forms of health care exempt from criminalization under the statute. These included not only exchanges between doctors and patients or books about sex education but also condoms and diaphragms, all of which might be integral to Americans' health.[37] By distinguishing obscenity from health, judges adopted a fair reading of the statute's language that responded to decades of judicial discussion, as well as to popular resistance that enforcers of the statute had tried to censor.[38] There was consensus from the beginning that health was excepted from the statute's ban on obscenity, yet courts' understandings of the distinction between obscenity and health evolved with the American public's understanding of democracy, freedom, family, and the Constitution. The history of Comstock

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American Postal System from Franklin to Morse 11 (1998) (noting that many commentators of this period shared this view).

34. *See* Henkin, *supra* note 33, at 27-41 (describing the importance of the mails to market participation and interpersonal communication); Winifred Gallagher, How the Post Office Created America: A History 207-16 (2017) (detailing how the advent of cheap, fast mailing of magazines, newspapers, and catalogs shaped politics, consumer practices, and intimate life).

35. *See infra* Sections I.B-D.

36. *See infra* notes 284-310 and accompanying text.

37. *See infra* Sections II.C-D.

38. *See infra* Sections I.A, II.D.

enforcement thus unearths the lost popular roots of modern First Amendment and sexual- and reproductive-liberties law.[39]

In important respects, then, the history of the Comstock Act is a story of bottom-up change. But, as importantly, the history of the Comstock Act we recount is a story of a statute entrenched *against* change by profoundly antidemocratic forces. Federal and state obscenity laws were enacted and then preserved on the books by forms of government action that today we would view as unquestionably unconstitutional—criminal prosecutions under federal and state obscenity laws persisting until the 1960s that stigmatized certain forms of political speech, intimate behavior, and reproductive decision-making as obscene: dirty, immoral, or unworthy.[40]

As we show, women's political marginalization and the Comstock law's stigmatization of speech about sex and reproduction interacted over the decades and together helped prevent the law's reform or repeal.[41] The Comstock Act was enacted in an era when women were barred from participating in the law's adoption, interpretation, and enforcement, and they had scant opportunity to do so well into the twentieth century.[42] And the Act was enforced to insulate the law from criticism. Advocates for free love or voluntary motherhood who spoke out against coerced sex, coerced motherhood, or the inequalities of marriage were targeted for criminal prosecution under the new obscenity statute, as were civil libertarians who criticized censors' efforts to suppress political speech and crush the movement for the statute's reform or repeal.[43]

These effects were not incidental. The goal of chilling political speech about intimate life motivated Anthony Comstock and the patrons with whom he worked to enact the law.[44] The drive to pass the statute began when Comstock sought to censor Victoria Woodhull—a prominent advocate for woman suffrage and free love, a successful stockbroker, and the first woman to declare her candidacy for the presidency—because she had objected to the sexual double standard, complaining of a prominent minister's sexual infidelities that

39. *See infra* Section III.B (showing how the Second Circuit's decision in the *Dennett* case lies at the foundation of modern First Amendment approaches to obscenity doctrine and the connections between the 1930s Comstock cases and modern substantive-due-process law).

40. *See infra* Part III.

41. *See infra* Section III.A.

42. *See infra* Section III.A.

43. *See infra* notes 190-193, 206-213, 290-312, 347-349, 356-359 and accompanying text.

44. *See infra* Section I.A.

would not have been tolerated in a woman.[45] It was Woodhull's 1873 acquittal under then-existing federal obscenity law that led Comstock and his allies to advocate that Congress adopt a new, more expansive obscenity law.[46]

As Woodhull's prosecution prefigured, antivice activists targeted those who dared speak out against laws enforcing women's inequality in private and public life for criminal prosecution—chilling political speech about intimate relations for generations after. Describing this "chilling effect," the Supreme Court has recently explained that "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries."[47] We employ the First Amendment concept of chill to emphasize that enforcement of the federal obscenity law—and of the state laws that copied the federal Comstock statute[48]—often involved state action threatening speech that today would be constitutionally protected expression.[49] As importantly, generations of prosecutions stigmatized *political* speech about sex and reproduction in ways that radiated

45. *See* Ellen Carol DuBois, Suffrage: Women's Long Battle for the Vote 83-93 (2020); Siegel, *supra* note 31, at 971-73. Victoria Woodhull's role as a symbol of the suffrage and free-love movements, and her willingness to criticize the gendered hierarchy of marriage, made her a particular target for sexual-purity crusaders. For further discussion of Woodhull's arguments and arrest, see *infra* notes 103-109, 263-264 and accompanying text.

46. Shortly before passage of the 1873 law, Anthony Comstock had prosecuted Victoria Woodhull for violating an 1865 federal law prohibiting the mailing of any "obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character." Helen Lefkowitz Horowitz, *Victoria Woodhull, Anthony Comstock, and Conflict over Sex in the United States in the 1870s*, 87 J. Am. Hist. 403, 420 (2000); *see* Sohn, *supra* note 18, at 66-75. For the 1865 law, see Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 504, 507. On Woodhull's acquittal and its influence on Comstock, see Escoffier et al., *supra* note 18, at 55-56; and Donna Dennis, Licentious Gotham: Erotic Publishing and Its Prosecution in Nineteenth-Century New York 252 (2009). For further discussion of Woodhull's influence on the Comstock Act and broader debates about voluntary motherhood, see *infra* notes 95-111 and accompanying text.

47. Counterman v. Colorado, 600 U.S. 66, 75 (2023).

48. Twenty-four states enacted so-called mini-Comstock Acts. *See* Andrea Tone, Devices and Desires: A History of Contraceptives in America 27 (2001). Many such laws went further than the federal statute: twelve made illegal *speech* about abortion or contraception, for example, while eleven criminalized the possession of information about contraception. Allan C. Carlson, Godly Seed: American Evangelicals Confront Birth Control, 1873-1973, at 35 (2012). Connecticut, which passed the law struck down in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was the only state to criminalize contraceptive use. Carlson, *supra*, at 35. For further discussion of these laws and their twentieth-century constitutional analysis, see *infra* Part III.

49. *See infra* notes 409-411 and accompanying text.

far beyond the original prosecutions and helped insulate the Comstock law against legislative change.[50]

As one uncovers the generations of state action that helped keep Comstock on the books—state action we would view as unquestionably unconstitutional today—the antidemocratic character of the movement to revive enforcement of the Comstock Act today comes more fully into view. Revivalists cherry-pick words from the 150-year-old obscenity statute, reading the law as it was never understood and as Americans today would never enact: as a nationwide, no-exceptions abortion ban.[51] Remains of a law enacted, enforced, and preserved by unconstitutional means are twisted to impose on the American people Comstockery anew: a regime that would criminalize access to health in ways the American people have long opposed.

Like the 2022 Office of Legal Counsel (OLC) memo on the Comstock Act's application to abortion, on which the federal government relied in the *Alliance* litigation,[52] this Article rejects the revivalist claim that Comstock's ban on mailing abortion-related materials is plain and absolute. OLC explained that to prove a violation of the Comstock Act, the government must show that a sender intended that the recipient of abortion-related items would use them unlawfully—following 1930s federal decisions which Congress was aware of when it codified the statute in 1948,[53] and which, OLC concluded, "Congress ratified and USPS itself accepted."[54]

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50. Women lacked political power to set legislative agendas until late into the twentieth century, and legislators were reticent to repeal obscenity laws. In Part III, we show how women's persisting marginalization interacted with the stigmatization of political speech about sex and reproduction, deforming democratic politics decades after the prosecutions ended.

51. *See infra* Section IV.A.

52. *See* Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C., slip op. at 1-5, 8-10 (Dec. 23, 2022) [hereinafter OLC Memo], https://www.justice.gov/olc/opinion/file/1560596/dl?inline [https://perma.cc/5892-AGCU]. *See generally* Brief for Former U.S. Department of Justice Officials as Amici Curiae in Support of Petitioners, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236) (discussing the legislative history and prior judicial interpretations of the Com-stock Act).

53. *See* OLC Memo, *supra* note 52, slip op. at 1-6, 3 n.6. This codification of the Comstock Act was part of Congress's comprehensive revision, codification, and enactment into positive law of Title 18 of the U.S. Code—covering "Crimes and Criminal Procedure"—and was accompanied by a Historical and Revision Note that addressed the 1930s cases. *See id.* at 11-15, 12-13 nn.12-15; Act of June 25, 1948, ch. 645, § 1461, 62 Stat. 683, 683, 768; *see also infra* note 399 and accompanying text (discussing the Historical and Revision Note).

54. OLC Memo, *supra* note 52, slip op. at 2 ("This conclusion is based upon a longstanding judicial construction of the Comstock Act, which Congress ratified and USPS itself accepted.").

This Article rejects the claim that the Comstock Act is a no-exceptions national abortion ban on textual grounds;[55] and it provides wide-ranging textual, doctrinal, historical, and constitutional support for the authority of the 1930s cases, which, it shows, government officials have looked to for guidance in interpreting the statute from the 1930s until the time of this writing.[56] Unlike the 2022 OLC memo, which suggests that courts adopted an interpretation of the statute that was "narrower than a literal reading might suggest," the Article shows that the 1930s cases provided an authoritative reading of the statute that "narrow[ed]" prior *case law*—not the statute itself.[57] Nor does the Article depend on congressional ratification to establish the authority of the 1930s decisions. The Article shows that the statute's text, and a rich body of historical evidence in the period *before* as well as after the 1930s cases, supports the reasoning of the 1930s cases, which in the last century have guided the decisions of not only Congress and the U.S. Postal Service, but also the Justices of the Supreme Court.[58] The judges in the 1930s cases were direct witnesses to the Comstock prosecutions that deformed democratic processes that might otherwise have enabled repeal or amendment of the law. Far from "narrowing" the statute, the 1930s cases reasoned about the role and reach of obscenity law in ways that coordinated fidelity to the statute and, implicitly, to the Constitution,[59] in cases decided just years before the Supreme Court's decision in *Carolene Products*.[60]

The Article unfolds in four Parts. Part I recounts the drive by Comstock and a small group of elite patrons that culminated in passage of the Comstock Act.

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55. *See infra* notes 510-536 and accompanying text.

56. Congress, the U.S. Postal Service, the lower federal courts, and the Supreme Court have long looked to the 1930s cases in interpreting the statute. *See supra* notes 53-54 and accompanying text; *infra* notes 57, 399, 448 and accompanying text.

57. The OLC Memo asserts that "the Judiciary, Congress, and USPS have all settled upon an understanding of the reach of section 1461 and related provisions of the Comstock Act that is narrower than a literal reading might suggest." OLC Memo, *supra* note 52, slip op. at 5. And it refers to cases holding that the Comstock Act does not prohibit a sender from conveying "items that can be used to prevent or terminate pregnancy" as a "narrowing construction" that subsequent congressional action ratified. *Id.* It reiterates this account of the case law as "narrowing" the statute throughout. *See, e.g.*, *id.*, slip op. at 10 (discussing the "narrowing construction upon which the courts of appeals had converged").

58. On the text of the 1873 Act, see *infra* Section I.A. On the reasoning of the 1930s decisions, see *infra* Section II.D. On the authority accorded to the 1930s cases, see *supra* notes 53-54 and *infra* notes 399, 448 and accompanying text.

59. *See infra* Part III.

60. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). For further discussion, see *infra* notes 557-559 and accompanying text.

After examining the statute's provisions, Part I then shows how an antivice movement mobilized after the statute's passage and promoted a vision of the new obscenity law as a sexual-purity mandate. We show that even at the height of a Victorian interpretation of the statute, courts distinguished health from obscenity.

Part II traces the emergence of organized resistance to the government's use of the criminal law to enforce sexual purity and to target the law's critics. It demonstrates the public's growing support for the new conceptions of constitutional democracy espoused by the feminist movement, civil libertarians, and other critics of Comstockery. And it shows how Comstock critics persuaded judges in the 1930s to define obscenity in terms that recognized the prerogatives of not only doctors but also citizens to make decisions about their sexual and reproductive health.

Part III considers how Comstock conflict shaped interpretations of the statute and the Constitution. While critics were able to persuade courts to repudiate Victorian interpretations of the postal obscenity statute, they could not persuade legislators to reform or repeal the statute itself. We show that the movement was impeded not only by the persistence of women's political marginalization, but also by the stigmatization of sexual and reproductive rights. Part III illustrates how generations of government action criminalizing speech about sex and reproduction deformed democratic politics and inhibited legislators from responding to demands for obscenity-law reforms that the public supported by wide margins. Finally, Part III connects statutory and constitutional history, demonstrating that the nation's experience living under Comstock censorship supplied the foundation for landmark First Amendment and substantive-due-process precedents in the latter half of the twentieth century.

Part IV explores why the Comstock Act has emerged from obscurity as the cornerstone of the post-*Dobbs* antiabortion strategy. It shows how revivalists have embraced an edited version of the obscenity statute as the abortion ban they cannot persuade the nation to enact and how their claims diverge from the historical record.

The Conclusion identifies a series of democracy problems in reinventing the Comstock Act as a plain-meaning, no-exceptions, nationwide abortion ban. And it suggests how the Article's inquiry into the enactment and enforcement of the Comstock Act uncovers lost foundations of free-speech and sexual- and reproductive-liberties law—expanding evidence of the nation's history and traditions in ways that are of constitutional as well as statutory consequence today.

I. HOW COMSTOCK REINVENTED OBSCENITY

By the mid-nineteenth century, the common law had come to define obscenity as a crime covering writings and images "indecent and contrary to public order and natural feeling."[61] The Comstock Act destabilized existing obscenity law by banning not only the mailing of obscene writings and images but also the mailing of *items* and *objects* deemed obscene. The Comstock Act was also unprecedented in defining both contraception and abortion as obscene as a matter of federal law. Responding to the demands of Anthony Comstock and his elite patrons in the Young Men's Christian Association (YMCA), the members of Congress who voted to pass the Comstock Act seemed unsure of the scope of its prohibitions on indecency and obscenity. The federal law's passage and Anthony Comstock's exhortations inspired others to form societies for the suppression of vice to fight for what they called *sexual purity.* These antivice activists defined obscenity to include political speech and articles believed to incite illicit—that is, nonprocreative—sex. Over time, censors responding to the antivice movement worked to promote a new interpretation of the Comstock law, a process that culminated in the Supreme Court's embrace of a sexual-purity interpretation of the obscenity statute in *Swearingen v. United States*.[62]

A. From Profanity to Obscenity to Comstock

At common law, the concept of obscenity almost inexorably involved a threat to the public order.[63] Early cases involving the common-law crime of obscene libel required that the censored speech have a blasphemous or political dimension, but by the early nineteenth century in Britain and the United States, speech was subject to criminal punishment when it was obscene without being either seditious or blasphemous.[64] The idea that obscenity involved an injury to the public morals—and that "[t]he common law . . . is the guardi-

61. FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 73 (London, J. Bell 2d ed. 1816). The common law of obscene libel, like that of blasphemous libel and seditious libel, was concerned with enforcing public order. Colin Manchester, *A History of the Crime of Obscene Libel*, 12 J. LEGAL HIST. 36, 36 (1991).

62. 161 U.S. 446, 450 (1896); *see also infra* notes 241-245 and accompanying text (discussing *Swearingen*).

63. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 3-7 (1976); *see also* Manchester, *supra* note 61, at 38-39 (describing an eighteenth-century case in which the prosecution argued that a book about lesbian love posed a "threat to morality and to the preservation of the King's peace").

64. *See, e.g.*, Manchester, *supra* note 61, at 47-48; SCHAUER, *supra* note 63, at 6-11.

an of the morals of the people"[65]—was a hallmark of nineteenth-century obscenity cases.[66] But for most of the century, as Frederick F. Schauer explains, "there remained no definition of what obscenity was."[67]

Prior to the 1870s, state common law defined any number of acts as threats to the public order, including public nudity,[68] profanity in public spaces (especially where women and children were present),[69] and the public display of erotic images.[70] When Congress began dabbling in morals regulations in 1842, the Federal Tariff Act barred the importation of "all indecent and obscene prints, paintings, lithographs, engravings, and transparencies."[71] While tariff

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65. State v. Appling, 25 Mo. 315, 317 (1857) (quoting Grisham v. State, 10 Tenn. (2 Yer.) 589, 594 (1831)); *see also* Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 102 (Pa. 1815) ("The courts are guardians of the public morals . . . ."); Barker v. Commonwealth, 19 Pa. 412, 413 (1852) (holding that language "addressed to the public" is obscene when "the intent and manifest tendency of it be to debauch and corrupt the public morals").

66. *See* Bell v. State, 31 Tenn. (1 Swan) 42, 45-47 (1851).

67. SCHAUER, *supra* note 63, at 7.

68. Some state obscenity laws applied to public nudity explicitly. *See* State v. Hazle, 20 Ark. 156, 158 (1859). Other states authorized prosecutions for obscenity or lewdness against slave owners who allowed enslaved persons to travel unclothed. *See* Britain v. State, 22 Tenn. (3 Hum.) 203, 203-04 (1842).

69. *See* SCHAUER, *supra* note 63, at 11. For examples, see *Bell*, 31 Tenn. (1 Swan) at 42-43, 47-48, which affirmed a man's conviction for uttering obscene words in public where the man had bragged about having sex with and contracting venereal disease from another man's female relatives; and *Appling*, 25 Mo. at 317-18, which affirmed under the common law the conviction of a man who used "vulgar, indecent and obscene words . . . in the hearing of both males and females."

70. Observe that courts sometimes deemed items obscene and threats to the public order even when they were viewed or read entirely in private. *See Sharpless*, 2 Serg. & Rawle at 102-03, 105 (upholding the conviction of a man accused of displaying a "lewd, scandalous and obscene painting" of "a man in an obscene, impudent, and indecent posture with a woman"); Commonwealth v. Holmes, 17 Mass. (17 Tyng) 336, 336-37 (1821) (discussing the publication of an erotic print found to be obscene); Commonwealth v. Landis, 8 Phila. 453, 453-55 (Pa. 1870) (upholding a conviction for the publication of a sex manual found to be obscene regardless of its scientific accuracy). Other prosecutions for "obscene papers" are hard to parse because the decisions neither define "obscene" nor detail the language found to be obscene. *See* SCHAUER, *supra* note 63, at 4-7, 11.

71. Tariff Act of 1842, ch. 270, § 28, 5 Stat. 548, 566. A law passed the following day also banned the lottery in Washington, D.C. *See* Act of Aug. 31, 1842, ch. 282, § 1, 5 Stat. 578, 578. The anticontraceptive and antiabortion language of the Comstock Act was later incorporated into the Tariff Act of 1930. Tariff Act of 1930, ch. 497, § 305(a), 46 Stat. 688, 688 (codified as amended at 19 U.S.C. § 1305(a)). The Tariff Act applied only to obscene images until 1873, when Congress amended it to include books. Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369, 384 (2002).

prosecutions focused on erotic images, the definition of obscenity in state law generally remained "local, customary, and discretionary."[72] What made obscenity a threat to the public order—and what the public order required—remained fluid.

Starting in the mid-nineteenth century, Horatio Storer, a professor at Harvard Medical School, led the recently formed American Medical Association (AMA) in a campaign to criminalize abortion as it never had been, even at the time of the Founding.[73] Storer and other antiabortion activists fused fetal-protective arguments with claims about the threat abortion posed to the public order. They expressed special disdain for married women who had abortions, proposing a model ordinance imposing a harsher penalty if "said offender be a married woman."[74] Other claims focused on the relative abortion rates of Catholic and Protestant women.[75] Married women, particularly white, upper-class ones, raised particular concern, for they seemingly wanted to trade childbearing for other pursuits like voting.[76] Storer stressed that he would not transplant women "from their proper . . . sphere, to the pulpit, the forum, or the cares of state."[77]

While Storer and his colleagues campaigned for state abortion bans, Congress passed another obscenity law[78]: an 1865 postal law to address various

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72. William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America 188 (1996). For Tariff Act prosecutions, see *United States v. Three Cases of Toys*, 28 F. Cas. 112, 112-13 (S.D.N.Y. 1843) (No. 16,499), which concerned indecent paintings attached to snuff boxes; *United States v. One Case Stereoscopic Slides*, 27 F. Cas. 255, 255-56 (D. Mass. 1859) (No. 15,927), which involved indecent slides intended to be used in a stereoscope viewer; and *Anonymous*, 1 F. Cas. 1024, 1024 (D.N.Y. 1865) (No. 470), which concerned sexual images on handkerchief boxes.

73. James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900, at 78-89 (1979); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 300-14 (1992).

74. Horatio Robinson Storer, On Criminal Abortion in America 99 (Philadelphia, J.B. Lippincott & Co. 1860).

75. Horatio Robinson Storer, Why Not? A Book for Every Woman 64 (Boston, Lee & Shepard 1867) (noting that "abortions are infinitely more frequent among Protestant women than among Catholic" women).

76. Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 Hous. L. Rev. 901, 924-30 (2023).

77. Horatio Robinson Storer, Is It I? A Book for Every Man 89-90 (Boston, Lee & Shepard 1868).

78. *See* Nancy F. Cott, Public Vows: A History of Marriage and the Nation, 124-26 (2009).

wartime concerns.[79] The law set out fines and a prison term for persons mailing obscene books and pamphlets.[80] At the time, the antiabortion movement presented its cause as a fight to protect unborn life, correct differential birth rates, and ensure that married women played their God-given role[81]—different aspects of public order than those preoccupying the emerging antivice movement, which focused on illicit sex.

The American antivice movement mobilizing around the time of the 1865 law's passage was much broader than any one man, but Anthony Comstock played an outsize role in its rise. One of seven children, Comstock revered his mother, Polly, who died in childbirth when he was ten.[82] By the early 1870s, already a Civil War veteran, he had started collaborating with the YMCA, which was lobbying for an expansion of New York's state obscenity law (and for the obscenity provision in the 1865 federal postal law).[83]

R.W. McAfee, another leader of the antivice movement, was raised Presbyterian in Missouri and hoped to become a minister before his eyesight prevented him from progressing.[84] In 1874, he organized a branch of the Railway Literary Union to stop the distribution of obscene literature via the rails.[85] This helped to launch McAfee's work in antivice societies later in the decade.[86]

Comstock's elite patrons in the New York YMCA promoted a new state obscenity law offering a different vision of the public order and threats to it.[87] The

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79. *See* Act of Mar. 3, 1865, ch. 89, §§ 1-2, 16, 13 Stat. 504, 504-05, 507.

80. *Id.* § 16, 13 Stat. at 507.

81. *See supra* notes 73-77 and accompanying text.

82. SOHN, *supra* note 18, at 40-54; WERBEL, *supra* note 18, at 35.

83. DENNIS, *supra* note 46, at 221, 243, 252. On Comstock's service in the Union Army, see WERBEL, *supra* note 18, at 38-41. On the Young Men's Christian Association's (YMCA's) sponsorship of the 1865 obscenity provision, see LEIGH ANN WHEELER, AGAINST OBSCENITY: REFORM AND THE POLITICS OF WOMANHOOD IN AMERICA, 1873-1935, at 10-11 (2004).

84. Joseph H. Dulles, *Necrological Report Presented to the Alumni Association of Princeton Theological Seminary at Its Annual Meeting*, 5 PRINCETON THEOLOGICAL SEMINARY BULL. 66, 105 (1911).

85. *Id.*

86. *Id.*

87. *See* DENNIS, *supra* note 46, at 225 (describing how, "[t]hrough this bill, the YMCA and its supporters sought to systematize and expand in critical ways the types of commerce that could be prosecuted as obscene," including by "[c]apitalizing on the concurrent lobbying by licensed doctors against abortion" to "broaden[] the scope of common-law prohibitions against obscenity by classifying the sale of devices and medicines for contraception and abortion as obscene," which "went against nearly three decades of law enforcement practice in New York City").

bill not only covered *speech and images*, including "any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, [or] instrument,"[88] but it was also the first to describe *objects* as obscene, targeting any "article of indecent or immoral use," including any "article or medicine for the prevention of conception or procuring of abortion."[89] At the time, prohibitions of contraception were just beginning, and criminal restrictions on abortion were in flux.[90] Statutes defining either one as obscene were novel.

These changes converged with other developments in the law of obscenity. In 1868, the year that New York amended its obscenity law,[91] a British decision, *Regina v. Hicklin*, defined as obscene any material that had a "tendency . . . to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[92] *Hicklin* directed judges to define obscenity with attention to those in the community they imagined most susceptible to depravity.[93] The decision would not be cited in the United States for more than a decade, when American courts seized upon it to expand the reach of obscenity law.[94]

Not long after the passage of New York's law, Comstock and his patrons in the YMCA became convinced of the need for a new national statute, provoked in particular by the 1873 acquittal of the suffragist Victoria Woodhull under the existing federal obscenity statute.[95] Her prosecution represented an emerging trajectory in obscenity prosecutions. Woodhull drew Comstock's attention because she publicized an alleged affair conducted by one of the nation's best-

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88. Act of Apr. 28, 1868, ch. 430, § 1, 1868 N.Y. Laws 856, 856-57.

89. *Id.* § 1, 1868 N.Y. Laws at 857; *see also* Heywood Broun & Margaret Leech, Anthony Comstock: Roundsman of the Lord 141-42 (1928) (explaining that Comstock first inserted "the phrase 'for the prevention of conception'" into New York obscenity law, and then in 1873 included it in the federal obscenity law).

90. On the nineteenth-century movement to criminalize abortion, see *supra* notes 73-77 and accompanying text. On the novelty of contraceptive regulation, see Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 175 (G. Edward White ed., 1985), which explains that "there were few explicit regulations on contraception until the 1870s."

91. On the passage of the bill, see *The Obscene Democracy*, N.Y. Daily Trib., Apr. 25, 1868, at 4, 4.

92. [1868] 3 QB 360 at 371 (Eng.).

93. *Id.*

94. The case first received attention in *United States v. Bennett*, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) (No. 14,571). For further discussion of the case, see *infra* Section I.D.

95. Escoffier et al., *supra* note 18, at 55-56. For a discussion of Comstock's targeting of Woodhull, see *supra* notes 45-46 and accompanying text.

known preachers, Pastor Henry Ward Beecher of Brooklyn, with a female parishioner.[96] Woodhull insisted on the importance of sexual self-determination for women and denounced Beecher as a hypocrite who preached against free love while practicing it himself.[97] In exposing the Beecher affair, Woodhull spoke as the most vocal proponent of free love, a movement started in the 1840s and 1850s by skeptics of the nineteenth-century institution of marriage with ties to anarchist and spiritualist movements.[98] Free lovers advocated for both liberty and equality: they "criticized male sexual dominance in marriage" and called for more equal relations between the sexes,[99] while arguing against rigid divorce laws that limited what the abolitionist and free lover Francis Barry called "perfect freedom and unconditional freedom for love."[100] Free lovers, by extension, criticized conventional marriages of the era—in which women owed men their sexual services and marital rape was a legal impossibility—as a form of involuntary servitude.[101] "The term 'marriage,'" Barry wrote, "has, by com-

96. On the so-called Beecher-Tilton scandal, see RICHARD WIGHTMAN FOX, TRIALS OF INTIMACY: LOVE AND LOSS IN THE BEECHER-TILTON SCANDAL 154-57, 293-301 (1999); and Horowitz, *supra* note 46, at 411-34.

97. *See The Free-Love Queen: Victoria Woodhull's Creed and Defense*, CHARLESTON DAILY NEWS, May 26, 1871, at 1, 1. The original letter ran in the *New York World*. *See* Robert Shaplen, *The Beecher-Tilton Affair*, NEW YORKER (June 4, 1954), https://www.newyorker.com/magazine/1954/06/12/the-beecher-tilton-case-ii [https://perma.cc/6QKY-L2FN].

98. On the early free-love movement in the mid-nineteenth-century United States, see HAL D. SEARS, THE SEX RADICALS: FREE LOVE IN HIGH VICTORIAN AMERICA 8-16 (1977); and John Spurlock, *The Free Love Network in America, 1850 to 1860*, 21 J. SOC. HIST. 765, 765-66 (1988).

99. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 114, 161 (1st ed. 1988) ("Free lovers opposed prostitution, criticized male sexual dominance in marriage, and envisioned a society in which women would have greater equality with men.").

100. Spurlock, *supra* note 98, at 768 (quoting Francis Barry, *Free Love and Marriage*, LIBERATOR, Sept. 26, 1856, at 150, 150).

101. SANDRA ELLEN SCHROER, STATE OF 'THE UNION': MARRIAGE AND FREE LOVE IN THE LATE 1800S, at 9-24 (Jerome Nadelhaft ed., 2005); JOANNE E. PASSET, SEX RADICALS AND THE QUEST FOR WOMEN'S EQUALITY 11-15, 54-61 (Anne Firor Scott, Nancy A. Hewitt & Stephanie Shaw eds., 2003). On the legal history of marital rape, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1382-1406 (2000). The history of the common-law action for loss of consortium also reflected the inequality in marriage of which free-love advocates complained. Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 656 (1930) ("The husband alone might sue. A deceived wife was a Dred Scott who might not be heard to complain because, so far as the law was concerned, she was not a person.").

mon consent, been applied to a system of which love forms no necessary part—a system essentially like chattel slavery."[102]

Woodhull, who as a young woman had married an unfaithful man struggling with alcoholism, had already endured the stigma of being a divorcée and had become a vocal proponent of free love[103]—so much so that her fellow suffragists perceived her forthrightness as threatening to discredit what was already perceived as a dangerous movement.[104] "Yes, I am a Free Lover," she proclaimed in a speech before three thousand people[105] at New York's Steinway Hall in 1871.[106] And she declared:

> I have an *inalienable*, *constitutional* and *natural* right to love whom I may, to love as *long* or as *short* a period as I can; to *change* that love *every day* if I please, and with *that* right neither *you* nor any *law* you can frame have *any* right to interfere.[107]

Woodhull's exposé of Reverend Beecher attracted controversy in part because it reiterated a more widespread critique of the sex roles inscribed in nineteenth-century marriage—and exposed the unwillingness of Woodhull's own critics to live by their self-proclaimed moral code.[108] Because of her willingness to speak out about free love, Woodhull became a convenient target for Comstock's efforts to reinforce a particular vision of public order in marriage.[109] The 1865

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102. Spurlock, *supra* note 98, at 768 (quoting Francis Barry, *To Henry C. Wright*, Liberator, Aug. 22, 1856, at 140, 140). Many champions of free love, like Moses Harman, had ties to the abolitionist movement. *Id.* at 770; Sarah L. Jones, *'As Though Miles of Ocean Did Not Separate Us': Print and the Construction of a Transatlantic Free Love Community at the Fin de Siècle*, 25 J. Victorian Culture 95, 103-04 (2020).

103. D'Emilio & Freedman, *supra* note 99, at 108 (stating in the caption to image 18 that "[t]he flamboyant Victoria Woodhull brought the issue of free love into the open in the 1870s").

104. Amanda Frisken, Victoria Woodhull's Sexual Revolution: Political Theater and the Popular Press in Nineteenth-Century America 11-12 (2004).

105. E. Brooke Phipps, *Victoria C. Woodhull, "'And the Truth Shall Make You Free.' A Speech on the Principles of Social Freedom Delivered in Steinway Hall," New York, NY (20 November 1871)*, 15 Voices Democracy 1, 1 (2020), https://voicesofdemocracy.umd.edu/wp-content/uploads/2020/12/Phipps-Interpretive-Essay-PDF.pdf [https://perma.cc/XUQ8-ACVY].

106. Victoria C. Woodhull, "And the Truth Shall Make You Free." A Speech on the Principles of Social Freedom, Address Delivered in Steinway Hall (Nov. 20, 1871), *in* A Speech on the Principles of Social Freedom 5, 27 (Paul Royster ed., Zea Books 2023) (1871).

107. *Id.*

108. *See supra* notes 96-97 and accompanying text.

109. On the divisions Woodhull prompted within suffragism in the 1870s, see Sally G. McMillen, Seneca Falls and the Origins of the Women's Rights Movement 191-92 (2008). On the caricature of Woodhull as Mrs. Satan, see Frisken, *supra* note 104, at 46-48.

statute under which Woodhull was charged did not cover newspapers,[110] the kind of gap Comstock sought to close with the bill that would become the Comstock Act.[111]

In lobbying Congress to update its postal obscenity law, Comstock urged coverage of writings and items for preventing conception or procuring abortion, producing some of the first regulation of birth control and expanding the category of the obscene to include articles as well as speech that would incite illicit sex. This precedent-setting move (treating contraceptives and abortifacients as obscene) would prove challenging to enforce for several reasons. In that era, it was all but impossible to differentiate between abortifacients and contraceptives.[112] And further, science offered no way for physicians to establish a pregnancy before a patient could detect fetal movement (nor would there be one for nearly a century).[113] Most medical guides advised women to wait until they had missed two periods before suspecting pregnancy,[114] and physicians relied on strange and unreliable methods, such as inspecting a patient's mouth, eyes, or nose, to guess about whether a pregnancy was present.[115] It was equally hard to determine how, if at all, the drugs and devices Comstock targeted worked.[116] Common remedies marketed as curing female troubles were presented as contraceptives, abortifacients, or emmenagogues for restor-

110. Escoffier et al., *supra* note 18, at 55-56.

111. Act of Mar. 3, 1873, ch. 258, § 1, 17 Stat. 598, 598 (prohibiting publication or possession of "any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material").

112. *See* JOHN M. RIDDLE, EVE'S HERBS: A HISTORY OF CONTRACEPTION AND ABORTION IN THE WEST 242 (1997) (explaining the "difficulty of making legal distinctions between menstrual regulators and abortives" or telling whether a drug was an "antifertility agent[]" or a drug for birth control).

113. *See* LARA FREIDENFELDS, THE MYTH OF THE PERFECT PREGNANCY: A HISTORY OF MISCARRIAGE IN AMERICA 38, 167-69 (2020) (explaining that physicians were just beginning to develop tests to ascertain physical signs of pregnancy and arguing that in the period, "distinctions between contraception, abortion, and miscarriage did not seem so relevant"); ANN OAKLEY, THE CAPTURED WOMB: A HISTORY OF THE MEDICAL TREATMENT OF PREGNANT WOMEN 17-25 (1984). Reliable pregnancy testing was not available until the 1970s. *See, e.g.*, Evan D. Bernick & Jill Wieber Lens, *Original Public Meaning and Pregnancy's Ambiguities*, 126 MICH. L. REV. 1443, 1469-70 & nn.188-89 (2024).

114. FREIDENFELDS, *supra* note 113, at 170.

115. KAREN WEINGARTEN, PREGNANCY TEST 58 (2023); *see also* FREIDENFELDS, *supra* note 113, at 167-69 (discussing other nineteenth-century pregnancy-diagnosis methods).

116. RIDDLE, *supra* note 112, at 242-43, 257-59 (explaining the difficulty of distinguishing different kinds of drugs in the nineteenth century, and reporting that "medical professionals came to view all nonprescription drugs," including "women's remedies," as "superstitious nonsense").

ing blocked menstruation,[117] or all three.[118] Others quite clearly had no effect at all.[119]

Comstock and his allies, however, scarcely paused to draw distinctions because their objection was that abortion, contraception, and even placebos all incentivized sexual impurity; while erotica stoked lust in boys, girls, and women, anything marketed as a contraceptive or abortifacient would facilitate licentiousness by allowing married women to shirk their sexual and reproductive obligations and permitting users to conceal their sin,[120] a common theme in newspaper reporting of the era.[121] It was concern about "free lust" that led

117. In the early modern era, a missed period was seen as the source of potentially serious health risks. Monica E. Eppinger, *The Health Exception*, 17 GEO. J. GENDER & L. 665, 679 (2016). In the nineteenth century, this health justification for the use of abortifacients and emmenagogues justified "medical intervention before quickening." *Id.* at 700.

118. *See, e.g.*, *The Great English Remedy: Sir James Clarke's Celebrated Female Pills*, DET. FREE PRESS, Oct. 2, 1864, at 3, 3 (advertising a "sure and safe remedy for female difficulties and obstructions"); *Doctress Meas Accoucheur*, BALT. SUN, Nov. 2, 1865, at 2, 2 (advertising the services of a doctor who "removes all female obstructions and treats all complications pertaining to the female system"); *Dr. Peron*, CIN. DAILY ENQUIRER, Nov. 17, 1871, at 6, 6 (featuring a classified ad for a doctor who claimed to "treat[] all diseases incident to women"). Illustrating the blurred line between abortifacients, emmenagogues, and contraceptives, Michigan passed a law in 1869 making it a crime to publish or sell information "in indecent or obscene language for the cure of chronic female complaints or private diseases," including compounds "designed to prevent conception, or tending to produce miscarriage or abortion." Act of Apr. 3, 1869, No. 106, § 2, 1869 Mich. Pub. Acts 175, 175.

119. Those accused of selling drugs for abortion or contraception routinely claimed to be marketing placebos that had no effect. For examples, see *United States v. Bott*, 24 F. Cas. 1204, 1204 (C.C.S.D.N.Y. 1873) (No. 14,626), in which two defendants claimed to have marketed snake-oil remedies; and *Bates v. United States*, 10 F. 92, 95 (C.C.N.D. Ill. 1881), in which the defendant argued that "certain pills which were sent by mail would not, of themselves, prevent conception or procure abortion."

120. *See* THE SECOND ANNUAL REPORT OF THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE 5 (New York, 1876) [hereinafter SECOND ANNUAL REPORT]. Comstock described publications explaining strategies for birth control as "incentive[s] to crime to young girls and women" who would be consumed by lust. ANTHONY COMSTOCK, FRAUDS EXPOSED; OR, HOW THE PEOPLE ARE DECEIVED AND ROBBED, AND YOUTH CORRUPTED 427 (New York, J. Howard Brown 1880); *see also* BROUN & LEECH, *supra* note 89, at 192 (quoting Comstock's diary denouncing "obscene publications, abortion implements, and other incentives to crime").

121. *See* Patricia Cline Cohen, Married Women and Induced Abortion in the United States, 1820-1860, at 3-4 (July 22, 2022) (unpublished manuscript), https://ssrn.com/abstract=4197554 [https://perma.cc/3GNU-LXVZ] (reporting on stories that prompted newspaper coverage of abortion in the early nineteenth century and finding that "[m]any of the cases involved a deceased woman," that "more than 4/5 of [the] cases involved single women," and that of "the 40 married women [studied], more than half had illicit pregnancies"); *id.* at 4 ("Like the pregnant spinster, these wives sought abortion to hide their shame."); Lawrence M.

Comstock to pursue Woodhull,[122] and it was anxiety about abortion and contraception incentivizing licentiousness inside and outside of marriage that he expressed when lobbying to Congress, armed with a suitcase of confiscated items he deemed obscene.[123] Comstock kept detailed lists of the items he confiscated, including "articles made of rubber for immoral purposes,"[124] such as dildos, which Comstock described as "in the form of the male organ of generation, for self-pollution."[125]

The statute Comstock proposed prohibited the mailing of articles or things intended for "the prevention of conception or procuring of abortion" and listed them with articles or things for "indecent or immoral use."[126] Comstock's primary ally in the House, Representative Clinton Merriam of New York, emphasized the importance of stamping out impure sex. In a March 1873 speech, Merriam read aloud Comstock's letter, in which he listed items that he had confiscated, making no mention of items related to contraception or abortion and instead pointing to "[o]bscene photographs, . . . books and pamphlets," "sheets of impure songs," "playing cards," "obscene and immoral rubber articles," "lead molds for manufacturing rubber goods," "newspapers," and "letters from all parts of the country."[127] In his final push to see the bill passed, Merri-

Friedman & Hutchison Fann, *High and Low: Abortion in the Press in the Late Nineteenth Century and Early Twentieth Century*, 72 CLEV. STATE L. REV. 865, 868 (2024) (analyzing newspaper coverage of abortion in late-nineteenth- and early-twentieth-century newspapers and reporting that the first "big theme[]" that "stand[s] out" is "the idea that abortion was evil because it encouraged immoral behavior among unmarried women and adultery among married women," enabling them "to cover up the fact that [a] woman had committed a sin").

122. *See supra* notes 96-109 and accompanying text.

123. WERBEL, *supra* note 18, at 77 (explaining that Comstock visited the "halls of Congress in January and February 1873" with "samples of the enormous haul of materials he had collected within the past year").

124. YOUNG MEN'S CHRISTIAN ASS'N OF THE CITY OF N.Y. COMM. FOR THE SUPPRESSION OF VICE, IMPROPER BOOKS, PRINTS, ETC. 4-5 (New York, 1874) (reporting on Comstock's seizures since March 1872).

125. WERBEL, *supra* note 18, at 77 (citing YMCA Comm. for the Suppression of Vice, Private and Confidential: Obscene Books, etc. Summary Report 4-5 (1872) (on file with Univ. of Mich., Kautz Fam., YMCA Archives, Box 386, Folder "NYSSV Pamphlets")); *see also* CONG. GLOBE, 42d Cong., 3d Sess. app. at 168 (1873) (quoting Comstock discussing the confiscation of "rubber articles for masturbation").

126. S. 1572, 42d Cong. § 2 (1873); *see infra* note 127 and accompanying text (referencing the proposed bill).

127. *See* CONG. GLOBE, 42d Cong., 3d Sess. app. at 168 (1873) (reproducing Representative Merriam's speech, which included Comstock's report listing items he had confiscated and his warning: "For be it known that wherever these books go, or catalogues of these books, there

am insisted that the bill was needed to protect the "purity and beauty of womanhood" from "the insults of this trade."[128]

The lawmakers who passed the Comstock Act remarked on the rush with which the law was enacted.[129] Speaker of the House, and later Senator, James G. Blaine of Maine allowed the bill to come up for House consideration two days before the end of session, and Merriam then pressed the House to adopt the Senate bill before even referring it to committee.[130] A first attempt failed because of members concerned about the "hot haste" in which the bill was considered; Merriam then succeeded in suspending the rules, and tellers tallied the votes, a now-moribund procedure that counted the number of lawmakers for or against a measure without recording individual votes.[131] The House passed the bill, and President Grant signed it the same day.[132] The anonymity of the House vote and the haste with which the law was enacted—even according to the understanding of contemporary legislators—precluded any meaningful discussion of the sea change the statute would create in American law.

The text that Congress ultimately enacted presented contraception, abortion, and sex toys as of a piece—incitements to immorality, like erotica and other articles of "indecent" or "immoral" use. The statute had three parts. The first, which applied only to Washington, D.C., and U.S. territories, made it a crime to sell, possess, publish, or give away

> any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material, or any cast, instrument or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion.[133]

A second provision on the U.S. mails provided:

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you will ever find, as almost indispensable, a complete list of rubber articles for masturbation or for the professed prevention of conception.").

128. *Id.*; *see also* BROUN & LEECH, *supra* note 89, at 153 (reporting on Merriam's focus on the purity of women).

129. *See* FOSTER, *supra* note 18, at 49-53 (arguing that the haste in which the Comstock Act passed led to "imprecise legislation that . . . Congress had to revise").

130. *Id.* at 52-53.

131. *Id.* at 53; Marjorie Hunter, *First Recorded Teller Vote Is Taken in the House*, N.Y. TIMES, Mar. 4, 1971, at 21, 21 (explaining the teller-vote procedure).

132. *See* FOSTER, *supra* note 18, at 53.

133. Act of Mar. 3, 1873, ch. 258, § 1, 17 Stat. 598, 598. This provision was eventually repealed by Congress in 1948. Act of June 25, 1948, ch. 645, § 21, 62 Stat. 683, 862, 864 (repealing 18 U.S.C. § 512 (1946)).

> That no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, 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, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail.[134]

For "any person who shall knowingly deposit . . . for mailing or delivery, any of the hereinbefore-mentioned articles or things," the statute authorized fines that could exceed $100,000 in inflation-adjusted dollars or imprisonment for one to ten years.[135] A third provision barred the importation of "any of the hereinbefore-mentioned articles or things."[136]

Why did the language of the first section refer to writings or articles "for causing unlawful abortion," while the language of the second section referred to writings or articles "designed or intended for . . . procuring of abortion"?[137] As we show, the phrase "procuring of abortion" entailed a showing of unlawful purpose as well. At the time the statute was enacted, the term "abortion" was synonymous with "miscarriage."[138] "Procuring of abortion," by contrast, referred to a crime. In 1850, one of the main legal dictionaries of the era stated that the crime of abortion occurred only "after the period of quickening" and only when the "premature exclusion of the human fetus" was "procured or

134. Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598, 599.

135. *Id.* For the inflation estimate, see Ian Webster, *CPI Inflation Calculator*, OFF. DATA FOUND., https://www.officialdata.org [https://perma.cc/3P87-Y388].

136. Act of Mar. 3, 1873, ch. 258, § 3, 17 Stat. 598, 599.

137. Courts would ultimately come to harmonize the first and second sections of the Comstock Act with respect to abortion and contraception, to which no provision of the statute applied any modifier, including "unlawful." A canonical example is *United States v. One Package*. 86 F.2d 737, 739-40 (2d Cir. 1936). For further discussion of these cases, see *infra* Section II.D.

138. CHAUNCEY A. GOODRICH & NOAH PORTER, DR. WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 5 (London, Bell & Daldy 1864); *see also* NOAH PORTER, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 5 (Springfield, Mass., G. & C. Merriam Co. 1898) (defining abortion as "[t]he act of giving premature birth; . . . miscarriage").

produced with a malicious design or for an unlawful purpose"[139]—an account of the crime echoed in state cases of the era.[140] Other prominent dictionaries, including *Black's Law Dictionary*, defined an unlawful abortion as applying only to procedures procured for illegal purposes after quickening.[141] Section 2 of the Comstock Act thus covered mailing of writings or articles "designed or intended for . . . procuring of abortion," that is, *employed to terminate pregnancy for an*

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139. Alexander M. Burrill, New Law Dictionary and Glossary 10 (New York, Baker, Godwin & Co. 1850); *see also* 1 John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union 45 (Philadelphia, T.K. Collins 12th ed. 1868) ("In this country, it has been held that it is not an indictable offence, at common law, to administer a drug, or perform an operation upon a pregnant woman with her consent, with the intention and for the purpose of causing an abortion . . . without averring . . . [that] such woman was quick with child."); Porter, *supra* note 138, at 5 (explaining that the term "abortion" is "sometimes used for the offense of procuring a premature delivery, but strictly the early delivery is the *abortion*; 'causing or procuring *abortion*' is the full name of the offense").

140. Contemporaneous state-law cases discuss this unlawful-purpose requirement for criminal abortion. *See* Commonwealth v. Bangs, 9 Mass. (9 Tyng) 387, 387 (1812) (discussing a prosecution for "administering a potion with intent to procure an abortion"); State v. Drake, 30 N.J.L. 422, 425 (1863) ("To make the transactions mentioned criminal under the statute, it is necessary that they should have been done with intent, to cause and procure the miscarriage of a woman then pregnant."); State v. Murphy, 27 N.J.L. 112, 113 (1858) (discussing a law making abortion a crime "if any person or persons [administer or prescribe abortifacients] maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child"); Mills v. Commonwealth, 13 Pa. 631, 633 (1850) (requiring proof of "an intent to cause and procure . . . miscarriage and abortion"); State v. Moore, 25 Iowa 128, 131 (1868) (approving a jury instruction explaining that "[t]o attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act"); People v. Josselyn, 39 Cal. 393, 398-99 (1870) (reversing the conviction of a physician in a case of a woman who miscarried because there was inadequate proof that he used an instrument with "the intent to produce abortion"); Dougherty v. People, 1 Colo. 514, 517 (1872) ("It is the administering the noxious substance or the use of the instrument with intent to produce miscarriage that makes up the crime . . . .").

141. In 1910, *Black's Law Dictionary* defined abortion as "[t]he miscarriage or premature delivery of a woman who is quick with child. When this is brought about with a malicious design, or for an unlawful purpose, it is a crime in law." *Abortion*, Black's Law Dictionary (2d ed. 1910); *see also* The Century Dictionary: An Encyclopedic Lexicon of the English Language 16 (William D. Whitney & Benjamin E. Smith eds., New York, Century Co. 1895) ("At common law the criminality depended on the abortion being caused after quickening."); William Caldwell Anderson, A Dictionary of Law: Consisting of Judicial Explanations and Explanations of Words, Phrases, and Maxims, and an Exposition on the Principles of Law 6-7 (Chicago, T.H. Flood & Co. 1889) ("At common law an indictment for abortion will not lie for an attempt to procure an abortion with the consent of the mother, until she is 'quick with child.'"). Earlier dictionaries echoed this definition. *See* Burrill, *supra* note 139, at 10.

unlawful purpose. (The abortion provision of the second section thus had two scienter requirements: the sender must (1) "knowingly deposit for mailing . . . the hereinbefore-mentioned articles or things," and (2) mail those things knowing that they would be used for unlawful terminations.[142])

Relatedly, leading treatises, including one coauthored by Storer, leader of the campaign against abortion in the states,[143] identified *lawful* purposes for terminating pregnancy, establishing that a defendant lacked criminal intent when "abortion [was] necessitated at the hands of physicians to save the mother's life."[144] The crime of abortion, by contrast, required the intentional production of miscarriage for a purpose other than protecting the life of the patient.[145]

In this era, the law afforded doctors treating patients considerable discretion in making this decision because pregnancy was quite dangerous and the

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142. *See supra* text accompanying notes 24, 135.

143. Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973, at 11 (2022); Sara Dubow, Ourselves Unborn: A History of the Fetus in Modern America 16-20 (2011).

144. Horatio R. Storer & Franklin Fiske Heard, Criminal Abortion: Its Nature, Its Evidence, and Its Law 89 n.1 (Boston, Little, Brown & Co. 1868); *see also* Edwin M. Hale, A Systematic Treatise on Abortion 314 (Chicago, C.S. Halsey 1866) (arguing that criminal intent was not satisfied when "justified by the rules of medicine, whether to save the life of the mother or her child").

145. How did including contraception and abortion in a bill to secure the "Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use" affect the practice of medicine? *See* Act of Mar. 3, 1873, ch. 258, 17 Stat. 598, 598. Senator Roscoe Conkling worried that in the haste to pass the statute, the Senate did not fully grasp the meaning of the law they were enacting:

> For one, although I have tried to acquaint myself with it, I have not been able to tell, either from the reading of apparently illegible manuscript in some cases by the Secretary, or from private information gathered at the moment, and if I were to be questioned now as to what this bill contains, I could not aver anything certain in regard to it. The indignation and disgust which everybody feels in reference to the acts which are here aimed at may possibly lead us to do something which, when we come to see it in print, will not be the thing we would have done if we had understood it and were more deliberate about it.

Cong. Globe, 42d Cong., 3d Sess., 1525 (1873) (statement of Sen. Conkling). The original bill Comstock presented permitted abortion or contraception "on a prescription of a physician in good standing, given in good faith." *Id.* at 1436. Senator William Buckingham maintained that his proposed amendment, which lacked this language, worked "no material alteration" of the previous text. *Id.* at 1525 (statement of Sen. Buckingham). The House retained the reference to "unlawful abortion" in Section 1 of the Comstock Act, which regulated the publication, possession, or distribution of obscene materials, while in Section 2, which addressed mailing items deemed to be obscene, instead employed the phrase "procuring of abortion." *Compare* Act of Mar. 3, 1873, ch. 258, § 1, 17 Stat. 598, 598 (referencing "unlawful abortion"), *with id.* § 2, 17 Stat. at 599 (referencing "procuring of abortion").

distinction between saving life and protecting health was hard to draw. As the historian Leslie J. Reagan explains, "Determining when an abortion was necessary—and thus legal—was left to the medical profession."[146] One of the most common justifications for lifesaving abortions in the nineteenth century, excessive vomiting, struck some as a health-protecting rather than lifesaving justification; nevertheless, physicians had discretion to intervene.[147] Even at the height of a sexual-purity interpretation of the Comstock law, courts assumed that the statute permitted physicians to communicate directly with their patients or with one another about abortion or contraception for reasons of health.[148] It does not appear that Comstock prosecutions focused on communications between doctors and their patients.[149] The pattern in these reported

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146. Reagan, *supra* note 143, at 61; *see also* Kristin Luker, Abortion and the Politics of Motherhood 33 (1984) (arguing that nineteenth-century bans gave doctors "almost unlimited discretion" about when and how to apply a life exception); Siegel & Ziegler, *supra* note 23 (manuscript at 20-33) (detailing a thick custom of physician discretion in cases of threats to life or health).

147. Reagan, *supra* note 143, at 63-64.

148. Burton v. United States, 142 F. 57, 63 (8th Cir. 1906) (distinguishing books and pamphlets directed to the public from "a communication from a doctor to his patient" or "a work designed for the use of medical practitioners only"); United States v. Smith, 45 F. 476, 478 (E.D. Wis. 1891) ("[P]roper and necessary communication between physician and patient touching any disease may properly be deposited in the mail."); United States v. Clarke, 38 F. 732, 735 (E.D. Mo. 1889) (interpreting the statute to exempt "standard medical works" and direct physician-patient communications about "physical ailments, habits, and practices"). *But see* United States v. Foote, 25 F. Cas. 1140, 1141 (C.C.S.D.N.Y. 1876) (No. 15,128) (discussing the conviction of a prominent proponent of birth control and woman suffrage and observing that "[i]f the intention had been to exclude the communications of physicians from the operation of the act, it was, certainly, easy to say so").

149. We have found no appellate record of a conviction based on communications within a doctor-patient relationship. Some of the cases involving contraception and abortion involved books or pamphlets available to the public. *See, e.g.*, *Foote*, 25 F. Cas. at 1141-42 (rejecting a motion to quash an indictment of a defendant who mailed a book about birth control); United States v. Kelly, 26 F. Cas. 695, 696-97 (C.C.D. Nev. 1876) (No. 15,514) (upholding the conviction in a case of a medical advertisement for abortion and contraception). Another relatively straightforward set of cases concerned decoy or other letters from the partners or parents of prospective patients, or investigators posing as such. *See* Bours v. United States, 229 F. 960, 962-64 (7th Cir. 1915) (acquitting a doctor who communicated with a man posing as the father of a patient because the statute would disallow prosecution "if an examination shows the necessity of an operation to save life"); United States v. Breinholm, 208 F. 492, 493 (E.D. Wash. 1913) (rejecting the defendant's demurrer in a case where the defendant responded to a decoy letter from a man posing as someone caring for an abortion patient); United States v. Kline, 201 F. 954, 955-56 (E.D. Pa. 1913) (upholding a conviction of the partner of a prospective abortion patient for mailing a letter to a physician); United States v. Somers, 164 F. 259, 259-60 (S.D. Cal. 1908) (upholding an indictment for mailing a letter that informed the addressee about how to procure an abortion); Kemp v. United

cases suggests that prosecutions focused on censoring physicians and others who advertised, published, or communicated health advice to the general public (with judges pointing out that the communications were not part of a doctor-patient relationship).[150] In 1915, in an interview with *Harper's Weekly*, Comstock himself explained that under the law, "a doctor is allowed to bring on an abortion in cases where a woman's life is in danger."[151] Debate about the statute's application to protection for health continued well after the statute's passage, reaching a fever pitch by the 1930s.[152]

B. Public-Private Enforcement

Members of Congress seemed uncertain about the scope of the Comstock Act's understanding of obscenity or indecency, but in the ten years after the passage of the Comstock Act, antivice societies were founded in major urban centers across the country to champion an interpretation of the law focused on deterring illicit sex, including nonprocreative sex within marriage.[153] These societies for the suppression of vice in some ways resembled other "preventative

States, 41 App. D.C. 539, 541-42 (D.C. Cir. 1914) (affirming the conviction of a man who responded to a decoy letter sent by a detective posing as a married man soliciting an abortion for his mistress). A more complex group of cases appears to have concerned prospective patients or those posing as such. *See* Pilson v. United States, 249 F. 328, 329 (2d Cir. 1918); United States v. Tubbs, 94 F. 356, 357-58 (D.S.D. 1899); Clark v. United States, 202 F. 740, 741 (8th Cir. 1912); United States v. Whittier, 28 F. Cas. 591, 592-93 (E.D. Mo. 1878) (No. 16,688). In other cases, it is unclear who the author of the decoy letter was pretending to be. *See* Bates v. United States, 10 F. 92, 95 (N.D. Ill. 1881) (sustaining a conviction in a decoy-letter case without detailing the contents of the decoy letter); Andrews v. United States, 162 U.S. 420, 423-24 (1896) (observing that a decoy letter posing as "Susan Budlong" intended to discern whether the defendant was engaged in a "business offensive to good morals"). On occasion, courts dealt with ongoing exchanges between doctors and prospective patients involving decoy letters. See, for example, *Ackley v. United States*, 200 F. 217, 219-21 (8th Cir. 1912), in which a detective posing as a prospective patient solicited a contraceptive from the defendant. The defendant initially responded by sending an advertisement for products he sold. *Id.* at 219-20. After another exchange, the defendant sent a contraceptive and a letter about how to use it and in what dosage. *Id.* at 220-21. None of the cases above, however, appear to have involved communications in an established patient-physician relationship.

150. *See supra* notes 148-149 and accompanying text.

151. Mary Alden Hopkins, *Birth Control and Public Morals: An Interview with Anthony Comstock*, HARPER'S WKLY., May 22, 1915, at 489, 490.

152. *See infra* Section II.D.

153. For examples, see *A New Reform Association: Establishment of the Society for the Suppression of Vice*, N.Y. DAILY TRIB., Nov. 29, 1873, at 5, 5; *A Good Move: A Society for the Suppression of Vice*, CIN. ENQUIRER, Mar. 21, 1878, at 8, 8; and *Suppression of Vice: Organizing the Chicago Branch*, CHI. DAILY TRIB., Sept. 27, 1879, at 8, 8.

societies" given quasi-governmental powers, such as groups focused on issues ranging from animal abuse to temperance.[154] But antivice groups differed in the kinds of members they attracted, the relationships they forged with government, and the law-enforcement powers they sometimes exercised.[155]

Both Comstock and McAfee had official government roles—Comstock was named a special agent of the U.S. Post Office in 1873, as was McAfee in 1884[156]—but each declined the modest annuity that accompanied the position, depending instead on the wealthy benefactors who funded antivice societies.[157] In addition to his stipend from the antivice society, Comstock collected often-significant bounties authorized by Congress to anyone who effectuated an arrest under the federal law. For example, he collected $1,250 in 1875, a time when the average American earned $776 in a year.[158]

The antivice movement that mobilized after the Comstock Act's passage thrived not only because of a public-private partnership with state and federal officials but also because of broad support from prominent evangelical ministers and organizations.[159] Catholic leaders at times backed this antivice movement as well because they shared Comstock's aversion to abortion, birth control, and erotica and because they sought to fend off nativist accusations about the perversity of their community.[160] Generally, however, the antivice societies represented the interests of white, male, Protestant urban elites: more than a quarter of those who funded antivice societies in New York or Boston were millionaires.[161] And for years, the membership of antivice societies was limited to white men, who saw policing sexuality and marriage as an area in which they were uniquely qualified.[162]

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154. Timothy J. Gilfoyle, *The Moral Origins of Political Surveillance: The Preventive Society in New York City, 1867-1918*, 38 Am. Q. 637, 639-44 (1986).

155. *Id.*

156. On Comstock's appointment, see Dennis, *supra* note 46, at 239; on McAfee's appointment, see Magdalene Zier, How Comstockery Went West 3 (2023) (unpublished manuscript) (on file with author).

157. *See* Zier, *supra* note 156, at 9; Kemeny, *supra* note 18, at 22; George McKenna, The Puritan Origins of American Patriotism 213 (2007).

158. Marc Stein, Vice Capades: Sex, Drugs, and Bowling from the Puritans to the Present 80 (2017).

159. Wayne E. Fuller, Morality and the Mail in Nineteenth-Century America 111-21, 130-43 (2003); Carlson, *supra* note 48, at 72-86.

160. Paula M. Kane, Separatism and Subculture: Boston Catholicism, 1900-1920, at 306-24 (1994).

161. Beisel, *supra* note 18, at 52.

162. *See* Gilfoyle, *supra* note 154, at 640-44.

C. A New Understanding of Obscenity

Antivice activists reacted to new challenges to the role of women in the family and the nation by promoting a new understanding of obscenity—one not clear in the text of the statute itself—that encompassed any materials or items that threatened "sexual purity."[163] Proponents of this vision of sexual purity had concerns about the sexual behavior of boys as well as girls and saw no reason to distinguish between contraception and abortion because both permitted women to have sex without pregnancy and thus allowed them to hide their "sin."[164] The sexual-purity ideal, which sought to ensure that white, upper-class women conformed to their roles in the polity and the family, argued that erotica, abortion, and contraception—and information about any of the three—threatened the public order by incentivizing crimes of lust, as Comstock wrote,[165] or by opening the door to "licentiousness without its direful consequences."[166]

Antivice activists railed particularly strongly against free love because of the threat it represented to the division of sexual and reproductive labor within *marriage*—and because of the demands free lovers made in the name of freedom of speech and freedom of the press.[167] Comstock, for example, mocked men in the free-love movement who attacked sex roles in marriage as "unworthy of the name of men," and women as "wearing a look of 'Well, I am boss.'"[168] Comstock would continue to target free lovers into the 1870s, describing their critique of sexual violence and control in marriage as a call for "indiscriminate sexuality."[169] A.F. Beard, another antivice activist, mocked the

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163. *See infra* notes 174-176 and accompanying text. Comstock himself described his agenda as ensuring that young men and women would "live a pure life." *Comstock to Young Men: The Noted Suppresser of Vice Delivers an Address on Social Purity*, WASH. POST, Apr. 4, 1892, at 8, 8.

164. *See infra* notes 179-182 and accompanying text.

165. *See* COMSTOCK, *supra* note 120, at 424-25 (denouncing "obscene publications, abortion implements, and other incentives to crime").

166. *See* SECOND ANNUAL REPORT, *supra* note 120, at 5.

167. *See infra* notes 169-170 and accompanying text.

168. BROUN & LEECH, *supra* note 89, at 120-21.

169. *Anthony Comstock: The Moral Detective—Talk on the Social Evil*, CIN. ENQUIRER, Apr. 2, 1879, at 5, 5 [hereinafter *Moral Detective*]. Comstock pursued those who critiqued marriage consistently. *See Sanctity of Marriage Disavowed by Sun Worshippers, Who Revive Cult in Gotham*, CIN. ENQUIRER, May 25, 1908, at 2, 2 (describing Comstock's effort to arrest members of a religious group who argued that "[m]arriage should be discouraged, if not abolished"). Leaders of the New York Society for the Suppression of Vice also attacked those who encouraged "the gradual breaking up of the sacred conception of the home as we see it in the

political speech of Comstock's critics, claiming that their arguments "for the free press and free mails" truly "mean[t] free lust or free love."[170]

To save children and women from being debauched, antivice crusaders sought to reinforce the roles assigned in marriage. In particular, they strove to ensure that women who had sex bore children and that women who had children stayed at home and dedicated themselves to childrearing. "As soon as the babe is born the duty of the mother is changed," Comstock explained in 1883.[171] "This gift from Heaven is no small thing, to be intrusted to an ignorant and often vicious servant girl."[172] Infrequently, Comstock borrowed fetal-protective rhetoric and railed against "ante-natal murderers,"[173] but far more often, antivice activists criticized abortion and contraception because they facilitated illicit sex, threatened sexual purity, and lured upper-class white women from their rightful place in the home.[174]

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divorces, in the separations, and in the domestic associations that have not been consecrated by marriage." THE FOURTH ANNUAL REPORT OF THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE 24 (New York, 1878) [hereinafter FOURTH ANNUAL REPORT].

170. A.F. Beard, *The National Liberal League Congress*, 18 CHRISTIAN UNION 378, 378 (1878). McAfee also arrested those who critiqued marriage in the terms used by the free-love movement. *See, e.g.*, *The Slenker Scandal: The Free Love Advocate Being Prosecuted by the Postal Authorities*, ST. LOUIS POST-DISPATCH, Apr. 30, 1887, at 12, 12; *Woman Author Is Declared Guilty: Court Directs Verdict Against Dr. Alice B. Stockham and Her Publisher*, CHI. TRIB., June 6, 1905, at 4, 4.

171. ANTHONY COMSTOCK, TRAPS FOR THE YOUNG 245 (New York, Funk & Wagnalls Co. 1883).

172. *Id.*

173. *Id.* at 154.

174. *See* SECOND ANNUAL REPORT, *supra* note 120, at 8-9 (framing abortion as a strategy for women to "conceal their own lapse from chastity"); FOURTH ANNUAL REPORT, *supra* note 169, at 10 (denouncing abortion and contraceptive methods as "articles of diabolical design" used to "conceal the crime which may be contemplated, or perchance already committed"); *see also* Andrea Tone, *Making Room for Rubbers: Gender, Technology, and Birth Control Before the Pill*, 18 J. HIST. & TECH. 51, 58 (2002) (arguing that for antivice activists, "pregnancy performed a civilizing function, serving as society's only 'brake on lust'").

In *Our Day*, a purity publication on whose board he served, Comstock framed abortion in similar terms: as indistinguishable from contraception as a lure for lust. Anthony Comstock, *Success in the Suppression of Vice*, 2 OUR DAY 298, 298 (1888). Indeed, he explained that his allies worked to suppress "articles for criminal abortion, preventing conception, aiding seduction, and for unreportable immoral use." *Id.* Reverend James Monroe Buckley, a prominent evangelical ally of Comstock's, spoke of abortion in similar terms, arguing that the "sole purpose" of "abortionists" was "the promotion or concealment of licentiousness." Anthony Comstock, O.B. Frothingham & J.M. Buckley, *The Suppression of Vice*, 135 N. AM. REV. 484, 500 (1882) (attributing the quoted material solely to James Monroe Buckley); *see also A Conspiracy Against Virtue*, ZION'S HERALD (Bos.), June 6, 1878, at 180, 180 (describing abortion and contraceptive drugs as "the most loathsome appliances for the accomplishment of the

The movement demanded control over—and deemed obscene—both speech and items that incited illicit sex. The Cincinnati branch of the Western Society for the Suppression of Vice circulated a pamphlet describing how young women who read about sex, contraception, or abortion would "be deluded or . . . disappear[]" or be left pregnant, "a blighted and crushing shame."[175] "From the corrupting influence of but one such book or picture," argued James Monroe Buckley, a prominent Methodist minister and editor of the *Christian Advocate*, "it is doubtful if many wholly recover."[176]

The antivice movement tended to frame contraception and abortion as part of a singular threat to sexual purity, a move that was reflected in the enforcement of the Comstock Act. In New York, for example, forty-six percent of birth-control defendants in 1873 also offered abortion remedies, and a small percentage, only around ten percent of the whole, offered abortion alone.[177] Data in Chicago tell a similar story.[178]

The antivice movement's sexual-purity ideal treated contraception and abortion as interchangeable. Comstock himself often referred to those who offered only contraceptive services as abortionists, signaling that birth control and abortion were functionally the same to him.[179] In the view of antivice activists, anything that was argued to prevent conception or procure abortion was a problem for the same reason as was erotica that lured boys to give in to sexual temptation: it encouraged women to have illicit sex and then "conceal their own lapse from chastity."[180] And free-love literature posed an acute danger be-

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lowest crimes without entailing their natural consequences"); *Comstock and the Clergymen*, N.Y. TIMES, Mar. 23, 1880, at 3, 3 ("The principal object of [Comstock's] work was . . . the maintenance of moral purity among the youth of America . . . ."); Anthony Comstock, *The Work of Suppressing Vice*, GOLDEN RULE (Bos.), Dec. 12, 1889, at 169, 169 (describing the suppression of "articles for immoral use" as "[t]he great and all-important work of this society").

For a discussion of newspaper coverage of abortion in this era, see *supra* note 121 and accompanying text. Case law also stressed the importance of sexual purity, including cases related to abortion. *See infra* Section I.D.

175. *The Appetite for Lascivious Reading*, COURIER J. (Louisville), Aug. 19, 1878, at 3, 3.

176. Comstock et al., *supra* note 174, at 496 (attributing the quoted material solely to James Monroe Buckley).

177. Elizabeth Bainum Hovey, Stamping Out Smut: The Enforcement of Obscenity Laws, 1872-1915, at 213 & n.35 (1998) (Ph.D. dissertation, Columbia University) (ProQuest).

178. Shirley J. Burton, Obscenity in Victorian America: Struggles over Definition and Concomitant Prosecutions in Chicago's Federal Court, 1873-1913, at 169 (1991) (Ph.D. dissertation, University of Illinois at Chicago) (ProQuest).

179. BROUN & LEECH, *supra* note 89, at 178.

180. SECOND ANNUAL REPORT, *supra* note 120, at 9.

cause it suggested that the moral order imposed by nineteenth-century marriage was inherently unequal and unjust.[181] "[T]he diabolical weapons they can use," Comstock explained of free lovers in 1879, "would upset the mind and morals of the country."[182]

D. Sexual Purity in the Courts

In the decades after the statute's passage, antivice activists selectively used the Comstock Act to prosecute their own critics.[183] In 1878, for example, Comstock famously arrested Madame Restell, the nation's best known "female physician," who had become associated with abortion but who also offered contraceptives, provided emmenagogues, and even assisted with childbirth and adoption.[184] At a time when stigma around abortion was growing, Restell criticized censors and defended the importance of care for women in New York newspapers.[185] Restell died by suicide before her trial concluded, but she was only one of several providers prosecuted under the law.[186]

In court, sexual-purity proponents insisted that what mattered was not whether actors like Restell actually terminated or prevented a pregnancy but whether the very possibility of abortion or contraception might encourage women to have sex by diminishing the fear of a possible pregnancy.[187] John Bott, charged in 1873 with depositing an abortifacient powder in the mail, claimed that the drug was actually harmless; John Whitehead likewise insisted

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181. *See supra* notes 167-174 and accompanying text.

182. *Moral Detective*, *supra* note 169, at 5.

183. On high-profile abortion arrests in the era, see *Important Arrests: The United States Marshal Captures Seven Alleged Abortionists*, Bos. Daily Globe, Oct. 10, 1873, at 8, 8; *Comstock's Western Raid*, N.Y. Times, Nov. 17, 1876, at 8, 8; *A Rival of Madame Restell: Arrest of Dr. Sara B. Chase*, N.Y. Trib., May 10, 1878, at 8, 8; and *Secret Vice: Annual Meeting of the Society for Its Prevention*, Cin. Enquirer, May 7, 1878, at 2, 2.

184. Nicholas L. Syrett, The Trials of Madame Restell: Nineteenth-Century America's Most Infamous Female Physician and the Campaign to Make Abortion a Crime 5-6, 28 (2023).

185. *Id.* at 2-9.

186. *Id.* at 279-81, 286-87.

187. United States v. Kelly, 26 F. Cas. 695, 696-97 (C.C.D. Nev. 1876) (No. 15,514) (upholding the conviction of a defendant who advertised "every possible relief and help" to "all married ladies, whose delicate health or other circumstances prevent an increase in their families"). *But see* United States v. Whittier, 28 F. Cas. 591, 593-94 (C.C.E.D. Mo. 1878) (No. 16,688) (overturning the conviction of a doctor who responded to a decoy letter requesting birth control because his response was addressed to a fictitious person).

that his nostrums were useless.[188] A federal court in New York upheld both men's convictions anyway.[189]

Nor were physicians consistently protected from prosecution, especially when they advertised or published material for the general public. So learned Dr. Edward Foote, a proponent of birth control and ardent suffrage supporter (he famously gave Susan B. Anthony $25 to pay down her $100 fine for voting in the 1872 election).[190]

After Foote published an expanded-edition book on sex and contraception in marriage, Comstock arrested him in 1874.[191] Foote argued that the statute did not treat "medical advice given by a physician" as obscene, even when the advice covered abortion or contraception.[192] A federal court rejected Foote's argument[193] but distinguished the issue in Foote's case from the question whether physicians could be prosecuted under the law for communicating in person with their patients.[194] Other courts would stress that the statute did not criminalize health-related communications between physicians and patients.[195]

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188. United States v. Bott, 24 F. Cas. 1204, 1204-05 (C.C.S.D.N.Y. 1873) (No. 14,626).

189. *Id.* Other courts reached similar conclusions. *See, e.g.*, Bates v. United States, 10 F. 92, 95 (C.C.N.D. Ill. 1881).

190. On Foote's career, see generally Janice Ruth Wood, The Struggle for Free Speech in the United States, 1872-1915: Edward Bliss Foote, Edward Bond Foote, and Anti-Comstock Operations (2011), which details Foote's work on questions of political speech and reproductive liberty; and Bachmann, *Dr. Edward Foote: Freethinker for Sexual Emancipation of Women*, Shelf (June 17, 2016), https://blogs.harvard.edu/preserving/2016/06/17/dr-edward-foote-freethinker-for-the-sexual-emancipation-of-women [https://perma.cc/Y3RM-KEHF], which describes Foote as one of the Comstock Act's "most outspoken adversaries."

191. Rabban, *supra* note 19, at 39.

192. United States v. Foote, 25 F. Cas. 1140, 1141 (C.C.S.D.N.Y. 1876) (No. 15,128).

193. *Id.*

194. *Id.*

195. *See* United States v. Smith, 45 F. 476, 478 (E.D. Wis. 1891) ("[P]roper and necessary communication between physician and patient touching any disease may properly be deposited in the mail."); United States v. Clarke, 38 F. 732, 735 (E.D. Mo. 1889) ("I have no doubt that under the statute under which this indictment is framed standard medical works . . . may lawfully be sent through the mail to persons who buy or call for them for the purpose of seeking information on the subjects of which they treat."); *supra* notes 148-149 and accompanying text; *see also* Burton v. United States, 142 F. 57, 62-63 (8th Cir. 1906) (distinguishing books and pamphlets directed to the public from "a communication from a doctor to his patient").

A sexual-purity interpretation also reinforced prevailing racial hierarchies.[196] In 1875, for example, a Michigan district court heard the appeal of a man who sent a postcard to a rival suggesting that his love interest had been in a sexual relationship with "a colored man."[197] Under a sexual-purity interpretation of the Comstock Act, such a letter would not excite the passions of innocent youth,[198] but the Michigan court treated accusations of interracial sex differently.[199] The defendant had "intended to impute to the woman whose name is mentioned an illicit connection with a colored man," the court explained, "and hence [the letter] contains an indecent epithet within the meaning of the statute."[200]

In practical terms, enforcement of the Comstock Act had clear class and gender dimensions as well. In McAfee's Chicago territory, prosecutions against those who mailed female contraceptives were far more common than those against dealers of condoms.[201] While Comstock pursued immigrants and women in contraception and abortion cases, Samuel Colgate, a member of the New York Society for the Suppression of Vice's executive committee, oversaw a marketing campaign centered on contraception without facing any consequences.[202]

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196. Most of those targeted in the early years after passage of the Comstock Act by the New York Society for the Suppression of Vice were immigrants. The First Annual Report of the New York Society for the Suppression of Vice 6 (1875); Second Annual Report, *supra* note 120, at 11. Later on, the New York Society for the Suppression of Vice and its government partners arrested people born in America as often as they did immigrants. Beisel, *supra* note 18, at 105-06. But, as Nicola Kay Beisel explains, Comstock and his colleagues still reasoned from race, presenting vice as a problem created by foreigners. *Id.* at 106 ("By blaming the spread of obscenity on immigrants, Comstock utilized already existing narratives about the city and its inhabitants to construct obscenity as a threat.").

197. United States v. Pratt, 27 F. Cas. 611, 613 (E.D. Mich. 1875) (No. 16,082).

198. *See* United States v. Wroblenski, 118 F. 495, 495-96 (E.D. Wis. 1902) (quashing an indictment in a case involving a sealed letter charging a "mother with adulterous intercourse with a son-in-law" because it was not likely to "corrupt the addressee"); United States v. Males, 51 F. 41, 41, 43 (D. Ind. 1892) (quashing an indictment of a man who mailed a letter suggesting that a woman liked to have her "picture taken again in men's clothing" because the letter, while "grossly libelous," did not "suggest libidinous thoughts, or excite impure desires").

199. *Pratt*, 27 F. Cas. at 611-13.

200. *Id.* at 613.

201. Burton, *supra* note 178, at 172.

202. D.M. Bennett, An Open Letter to Samuel Colgate Touching the Conduct of Anthony Comstock and the N.Y. Society for Suppression of Vice 8-10 (New York, Liberal Publisher 1879); *see also* Werbel, *supra* note 18, at 143-44 (detailing Colgate's campaign to market Vaseline as a contraceptive).

Contemporaries challenged these targeted prosecutions, raising free-speech and other constitutional objections, which the Supreme Court rejected. In 1878, *Ex parte Jackson* dispensed with then-common constitutional arguments against the Comstock Act.[203] In an opinion by Justice Field, the Supreme Court held that the power to "establish post offices and post roads" included the authority to regulate what could be mailed.[204] Field rejected the claim that Comstock violated the freedom of the press and stressed that postal inspectors still required a warrant to open any sealed letter or package.[205]

Energized by *Jackson*, Comstock took aim at one of his most outspoken critics, D.M. Bennett, the publisher of the free-thought newspaper *The Truth Seeker*, who got embroiled in the conflict surrounding Comstock's arrest of Ezra Heywood, an anarchist, free lover, and suffrage proponent.[206] By the time he was arrested in 1877, Heywood had already penned a popular suffrage tract circulated by the National American Woman Suffrage Association.[207] He followed this in 1876 with *Cupid's Yokes*, a critique of what Heywood saw as the oppression of women in the marriages of his era—and a defense of sex and love for reasons beyond procreation.[208] Heywood was a prominent exponent of free-love attacks on the inequality of marriage, which, he explained, granted "relentless license" to men while enslaving women.[209] "The definition of the wife's condition, as given in the English law-books," Heywood wrote, "contains all the elements of a definition of domestic slavery."[210] Heywood challenged Comstock as a "religious monomaniac" and argued that a sexual-purity interpretation of the law had suppressed "free inquiry."[211] When Comstock responded by arresting Heywood in 1877, Bennett, another proponent of suffrage, free love,

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203. 96 U.S. 727, 732-33, 736-37 (1878).

204. *Id.* at 732.

205. *Id.* at 735-36; *see also id.* at 736 (asserting that in restricting the mails, Congress did not "interfere with the freedom of the press," but "refuse[d] its facilities for the distribution of matter deemed injurious to the public morals"). For a discussion of the free-speech challenges of the era, see generally Gibson, *supra* note 19.

206. WOOD, *supra* note 190, at 65; BEISEL, *supra* note 18, at 91-95.

207. EZRA HEYWOOD, UNCIVIL LIBERTY: AN ESSAY TO SHOW THE INJUSTICE AND IMPOLICY OF RULING WOMAN AGAINST HER CONSENT (Princeton, Mass., Coop. Publ'g Co. 1871).

208. On Heywood's life, see D'EMILIO & FREEDMAN, *supra* note 99, at 163-64.

209. EZRA HEYWOOD, CUPID'S YOKES: OR, THE BINDING FORCES OF CONJUGAL LIFE 8 (Princeton, Mass., Coop. Publ'g Co. 1876).

210. *Id.*

211. *Id.* at 11-12.

and legal birth control,[212] announced a crusade to continue mailing *Cupid's Yokes*.[213]

Bennett became the first American decision to adopt the *Hicklin* standard, which determined whether material was obscene by imagining its effects on the most lewd or impressionable community member that antivice activists might conjure up.[214] The case became one of the most visible to embrace a maximalist interpretation of the statute. There were other reasons that *Bennett* was a watershed decision in the adoption of a sexual-purity reading of the statute. At common law, a great deal of profane speech might qualify as obscene.[215] Bennett argued that only sexually exciting speech was prohibited under *Hicklin*, and Heywood's tract involved political arguments that would not be sexually stimulating to anyone.[216] This effort failed; a jury concluded that Heywood's political speech would suggest "impure and libidinous thoughts in the young and the inexperienced."[217]

E. Revenge and Sexual Purity Under the Comstock Act

The antivice movement and its allies in the federal government continued to advance a sexual-purity interpretation of the Comstock Act after Congress expanded the language of the statute in 1888,[218] clarifying that the term "writing" applied to material "whether sealed as first-class matter or not."[219] This was a sweeping change, extending the statute not only to the newspapers and periodicals sent through second-class mail but also to the letters and private

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212. On Bennett, see RODERICK BRADFORD, D.M. BENNETT: THE TRUTH SEEKER 18, 118, 218-19 (2010).

213. *See* RABBAN, *supra* note 19, at 36-37; FULLER, *supra* note 159, at 131-32.

214. *See* R v. Hicklin [1868] 3 QB 360 at 371 (Eng.); *supra* text accompanying notes 92-94.

215. *See supra* Section I.A.

216. *See* United States v. Bennett, 24 F. Cas. 1093, 1101-02 (C.C.S.D.N.Y. 1879) (No. 14,571).

217. *Id.* at 1102; *see* United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889) (upholding a conviction for mailing a pamphlet entitled "Dr. Clarke's Treatise on Venereal, Sexual, and Special Diseases" and reasoning that "[t]he word 'obscene' ordinarily means something that is offensive to chastity . . . [and] offensive to pure-minded persons," as well as that "it means a book . . . containing immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt . . . those . . . whose minds are open to such immoral influences" (citing *Bennett*, 24 F. Cas. at 1103-04; *Hicklin*, 3 QB at 371)).

218. On the 1888 expansion, see FULLER, *supra* note 159, at 120-21, where he describes the 1888 amendment as "the third and final amendment to the Comstock law in the nineteenth century"; and DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 74-75 (1977).

219. FOWLER, *supra* note 218, at 75.

correspondence sent through first-class mail.[220] By 1888, a social-purity movement led by women was making its own claims about what qualified as obscene, yoking purity to concerns about suffrage or temperance.[221] Founded in 1874, the Woman's Christian Temperance Union (WCTU) launched the Department for the Suppression of Impure Literature in 1883, later renamed as the Department for the Promotion of Purity in Literature and Art.[222] The WCTU formed part of a broader social-purity movement that included the precursor to the Parent Teacher Association, the National Association of Colored Women, and the National Education Association.[223] With little power to influence politics, women social-purity activists used then-dominant purity rhetoric for gender-emancipatory ends, arguing that women could protect public order from the obscene if the law gave them the vote, or if married women had the right to refuse sex, or if women educated their children about sex.[224] While social-purity advocates insisted that women could do more than men to protect public morals, sexual-purity champions argued that women would expose themselves and their children to debauchery if they entered public life.

After Congress amended the statute in 1888, these competing ideas of sexual and social purity coexisted as new forms of public-private enforcement emerged.[225] People who received writings they found objectionable strategically pursued relief under the Comstock Act by notifying local postmasters or antivice activists; these bureaucrats, in turn, sent material they deemed suspect to the Postmaster General for a final decision.[226] Victims of sexual harassment,[227]

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220. FULLER, *supra* note 159, at 120-21 (noting that the final amendment to the Comstock laws, which "went beyond all previous laws governing unmailable matter," passed in 1888).

221. LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 73 (2002). On the founding of the Woman's Christian Temperance Union's purity department, see KEMENY, *supra* note 18, at 80-81.

222. ALISON M. PARKER, PURIFYING AMERICA: WOMEN, CULTURAL REFORM, AND PRO-CENSORSHIP ACTION, 1873-1933, at 111, 113 (1997); FRANCIS COUVARES, MOVIE CENSORSHIP AND AMERICAN CULTURE 74 (2006).

223. PARKER, *supra* note 222, at 21.

224. For a look at early uses of purity rhetoric for these ends, see Nancy F. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850*, 4 SIGNS 219, 219-25 (1978).

225. The number of arrests in New York involving personal disputes increased considerably after 1888—from roughly eleven percent of the New York Society for the Suppression of Vice total between 1895 and 1900 to twenty-five percent of the total between 1908 and 1915. Hovey, *supra* note 177, at 451.

226. On the private letters sent to postal inspectors, see FULLER, *supra* note 159, at 231; and Burton, *supra* note 178, at 195-202. Comstock himself gave an interview to the *Washington Post* in 1888 where he described the wide range of private letters he received. *The Suppression of Vice: A Day with Anthony Comstock and His Work*, WASH. POST, Mar. 18, 1888, at 10, 10.

angry spouses,[228] feuding colleagues,[229] and resentful neighbors[230] turned to the Comstock Act to make their personal disputes into criminal cases. Husbands anxious that their wives received circulars advertising abortion or contraceptive remedies contacted postal inspectors too.[231]

Only certain kinds of obscenity cases, however, survived in the appellate courts: those centered on nonprocreative sex. A Virginia court had no trouble in 1892 deeming obscene two letters sent by a secret admirer to a woman asking her to take an overnight trip.[232] In 1904, a Missouri court likewise denied the demurrer of a married man who was indicted for sending a letter inviting another woman to meet him in a rented room to "pass some pleasant afternoons together."[233] Nor was the Eighth Circuit sympathetic in 1909 to the author of a free-love publication telling the story of a South Dakota woman who died during an illegal abortion.[234]

Defendants who steered clear of nonprocreative sex fared better, even if they acted in ways that social-purity leaders—or older common-law obscenity rules—would condemn. In 1891, a South Carolina district court instructed the jury to acquit the defendant, Durant, of obscenity for accusing a witness in an earlier criminal case against him of being "a lying son of a bitch."[235] The court

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227. Miss A.B. Vann, a mill worker, turned over a letter sent to her by the mill owner threatening to expose her after seeing her "in a very funny position" with "Dave R." unless she began an affair with him. Parish v. United States, 247 F. 40, 41 (4th Cir. 1917). Likewise, Lena, another woman, turned in a series of harassing letters. United States v. Lamkin, 73 F. 459, 460-61 (C.C.E.D. Va. 1896).

228. For example, Julia Keefe, who suspected that her husband was having an affair with the widow Lillie Parish, faced arrest by Comstock after Parish turned in what she deemed to be criminal letters. *See Jealous Wife Under Arrest*, N.Y. TIMES, Jan. 7, 1900, at 14, 14.

229. Comstock arrested Edward F. Williams when a business rival, George Rowland, a retired merchant, turned over "some threatening and obscene letters." *A Bank President Arrested*, N.Y. TIMES, Feb. 13, 1880, at 3, 3.

230. Fannie Hoffman came to the attention of antivice inspectors after her neighbors turned in what they saw as illegal letters. *See The Comstock "Lay": What a Woman Who Was Arrested by the Virtuous Anthony Says*, BOS. DAILY GLOBE, Nov. 28, 1879, at 1, 1.

231. Charles Dickinson, upset that his wife had received a circular advertising, "under thin veil, a medicine to produce abortion," called the circular to Comstock's attention in 1895. Letter from Charles Dickinson to Anthony Comstock (Oct. 31, 1895) (on file with Nat'l Archives & Recs. Admin., Recs. of the Post Off. Dep't, Rec. Grp. 28, Box 27, Postal Inspection Folder, 1832-1970).

232. *See* United States v. Martin, 50 F. 918, 919-21 (W.D. Va. 1892).

233. *See* United States v. Moore, 129 F. 159, 162-63 (W.D. Mo. 1904).

234. *See* Knowles v. United States, 170 F. 409, 410-12 (8th Cir. 1909).

235. United States v. Durant, 46 F. 753, 753-54 (E.D.S.C. 1891).

acknowledged that Durant's speech was defamatory but insisted that it did not threaten sexual purity by exciting "the animal passion."[236]

An Indiana district court reached a similar conclusion when Cora Anderson received a "vinegar valentine," sent in that era to reject suitors or insult rivals.[237] The court concluded that the valentine "would repel, rather than excite, feelings of an impure, licentious, or unchaste character."[238] Even a tract arguing that the Virgin Mary was no virgin—and that Jesus Christ was born after a torrid love affair—required a court to direct a jury to acquit.[239] Courts applied a similar understanding of sexual purity in cases about sex education, abortion, and contraception.[240]

This iterative process of mobilization, enforcement, and lower-court decisions culminated in 1896 when the Supreme Court endorsed a sexual-purity interpretation of the Comstock Act.[241] Populist Indiana newspaperman Dan Swearingen had denounced a political opponent as a man "filthier, rottener than the rottenest strumpet that prowls the streets by night."[242] The Supreme Court agreed with Swearingen that his article was not likely to lead to nonprocreative sex and was therefore not obscene.[243] The Court tied its reasoning to the common law of obscene libel, without acknowledging how much the understanding of *obscenity* in the Comstock Act departed from the common law, particularly in defining abortion or contraception as obscene.[244]

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236. *Id.* at 753.

237. *See* United States v. Males, 51 F. 41, 41-43 (D. Ind. 1892). For further discussion of vinegar valentines, see Natalie Zarrelli, *The Rude, Cruel, and Insulting "Vinegar" Valentines of the Victorian Era*, Atlas Obscura (Feb. 8, 2017), https://www.atlasobscura.com/articles/vinegar-valentines-victorian [https://perma.cc/DR2C-5DV6] (describing vinegar valentines as including a broad array of anonymous notes that could be "crass," "playful," "sarcastic," or even political, as was the case with vinegar valentines sent as part of the campaign for suffrage).

238. *Males*, 51 F. at 42.

239. United States v. Moore, 104 F. 78, 79-80 (D. Ky. 1900).

240. *See* United States v. Whittier, 28 F. Cas. 591, 593-94 (C.C.E.D. Mo. 1878) (No. 16,688) (quashing the indictment of a defendant for sending information on contraceptives in response to a false letter); Bates v. United States, 10. F. 92, 95-96 (C.C.N.D. Ill. 1881) (upholding the conviction of a defendant convicted of mailing abortion- and contraception-related materials). On the application of the statute to patient-physician communications, see *United States v. Foote*, 25 F. Cas. 1140, 1141 (C.C.S.D.N.Y. 1876) (No. 15,128), which distinguishes the facts of *Foote* from physicians' in-person communication with their patients.

241. Swearingen v. United States, 161 U.S. 446, 450-51 (1896).

242. *Id.* at 447 & n.1, 448-49.

243. *Id.* at 450-51.

244. *See supra* Section I.A. For a discussion of the novelty of including abortion and contraception in an obscenity law, see *supra* note 89 and accompanying text.

What the Court embraced in *Swearingen* was not a common-law principle or the plain text of the statute but an interpretation forged by a social movement and federal bureaucrats in response to profound changes in the nation's birth rate, immigration numbers, and sense of gender roles. "The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity," the Court explained.[245]

F. Stigma and Underenforcement

Swearingen was a tremendous victory for the antivice movement, but Comstock's biographers wryly remarked that societies for the suppression of vice "had no great luck among the so-called abortionists," with Comstock convicting a relatively low percentage of those he targeted.[246] Historian Shirley J. Burton identified only 132 prosecutions for abortion or birth control in Chicago between 1873 and 1913, and only seven that resulted in a prison sentence.[247] After 1915, New York Society for the Suppression of Vice arrests related to abortion or contraception, which had never comprised a majority, all but dried up, with fewer than two a year.[248]

Yet this inconsistent enforcement did nothing to undermine the forms of stigma and fear that the statute created. In 1907, faced with criticism about the dual loyalties of men like Comstock and McAfee who worked for the government but owed their livelihood to private antivice societies,[249] Congress replaced the bounty funding that Comstock and McAfee had enjoyed with a regular salary.[250] Antivice activists went to ridiculous new lengths after the 1909 amendments. In 1911, for example, postal inspectors confiscated a report of the Chicago Vice Commission, an antivice organization, because it merely *discussed* vice in raising funds to suppress it.[251]

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245. *Swearingen*, 161 U.S. at 451.

246. Broun & Leech, *supra* note 89, at 172.

247. Burton, *supra* note 178, at 189.

248. Hovey, *supra* note 177, at 437.

249. *See* Zier, *supra* note 156, at 9-10. For more on salary reform for bureaucrats, see Nicholas Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1740-1940, at 111-24 (2013).

250. Zier, *supra* note 156, at 9-10.

251. *Report Held Up*, Chi. Evening Post, Oct. 14, 1911 (on file with the Wis. Hist. Soc'y, Ralph Ginzburg Papers, Box 8, Folder 1); *see also Bar Vice Report from Mail*, N.Y. Times, Sept. 16, 1911, at 7, 7 (detailing the postal inspectors' decision to confiscate a report from the Chicago Vice Commission because they believed that it violated the Comstock Act); *Bar Vice Report*

In 1915, Comstock died.[252] McAfee had passed away six years before, the year that Congress had most recently expanded the statute so closely associated with his colleague.[253] Comstock claimed, by that time, to have convicted nearly four thousand people for obscenity-related offenses and to have driven fifteen to suicide.[254]

That both men were gone and prosecutions had become rarer than ever hardly seemed to matter, for the threat of punishment still hung over any critic of the sexual-purity regime. "The primary aim," McAfee wrote in 1892, "is prevention or suppression, not punishment!"[255]

II. RESISTING COMSTOCKERY: DEMANDS FOR EQUAL CITIZENSHIP, FREE SPEECH, AND SEXUAL FREEDOM

It took until the early decades of the twentieth century for Comstock's campaign to provoke organized resistance.[256] A younger generation of suffragists and civil libertarians had a wider political base and more confidence to speak out about sex and reproduction than suffragists in the wake of the Civil War. Young women in the movement were entering a more militant phase of the struggle for political voice, divided among themselves but more prepared than their forebears to enter into direct conflict with the state and to view escalation of conflict as a mode of democratic dialogue available to the disenfranchised.[257] They brought this attitude to challenging laws that imposed inequality in intimate life.

In what follows, we trace the emergence of a movement for sex education and birth control that began openly to defy federal and state laws enforcing sexual purity. We show how the movement employed the only power its members had—conscience-based lawbreaking to invite (unjust) arrest—as a way of

from U.S. Mail: Attorney-General's Office Decides Chicago Document Comes Under the Law, DET. FREE PRESS, Sept. 27, 1911, at 2, 2 (same).

252. *Anthony Comstock Dies: Antivice Crusader Succumbs to Attack of Pneumonia*, WASH. POST, Sept. 22, 1915, at 2, 2; *Anthony Comstock, Vice Fighter, Dead: End Comes After a Brief Illness, Following a Cold*, BOS. GLOBE, Sept. 22, 1915, at 16, 16.

253. Dulles, *supra* note 84, at 105.

254. EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 5 (1992); STONE, *supra* note 19, at 192.

255. *Western Society for the Suppression of Vice: The Protection of Youth*, INTERIOR (Chi.), Apr. 28, 1892, at 23, 23.

256. *See infra* Section II.B.

257. *See infra* Section II.A.

conversing with the American people.[258] And we show how these conflicts, conducted outside and inside the courts and publicized in newspapers in cities across the country, helped to give voice to "Comstockery," the public's alienation from the regime of speech and sexual censorship enforced by law, and to give birth to modern understandings of democracy as requiring free speech and sexual and reproductive freedom.[259] (Appeals to "Comstockery" surged with arrests and adjudication in the 1910s, 1930s, and 1960s.[260])

Lastly, we show how these conflicts reshaped interpretation of the federal statute,[261] leading judges to embrace the view that health required freedom of sexual expression and a means to control birth. We observe that while the case law primarily addressed access to contraception, judges explained this health-based interpretation of the law as applying to both abortion and contraception.[262]

A. The Roots of Resistance: Sexual Purity, Suffrage, and the Rise of "Feminism"

Comstock's campaign for sexual purity enforced traditional roles for women, using targeted arrests to generate thrilling and intimidating headlines. Comstock quite literally pioneered "Lock her up!" politics with the arrest of Woodhull, who had recently testified in Congress that women had a right to vote under the Fourteenth Amendment and given prominent lectures on behalf of free love.[263] Woodhull, the first woman to run for president, spent election night of 1872 and all of November in jail, only to be arrested again shortly after

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258. *See infra* Section II.B.

259. *See infra* Section II.C.

260. *See infra* note 413, Figure 1.

261. *See infra* Section II.D.

262. *See infra* Section II.D.

263. *See* DuBois, *supra* note 45, at 83-95 (discussing Woodhull's congressional testimony and her subsequent arrest for mailing "obscene materials"); Siegel, *supra* note 31, at 971-73 (situating Woodhull's testimony in constitutional arguments of the suffragist movement); *see also* James W. Fox, Jr., *Publics, Meanings & the Privileges of Citizenship*, 30 Const. Comment. 567, 597-604 (2015) (reviewing Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship (2014)) (discussing the suffrage arguments of Frederick Douglass and Victoria Woodhull as evidence bearing on the Fourteenth Amendment's original public meaning). In the same period that Woodhull was testifying before Congress on suffrage rights, she was also speaking out about free love, the principles governing intimate and family life. Woodhull was renowned for *The Principles of Social Freedom*, a speech on free love that she gave before large audiences in 1871 and 1872. *See supra* note 106 and accompanying text. She joined many in the suffrage movement in criticizing marriage as "legalized prostitution." Woodhull, *supra* note 106, at 17-20.

her release.[264] Leadership of the nineteenth-century suffrage movement did not directly challenge Comstock's sexual-purity campaign in the wake of this episode. As they struggled to persuade Americans who viewed women voting as a threat to social order, few suffragists dared publicly to embrace tenets of free love or to wrangle with Comstock.[265] As we have seen, temperance advocates who joined the suffrage movement in the 1890s instead sought to appropriate the authority of purity talk for their own gender-emancipatory ends.[266]

In time, however, the balance of authority began to shift. In 1905, when Comstock shut down a production of George Bernard Shaw's *Mrs. Warren's Profession* after one performance, Shaw wrote the *New York Times* a contemptuous letter proclaiming that "Comstockery is the world's standing joke at the expense of the United States."[267] Usage of the term "Comstockery" soared.[268] By the 1910s, silent films flouted Comstock's efforts to keep sex out of the public sphere.[269] And suffrage emerged as a mass movement, organizing parades and pickets to dramatize its demand to amend the Constitution.[270]

By the early twentieth century, a group of women in the suffrage movement—who called themselves "feminists" and were concerned with securing

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264. Lois Beachy Underhill, The Woman Who Ran for President: The Many Lives of Victoria Woodhull 232-35 (1995).

265. *See* Heather Munro Prescott & Lauren MacIvor Thompson, *A Right to Ourselves: Women's Suffrage and the Birth Control Movement*, 19 J. Gilded Age & Progressive Era 542, 545-46, 549 (2020).

266. *See supra* Sections I.D-E.

267. *Bernard Shaw Resents Action of Librarian*, N.Y. Times, Sept. 26, 1905, at 1, 1.

268. *See infra* Figure 1.

269. A scantily clad Theda Bara emerged as one of Hollywood's first sex symbols—nicknamed "The Vamp." *Silent Film Actresses and Their Most Popular Characters*, Nat'l Women's Hist. Museum (Apr. 6, 2017), https://www.womenshistory.org/articles/silent-film-actresses-and-their-most-popular-characters [https://perma.cc/YL4C-3ABZ]; *see also* Natasha Lavender, *The Dark Side of the Silent Film Era*, Grunge (Nov. 10, 2021, 1:28 AM), https://www.grunge.com/656796/the-dark-side-of-the-silent-film-era [https://perma.cc/5JFG-YTE3] (describing the debut of sex symbols including Theda Bara). In 1921, the *South Bend News-Times* described the word "vamp" as a "20th century . . . movie word . . . coined for such as Theda Bara." *Fashions "for VAMPS Only": Fascinating New Creations from Hats to Shoes Designed to Make the Modern 'Heart-Breakers' More Charming Than Ever*, South Bend News-Times, Feb. 17, 1921, at 12, 12. The Motion Picture Production Code grew out of the Comstock Act. Lawrence M. Friedman, *Human Rights, Freedom of Expression, and the Rise of the Silver Screen*, 43 Hofstra L. Rev. 1, 10-11 (2014).

270. Leslie Goddard, "Something to Vote For": Theatricalism in the U.S. Women's Suffrage Movement 171-76, 312-21 (June 2001) (Ph.D. dissertation, Northwestern University) (ProQuest); DuBois, *supra* note 45, at 205-38.

equality in modes of life as well as the capacity to vote[271]—began to speak and act in open opposition to Comstock. Equal citizenship required more than the vote, they argued; it required what feminists had then begun to call "voluntary motherhood," achieved through "birth control," a claim that connected political and economic emancipation and uplift.[272] In a famous speech after ratification of the suffrage amendment setting out a wide-ranging agenda for the National Woman's Party in support of "[w]oman's freedom, in the feminist sense,"[273] Crystal Eastman explained: "Freedom of any kind for women is hardly worth considering unless it is assumed that they will know how to control the size of their families. 'Birth control' is just as elementary an essential in our propaganda as 'equal pay.'"[274] Under Alice Paul's leadership, the National Woman's Party rejected, by a two-to-one margin, Eastman's proposed multi-issue equality campaign in favor of a single-issue campaign seeking to eliminate women's le-

271. In chronicling the emergence of feminism in the early twentieth century, Nancy Cott observes that "[f]eminism . . . was both broader and narrower [than the nineteenth-century woman's movement]: broader in intent, proclaiming revolution in all the relations of the sexes, and narrower in the range of its willing adherents." Nancy Cott, The Grounding of Modern Feminism 3 (1987). For an Ngram depicting the rise of the term feminism in the 1910s, see "*Feminism*," Google Books Ngram Viewer, https://books.google.com /ngrams/graph?content=feminism&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3 [https://perma.cc/Q33L-6WQD].

272. In 1917, Sanger began publishing the *Birth Control Review*, announcing that if a woman "must break the law to establish her right to voluntary motherhood, then the law shall be broken."Margaret Sanger, *Shall We Break This Law?*, Birth Control Rev. , Jan.-Feb. 1917, at 4, 4 (emphasis omitted); *see also* Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elena R. Gutiérrez, Undivided Rights: Women of Color Organize for Reproductive Justice 58 (Haymarket Books 2016) (2004) ("[I]n 1918 the Women's Political Association of Harlem . . . was the first African-American women's club to schedule lectures on birth control."); Rosalyn Terborg-Penn, African American Women in the Struggle for the Vote, 1850–1920, at 70-72 (1998) (discussing Angelina Weld Grimké and other African American suffragists who wrote for feminist journals on the eve of World War I); Jessie M. Rodrique, *The Black Community and the Birth Control Movement*, *in* Passion and Power: Sexuality in History 138, 138, 141 (Kathy Peiss, Christina Simmons & Robert A. Padgug eds., 1989) (observing that African Americans were "active and effective participants in the establishment of local [family-planning] clinics," and that a "discourse on birth control emerged in the years from 1915-1945").

273. Crystal Eastman, *Now We Can Begin*, Liberator, Dec. 1920, at 23, 23-24.

274. *Id.* at 24; *see* Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 Yale L.J.F. 450, 469-73 (2020) (locating the demand for voluntary motherhood in Eastman's larger program and in the history of the suffrage movement). For a recent and wide-ranging biography of Eastman, who worked for workers' rights, suffrage, and the international peace movement and helped found the ACLU, see generally Amy Aronson, Crystal Eastman: A Revolutionary Life (2020).

gal disabilities.[275] Yet Eastman spoke for the future. By the end of the decade, even Paul's paper *Equal Rights* would express support of birth control.[276]

To be clear, the use of contraception was not new; the birth rate dropped throughout the nineteenth century and continued declining in the opening decades of the twentieth century. In 1800, American women were having eight children on average, and in 1935, two.[277] Nor was the demand for reproductive autonomy new. Women's rights advocates had demanded the right to control the timing of childbirth since the days of the abolitionist movement—by asserting a wife's right to say no to sex in marriage.[278] But by the Progressive Era, feminists reasoned differently. It was the *public and political demand* for birth control that was new, and the first mass-mobilized challenge to Comstock.

B. Engaging the Public—and the Courts—Through Civil Disobedience

In the decade before the Nineteenth Amendment's ratification, a growing circle of feminists debated the social arrangements needed to support what Eastman would call "[f]reedom[] in the feminist sense."[279] A key locus of this conversation was a network of women in New York's Greenwich Village who organized themselves in 1912 as "Heterodoxy."[280] Heterodoxy's wide-ranging conversations—and prominent invited speakers—addressed questions of poli-

275. COTT, *supra* note 271, at 70-71. For Eastman's proposal, see Crystal Eastman, *Alice Paul's Convention*, LIBERATOR, Apr. 1921, at 9, 9-10.

276. *Feminism and Birth Control*, EQUAL RTS., Aug. 20, 1927, at 220, 220 (affirming "the right of the wife equally with the husband to determine the number of children they shall have," but elevating the single-issue pursuit of equal rights over the pursuit of birth control, on the ground that "[w]e believe that women cannot exercise the right to limit their families if they choose unless they have Equal Rights in all the relations of life").

277. For a discussion of the drop in the birth rate and the different contraceptive practices Americans employed, see *supra* notes 29, 112-119 and accompanying text.

278. On claims to self-ownership in matters of sex and reproduction asserted by suffragists, see Siegel, *supra* note 274, at 462-65.

279. Eastman, *supra* note 273, at 23.

280. Jena Hinton, *Anything but Orthodox: The Feminists of the Heterodoxy Club*, OFF THE GRID: VILL. PRES. BLOG (Dec. 13, 2022), https://www.villagepreservation.org/2022/12/13/heterodoxy-club [https://perma.cc/533C-KK4M]. Posters for meetings held in Greenwich Village in 1914 illustrate the group's wide-ranging interests and networks. *See, e.g.*, *What Is Feminism?: Come and Find Out*, WOMEN & AM. STORY, https://wams.nyhistory.org/modernizing-america/fighting-forsocial-reform/what-is-feminism [https://perma.cc/5DWQ-TB43].

tics and culture, with topics including economic equality across classes, gender equality in the market and the household, sexual freedom, and birth control.[281]

These conversations proved a seedbed of activism. Emma Goldman, a radical who campaigned for workers' rights and women's rights, led the way in speaking openly on birth control, lecturing on the topic as early as 1910.[282] In 1912, Mary Ware Dennett, who was then organizing for the National American Woman Suffrage Association, advocated birth control and changes in the roles men and women played in raising and supporting a family in the pages of an English feminist review.[283]

Within years, the group began actions designed to shift public opinion in support of changing the law. Before women were granted the right to vote in New York (in 1917),[284] the campaign started as a series of direct actions of civil disobedience to state and federal obscenity laws; then, newly enfranchised but still outsiders to the political system, women sought to move legislators to change the law. In this era, civil-disobedience strategies—violations of a law undertaken to protest its injustice and build public support for change[285]—were employed by the politically disempowered to amplify their voices in conflicts that spanned national borders.[286]

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281. *See* COTT, *supra* note 271, at 37-50.

282. CONSTANCE M. CHEN, "THE SEX SIDE OF LIFE": MARY WARE DENNETT'S PIONEERING BATTLE FOR BIRTH CONTROL AND SEX EDUCATION 161 (1996) ("By 1910, birth control had become a staple on Goldman's lecture tours."). Goldman's advocacy was an integral part of her work for emancipation of the working class.

283. *See* Mary Ware Dennett, Letter to the Editor, *The Status of Men*, 25 FREEWOMAN 498, 498-99 (1912), https://repository.library.brown.edu/studio/item/bdr:518550/PDF [https://perma.cc/3W2A-838C].

284. *See New York Amendment 1, Women's Suffrage Measure (1917)*, BALLOTPEDIA, https://ballotpedia.org/New_York_Amendment_1,_Women%27s_Suffrage_Measure_(1917) [https://perma.cc/97EJ-EFQX]; SUSAN GOODIER & KAREN PASTORELLO, WOMEN WILL VOTE: WINNING SUFFRAGE IN NEW YORK STATE 162-82 (2017) (chronicling the passage of woman suffrage via referendum in New York in 1917).

285. *See* William Smith & Kimberley Brownlee, *Civil Disobedience and Conscientious Objection*, OXFORD RSCH. ENCYCLOPEDIAS POLS. 1 (May 24, 2017), https://oxfordre.com/politics /display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-114?print
=pdf [https://perma.cc/YWE9-ZZ5F].

286. Alice Paul learned civil-disobedience strategies while she was studying and doing social work in England, drawing on her experience working with the militant suffragist organizations led by Emmeline and Christabel Pankhurst. J.D. Zahniser & Amelia R. Fry, ALICE PAUL: CLAIMING POWER 41-64 (2014) (describing Paul's time in England and work with the Pankhurst sisters' suffrage organization); *see also Visionaries*, LIBR. CONG., https://www.loc.gov/collections/women-of-protest/articles-and-essays/selected-leaders-of-the-national-womans-party/visionaries/#:~:text=While%20studying%20and%20doing%20social,her%20suffrage%20activity%20in%20London [https://perma.cc/N4U3-29BL]

It was Margaret Sanger whose actions first provoked Comstock. Sanger practiced as a nurse for New York's poor on the Lower East Side, caring for immigrant women who repeatedly faced death or injury in childbirth and abortion and who struggled to care for large families they could not feed.[287] Sanger's own mother had died of tuberculosis after conceiving eighteen times in twenty-two years, enduring eleven live births and seven pregnancies that ended in miscarriage.[288] Sanger cared for a woman named Sadie Sachs through a self-induced septic abortion, and Sachs came to represent for Sanger the women who desperately sought contraceptive information denied to them by doctors.[289]

Sanger, then a protégé of Goldman's, was moved to action.[290] Sanger openly published contraceptive information in 1914 in a magazine, *The Woman Rebel*, which the Post Office confiscated under the Comstock laws.[291] But Sanger left for Europe rather than face trial.[292] An agent of the New York Society for the Suppression of Vice then solicited birth-control information from Sanger's husband, and soon he too was arrested.[293] Sanger returned from Europe and opened the first birth-control clinic in the United States; by 1916, Sanger and her sister Ethel Byrne were arrested for violating New York's "mini-Comstock" statute,[294] convicted, and sentenced to a month in jail. While they served their

("While studying and doing social work in England, Paul learned firsthand the confrontational tactics and civil disobedience used by the militant wing of the British suffrage movement."). Pankhurst was also an important, if little recognized, model for Mahatma Gandhi. *See* Gail M. Presbey, *Gandhi's Encounter with the British Suffrage Movement: Lessons Learned*, *in* GANDHI'S GLOBAL LEGACY: MORAL METHODS AND MODERN CHALLENGES 87, 89, 94 (Veena R. Howard ed., 2022); *see also* Alexander Livingston, *Fidelity to Truth: Gandhi and the Genealogy of Civil Disobedience*, 46 POL. THEORY 511, 512-14 (2018) (describing Gandhi's theory and practice of civil disobedience).

287. *See* CHESLER, *supra* note 18, at 62-63.

288. *See id.* at 33-34, 41, 43; ALICIA GUTIERREZ-ROMINE, FROM THE BACK ALLEY TO THE BORDER: CRIMINAL ABORTION IN CALIFORNIA, 1920-1969, at 29 (2020).

289. *See* CHESLER, *supra* note 18, at 63. For an account exploring how contemporary attacks on Sanger diverge from this history, see Reva B. Siegel & Mary Ziegler, *Abortion-Eugenics Discourse in* Dobbs*: A Social Movement History*, 2 J. AM. CONST. HIST. 71, 75-78 (2024).

290. *See* CHESLER, *supra* note 18, at 81 ("Margaret quite clearly adopted her feminist ideology, and much of the rhetoric she later claimed as her own, from Emma Goldman.").

291. *See id.* at 97-99.

292. *See* Candace Falk, *Into the Spotlight: An Introductory Essay*, *in* 3 EMMA GOLDMAN: A DOCUMENTARY HISTORY OF THE AMERICAN YEARS 1, 87 (Candace Falk & Barry Pateman eds., 2012).

293. *See* Dorothy Wardell, *Margaret Sanger: Birth Control's Successful Revolutionary*, 70 AM. J. PUB. HEALTH 736, 739 (1980); CHESLER, *supra* note 18, at 109, 126-27.

294. Falk, *supra* note 292, at 88; CHESLER, *supra* note 18, at 150-52, 157.

sentence, Byrne conducted a hunger strike that helped galvanize media attention and inspire further resistance.[295]

These arrests and trials generated massive publicity nationwide. From 1915 to 1917, talk of "birth control" entered mainstream usage, and there was a surge of articles covering the topic.[296] The *Washington Times* reported from the District of Columbia on the trial of William Sanger, detailing his story of entrapment by an agent of Comstock.[297] Before his trial, William Sanger explained what was at stake in a remarkable speech anticipating constitutional developments of the twentieth century:

> I deny the right of the state any longer to encroach on the privacy of the individual by invading it with its statute. I deny the right of the state to exercise dominion over the souls and bodies of our women by compelling them to go into unwilling motherhood.
>
> I deny the right of the state to . . . arm a prudish censorship with the right of search and confiscation to pass judgment on our art and literature. I deny, as well, the right to hold over the entire medical profession the laws of this obscenity statute . . . .[298]

While Sanger's trial was ongoing, "[p]andemonium broke loose" in the opening session of the ninth International Purity Congress in San Francisco, when a local medical student disrupted proceedings to ask Comstock whether he "acted justly and rightly" in arresting Sanger.[299] And when the judge reached a verdict convicting Sanger, who represented himself, the *Fall River Globe* reported that "[i]n a second nearly everyone in the courtroom was upon his feet, cheer-

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295. *See* Chesler, *supra* note 18, at 153-54, 156-58. On Byrne's strike, see *infra* notes 304-305 and accompanying text.

296. *See* Ana C. Garner, *Wicked or Warranted? US Press Coverage of Contraception, 1873–1917*, 16 Journalism Stud. 228, 236-40 (2015) (tracing the rise in the coverage of contraception in the period). For a quantitative and qualitative study, see generally Dolores Flamiano, *The Birth of a Notion: Media Coverage of Contraception, 1915-1917*, 75 Journalism & Mass Commc'n Q. 560 (1998). On the entrance of the term "birth control" into the public vocabulary, see Flamiano, *supra*, at 561. For an Ngram depicting rising and falling usage of the term "birth control" from 1800 through 2019, see "*birth control*," Google Books Ngram Viewer, https://books.google.com/ngrams/graph?content=birth+control&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3 [https://perma.cc/DWW3-9F7T].

297. *To Fight in Court for Birth Control: Sanger, the Artist, Ready to Meet Comstock's Efforts to Suppress Discussion*, Wash. Times, Sept. 6, 1915, at 5, 5.

298. *Id.* The paper reported that Sanger, if convicted, would be punished with a year in prison and a $1,000 fine. *Id.*

299. *Clash over Comstock: Purity Congress Refuses to Listen to Attack upon Anti-Vice Man*, Fall River Evening News (Mass.), July 19, 1915, at 5, 5.

ing, shouting opinions of the judge and court and declaring that the prisoner had been treated unjustly."[300]

Margaret Sanger's arrest and 1917 trial generated even more publicity, with coverage reaching beyond the coasts. The *St. Louis Post-Dispatch* reported on the trial with a banner—"Mrs. Margaret Sanger Contends Law is Wrong in Classing Terms She Used in Her Literature as Obscene"—and quoted at length from an article Sanger had written in her own defense.[301]

The *Salt Lake Telegram* devoted four articles in one issue, and a fifth a few days later, to questions raised by Sanger's trial and extensively quoted Sanger in her own defense.[302] Two such articles attested to Comstock's declining authority, emphasizing that his use of the criminal law to target Sanger and punish discussion of birth control was a First Amendment issue and reporting that prominent English intellectuals had spoken out in opposition to America's suppression of public debate.[303] The press also extensively covered Byrne's hunger strike,[304] with the *New York Times* and other papers providing graphic details to the public.[305]

The government crushed Sanger's and Byrne's efforts to speak when they could not vote: they were convicted and jailed, and courts simply refused to address their challenges to the constitutionality of laws banning birth con-

300. *Riot in Court When Sanger Is Convicted: Comstock Prosecutes Him at New York on Charge of Circulating Immoral Book Written by His Wife*, FALL RIVER GLOBE (Mass.), Sept. 11, 1915, at 2, 2; *Riot in Court When Sanger Is Convicted: Comstock Prosecutes Him on Charge of Circulating Immoral Book*, BOS. HERALD, Sept. 11, 1915, at 12, 12.

301. *Woman Advocate of Birth Control Outlines Defense: Mrs. Margaret Sanger Contends Law Is Wrong in Classing Terms She Used in Her Literature as Obscene*, ST. LOUIS POST-DISPATCH, Jan. 19, 1916, at 3, 3 [hereinafter *Woman Advocate of Birth Control Outlines Defense*].

302. Kenneth W. Payne, *Threat of Prison Won't Stop "Woman Rebel" from Making "Birth Control" National Issue*, SALT LAKE TELEGRAM, Jan. 18, 1916, at 7, 7; *Birth Control Leagues Formed*, SALT LAKE TELEGRAM, Jan. 18, 1916, at 7, 7; *Leading British Thinkers Appeal to Wilson in Behalf of Mrs. Sanger*, SALT LAKE TELEGRAM, Jan. 18, 1916, at 7, 7 [hereinafter *Leading British Thinkers*]; *Court at Odds as to the Guilt of Mrs. Sanger*, SALT LAKE TELEGRAM, Jan. 18, 1916, at 7, 7; *Birth Control Now Before Trial Court*, SALT LAKE TELEGRAM, Jan. 24, 1916, at 1, 1.

303. *Birth Control Leagues Formed*, *supra* note 302, at 7; *Leading British Thinkers*, *supra* note 302, at 7.

304. CHESLER, *supra* note 18, at 153-54 (observing that after Ethel Byrne was sentenced to a month in jail and began a hunger strike, "[n]ewspapers throughout the country bannered her vow to 'die, if need be, for my sex'").

305. *Mrs. Byrne Now Fed by Force*, N.Y. TIMES, Jan. 28, 1917, at 1, 1. Jill Lepore's riveting account of Byrne's hunger strike emphasizes that the government sought to silence Byrne through a pardon conditioned on her ceasing to advocate for voluntary motherhood. *See* JILL LEPORE, THE SECRET HISTORY OF WONDER WOMAN 93-95 (2014).

trol.[306] But incarceration amplified rather than silenced their voices.[307] In affirming Sanger's conviction, the New York Court of Appeals for the first time construed a provision of the state obscenity statute exempting articles for preventing venereal disease to authorize doctors to prescribe contraception for women's health, even as the court ruled that Sanger herself was not a professional entitled to its benefit.[308] The public was fascinated by the claims of Comstock resisters, and their stories were accorded increasingly positive coverage.[309] That said, the *Sanger* decision most immediately benefited men, as pool halls, gas stations, and other male-dominated businesses marketed condoms as for the "prevention of disease only,"[310] despite the judge's requirement that a physician prescribe contraception.

Change was in the air. In this period, conflicts over censorship of birth control converged with conflicts over censorship of speech criticizing World War I. Courts regularly authorized the government to censor dissident political speech.[311] But that understanding of the state was now in contest, and an increasingly engaged public recognized that a democracy might require more. As Margaret Sanger explained the stakes of her prosecution under the federal ob-

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306. People v. Sanger, 118 N.E. 637, 637 (N.Y. 1918) ("[T]he defendant is not a physician, and the general rule applies in a criminal as well as a civil case that no one can plead the unconstitutionality of a law except the person affected thereby."); *Birth Control Conviction: Brooklyn Judge Finds Nurse Guilty of Giving Information — Emma Goldman Not Guilty*, Springfield Republican (Mass.), Jan. 9, 1917, at 13, 13 ("Miss Byrne's counsel questioned the constitutionality of the law, but the court declined to pass upon that point and ruled that birth control itself was not on trial."). On erasure of the constitutional claims asserted in conscientious resistance to Comstock, see *infra* Section III.A.

307. The prosecutions offered a textbook case of winning through losing. *See generally* Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941 (2011) (explaining how losses in court can nonetheless be generative for social movements).

308. *See infra* Section III.A (discussing the *Sanger* case). Earlier rulings under the Comstock Act had focused on potential protection within the physician-patient relationship. *See supra* notes 148-149 and accompanying text.

309. *See* Flamiano, *supra* note 296, at 563 ("An examination of 44 articles in 5 magazines revealed a pattern of predominately positive portrayals of birth control.").

310. *See* Tone, *supra* note 48, at 107-08 (reporting that the *Sanger* ruling had the greatest effect on the "masculine side of the birth control business" because male customers "routinely ignored" the rule that contraceptives would be legal only if prescribed by a doctor).

311. *See, e.g.*, Masses Publ'g Co. v. Patten, 246 F. 24, 39 (2d Cir. 1917); *see also* John Sayer, *Art and Politics, Dissent and Repression: The Masses Magazine Versus the Government, 1917-18*, 32 Am. J. Legal Hist. 42, 43 (1998) (offering a "reconstruction . . . of the criminal and civil cases involving *The Masses* magazine and its editors"); Laura Weinrib, *The Limits of Dissent: Reassessing the Legacy of the World War I Free Speech Cases*, 44 J. Sup. Ct. Hist. 278, 279 (2019) (analyzing "the debates about judicial role that roiled American society before and after World War I" that informed the wartime-political-dissent cases).

scenity statute: "Nothing can be accomplished without the free and open discussion of the subject."[312]

C. *Sex and Democracy: Mary Ware Dennett's Challenge to Comstock in Congress and the Courts*

Yet in this period it was not Sanger but Dennett who most directly made the case that censorship of sex violated fundamental tenets of democracy. Today, Dennett is little known, obscured by Sanger's shadow. But Dennett's drive to amend federal obscenity law and to defend herself helped change the premises on which judges interpreted the Comstock Act. She situated obscenity law in a very different society: one that valued free speech, voluntary motherhood, health, and sexual freedom as integral components of democratic life. These arguments helped transform the premises of obscenity law. Judge Augustus Hand's decision in 1930 overturning Dennett's conviction—based in significant part on her arguments—laid the groundwork for his later decisions holding that James Joyce's *Ulysses* was not obscene and authorizing importation of contraceptive articles in *United States v. One Package*.[313] *United States v. Dennett* was ultimately overshadowed by the subsequent decisions it enabled.[314]

Dennett was born the year Comstock jailed Woodhull.[315] Bearing children under the Comstock regime helped lead Dennett to women's rights causes. Dennett endured three difficult pregnancies in what was otherwise a happy marriage.[316] When she failed to heal from her last pregnancy in 1905, doctors warned her that having another child would kill her, but they offered no advice about contraception.[317] The couple ended sexual relations,[318] and while Dennett was recovering from surgery, her husband began a relationship with a family friend; a separation and then an acrimonious divorce—widely covered in

312. Margaret H. Sanger, *Not Guilty*, BLAST (S.F.), Jan. 15, 1916, at 7, 7. Shortly before her trial began, the *St. Louis Post-Dispatch* published an excerpt of Sanger's article, noting that it was originally published "under her own name in 'The Blast,' a revolutionary labor weekly of San Francisco, of which Alexander Berkman is the editor and publisher." *Woman Advocate of Birth Control Outlines Defense*, *supra* note 301, at 3.

313. *See infra* Section II.D.

314. *See infra* notes 371-375 and accompanying text.

315. CHEN, *supra* note 282, at 3 (reporting that Dennett was born in April of 1872).

316. *See id.* at 45-56.

317. *Id.* at 56.

318. *Id.*

the press—followed.[319] When her husband refused to support their family, Dennett found salaried suffrage work, and by 1910 she was gaining a national reputation as a suffragist and had been appointed corresponding secretary of the National American Woman Suffrage Association.[320]

In 1915, unable to find appropriate materials to answer her fourteen-year-old son's questions about sex, Dennett decided to write her own account, an essay she titled *The Sex Side of Life: An Explanation for Young People*.[321] In the essay, she offered teens a frank, anatomically correct account of sexual relations and the reproductive process, presenting the physiological and emotional aspects of sex as integral parts of love.[322] Movements for sex education were then several decades old,[323] but Dennett's book broke ground by framing sex as a distinctively human and valuable form of self-expression. "It is *not* a nasty subject," she wrote.[324] "It should mean everything that is highest and best and happiest in human life."[325]

William Sanger's trial that same year provoked Dennett to take a public stand against Comstock. But rather than speaking through civil disobedience, Dennett brought her skills as a suffrage organizer to bear on birth-control politics. In March of 1915, she founded the first birth-control organization in the United States, the National Birth Control League (NBCL).[326] During World

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319. *Id.* at 58-59, 64-68, 91-95, 112-25.

320. *Id.* at 105-06.

321. *Id.* at 171-72.

322. *Id.* at 172-76.

323. Beginning in the 1880s, a self-proclaimed moral-education movement argued that educating women and children about sex actually *preserved* purity, prepared people for parenthood, and educated women about voluntary motherhood. *See* D'Emilio & Freedman, *supra* note 99, at 155-56; Bryan Strong, *Ideas of the Early Sex Education Movement in America, 1890-1920*, 12 Hist. Educ. Q. 129, 134-41 (1972) (describing the work of the early sex-education movement that sought to preserve "old morality that demanded the repression of all sexual activities except those designed for procreation" by "emphasizing the value and nobility of purity" and that instructed students "in the principles of sex hygiene"). Advances in knowledge about venereal disease, a major problem of the era, inspired physicians to found their own organizations on sex education. Kristy L. Slominski, Teaching Moral Sex: A History of Religion and Sex Education in the United States 30-36 (2021) (describing the mobilization of physicians in the early sex-education movement concerned with "venereal peril"); Jeffrey P. Moran, Teaching Sex: The Shaping of Adolescence in the 20th Century 40-51 (2000) (chronicling the work of doctors like Prince Morrow to establish that the moral life was a hygienic life).

324. Mary Ware Dennett, The Sex Side of Life: An Explanation for Young People 15 (1919).

325. *Id.*

326. Chen, *supra* note 282, at 180-82.

War I, Dennett mobilized war protests alongside figures like Crystal Eastman and Max Eastman, seeking to "wrest power from the government and bring it back to the people,"[327] and then with Crystal Eastman and Roger Baldwin helped organize the National Civil Liberties Bureau (later the American Civil Liberties Union).[328] When the war ended, Dennett resumed work on birth control, bringing to that work her experience protecting civil liberties as a fundamental basis of democracy. Dennett published *The Sex Side of Life* in a medical journal in 1918[329] and in 1919 advocated for a bill reforming obscenity law in New York State, appealing to principles of freedom and democracy as she did so.[330]

In the pages of Sanger's new *Birth Control Review*, Dennett reported—and rebutted—New York legislators' objections to repealing the state's birth-control ban: that repeal of the ban might lead to "race suicide," that there would be a decline in "moral standards" if Americans could separate sex and reproduction, and that it was unnecessary to repeal the law because most people already had information on birth control.[331] Arguing as a full-throated civil libertarian, Dennett emphasized that "the present laws are absolutely inconsistent with the principle of freedom to know, to think and to do, on which this country is supposed to be founded."[332] Dennett attacked advocates of sexual purity—those who "accept sex relations as necessary for parenthood and demand complete suppression otherwise"—and described Comstock laws as "enslaving a great part of the population" and "inflict[ing] upon our womanhood a state of pov-

327. *See id.* at 200-03.

328. *See id.* at 203; Lynn Lederer, "The Dynamic Side of Life" – The Emergency of Mary Coffin Ware Dennett as a Radical Sex Educator 168-69 (2001) (Ph.D. Dissertation, Rutgers University), https://www.researchgate.net/profile/Lynn-Lederer-2/publication/267899743_The_Dynamic_Side_of_Life_The_Emergence_of_Mary_Coffin_Ware_Dennett_as_a_Radical_Sex_Educator/links/5c2ef2cfa6fdccd6b58fa593/The-Dynamic-Side-of-Life-The-Emergence-of-Mary-Coffin-Ware-Dennett-as-a-Radical-Sex-Educator.pdf [https://perma.cc/26UW-PYWH].

329. CHEN, *supra* note 282, at 120-25.

330. *See* Mary Ware Dennett, *Do the People Want It?*, BIRTH CONTROL REV., Mar. 1919, at 14, 14.

331. Mary Ware Dennett, *Legislators, Six-Hour Weeks and Birth Control*, BIRTH CONTROL REV., Mar. 1919, at 4, 4.

332. *Id.* at 5; *see also* Mary Ware Dennett, Letter to the Editor, *Voluntary Parenthood*, N.Y. TIMES, Feb. 11, 1922, at 12, 12 (asserting that the suppression of information about birth control was "quite out of harmony with supposedly American ideals"); Mary Ware Dennett, *A Poser for the "Purists,"* BIRTH CONTROL REV., June 1919, at 20, 20 (attacking sexual purity as contrary to American traditions of liberty: "[T]he only sort of family which is legally approved in these United States is that in which there are as many children as it is physically possible for the parents to produce. 'The Land of the Free!'").

erty, degradation, illness and death unequalled in the whole history of our times."[333]

Dennett soon decided to reorganize the NBCL as the Voluntary Parenthood League with the goal of focusing on the federal government—as women's campaign for suffrage had—and removing "the prevention of conception" from federal obscenity law.[334] She invited Sanger to serve on the executive committee, but in 1919 Sanger instead supported an incremental reform bill that authorized birth-control information only for doctors[335]—still ambitious in an era when the AMA supported criminalization of contraception.[336] Tensions mounted as Sanger attempted unsuccessfully to deter England's birth-control leader, Marie Stopes, from dealing with Dennett, and then in 1921 when she started her own organization called the American Birth Control League (ABCL).[337] The conflict never abated, reflecting differences in values, strategy, and temperament.[338]

In 1924, Dennett actually succeeded in securing sponsors and a joint congressional hearing for the Cummins-Vaile bill, which would exempt communication about contraception from federal obscenity law.[339] Testifying before a joint subcommittee hearing on the bill, Dennett emphasized the haste with which the Comstock statute had been passed, inviting Congress to clarify its understanding of obscenity.[340] And, as she had in New York, Dennett insisted

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333. Mary Ware Dennett, *The Stupidity of Us Humans*, Birth Control Rev., Jan. 1919, at 5, 5.

334. *See* Chen, *supra* note 282, at 212; *Work on Congress Begins*, Birth Control Rev., Aug. 1919, at 13, 13 (reporting the founding of the Voluntary Parenthood League, with a goal of persuading Congress to enact a measure "providing for the removal of the words 'prevention of conception' from the Federal Penal Code").

335. *See* Tone, *supra* note 48, at 125 (describing how Sanger "set her sights on the passage of 'doctor-only' bills to exempt doctors from prosecution").

336. The American Medical Association's Committee on Contraception did not endorse the legalization of contraception until 1937. *See* James Reed, The Birth Control Movement and American Society: From Private Vice to Public Virtue 52-53 (2014).

337. Chen, *supra* note 282, at 219-20.

338. *Id.*

339. *Id.* at 234-35; *see also Cummins-Vaile Bill: Joint Hearings on H.R. 6542 and S. 2290 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 1-3 (1924) [hereinafter *Cummins-Vaile Bill Hearings*] (providing the text of the bill, which sought "[t]o remove the prohibition of the circulation of contraceptive knowledge . . . and to safeguard the circulation of proper contraceptive knowledge and means by the enactment of a new section for the Criminal Code").

340. *Cummins-Vaile Bill Hearings*, *supra* note 339, at 11 (statement of Mary Ware Dennett) ("When the [Comstock Act] came up for action it was passed very hurriedly without debate at all."); *see also Effort to Lift Ban upon Birth Control Facts: Senator Cummins Introduces*

that by criminalizing "the circulation of knowledge as to how conception may be controlled," the statute violated democratic principles:

> The utterly un-American nature of this statute becomes clear if one pictures what it would mean if some other item of scientific knowledge was similarly prohibited. For instance, suppose we had laws prohibiting knowledge about the principles on which automobiles are operated.
>
> . . . .
>
> . . . The present laws as they stand are predicated on distrust by the Government of the mass of its citizens, which is an intolerable principle for laws in a supposed democracy.[341]

Dennett's bid to amend the statute failed for a variety of reasons. First among them was the fact that the suffrage amendment had only just been ratified, and women participated in Congress's deliberations as supplicants and outsiders to the political process, even if more of them were now allowed to vote. At the time of Cummins-Vaile, there was only *one* woman serving in Congress.[342] It did not help that Dennett not only faced ongoing Catholic opposition but also lacked the support of Sanger; Sanger thereafter attracted attention through her competing, better-funded ABCL, which supported bills allowing doctors to access contraception under federal obscenity law, a bill Dennett opposed as likely to exclude the poor.[343] In fact, in the years after

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Measures Backed by Parenthood League, AM. GUARDIAN (Okla. City), Feb. 15, 1924, at 5, 5 (discussing the introduction of the Cummins-Vaile bill and quoting Mary Ware Dennett as saying: "The birth rate in the United States is conclusive proof that the mass of people believe in parenthood which is intentional. . . . [Comstock's] bill, hastily framed, included a sweeping prohibition of all contraceptive knowledge, whereas the intention was to prohibit only the abuse of that knowledge in connection with perversions and depravity. To correct this blunder now will be to reflect the point of view of the millions of normal, decent, self-respecting American parents.").

341. *Cummins-Vaile Bill Hearings*, *supra* note 339, at 11 (statement of Mary Ware Dennett).

342. *See History of Women in the U.S. Congress*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/congress/history-women-us-congress [https://perma.cc/HXL5-MCGU] (reporting that there was only one woman in the 68th Congress (1923-25), who served in the House); *see also id.* (reporting that there were only eight women in the 75th Congress (1937-39) when Sanger's bills failed).

343. *Birth Control Bill Evokes Protest from Catholics*, TIDINGS (L.A.), Apr. 18, 1924, at 3, 3. On Sanger's proposals, see CHESLER, *supra* note 18, at 231-34. On Dennett's objection to Sanger's approach, see CHEN, *supra* note 282, at 213. *See also* Cathy Moran Hajo, *Voluntary Parenthood League*, *in* ENCYCLOPEDIA OF BIRTH CONTROL 261, 262 (Vern L. Bullough ed., 2001) (reporting that Dennett was criticized for "her insistence that the bill was not about birth control per se, but free speech").

women were first allowed to participate in electoral politics, Congress was not willing to enact either proposal—and would not for another half-century.[344]

It is no small irony, then, that Dennett, who insisted on seeking change through the legislative process, would ultimately shape American law in the courts, speaking in defense of *The Sex Side of Life*. The pamphlet is remarkable not only for its forthrightness in explaining to young people the physiology of sex, but also for its emotional dimensions. Its introduction for elders explained:

> In not a single one of all the books for young people that I have thus far read has there been the frank, unashamed declaration that the climax of sex emotion is an unsurpassed joy, something which rightly belongs to every normal human being, a joy to be proudly and serenely experienced. Instead there has been all too evident an inference that sex emotion is a thing to be ashamed of, that yielding to it is indulgence which must be curbed as much as possible, that all thought and understanding of it must be rigorously postponed, at any rate till after marriage.[345]

In 1922, the Post Office ruled the pamphlet obscene, even as religious, educational, and medical leaders recommended it, and the pamphlet's readership grew.[346] After lawyer Morris Ernst, general counsel of the newly formed American Civil Liberties Union (ACLU), spoke to Dennett's group, he offered to bring suit and appeal to the Supreme Court if necessary.[347] Within two weeks, Dennett was indicted—targeted, she suspected, for her advocacy[348]—and soon thereafter tried and convicted for violating the Comstock Act.[349]

The Brooklyn trial court's decision provoked a storm of protest.[350] The press invoked the wide variety of civic, religious, and medical authorities who

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344. *See generally* Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. 1973 (repealing contraception-related prohibitions).

345. DENNETT, *supra* note 324, at 4.

346. *See* CHEN, *supra* note 282, at 241-42.

347. LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 40-41 (2013).

348. *Id.*; *see also* GARY, *supra* note 19, at 36-39 (noting that "Dennett was not surprised" to be indicted and was "anything but an unwitting victim").

349. GARY, *supra* note 19, at 43, 50; Weinrib, *The Sex Side of Civil Liberties*, *supra* note 19, at 355.

350. Weinrib, *The Sex Side of Civil Liberties*, *supra* note 19, at 342 ("The pamphlet was heralded by secular and religious reformers as an indispensable educational tool, and its censorship, coupled with Dennett's conviction for mailing an obscene publication, touched off a firestorm of public outrage . . . ." (footnotes omitted)).

had approved of Dennett's pamphlet[351] and criticized classification of the pamphlet as obscene by depicting Dennett as a maternal, even grandmotherly, figure.[352] Refrains like this were repeated across the nation: "It is only twenty thin pages written by a grandmother for distribution to such organizations as the Y.M.C.A., but it has sent the United States postoffice [sic] authorities, the New York clergy, the United States attorney's office and educational circles into a lather."[353] Editorials derided the New York court for enforcing beliefs even more pernicious than Tennessee's law banning teaching of evolution in the public schools,[354] and for its infidelity to the Constitution. The *Chattanooga Daily Times* warned that "[t]he federal judiciary is suffering seriously in public opinion because of its apparent 'bent' toward intolerance, its subserviency to religious proscription and its failure to sustain the constitutional liberties of the people."[355]

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351. *See Modern Czardom*, CHATTANOOGA DAILY TIMES, May 6, 1929, at 4, 4 ("The little book has been in circulation, indorsed by church societies, the Y. M. C. A., physicians, ministers, professors in colleges, lawyers and prominent laymen of all denominations, for ten years."); *see also* Estelle Lawton Lindsey, *Disturbing Elements Creating Discussion: Matter of Informing Youth Regarding Secrets of Life Given Consideration by Skipper of Good Ship Life in Her Column This Afternoon*, PASADENA POST, Apr. 11, 1929, at 9, 9 (describing an editorial in the February issue of the *Woman's Journal* as "a protest, because this pamphlet has been endorsed by the Y.M.C.A., the Y.W.C.A. and colleges and theological schools, by educators, parents and publishers of note. The dictionary defines obscene as 'foul, filthy, disgusting.' Is life that, or is obscenity in the minds of those who would so degrade it?").

352. *Now Tennessee Can Laugh at New York*, WHITTIER NEWS, May 15, 1929, at 10, 10 (describing Dennett as "a grandmother—a woman of culture and standing" who sought only to educate her sons about sex); *Grandmother's Treatise on Sex Brings Arrest*, PETALUMA ARGUS-COURIER, Apr. 24, 1929, at 1, 1 (reporting the conviction of a "a gray-haired grandmother").

353. Jessie Henderson, *New Book on Sex Brews Hot Debate*, CHATTANOOGA TIMES, Feb. 3, 1929, at 32, 32; *see also* Lindsey, *supra* note 351, at 9 ("For providing a pamphlet answering with quiet dignity the questions that most children ask Mrs. Mary Ware Dennett . . . must stand trial on an obscenity charge.").

354. *See, e.g.*, *Now Tennessee Can Laugh at New York*, *supra* note 352, at 10 (observing that "[i]f Tennessee had its monkey law, New York has just eclipsed it with its conviction of Mrs. Mary Ware Dennett" and characterizing the trial as "narrow-minded fanaticism at its worst" and "one of the most amazing bits of bigoted nonsense of recent years").

355. *Modern Czardom*, *supra* note 351, at 4; *see also id.* (quoting the *Baltimore Evening Sun* as "bravely assert[ing]" that "millions of American people . . . 'instead of regarding the federal courts as the champions of justice and liberty as guaranteed them under the constitution, seem now to regard them as one of the forces in the alliance to extirpate all aids to self-determining and pleasant living'").

The Executive Committee of the ACLU expanded its conception of civil liberties to support Dennett[356] and formed a defense committee headed by John Dewey, who launched a national campaign on Dennett's behalf.[357] Dewey, who evidently recognized that he shared common commitments with Dennett,[358] wrote a remarkable letter in her defense. In it, Dewey spoke as an educator and father of seven children, calling *The Sex Side of Life* "admirable"—and arguing that the Comstock law itself was *producing* obscenity, teaching the public to view sex as dirty by driving access underground and stigmatizing its discussion:

> Instead of being suppressed its distribution to parents and to youth should be encouraged. It is the secrecy and nasty conditions under which sex information is obtained—or used to be—that creates the idea that there is anything obscene in the pamphlet. Instead of being indecent I should have been glad to have my own children receive such information as a protection against indecency. If such a pamphlet as this prepared under scientific auspices cannot be distributed without legal

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356. Weinrib, *The Sex Side of Civil Liberties*, *supra* note 19, at 364; *see also* Leigh Ann Wheeler, *Where Else but Greenwich Village? Love, Lust, and the Emergence of the American Civil Liberties Union's Sexual Rights Agenda, 1920–1931*, 21 J. HIST. SEXUALITY 60, 80-81 (2012) ("Clearly, ACLU leaders appreciated a number of things about Dennett's case, including its potential to attract public support . . . . The Mary Ware Dennett Defense Committee was itself a momentous development signaling the ACLU's growing dedication to defending serious authors ensnared by obscenity law.").

357. This committee grew from eight to over fifty national leaders, including Alice Stone Blackwell, Mary Phillips Riis (Mrs. Jacob Riis), and Rabbi Stephen Wise. *See* John M. Craig, *"The Sex Side of Life": The Obscenity Case of Mary Ware Dennett*, 15 FRONTIERS 145, 155 (1995). In correspondence with Mary Ware Dennett, John Dewey outlined the stakes of the defense committee, writing that he hoped her fight could challenge "the whole situation of freedom of thought repression." Letter from John Dewey, Professor, Columbia Univ., to Mary Ware Dennett (Apr. 17, 1930) (on file with Harv. Univ., Radcliffe Coll., Schlesinger Libr., Papers of Mary Ware Dennett, Part B, Microfilm Reel M-138). Dennett similarly framed her campaign as a struggle against government censorship. In a letter to Dewey, Dennett wrote: "I do hope the outcome of the case will be such as may contribute definitely toward the ending of the Post Office censorship, and lessening the tendencies to censorship in other directions." Letter from Mary Ware Dennett to John Dewey, Professor, Columbia Univ. (Nov. 8, 1929) (on file with Harv. Univ., Radcliffe Coll., Schlesinger Libr., Papers of Mary Ware Dennett, Part B, Microfilm Reel M-138).

358. *See* Laura M. Westhoff, *The Popularization of Knowledge: John Dewey on Experts and American Democracy*, 35 HIST. EDUC. Q. 27, 33-34 (1995) (describing Dewey's belief in the importance of an individual's freedom to "discover and verify truth for himself").

interference, the latter is equivalent in my judgment to putting a large premium on real indecency and obscenity of thought and action.[359]

D. The Courts Respond to the Public's Repudiation of "Comstockery"

Represented by Morris Ernst, Dennett appealed to the Second Circuit, where Judge Augustus Hand decided her case, *United States v. Dennett*, in 1930.[360] Within the next few years, Judge Hand also authored two other decisions of critical importance to evolving understandings of federal obscenity law: *United States v. One Book Entitled* Ulysses *by James Joyce*[361] and *United States v. One Package*.[362]

1. United States v. Dennett — *Democracy and Sexual Freedom*

In *Dennett*, Judge Hand ruled that *The Sex Side of Life* was not obscene.[363] Drawing from Dennett's reasoning, he rejected key elements of the sexual-purity understanding of obscenity. A first critical premise of his opinion was that sexual expression is a *valuable* dimension of human relationships. Quoting at length from the introduction to Dennett's pamphlet, the decision showed how *The Sex Side of Life* systematically situated sex in the context of love.[364] "[The pamphlet] negatives the idea that the sex impulse is in itself a base passion, and treats it as normal and its satisfaction as a great and justifiable joy when accompanied by love between two human beings."[365] A second critical premise drawn from Dennett and the movement for sex education was that society would *benefit* from greater access to knowledge about sex.[366]

It was not sex that threatened society, Judge Hand reasoned, so much as the sexual-purity reading of the obscenity statute itself. The obscenity statute could

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359. Letter from John Dewey to Morris Ernst, *reprinted in* 17 JOHN DEWEY: THE LATER WORKS, 1925-1953, at 127, 127 (Jo Ann Boydston ed., 1990) (emphasis added).

360. 39 F.2d 564 (2d Cir. 1930).

361. 72 F.2d 705 (2d Cir. 1934).

362. 86 F.2d 737 (2d Cir. 1936). Judge Learned Hand also participated in these two cases. On Ernst's work in these cases, see GARY, *supra* note 19, at 39-60, 186-203, 238-48.

363. *Dennett*, 39 F.2d at 569.

364. *See id.* at 565-67.

365. *Id.* at 567.

366. *Id.* at 568-59 ("It . . . may reasonably be thought that accurate information, rather than mystery and curiosity, is better in the long run and is less likely to occasion lascivious thoughts than ignorance and anxiety.").

not refer to "everything which *might* stimulate sex impulses," otherwise "much chaste poetry and fiction, as well as many useful medical works would be under the ban."[367] He ruled that the statute "must not be assumed to have been designed to interfere with serious instruction regarding sex matters unless the terms . . . are clearly indecent."[368]

It is here in the *Dennett* opinion that a modern approach to obscenity was born. Rather than looking at the effect of selectively excised passages on the most susceptible readers—as the traditional *Hicklin* test required[369]—Judge Hand introduced a new test in *Dennett* that evaluated the effect of the work as a whole on a general audience:

> Any incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect. The tendency can only exist in so far as it is inherent in any sex instruction, and it would seem to be outweighed by the elimination of ignorance, curiosity, and morbid fear.[370]

The impact of the *Dennett* case was immense, even as citations to the decision have ceased in recent decades.[371] At the time the decision was handed down, an ACLU pamphlet explained the case was pathbreaking because it "*involves the whole method of determining obscenity*, the rules of evidence in trials, and the constitutionality of the law under which the Post Office Department operates its censorship."[372] Professor Laura Weinrib has observed that "[w]ithin a few years of the Second Circuit's decision, civil libertarians were aggressively advocating not only open sex education but also artistic freedom

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367. *Id.* at 568.

368. *Id.* at 569.

369. *See supra* notes 214-217 and accompanying text (discussing the adoption of the *Hicklin* standard in the *Bennett* case); GARY, *supra* note 19, at 11-12 (discussing the *Hicklin* obscenity standard in the courts and observing that "[t]he entire work did not matter either—just an offending passage or image was enough for prosecutors to successfully assert that anyone in the vast audience of potential readers might be aroused or otherwise morally affected"); *supra* note 217 (describing *United States v. Clarke*, which applied the *Hicklin* obscenity standard to a pamphlet on the symptoms of venereal disease).

370. *Dennett*, 39 F.2d at 569.

371. According to Westlaw's "Citing References" function, there have been forty-nine citations of *Dennett* in other cases, forty-one of which occurred within the first thirty years after *Dennett* was decided, and none since 1985. *See infra* notes 436-440 and accompanying text (discussing how the Warren Court invoked *Dennett* in modernizing obscenity law in the 1950s).

372. AM. C.L. UNION, THE PROSECUTION OF MARY WARE DENNETT FOR "OBSCENITY" 8 (1929) (emphasis added).

and even, in some cases, birth control."[373] Just a few years after *Dennett*, Judge Hand invoked its principle that obscenity is to be judged in light of the work as a whole, rather than a particular passage, to hold that Joyce's *Ulysses* was not obscene.[374]

2. United States v. One Package—*Health and Sexual Freedom*

Dennett's and Sanger's advocacy combined to shape Judge Hand's 1936 decision in *One Package*, which held that a doctor importing a diaphragm from another doctor did not violate federal obscenity laws.[375] In these developments, we can see the shifting characterization of practices as "health" and "obscenity," as lawful and unlawful.[376]

Morris Ernst, who proposed *One Package* as a test case to Margaret Sanger, recognized that courts were increasingly likely to recognize doctors' authority to prescribe contraception, and not just in dicta: Sanger's own 1918 case had helped establish this understanding.[377] In this same era, the Seventh Circuit affirmed that a physician could use the mails to discuss abortion in cases where the procedure would be to save a life.[378] And in the *Dennett* case, Judge Augustus Hand had shifted the standard for assessing obscenity away from *Hicklin*, ensuring that medical practices distinguished from obscenity under the statute would no longer be assessed from the standpoint of the most prurient member of the community.[379]

One Package consolidated vital developments in the Second Circuit. Consider the critically important 1930 case *Youngs Rubber Corp. v. C.I. Lee & Co.*, in

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373. Weinrib, *The Sex Side of Civil Liberties*, *supra* note 19, at 363.

374. United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 707 (2d Cir. 1934) (citing *United States v. Dennett* for the holding "that works of physiology, medicine, science, and sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts" and explaining that the "question in each case is whether a publication taken as a whole has a libidinous effect").

375. United States v. One Package, 86 F.2d 737, 739 (2d Cir. 1936).

376. *See infra* Section III.A.

377. *See* GARY, *supra* note 19, at 228 ("Judge Crane offered a liberal interpretation of Section 1145 that considered contraception useful for women's health reasons rather than exclusively for the prevention of venereal disease."). For further discussion, see *infra* Section III.C.

378. Bours v. United States, 229 F. 960, 964 (7th Cir. 1915) ("Though the letter of the statute would cover all acts of abortion, the rule of giving a reasonable construction in view of the disclosed national purpose would exclude those acts that are in the interest of the national life. Therefore a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position.").

379. *See supra* notes 366-370 and accompanying text.

which the Second Circuit enforced a patent for Trojan condoms on the grounds that they could be used for lawful purposes.[380] Suggesting that a sweeping sexual-purity interpretation misunderstood Comstock's contraception and abortion provisions, the Second Circuit returned to the text of the statute. It was reasonable, the court concluded, "to construe the whole phrase 'designed, adapted or intended' as requiring an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes."[381] This intent requirement was consistent with the statute as enacted,[382] even as the court diverged from a maximalist understanding of "immoral purposes." The "prevention of disease" was not such a purpose, the court reasoned, *nor* was "the prevention of conception, where that is not forbidden by local law."[383] The court acknowledged the condom's dual function as licit, so long as its purpose was consistent with local law, and more importantly emphasized the condom's health-related purposes in reasoning about its legality under the Comstock law: "The intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress."[384] As importantly, the Second Circuit read the Comstock statute as allowing distribution of items for lawful "contraceptive or abortifacient uses" outside the physician-patient relationship.[385]

Youngs Rubber illustrates the condom's role in expanding access to contraception for health purposes under the Comstock Act *and* in unsettling Victorian precedent that employed the physician-patient relationship to limit lawful health uses under the statute.[386] Public-health concerns drove these changes in part. A policy preaching abstinence to the military failed to contain the spread

380. 45 F.2d 103, 107, 110 (2d Cir. 1930); *see also* Tone, *supra* note 174, at 68-69 (describing the significance of the patent litigation as, among other things, an important modification of the Comstock law).

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

382. *See supra* Section I.A (describing how Section 2 of the Comstock Act covered materials "designed or intended" for procuring an abortion).

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

384. *Id.* at 108.

385. *Id.* at 108-09.

386. *See* Joshua Gamson, *Rubber Wars: Struggles over the Condom in the United States*, 1 J. HIST. SEXUALITY 262, 268-69 (1990). *See generally* ALEXANDRA M. LORD, CONDOM NATION: THE U.S. GOVERNMENT'S SEX EDUCATION CAMPAIGN FROM WORLD WAR I TO THE INTERNET (2010) (tracing how approaches to condoms evolved in the twentieth century).

of venereal disease during and immediately after World War I.[387] There were persistently high rates of venereal disease in the Army and Navy in the decade before *Youngs Rubber*, and senior medical officers insisted that encouraging men to practice abstinence was both pointless and dangerous from the standpoint of public health.[388] By the early 1930s, portrayals of male sexual aggressiveness as natural or even laudable were widespread.[389] *Youngs Rubber* reflects this new acceptance of men's sexual drive in the crafting of public policy, not only in sanctioning the marketing of condoms as licit means to protect "health"—in its many senses—but also in sanctioning a market in condoms outside the physician-patient relationship.

"Health" was also the language in which the public talked about over-the-counter products that were designed to promote contraception for women—a "euphemism," as Sanger's biographer put it.[390] "Readers of feminine hygiene ads [obtained] the knowledge necessary to '*remove many of their health anxieties*, and give them that sense of well being, personal daintiness and mental poise so essential to wifely security.'"[391]

In the 1930s, "health" operated as a euphemism for abortion as well as contraception, especially given the popularity of drugs like Lydia Pinkham's Vegetable Compound, which, in an era in which there was no way of diagnosing early pregnancy,[392] women used as both a contraceptive *and* an abortifacient.[393]

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387. LORD, *supra* note 386, at 24-30.

388. *See* RICKIE SOLINGER, PREGNANCY AND POWER: A HISTORY OF REPRODUCTIVE POLITICS IN THE UNITED STATES 104-05 (rev. ed. 2019) ("Now the military stressed the inevitability of male sexual activity and the fact that soldiers simply had to be supplied with condoms in the interests of public health.").

389. TONE, *supra* note 48, at 106 (reporting that, by the time of the *Sanger* decision, the condom industry flourished, and a growing number of institutions "took male sexual activity for granted"); *id.* at 112 (describing a growing hypermasculinity in the culture and the military, as well as a "newer, more indulgent perception of male sexuality").

390. DAVID M. KENNEDY, BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER 212 (1970) (describing *Youngs Rubber* as allowing "advertisement and shipment of contraceptive devices intended for legal use—in most states, 'for the prevention of disease'" and observing that "[u]nder cover of that and similar euphemisms such as 'feminine hygiene,' a booming business in contraceptives developed rapidly").

391. *See* Andrea Tone, *Contraceptive Consumers: Gender and the Political Economy of Birth Control in the 1930s*, 29 J. SOC. HIST. 485, 495 (1996) (emphasis added); *see also id.* at 486 (reporting that in the 1930s, manufacturers sold over-the-counter contraceptive goods as "feminine hygiene").

392. *See supra* notes 112-113 and accompanying text.

393. RIDDLE, *supra* note 112, at 250-52; *see also* Sarah E. Patterson, Being Careful: Progressive Era Women and the Movements for Better Reproductive Health Care 145-46 (Dec. 2020) (Ph.D. dissertation, State University of New York at Albany) (ProQuest) (relating the stories of

One of the most popular "health" remedies of the era to regulate birth was the antiseptic Lysol. A 1933 women's magazine, *McCall's*, promised the wife that regular use of "Lysol would ensure 'health and harmony . . . throughout her married life.'"[394]

In *One Package*, Morris Ernst presented Judge Augustus Hand with a detailed discussion of Comstock's legislative history (much of it developed by Dennett), arguing that Congress did not enact the obscenity statute to interfere with health care and that the statute would be unconstitutional if enforced in this way.[395]

Federal obscenity law, Judge Augustus Hand ruled in *One Package*, did not "prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients."[396] In this way, Hand expanded the range of lawful purposes under the Comstock Act, from saving lives to "promoting the well being" of patients, an end that could make distributing a pessary for birth control lawful under the statute. Quoting *Youngs Rubber*, Hand reasoned that the Government had to prove "an intent on the part of the sender that the article mailed . . . be used for illegal contraception or abortion or for indecent or immoral purposes."[397] The Second Circuit recognized that there were legitimate health-related purposes for communicating about and sending articles for controlling birth through the U.S. mails.

Dennett, *Youngs Rubber*, and *One Package* played a critical role in establishing the modern understanding of the Comstock Act. Over the ensuing decades, federal and state cases affirmed the health-protective interpretation of federal obscenity law set forth in *One Package*, recognizing that there were legitimate purposes for mailing articles for contraception and abortion and communications concerning either one—not only among doctors and between doctors and their patients, but as the condom example first established, among a wide

women in the interwar period who used certain drugs interchangeably for both contraception and abortion).

394. Tone, *supra* note 391, at 485 (alteration in original).

395. *See* Brief for Claimant-Appellee at 7-30, 35-38, United States v. One Package, 86 F.2d 737 (2d Cir. 1936) (No. 62). The brief is remarkable in its range of argument.

396. *One Package*, 86 F.2d at 739; *see also* OLC Memo, *supra* note 52, slip op. at 1-2 (reasoning that the "longstanding judicial construction of the Comstock Act," including in cases like *One Package*, allows the mailing of mifepristone and misoprostol "where the sender lacks the intent that the recipient of the drugs will use them unlawfully"). For a discussion contextualizing the courts' reasoning in these cases in developments of the early twentieth century, see *supra* notes 362-394 and accompanying text.

397. *One Package*, 86 F.2d at 738 (quoting Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103, 108 (2d Cir. 1930)).

swath of the American public, including intermediaries and interested third parties.[398]

Codification of the Comstock Act in 1948 included a lengthy "Historical and Revision Note" reporting *Youngs Rubber* and other cases of the 1930s "as requiring 'an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes.'"[399] Most but not all states adopted this understanding as a matter of state law: Connecticut and Massachusetts were among the holdouts, adamantly refusing in the wake of *One Package* to update their interpretation of the states' mini-Comstock laws in response.[400]

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398. Some cases authorized mailings involving medical personnel, including pharmacists. Often, the cases go much further, as *One Package* did, and reason about mailing communications and articles enabling contraception and abortion as presumptively lawful unless the government proved that the sender intended the mailed item to be used for unlawful purposes, sometimes citing *Youngs Rubber*. These cases all discuss lawful contraception and abortion, and thus place the burden of proof on the prosecution to demonstrate that any mailing involving communications about or articles of reproduction violated the statute through a showing of intent or otherwise.

For an early and prominently cited case, see *Bours v. United States*, 229 F. 960, 964 (7th Cir. 1915), which interpreted the Comstock Act to create an exception for abortions for "an operation to save life." For 1930s cases, see *Davis v. United States*, 62 F.2d 473, 474-75 (6th Cir. 1933) (quoting *Youngs Rubber*, 45 F.2d at 108), which reversed and remanded for a new trial to determine the intent of contraceptive dealers convicted under the Comstock Act and cited with approval *Youngs Rubber*'s conclusion that the Comstock Act required "an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion"; *One Package*, 86 F.2d at 739; and *United States v. Nicholas*, 97 F.2d 510, 511-12 (2d Cir. 1938), which applied a provision of the Tariff Act and concluded that a magazine describing contraceptive methods could not be confiscated because "contraceptive articles may have lawful uses and that statutes prohibiting them should be read as forbidding them only when unlawfully employed"—and that lawful uses included those by "physicians, scientists and the like."

399. 18 U.S.C. § 1461 note (2018) (Historical and Revision Note) (quoting *Youngs Rubber*, 45 F.2d at 103); *cf.* Whitney R. Harris, *Survey of the Federal Judicial Code: The 1948 Revision and First Interpretative Decisions*, 3 SW. L.J. 229, 249-50 (1949) (documenting how Congress revised much of the federal criminal and judicial codes in 1948). When Congress codified the federal criminal code in Title 18, it included 18 U.S.C. §§ 1461-1462, a version of the Comstock Act prohibiting the mailing and importation of "obscene" matter. *See* Act of June 25, 1948, 62 Stat. 683, 683, 768-69 (codified as amended at 18 U.S.C. §§ 1461-1462) (codifying and enacting Title 18 of the U.S. Code into positive law, including the Comstock Act).

400. *See* Brooks, *supra* note 2, at 3-5.

III. COMSTOCK'S LEGACIES IN POLITICS AND CONSTITUTIONAL LAW

In what follows, we consider how Comstock conflict shaped both the statute and the Constitution. To do so, we briefly look backwards, and then forwards.

Comstock resisters helped bring about remarkable changes in the law, given their scant social and political power. By the 1930s, the federal government's enforcement of Comstock's contraception and abortion provisions appears to have ceased.[401] State enforcement declined in its wake.[402] Decades of advocacy amplified the dramatic shifts in birth rates and family formation[403] that guided Comstock decisions in the 1930s and dislodged the most expansive sexual-purity understandings of obscenity.[404]

These now-forgotten statutory decisions expressed a twentieth-century understanding of democracy as requiring particular kinds of freedom from government control: in giving voice to Americans' demand for liberty of speech and intimate life, they laid the foundations for modern free-speech and substantive-due-process law. In this way, democratic struggles over the meaning of Comstock's obscenity provisions were a stunning success.

Yet even as enforcement and interpretation of the reproductive provisions of federal obscenity law shifted in response to evolving mores and sustained public outcry, the censors' project nonetheless succeeded in key respects. In interpreting the Comstock Act, judges characterized practices once branded "obscene" as necessary for "health"; this often made *doctors* gatekeepers—especially in matters concerning women's sexual and reproductive lives. And, as we show, judges typically did so without mention of the advocates who fought for these changes or the constitutional principles for which those advocates struggled: fundamental freedoms of democratic and intimate life. Comstock resisters thus helped engender new interpretations of the Comstock Act, but even those

401. *See* KENNEDY, *supra* note 390, at 242 (reporting that at the time of the district court's ruling in *One Package*, Sanger's "staff" found that in cases concerning "legal interference with birth control . . . sections pertaining to the mails and interstate transportation were virtually a dead letter" and that of "sixteen cases [involving birth control] reported, all but one were brought under the section dealing with importation").

402. *See* Hovey, *supra* note 177, at 437 (analyzing enforcement statistics in New York City); Abraham Stone & Harriet Pilpel, *The Social and Legal Status of Contraception*, 10 CURRENT LEGAL THOUGHT 371, 376 (1944) (describing recent state enforcement as "sporadic").

403. *See supra* note 29 and accompanying text (discussing a massive decline in birth rates in the first decades of the twentieth century).

404. *See supra* Sections II.C-D.

emergent constitutional understandings effaced the advocates' role as midwives of constitutional modernity.

More fundamentally, Comstock resisters failed in every effort at legislative reform. Because advocates persuaded judges to abandon the most extreme interpretations of obscenity yet failed to secure legislative repeal or reform, significant vestiges of the Comstock Act remain in force today.[405]

Why, given broad-based public support for change,[406] were advocates like Dennett and Sanger unable to secure any of their proposed legislative reforms? One obvious problem was women's continuing political marginalization. Women may have secured a right to vote in 1920, but they were unable to shape the law significantly for at least a half-century thereafter. Not all women were enfranchised until after the 1965 Voting Rights Act, and the right to vote did not translate into power to transform the law: a half-century after the Nineteenth Amendment's ratification, there were still only a handful of women who served in Congress, on the federal bench, or on the faculties of the nation's elite law schools.[407] After centuries of exclusion, women may have secured the vote and yet had little power to shape the national legislative agenda.

But the problem was not only, or even primarily, one of political marginalization. After all, there were men in the movement for civil liberties who supported the decriminalization of obscenity and birth control.[408] The core prob-

405. Even the American Civil Liberties Union (ACLU), which had just begun a court-centered campaign, was not yet framing sex as a civil liberty. WHEELER, *supra* note 347, at 3, 40-56 (documenting how the ACLU's "growing eagerness to aid individuals censored for disseminating information about sex" in the first decades of the twentieth century had yet to blossom into a more comprehensive campaign). Dennett found herself in court because she was prosecuted, not because she embarked upon an affirmative litigation campaign. *See supra* text accompanying notes 346-349.

406. *See supra* notes 351-355 (describing popular newspaper coverage of Comstock resistance and the litigation it engendered); *infra* note 423 and accompanying text (reporting popular support for birth control expressed in polls).

407. In 1965, only two Article III judges were women; by 1973, when *Roe* was decided, there were only six. Mary L. Clark, *One Man's Token Is Another Man's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 492-93 (2004). In the 93rd Congress, which began in 1973, there were sixteen women in the House and *none* in the Senate. *History of Women in the U.S. Congress*, *supra* note 342. In 1973, the faculty of Yale Law School included only one tenured woman; eight years later, the faculty of Harvard Law School had only two. Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of the Courts in Democracy*, 96 N.Y.U. L. REV. 1902, 1940 n.192 (2021).

408. For examples from the nineteenth century, including Ezra Heywood, D.M. Bennett, and Edward Foote, see *supra* notes 190-192, 206-216 and accompanying text. In the twentieth century, civil libertarians like Max Eastman, John Dewey, Jacob Riis, and Morris Ernst played a significant role in the resistance to Comstock. *See supra* notes 327, 347, 357-359 and accompanying text.

lem advocates faced seems to have been the stigmatization of political speech about sex and reproduction. Comstock censorship and surveillance outlasted the more spectacular prosecutions by generations, chilling discussion of sex and reproduction in a range of contexts, including politics and constitutional law.

Precisely because the First Amendment as we understand it today did *not* prohibit these political prosecutions—allowing government to ban political speech and even basic information about contraception as "obscenity" until the late twentieth century[409]—it is hard for us now to grasp how deeply federal and state Comstock prosecutions stigmatized political speech about sex and reproduction as obscene, deforming the democratic process long after the prosecutions ended.

We call these legacy effects of the Comstock prosecutions "chill." We employ the First Amendment concept of chill to emphasize (1) that Comstock enforcement often involved state action threatening speech that today would be constitutionally protected expression[410] and (2) that generations of prosecutions unpredictably targeting and surveilling speech about sex and reproduction stigmatized that speech in ways that radiated far beyond the original prosecutions.[411] Chill highlights, as John Dewey recognized, that obscenity law

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409. It was not until the 1950s in *Roth v. United States*, discussed *infra* Section III.B, that the Court revisited the *Hicklin* standard and narrowed the First Amendment understanding of obscenity to material that the *average* person, rather than the most susceptible person, would find appeals to the prurient interest. *See* 354 U.S. 476, 488-49 (1957). And it was only in 1973, in *Miller v. California*, that the Court adopted the prevailing understanding of obscenity, requiring that the government show that the "average person, applying contemporary community standards," would find that the work, "taken as a whole, appeals to the prurient interest"; "depicts or describes, in a patently offensive way, sexual conduct"; and "lacks serious literary, artistic, political, or scientific value." 413 U.S. 15, 24 (1973) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

Therefore, by the early 1970s, state laws prohibiting the mailing of information about contraception were of uncertain constitutionality. *See, e.g.*, C. Thomas Dienes, *The Progeny of Comstockery—Birth Control Laws Return to Court*, 21 AM. U. L. REV. 1, 62 (1971) (arguing that "even if the Massachusetts statutes do not prohibit the *use* of contraceptives to married persons protected in *Griswold*, statutory restriction of the effectuation of that right through severe limitations on access to contraceptive information may itself be constitutionally impermissible" and explaining that it is "highly questionable" to assume that "a state may *prohibit* the communication of knowledge to the unmarried consistently with the first amendment guarantee"); *see also* Kenneth D. McCoy, Jr., Comment, *Constitutionality of State Statutes Prohibiting the Dissemination of Birth Control Information*, 23 LA. L. REV. 773, 775-76 (1963) (making a similar argument in 1963).

410. For a discussion of First Amendment law in the era of Comstock and ensuing decades, see Gibson, *supra* note 19, at 293-309.

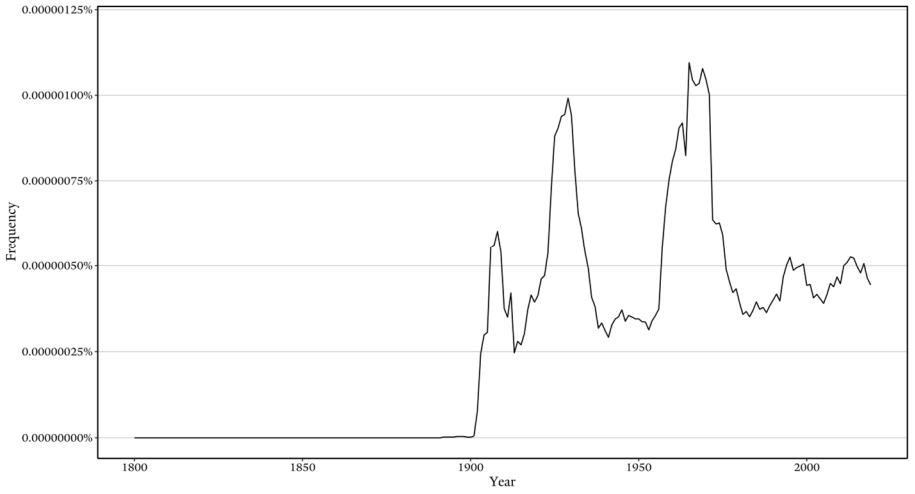
411. *See infra* Sections III.A-B.

actively shaped social norms: the perennial threat of government censorship played a significantly underappreciated role in stigmatizing speech about the regulation of intimate life, both in the era of the statute's active enforcement and for generations after.[412] Obscenity law helped mark public claims about sex and reproduction as *obscene*, dirty, shameful, and unworthy—as the expression of base animal impulse rather than liberty, conscience, or constitutional right.

As Section III.A shows, the result was that legislatures proved unwilling or incapable of reforming obscenity legislation, even as Americans—a majority of whom may never have supported the obscenity laws in the first instance—proved increasingly alienated from the Comstock laws. In these circumstances of legislative lockup, courts ultimately stepped in to align prohibitions on obscenity with evolving public norms, responding to the constitutional claims of Comstock critics, generally without acknowledging that they were doing so. In Section III.B, we examine critically important decisions in First Amendment and substantive-due-process law that decades later drew upon understandings forged through Comstock conflict in the 1930s. As an Ngram illustrates, usage of "Comstockery" surged at the time of these constitutional decisions, even as judges made scant reference to their statutory antecedents.

412. *See supra* Section II.C.

FIGURE 1. USAGE OF "COMSTOCKERY" FROM 1800-2019[413]



A. Barriers to Democratic Change: Political Power, Comstock Chill, and Legislative Lockup

In the early twentieth century, as we have seen, courts began to interpret the Comstock Act to shift responsibility for oversight of sex, contraception, and abortion from government censors to the institutional auspices of medicine. Growing numbers of (married) women secured access to contraception and in some cases abortion, authorized by doctors for women's health, rather than as a matter of constitutional right.[414] As compared to earlier understandings of the Comstock Act, this regime of health—both a language and an institutional framework for regulating sex and reproduction—was both emancipatory and constraining. Americans fought for and secured a measure of freedom from obscenity prosecutions, but the constitutional claims they asserted in the process have been lost to memory.

413. "*Comstockery*," GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph ?content=Comstockery&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3&case_insensitive=false [https://perma.cc/7A9Y-WQKT].

414. On physician discretion and the breadth of understandings of "life" as used in statutes that authorized abortions to save the life of the mother, see REAGAN, *supra* note 143, at 61; LUKER, *supra* note 146, at 36; and Siegel & Ziegler, *supra* note 23, at 21-28.

The interplay of political power and stigma is evident in the adjudication of the 1918 prosecution and incarceration of Margaret Sanger. It appears on the face of it that Sanger's protest action, at a time when women still lacked the vote, succeeded in moving public opinion and the law in the direction that the movement for voluntary motherhood sought. But her victory came at a hidden and high price.

Sanger's brief asserted that the state's obscenity law was unconstitutional, not only because the state's criminalization of contraception jeopardized women's health but also because it denied women the rights to voluntary motherhood and sex in the marital relationship.[415] The judge responded to Sanger's and Byrne's constitutional arguments without ever recognizing those arguments as claims on the Constitution or conscience; instead, within the provision of the state's Comstock law that allowed men access to condoms for "cure or prevention of disease," he located statutory permission for doctors to prescribe contraception for married women as well.[416] At the same time, the court upheld Sanger's and Byrne's convictions because, as nurses, they were not licensed to dispense contraception to their patients.[417]

Sanger had challenged the obscenity law on the ground that women should be able to choose motherhood and protect their health without compromising on sexual freedom. Her case set in motion a compromise in which (some) women could secure access to contraception, but not as a matter of right.[418] The standard of "health" the New York court recognized accommodated Sanger's and Byrne's claims in a way that preserved male control.[419] The spread of

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415. *See* Appellants' Brief in Support of Motion for Stay of Proceedings at 8-9, People v. Sanger, 166 N.Y.S. 1107 (App. Div. 1917) (under the heading "'Birth Control' Means 'Voluntary Motherhood,'" objecting that Section 1142 of the Penal Law classifies "voluntary motherhood" as "obscene," and observing that the relators seek "to eliminate 'voluntary motherhood' from the 'obscene' classification"); *id.* at 15 (objecting that if a woman "wishes to enjoy her marital right of copulation and the pleasure and happiness incidental thereto, she is absolutely denied it, unless she so conduct the act that conception ensue").

416. People v. Sanger, 118 N.E. 637, 637-38 (N.Y. 1918) (citing N.Y. PENAL LAW § 1145); *see also id.* ("This exception . . . is broad enough to protect the physician who in good faith gives such help or advice to a married person to cure or prevent disease.").

417. The judge upheld Sanger's and Byrne's convictions after concluding that a sexual-health provision did not cover their conduct. *Id.* New York's governor pardoned Byrne "on condition that she refrain from further disseminating birth control information." *Whitman Pardons Mrs. Ethel Byrne*, ARIZ. REPUBLICAN, Feb. 2, 1917, at 2, 2.

418. Courts' increasing willingness to distinguish obscenity from health enabled momentous shifts in obscenity law, on terms that effaced the constitutional claims that drove them.

419. *Sanger*, 118 N.E. at 637-38. The statutory exception had its own gendered logic. The legislature had created an exception allowing condoms to protect men's health during sex, without a parallel exception for women who needed protection against conception for health rea-

condoms available *without* a physician's prescription "for the prevention of disease" in the aftermath of *Sanger* expanded the meaning of "health" for the expression of male sexuality while ensuring that "women's procreative destiny [remained] in men's hands."[420]

Margaret Sanger learned from her encounter with the law. Whether we consider this a chilling of expression, a pragmatic accommodation of power, or both, Sanger shifted from the language of right to the language of health, seeking the medical profession's support in providing contraceptive access for women—and persuading men in elected office and the judiciary to advance her cause.[421]

But the same political forces that Sanger tried to accommodate—by substituting claims of need for claims of right and claims of health for claims of freedom—proved too powerful for women to reckon with, even after many were enfranchised and sought change through electoral politics. Now, they faced both marginalization in the political process and the difficulty of advocacy about topics that were deemed obscene and had been subject to sixty years of censorship and surveillance.

Though few reports survive, it is clear that Comstock chill obstructed political advocacy. Men on Capitol Hill were obviously "embarrassed" to discuss the legal regulation of obscenity or contraception with women.[422] Despite numerous polls showing supermajority support for legalizing access to contraception, especially during the Depression,[423] advocates were unable to move a virtually

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sons. TONE, *supra* note 48, at 107-10 (describing the flourishing of the condom industry in the aftermath of the *Sanger* decision and explaining that the "needs of women, which Sanger focused on, were not paramount in the minds of the various parties—public health advocates, military leaders, and politicians—who unwittingly helped condoms toward legitimacy"). Dennett reported that legislators were unwilling to modify the ban on contraception that they believed would preserve "moral standards" and prevent "race suicide." Dennett, *supra* note 331, at 4.

420. TONE, *supra* note 48, at 108; *see also supra* Section II.D (discussing the relationship between contraception and health in *United States v. One Package*).

421. For a report of how the New York Court of Appeals's reasoning in her case helped change Sanger's views about the prospects for change, see KENNEDY, *supra* note 390, at 219-20.

422. *See* Hazel C. Benjamin, *Lobbying for Birth Control*, 2 PUB. OP. Q. 48, 59 (1938) (reporting on incremental progress interacting with congressmen ignorant of the issue and uncomfortable discussing it with women: "This is a far cry from 1930 when some of our representatives were forcibly ejected from Congressional offices because the subject was considered 'too indecent to discuss with a lady!'"); *see also* Norman E. Himes, *Birth Control in Historical and Clinical Perspective*, 160 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 63 (1932) (discussing "embarrassed legislators").

423. Contemporaries were well aware of widespread contraceptive use, and of reliance on abortion. *See* Note, *Contraceptives and the Law*, 6 U. CHI. L. REV. 260, 265 (1939) (estimating the

all-male Congress to change the statute.[424] Congressmen professed support for changing the Comstock law but in the end withheld it.[425] They understood that the vote to legalize access was politically fraught and entangled in questions of gender, claims of "race suicide," and religion.[426] Because women re-

numbers). The public sought change. *See* Benjamin, *supra* note 422, at 49-50 (discussing numerous polls supporting legalization of contraceptive access). In 1936, the American Institute of Public Opinion, the predecessor to Gallup, found that seventy percent of Americans responded that "the distribution of information on birth control should be made legal." George Gallup & Claude Robinson, *American Institute of Public Opinion—Surveys, 1935-38*, 2 PUB. OP. Q. 373, 390 (1938). For additional coverage of this polling, see *Americans by More than Two to One Favor Modifying Bans Against Distribution of Birth Control Information*, ROCHESTER DEMOCRAT & CHRON., Nov. 29, 1936, at E1, E1. For further detail, see Inst. of Pub. Op., *Large Majority Believes Distribution of Birth Control Data Should Be Legalized*, WASH. POST, Nov. 29, 1936, at B1, B1. One 1937 poll found that nearly eighty percent of American women approved of birth-control use. REAGAN, *supra* note 143, at 134; *see also* KENNEDY, *supra* note 390, at 140 (discussing rising and even greater support among women in this era).

424. *See History of Women in the U.S. Congress*, *supra* note 342 (showing eight women in Congress for most of the 1930s, with typically one to two women in the Senate).

425. *See* Benjamin, *supra* note 422, at 60 ("Although there has been an undoubted increase in the number of Congressmen willing to express themselves as favorable to the proposed legislation on birth control in an interview with a lobbyist or a constituent, very little action resulted.").

426. In addition to women's continuing status as outsiders in politics, historians point to Catholic opposition as an obstacle to Sanger's and Dennett's efforts to amend the statute. *See* PETER ENGELMAN, A HISTORY OF THE BIRTH CONTROL MOVEMENT IN AMERICA 163-64 (2011); JEAN BAKER, MARGARET SANGER: A LIFE OF PASSION 224-25 (2011); CHESLER, *supra* note 18, at 330-445.

Yet in this era, Catholics were still subject to significant bias and not well positioned to set a national political agenda. It appears that to broaden the appeal of their demands, some Catholic leaders invoked then-popular arguments about "race suicide" to warn legislators about the perils of legalizing access to contraception, restating religious objections in racial terms. Sanger's opponents included the politically powerful Father Coughlin, who in 1934 warned Congress against amending the Comstock Act, arguing that legalizing birth control risked eventually making "Anglo-Saxons . . . ancient history" because "[t]he negroes are outbegetting the Anglo-Saxon and Celtic races in this country." *Birth Control Would Extinguish Anglo-Saxons, Priest Tells House*, SALT LAKE TRIB., Jan. 19, 1934, at 9, 9. Other Catholic leaders joined in. *See Birth Control "Race Suicide,"* ATLANTA CITY PRESS, Dec. 19, 1935, at 2, 2 (describing Archbishop Patrick Hayes of New York as arguing that "the practice of birth control involves the danger of race suicide"); *Birth Control Trend Opposed*, ESCANABA DAILY PRESS, July 18, 1934, at 2, 2 (quoting the president of the International Lions Association as arguing that legal birth control poses "a serious menace to the white race"). A mobilized plurality certainly contributed to the defeat of efforts to modify or repeal the Comstock Act, but as Dennett indicated, the political impulse to preserve the status quo was more widespread. *See* Benjamin, *supra* note 422, at 59-60; Himes, *supra* note 422, at 63-64. Considerations of gender seem to have played a role, *see supra* notes 422-424 and accompanying text, as did considerations of religion and race.

mained at the nation's political margins, members of Congress feared the costs of appearing to license obscenity—or contraception—more than they did any potential backlash from a group of voters who lacked leverage in the nation's major political parties.

Congressional inaction posed real risks to women's life and health. A woman who used ineffective contraception was at risk for complications related to pregnancy or abortion[427]—or injury by douching with Lysol.[428] A growing number of scientific experts now advised legalizing the contraceptive market so that it could be regulated both for efficacy and safety. As sociologist Norman Himes described the problem of "embarrassed legislators," a campaign was needed "until the legislators give the people what they want."[429]

But in the end, despite public demand and open lawbreaking, legislative lockup persisted. Men who grew up under Comstock were more comfortable with inaction, unwilling publicly and expressly to permit practices that enabled Americans to separate sex and childbearing, preferring to leave them hidden and marked by law as obscene. In this political ecology, movement leaders appreciated that advocating openly for abortion would have been even more politically challenging, risked alienating potential AMA allies, and was perhaps unnecessary given that some of the drugs to which women turned were used both as contraceptives and abortifacients.[430]

In times such as these, when legislatures persist in acting in evidently countermajoritarian ways, judges may prove more democratically responsive than the political branches.[431] In the 1930s, Judge Augustus Hand responded to

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427. *See* Tone, *supra* note 391, at 491-94; REAGAN, *supra* note 143, at 135 ("Medical studies and sex surveys demonstrated that women of every social strata turned to abortion in greater numbers during the Depression."); LUKER, *supra* note 146, at 41 (explaining that "illegal abortion flourished" during the Depression).

428. *See supra* note 394 and accompanying text. Lysol ads were widespread during the Depression, and the product's use as a contraceptive left women susceptible to pregnancy and burns. *See* Tone, *supra* note 391, at 493; Rose Eveleth, *Lysol's Vintage Ads Subtly Pushed Women to Use Its Disinfectant as Birth Control*, SMITHSONIAN MAG. (Sept. 2013), https://www.smithsonianmag.com/smart-news/lysols-vintage-ads-subtly-pushed-women-to-use-its-disinfectant-as-birth-control-218734 [https://perma.cc/38BP-8FFP]. Failure to regulate the market for contraception meant that sellers could prey on families' economic desperation. *See* Himes, *supra* note 422, at 63-64; Tone, *supra* note 391, at 486.

429. Himes, *supra* note 422, at 63-64.

430. *See* Patterson, *supra* note 393, at 159-60, 165 (discussing advocates' relations with the American Medical Association); *supra* text accompanying note 393 (discussing abortifacients).

431. *See* Corrina Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 115 (2012) (observing that scholars at the "intersection of law and politics" have "shifted their attention" from countermajoritarianism in courts to the "democratic failings of the democratically elected

Dennett's and Sanger's arguments in ways the political branches would not. In refusing to convict them, he read the language of the obscenity statute in terms responsive to its text and history, to public opinion, and to families' health exigencies—even as Congress remained reticent to act.[432] As Hand reasoned in *One Package*, Congress could not have intended to "prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients."[433] The decisions were statutory. But the federal courts of appeals that repudiated sexual-purity understandings of obscenity in the 1930s were reasoning from an understanding of constitutional democracy that conflict over Comstock had engendered.

Even these victories, however, were far from complete, as they largely erased both the history of Comstock resistance and the understandings of democracy, free speech, family, and reproductive liberty that the movement advocated. And even when allowed to vote, women still lacked power to enact into law the holdings of the cases. At the time of the *Roe* decision, for example, not a single woman was serving in the Senate.[434]

B. From Health to Privacy: Substantive-Due-Process Law

The cases under the Comstock Act that helped establish limits on government regulation of individual liberty played a significant role in shaping modern constitutional law under the First Amendment and in Fourteenth Amendment substantive-due-process cases. Members of the Warren and Burger Courts who came of professional age at the height of Comstockery decided constitutional cases that were silent about the reproductive provisions of the Comstock Act.[435] The younger members of these Courts wrote constitutional decisions that drew on understandings forged in conflict over the meaning of obscenity in the federal postal statute without mentioning the Comstock law.

branches"); *id.* at 116-17 (discussing how courts respond to a widespread change in public attitudes and policy preferences to which the political branches have failed to respond).

432. *See* Benjamin, *supra* note 422, at 48-49 (discussing the relationship between the legislative campaign and the judicial decision in *One Package*).

433. United States v. One Package, 86 F.2d 737, 739 (2d Cir. 1936).

434. *See supra* note 407 and accompanying text.

435. Without discussing the Justices' alignment across decisions, we note that Justice Felix Frankfurter was born in 1882, Hugo Black in 1886, William Douglas in 1898, William Brennan in 1906, and Harry Blackmun in 1908. TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 303, 311, 315, 358, 388 (2001).

As we have seen, *Dennett*, *Ulysses*, and *One Package* helped liberate obscenity law from the grips of sexual-purity reasoning.

Though forgotten today, *Dennett*'s critique of the *Hicklin* test's Victorian logic helped forge a fateful shift in obscenity law. In 1957, in *Roth v. United States*, the Court ruled that "obscenity is not . . . constitutionally protected speech or press,"[436] yet as he did so Justice Brennan narrowed the forms of expression that states could prohibit as obscene. He did so by rejecting a sexual-purity understanding of obscenity, repudiating the *Hicklin* test, and citing *Dennett* to hold that "sex and obscenity are not synonymous."[437] At this point, Justice Brennan incorporated into the First Amendment core understandings produced in Comstock conflict—that "[s]ex . . . is one of the vital problems of human interest and public concern."[438] A per curiam decision handed down the following year in *ONE, Inc. v. Olsen*—viewed by later historians as "a necessary first step in the evolution and growth of the movement for gay rights"[439]—overturned a Ninth Circuit decision holding that the homophile magazine *ONE* violated the Comstock Act.[440]

Modern constitutional cases protecting the individual's freedom to make decisions about intimate and family life were also built on understandings forged in *Dennett* and *One Package*. Some states refused to follow federal Comstock cases distinguishing between health and obscenity in interpreting Comstock-era state statutes, and this handful of states persisted as outliers for several decades and ultimately led to federal constitutional litigation.[441] In 1961, in

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436. 354 U.S. 476, 485 (1957). The dissent invoked Comstock to express the view that the statute's censorship of speech in fact offended the First Amendment. *Id.* at 512 (Douglas, J., dissenting). For a more recent commercial-speech case discussing the history of the statute, see generally *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which discusses whether the post office could differentially treat circulars for condoms.

437. *Roth*, 354 U.S. at 487 n.21 (citing United States v. Dennett, 39 F.2d 564, 569 (2d Cir. 1930)).

438. *Id. Roth* references an excerpt of the postal obscenity statute that was edited to exclude its language about contraception and abortion. *Id.* at 479 n.1 (quoting an excerpted version of 18 U.S.C. § 1461).

439. Briker, *supra* note 18, at 56.

440. 355 U.S. 371, 371 (1958). Like *Roth*, *ONE* made no mention of the statute's provisions on abortion and contraception. *Id.* For more on the significance of *ONE*, see Ball, *supra* note 18, at 229-30; Briker, *supra* note 18, at 54-56; and Carlos A. Ball, The First Amendment and LGBT Equality: A Contentious History 15-23, 36-49 (2017).

441. *See, e.g.*, Commonwealth v. Gardner, 15 N.E.2d 222, 223-24 (Mass. 1938) (refusing, after *One Package*, to exempt physicians prescribing contraception for the health of married patients from an 1879 state law); State v. Nelson, 11 A.2d 856, 862-63 (Conn. 1940) (holding that a chain of healthcare clinics offering contraceptive services to the poor that opened after *One Package* violated an 1879 state law); *see also* Cary Franklin, *The New Class Blindness*, 128 Yale L.J. 2, 22 (2018) (following this conflict as it led to *Griswold*).

Poe v. Ullman, the Court refused to hear a challenge to Connecticut's obscenity statute prohibiting "the use of contraceptive devices and the giving of medical advice in the use of such devices"[442]—with several of the Justices discussing Comstock and the federal law[443]—even though the record showed that the criminal law chilled communications between physicians and patients and subjected the complainants to extreme physical injury and interference with their intimate lives.[444] As late as 1963, a commentator was still speculating about the constitutionality under the First and Fourteenth Amendments of a Louisiana law banning the dissemination of *information* about contraception.[445]

As public resistance to these restrictions grew during the 1960s, the Court began to address Fourteenth Amendment challenges to state laws criminalizing reproductive choice, two of which were Comstock-era laws restricting contraception. The Court would constitutionalize understandings forged in the earlier cases interpreting the statute, yet it would do so without mentioning the reproductive provisions of federal obscenity law.

In *Griswold v. Connecticut*, the Court finally faced the constitutional questions about Connecticut's law it had avoided four years earlier in *Poe* and held that married couples have a federal constitutional right to make decisions about contraception free from criminal control by the state.[446] Yet as it reached the merits, the Court's opinion said nothing about the contraceptive provisions of the federal obscenity law still on the books.[447] The Court's silence about the contraceptive provisions of federal obscenity law in *Griswold* seems to have

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442. Poe v. Ullman, 367 U.S. 497, 498 (1961).

443. *Id.* at 519-20 (Douglas, J., dissenting); *id.* at 546 n.12 (Harlan, J., dissenting); *see* Ryan C. Williams, *The Paths to* Griswold, 89 NOTRE DAME L. REV. 2155, 2157-60 (2014) (discussing the jurisprudential debates through which the Court addressed movement questions).

444. *Poe*, 367 U.S. at 510 (Douglas, J., dissenting); *see also id.* at 513 ("The right of the doctor to advise his patients . . . seems so obviously within First Amendment rights as to need no extended discussion.").

445. *See* McCoy, *supra* note 409, at 775-76 (arguing that "[s]tate regulation of noncommercial dissemination of birth control information may be vulnerable to federal constitutional attack on two theories" and discussing First Amendment and substantive-due-process law that might support a challenge). A dozen states at one point criminalized speech and information about birth control and abortion. *See supra* text accompanying note 48.

446. 381 U.S. 479, 480, 484-86 (1965). For a discussion of contraceptive availability—particularly condoms—in Connecticut at the time of the decision, see Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J.F. 349, 353-54 (2015). The case was the fruit of years of national and in-state advocacy. *See* Allison Day, *Guiding* Griswold*: Reevaluating National Organizations' Role in the Connecticut Birth Control Cases*, 22 CARDOZO J.L. & GENDER 191, 198 (2016).

447. *See Griswold*, 381 U.S. at 481-86.

been intentional. At oral argument in the case, in a colloquy with the plaintiff's attorney, Thomas I. Emerson, the Court *did* discuss the Comstock Act and appeared to proceed on Emerson's explanation that *One Package* was the leading case interpreting the "Federal statute[s] 18 United States Code 1461 and 1462," "which held that they prevented only the transportation of contraceptive devices for unlawful purposes—illegal abortions or unlawful purposes—and did not prevent their transportation where those purposes did not exist"; as the Justices inquired whether particular contraceptive devices for women might qualify as health-protecting (presumably as condoms did), the Justices' euphemisms about the devices prompted nervous laughter in the courtroom.[448] In these euphemisms, evasions, and laughter, we see the legacy of Comstock prosecutions marking public discussion of contraception as obscene now shaping the Court's deliberations in *Griswold*, even as the Court reached the constitutional question judges had ignored a half-century earlier in *Sanger* and had avoided in *Poe*.

In deciding *Griswold*, the Court was careful sub silentio to distinguish and to distance Comstock. The Court emphasized that the Connecticut case concerned "a law . . . forbidding the *use* of contraceptives,"[449] in this way pointing out to those in the know that the state law regulated matters outside of the reach of federal law. (Observe that in quietly emphasizing that the state law regulated matters that the federal obscenity laws did not, the Court characterized the Connecticut law in terms that omitted reference to its provisions pro-

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448. Transcript of Oral Argument at 11-12, 20-21, *Griswold*, 381 U.S. 479 (No. 496). During oral argument, Joseph B. Clark, the lawyer representing Connecticut, attempted to distinguish particular contraceptives for women from condoms by arguing that "only certain of these devices could be used for [preventing] disease." *Id.* at 21. In arguing this point, Clark referenced a letter from the Connecticut Commissioner of Food and Drugs pertaining to "devices," which discussed the status and use of diaphragms. *Id.* The Court asked him to point to the place in the record that described such "devices," prompting laughter:

> THE COURT: Is the device which you're talking about here described in the record? If so, what page?
> MR. CLARK: If Your Honor please, a device that could be used for prevention of disease—
> THE COURT: . . . You said this one is not that kind. Is it described in the record? I won't ask you to describe it.
> [Laughter.]
> THE COURT: I want to see where it's described.
> MR. CLARK: They are listed in the findings as exhibits. I think that is the only place it can be found in the record, the particular things that were given to the particular married women in the case.

Id. at 21-22.

449. *Griswold*, 381 U.S. at 485.

hibiting counseling about contraception, which, like the federal law, implicated questions of freedom of speech.[450])

The Court then declared, for the first time, that a ban on contraceptive use presented a question of constitutional magnitude, not by appeal to the long-running debate over speech and sexual liberty that Comstock had provoked, but instead by appeal to penumbras of the Constitution's text. Reasoning that "specific guarantees in the Bill of Rights have penumbras," the Court asserted that a marital right to privacy could be found within "the zones of privacy created by several fundamental constitutional guarantees."[451]

Just as it derived the right to privacy by analyzing the penumbras of the Constitution's text—rather than by reference to the nation's long-running debate over the government's power to surveil and police sex and reproduction—the Court then defined the reach of the privacy right as if Comstock enforcement had never happened, asking: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[452]

The Court's appeal to this dystopian prospect is remarkable. For generations, the Court's nightmare scenario had been all too real for many Americans. Ninety years earlier, Congress had first declared marital nonprocreative sex obscene and unleashed a regime of criminal surveillance and censorship. The Court was speaking as if this dreaded prospect had never occurred.

Like the 1930s cases before it, *Griswold* provided important forms of relief from the coercion of the criminal law. At the same time, the Court provided relief in a right of privacy at least temporarily grounded in the institution of marriage, and not on the grounds that Comstock critics originally urged: that democracy requires limits on the government's power to criminalize citizens' speech and intimate lives or it is no democracy at all. *Griswold*'s approach, with its language of penumbras and emanations, provoked mockery and criticism

450. The Court mentioned the counseling provision, which made an individual a principal in the crime of contraceptive use if she "assists, abets, counsels, causes, hires or commands another." *Id.* at 480 (quoting CONN. GEN. STAT. § 54-196 (1958)). The Court, however, only analyzed the use provisions of the statute. *See id.* at 484-86 (discussing the "maximum destructive impact" on marriage of a law regulating the "use of contraceptives"). Connecticut would not repeal the counseling provision until 1969. Penal Code, Pub. Act No. 828, § 214, 1969 Conn. Pub. Acts 1554, 1618 (repealing CONN. GEN. STAT. §§ 54-196 to -198 (1958)).

451. *Griswold*, 381 U.S. at 484-85.

452. *Id.* at 485-86.

from a range of academic critics,[453] even as editorial reaction to the decision was largely positive.[454]

Congress repealed the contraceptive language in the Comstock law in 1971,[455] a scarcely noticed development that the Court did not bother to mention a year later in *Eisenstadt v. Baird*, when, reviewing Massachusetts's obscenity law, it held that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[456] And the following year, when the Court extended the right to privacy recognized in *Griswold* and *Eisenstadt* to decisions about abortion in *Roe*, neither the majority nor the dissent mentioned the abortion provisions of the federal statute. The majority recounted the history of

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453. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971) ("Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups . . . . Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical."); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 34-35 (1967) (contending that *Griswold*'s approach was a "malformation of constitutional law").

454. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 256 (1994) (describing the editorial reaction to *Griswold* as "largely but not unanimously positive"); Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316, 321 (2015) ("[T]he wide-ranging conflict over Judge Bork's confirmation helped entrench *Griswold*. After this great conflict, subsequent nominees concluded that *Griswold*, like *Brown*, was part of the constitutional canon—accepted as mainstream.").

455. *See* Act of Jan. 8, 1971, Pub. L. No. 91-662, §§ 1-4, 84 Stat. 1973, 1973. The 1971 amendment passed with scant attention and without any mention of abortion. A search of articles in the *New York Times* and the *Washington Post* indicates that the bill was mentioned only once, in a two-sentence paragraph on page 18 of the *Times* explaining that the measure passed the House and was sent to the Senate by voice vote. *Contraceptive Ban Loses*, N.Y. TIMES, June 23, 1970, at 18, 18. The sponsors of the bill spoke briefly in the House and Senate, but there was no recorded opposition or debate. 116 CONG. REC. 20629-30, 42356-57 (1970). This may be due in part to broad statements of support submitted during committee hearings by the Departments of Health, Education, and Welfare (HEW), Commerce, State, Labor, Treasury, and the Post Office. HEW wrote that "[t]here no longer seems to be any justification for associating with the obscene and immoral . . . articles for the prevention of conception," and the Postmaster General explained that "existing statutory prohibitions . . . merit[] reappraisal, in light of court decisions and present attitudes." H.R. REP. NO. 91-1105, at 3-4 (1970).

456. 405 U.S. 438, 453 (1972) (emphasis omitted). The Court was once again silent, although Justice Douglas cited a source called *The Progeny of Comstockery* for background on the policies underlying the Massachusetts law. *Id.* at 458 n.2 (Douglas, J., concurring) (citing C. Thomas Dienes, *The Progeny of Comstockery—Birth Control Laws Return to Court*, 21 AM. U. L. REV. 1, 3-44 (1971)).

abortion regulation as if the Comstock law never mentioned abortion.[457] It held that the right to privacy recognized in *Griswold* and other liberty cases was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[458]—speaking as if Americans, at the time of the Fourteenth Amendment's ratification or since, had never before asserted claims of reproductive liberty.

Griswold, *Eisenstadt*, and *Roe* built upon understandings about law and intimate life that had been forged in decades of struggle over federal obscenity law, even as the Court was silent about the statute and conflict over it. As judges began to respond to new mobilizations seeking relief from the criminalization of intimate life in the 1960s and 1970s,[459] the Supreme Court sought authority not by invoking the memory of Americans who resisted Comstock censorship, but instead by invoking the authority of marriage and medicine—fundamental institutions of American life that men might respect.

Griswold summoned the dystopia of police invading the marital bedroom.[460] *Roe* famously discussed the abortion decision as the *physician's* right, jointly exercised with his patient.[461] In these shadowy referents, we can see a memory of the Comstock struggle expressed by a Court whose members were born before women could vote and who were more comfortable appealing to the authority of marriage and medicine than reasoning about women as full and equal rightsholders.[462]

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457. Roe v. Wade, 410 U.S. 113, 130-52 (1973).

458. *Id.* at 153.

459. *See* NeJaime & Siegel, *supra* note 407, at 1923 (observing that in the 1970s, "[s]tigmatization of the banned practices was so severe that it became difficult even publicly to discuss the practices whose criminalization claimants sought to challenge," that "the groups developed forms of protest" (e.g., speak-outs and coming out) "to contest their criminalization," and that "the turn to courts was part of a strategy to cope with deliberative blockages and legislative lockout rooted in conditions we now recognize as subordination").

460. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

461. *See Roe*, 410 U.S. at 163-66 (explaining that "for the period of pregnancy prior to th[e] 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated," identifying "the right of [a] physician to administer medical treatment according to his professional judgment," and characterizing "the abortion decision" as "inherently, and primarily, a medical decision, . . . basic responsibility for [which] must rest with the physician").

462. *See* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims That Engendered* Roe, 90 B.U. L. Rev. 1875, 1879-86 (2010) (tracing the progressive shift in the courts' understanding of abortion during the 1960s and 1970s from a doctors' rights model to a women's rights model); Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of* Roe v. Wade, *in* Reproductive Rights and Justice Stories 53, 70-71, 74 (Melissa Murray, Katherine Shaw &

There are any number of reasons why the Justices who decided *Roth*, *Griswold*, *Eisenstadt*, and *Roe* sought to endow their decisions with traditional sources of authority—whether by appeal to the Constitution's text, the sanctity of the marital bedroom, or the expertise of the medical profession. Not only did the cases concern long-stigmatized areas of sexual regulation, but they entangled the Court—grappling with enforcing its desegregation decrees[463]—in ongoing debates about the interpretation of the due-process liberty guarantee and the Ninth Amendment. It is not surprising that the Court was reticent to acknowledge more about the cases' ties to Comstock conflict than it did in *Roth*—even as the Justices who came of age during these controversies surely recognized the connections and, as we have shown, even discussed Comstock case law as context for their decisions; relying on Comstock history would not have given their decisions more authority when public discussion of birth control still provoked laughter.[464] And so they did not mention Comstock in *Griswold*, *Eisenstadt*, or *Roe*. Nor did the Court mention Comstock in the course of overruling *Roe* in *Dobbs*, not even when the Court recounted the long history of abortion's criminalization—replete with statutory appendices.[465]

Today, American law has no knowledge of the democratic roots of the 1930s cases and the First and Fourteenth Amendment understandings that grew out of them. Conflicts deemed unworthy of mention were simply lost to memory, eroding the foundations of the constitutional decisions that built upon them. The erasure of the struggle over freedom of speech and reproductive liberty and the connections between them created an opening for critics of substantive due process to denounce "the facial absurdity of *Griswold*'s penumbral theory"[466] and to paint *Roe* as constitutional fabrication having no discernible basis in the nation's history and traditions.[467]

Reva B. Siegel eds., 2019) (observing that *Roe* preceded the Court's equal-protection sex-discrimination cases).

463. On the struggle to enforce desegregation mandates in the 1950s and 1960s, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 365-462 (2004) (detailing why "*Brown* was more difficult to enforce than *Roe*"); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 198-208, 243-45 (2011) (chronicling defiance of desegregation orders in and beyond Atlanta).

464. *See supra* notes 447-448 and accompanying text.

465. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 242-55, 302-30 (2022) (offering a historical account and appendix and claiming to "set the [historical] record straight").

466. *Id.* at 332 n.* (Thomas, J., concurring).

467. *Id.* at 261 (majority opinion) ("The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.").

IV. COMSTOCK REVIVALISM: QUESTIONS OF MEANING AND DEMOCRATIC LEGITIMACY

It has been nearly sixty years since the Court began to interpret the Constitution's liberty guarantee to limit the criminalization of intimate life, producing a body of law that remains hotly contested. But whatever can be said about this debate, it has not been about Comstock—that is, not until *Roe*'s overruling.

In the aftermath of *Dobbs*, mainstream antiabortion organizations have coalesced around reinterpreting and enforcing Comstock as the cornerstone of a new strategy to ban abortion nationally. In litigation challenging the Food and Drug Administration's authorization of medication abortion, antiabortion advocates and conservative attorneys general have advanced several Comstock claims, asserting that the statute barred the mailing of items related to abortion.[468] And before his election in 2024, surrogates for Donald Trump proposed that the Department of Justice enforce the abortion provisions of the Comstock law as the national ban on abortion that antiabortion groups seek.[469] During his time in the Senate, Trump's vice president, JD Vance, called for the Comstock Act to be enforced as an abortion ban.[470] Support for Comstock as an

468. *See supra* note 5 and accompanying text; *infra* notes 496-501 and accompanying text.

469. Roger Severino, the former head of the new civil-rights enforcement division in the Department of Health and Human Services, authored Project 2025's recommendation that HHS "[s]top promoting or approving mail-order abortions in violation of long-standing federal laws that prohibit the mailing and interstate carriage of abortion drugs." Roger Sev-erino, *Department of Health and Human Services*, *in* MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 449, 459 (Paul Dans & Steven Groves eds., 2023) [hereinafter PROJECT 2025]. On Severino's involvement in the first Trump Administration, see Emma Green, *The Man Behind Trump's Religious-Freedom Agenda for Health Care*, ATLANTIC (June 7, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-man-behind-trumps-religious-freedom-agenda-for-health-care/528912 [https://perma.cc/YUR6-PNX5]. Gene Hamilton, a former Trump Administration official known for engineering a policy of child separation, wrote Project 2025's recommendation that the Justice Department enforce Comstock against providers and drug companies. Gene Hamilton, *Department of Justice*, *in* PROJECT 2025, *supra*, at 545, 562. On Hamilton's work in the first Trump Administration, see Michael D. Shear, *Trump and Aides Drove Family Separation at Border, Documents Say*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/01/14/us/politics/trump-family-separation.html [https://perma.cc/5YZH-2Y3D]. Severino has since established that antiabortion leaders fully expect Trump to enforce the Comstock Act. Caroline Kitchener, Josh Dawsey & Hannah Knowles, *Trump Wins Back Antiabortion Movement as Activists Plot 2025 Crackdown*, WASH. POST (Jan. 5, 2024, 6:00 AM EST), https://www.washingtonpost.com/politics /2024/01/05/trump-abortion [https://perma.cc/UZ6C-B4T6].

470. On JD Vance's interpretation of the Comstock Act, see Dan Diamond & Meryl Kornfield, *Vance Urged the DOJ to Enforce the Comstock Act, Crack Down on Abortion Pills*, WASH. POST

abortion ban is widespread within the antiabortion movement and includes historically pragmatic organizations like Americans United for Life,[471] financial powerhouses in the conservative Christian legal movement like the Alliance Defending Freedom (ADF),[472] newly powerful activists in Students for Life,[473] and GOP powerbrokers tied to the Heritage Foundation.[474]

Why, after so many years, have abortion opponents made the Comstock Act a centerpiece of their legal agenda? Since the 1960s, the movement has sought more than the destruction of abortion rights.[475] Antiabortion advocates have long argued that state or federal laws granting reproductive rights themselves violate the Constitution by denying an unborn person equality and due process of law—and that any satisfactory solution on abortion requires a national ban.[476]

Now, with *Roe* overturned, opponents of abortion are constitutionally free to campaign for a national ban. But voters have overwhelmingly opposed the policies the antiabortion movement promotes. Polls conducted after the *Dobbs* decision show record-high support for abortion rights, numbers that seem to exceed even the high numbers before and after the Court's decision in *Roe*.[477]

(July 17, 2024, 7:21 PM EDT), https://www.washingtonpost.com/health/2024/07/17/jd-vance-abortion-comstock-vice-presidential-nominee [https://perma.cc/Z9CK-TVJR].

471. Elaine Godfrey, *A Plan to Outlaw Abortion Everywhere*, Atlantic (Dec. 6, 2023), https://www.theatlantic.com/magazine/archive/2024/01/anti-abortion-movement-trump-reelection-roe-dobbs/676132 [https://perma.cc/R4U6-835S].

472. *See infra* Section IV.A.

473. Emily Bazelon, *How a 150-Year-Old Law Against Lewdness Became a Key to the Abortion Fight*, N.Y. Times (May 16, 2023), https://www.nytimes.com/2023/05/16/us/abortion-comstock-act.html [https://perma.cc/5J2Z-BNCY].

474. *See supra* notes 469, 470 and accompanying text.

475. Mary Ziegler, Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment 32-39 (2022).

476. Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. Rev. 869, 870-74, 902-03.

477. *See* Wernau, *supra* note 3; Laura Santhanam, *Support for Abortion Rights Has Grown in Spite of Bans and Restrictions, Poll Shows*, PBS (Apr. 26, 2023, 5:00 AM ET), https://www.pbs.org/newshour/health/support-for-abortion-rights-has-grown-in-spite-of-bans-and-restrictions-poll-shows [https://perma.cc/6FJU-E563]. For polls documenting support for abortion rights before and after *Roe*, see generally Before *Roe v. Wade*: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling (Linda Green-house & Reva Siegel eds., 2010). Writing in the 1970s, William Ray Arney and William H. Trescher observed that the 1973 National Opinion Research Center survey "showed a re-markable liberalization of abortion attitudes on the part of all groups and subgroups of American society"—and that support remained fundamentally unchanged in the years im-mediately following *Roe*. William Ray Arney & William H. Trescher, *Trends in Attitudes To-ward Abortion, 1972-1975*, 8 Fam. Plan. Persps. 117, 124 (1976).

Each state to consider a ballot initiative on abortion in 2022 and 2023 reached the pro-abortion-rights outcome, including conservative states like Ohio.[478] In 2024, seven of the ten states to consider abortion-rights ballot measures passed them, enshrining reproductive freedoms in their state constitutions.[479]

Comstock revival has emerged as a tool to create a national abortion ban that advocates understand the American public would oppose.[480] Amidst the public's growing opposition to further criminalization, the Comstock Act has emerged as the antiabortion movement's stealth ban.[481] "We don't need a federal ban," explained Comstock revivalist Jonathan F. Mitchell, the former Texas solicitor general, "when we have Comstock on the books."[482] It is for this reason that contemporary abortion opponents *speak through* Comstock, using the long-unenforced provisions of the statute[483] as a platform for their own vision of the constitutional order. Mitchell was careful not to draw *too* much attention to Comstock—"I think the pro-life groups should keep their mouths shut as

478. *See* Kate Zernike, *Ohio Vote Continues a Winning Streak for Abortion Rights*, N.Y. TIMES (Nov. 7, 2023), https://www.nytimes.com/2023/11/07/us/politics/ohio-abortion-amendment.html [https://perma.cc/7BV2-SD6W]; Kate Zernike, *Why Democracy Still Hasn't Settled the Abortion Question*, N.Y. TIMES (Dec. 17, 2023), https://www.nytimes.com/2023/12/17/us/where-will-abortion-rights-land.html [https://perma.cc/2KQT-7A25].

479. Amy O'Kruk, Annette Choi, Lauren Mascarenhas, Kaanita Iyer & Piper Hudspeth Blackburn, *7 States Vote to Protect Abortion, While Efforts to Expand Access in Florida, Nebraska, and South Dakota Fail*, CNN (Nov. 6, 2024, 8:14 PM EST), https://www.cnn.com/2024/11/05/politics/abortion-state-ballot-measure-dg/index.html [https://perma.cc/L2SS-ZBH7]; Is-abel Guarnieri & Krystal Leaphart, *Abortion Rights Ballot Measures Win in 7 out of 10 US States*, GUTTMACHER INST. (Nov. 6, 2024), https://www.guttmacher.org/2024/11/abortion-rights-state-ballot-measures-2024 [https://perma.cc/FD3N-BXSW].

480. For recent polls showing very high and steadily increasing levels of support for abortion access, see *supra* note 3.

481. Scott L. Cummings views Comstock revivalist claims as "one facet of a broader far-right distortion of the principle of zealous advocacy into a style of lawfare . . . different from even the most aggressive forms of cause-oriented legal activism that has preceded it," in which law can be mobilized as a "vehicle for delivering dramatic, and democratically dangerous, policy wins outside of the zone of ordinary politics." Scott L. Cummings, *The Democratic Threat of Far-Right Lawyering*, 104 B.U. L. REV. ONLINE 249, 249-50 (2024).

482. Lisa Lerer & Elizabeth Dias, *Trump Allies Plan Sweeping New Abortion Restrictions*, N.Y. TIMES (Feb. 17, 2024), https://www.nytimes.com/2024/02/17/us/politics/trump-allies-abortion-restrictions.html [https://perma.cc/AQ2X-TATH].

483. For sources documenting the decline in enforcement of federal and state law before and after the Second Circuit's decision in *One Package*, see generally *supra* notes 396-398 and accompanying text.

much as possible until the election," he said[484] — presumably out of concern that voters might mobilize against it.

A. Reviving the Comstock Act

The idea for reinventing the Comstock Act began in a search for creative public-private enforcement strategies. In 2019, Mark Lee Dickson, a Texas activist and preacher,[485] collaborated with Mitchell to develop a private enforcement mechanism, initially with the primary aim of preventing federal courts from adjudicating the constitutionality of the law.[486] The two created a model for what they called "sanctuary cities for the unborn" through ordinances that banned abortion within county or city limits, and authorized anyone, no matter how disconnected from an abortion, to sue a physician and anyone aiding or abetting them.[487] These ordinances became a blueprint for a state law, S.B. 8, passed by Texas in 2021 and upheld by the Supreme Court later that year.[488] Beyond exploring private enforcement, Mitchell came to his ideas about the Comstock Act by exploring related ideas in his 2018 law-review article, *The Writ-of-Erasure Fallacy*, in which he argued that were a court to reverse an earlier opinion, that liberated the executive to "resume enforcing the statute, both against those who will violate it in the future and against those who have violated it in the past."[489]

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484. Lerer & Dias, *supra* note 482.

485. Amy Littlefield, *The Poison Pill in the Mifepristone Lawsuit That Could Trigger a National Abortion Ban*, NATION (Apr. 26, 2023), https://www.thenation.com/article/society/comstock-act-jonathan-mitchell [https://perma.cc/JW5X-QHNK]; Jenna Ebbers, *'Abortion Free America': Initiative Seeks More 'Sanctuary Cities for the Unborn' Across U.S.*, ARIZ. MIRROR (Aug. 9, 2023, 7:06 AM), https://www.azmirror.com/blog/abortion-free-america-initiative-seeks-more-sanctuary-cities-for-the-unborn-across-u-s [https://perma.cc/B65X-2RYF].

486. *See* Sabrina Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html [https://perma.cc/G2J2-UKL7]; Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here's How It Works.*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html [https://perma.cc/43DZ-Z6SK].

487. *See* Diana Chandler, *41 US Cities Ban Abortion in Sanctuary Cities for the Unborn*, BAPTIST PRESS (Nov. 2, 2021), https://www.baptistpress.com/resource-library/news/41-u-s-cities-ban-abortion-as-sanctuary-cities-for-the-unborn [https://perma.cc/XZ3V-HWMX]. For an overview of one such sanctuary-city statute, see Amarillo, Tex., Amarillo Sanctuary City for the Unborn Ordinance (proposed Dec. 29, 2023).

488. MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION 144-48 (2023); *see* Whole Woman's Health v. Jackson, 595 U.S. 30, 35 (2021).

489. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 986-89 (2018).

Mitchell proposed that Comstock could be read as a de facto ban on all abortion procedures, not just those involving pills sent through the mail.[490] He acknowledged that federal precedent did not support this interpretation but insisted that "[t]his limitation is nowhere to be found in the text of the statute," which plainly imposes federal criminal liability "on every person who ships . . . abortion-related paraphernalia through the mail."[491] "Even though the Comstock law does not ban abortion literally," Mitchell explained, "it bans the shipment or receipt of any abortion-related equipment."[492] And any abortion, Dickson and Mitchell reasoned, required the use of something sent in the mail.[493]

Shortly after *Dobbs*, Dickson and Mitchell proposed a new brand of "sanctuary city" ordinance in Hobbs, New Mexico, that required abortion clinics operating within city lines to get a license; the licensing requirements, in turn, required compliance with Mitchell and Dickson's interpretation of the Comstock Act.[494] Other ordinances citing the Comstock Act would follow.[495]

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490. Mark Lee Dickson, *Edgewood in New Mexico Considers First "Sanctuary City for the Unborn" Ordinance Since Passage of HB7*, LIVE ACTION (Apr. 7, 2023, 6:40 AM), https://www.liveaction.org/news/edgewood-new-mexico-sanctuary-city-hb7 [https://perma.cc/48DS-W39E] (reporting Mitchell arguing that his interpretation of the Comstock Act would "effectively ban abortion nationwide . . . [b]ecause even though the Comstock law does not ban abortion literally, it bans the shipment or receipt of any abortion-related equipment").

491. Complaint at 1-5, City of Eunice v. Torrez, No. D-506-CV-2023-00407 (N.M. 5th Dist. Ct. Apr. 17, 2023). The state district court enjoined enforcement of the *Eunice* order, *see* Dan Boyd, *Judge Pauses Eunice's Lawsuit Challenging Top Democrats' Authority to Block Anti-Abortion Ordinances*, ALBUQUERQUE J. (June 13, 2023), https://www.abqjournal.com/news/local/article_8cb31294-1b50-53bf-9b4f-1ac357bc22f1.html [https://perma.cc/L38T-MW2P], after the New Mexico Attorney General petitioned a writ of mandamus before the state supreme court, seeking to establish that Eunice's sanctuary-city ordinance, like those on the books in several other cities and counties, were preempted by state law and violated the state constitution. State *ex rel.* Torres v. Bd. of Cnty. Comm'rs, No. S-1-SC-39742, 2025 WL 52496, at *1 (N.M. 2025). The New Mexico Supreme Court subsequently issued the writ of mandamus, resting its decision entirely on state preemption. *Id.* at *3-14.

492. Shoshanna Ehrlich, *"Comstocked": How Extremists Are Using a Victorian-Era Law to Deny Abortion Access*, MS. MAG. (Oct. 25, 2023), https://msmagazine.com/2023/10/25/comstock-abortion-access-sanctuary-cities [https://perma.cc/27AV-LW73].

493. Jazmin Orozco Rodriguez, *Small Rural Communities Are Becoming Abortion Access Battlegrounds*, NBC NEWS (May 21, 2023, 5:00 AM EDT), https://www.nbcnews.com/health /womens-health/small-rural-communities-are-becoming-abortion-access-battlegrounds-rcna84921 [https://perma.cc/X7S4-V7VV] (reporting Dickson arguing that Comstock bans "any 'paraphernalia,' including anything that could be used to perform an abortion, such as certain medical devices and tools").

494. HOBBES, N.M., MUN. CODE §§ 5.52.030, .070 (2024).

In November 2022, ADF, a leading voice in the conservative Christian legal movement, made Comstock central to its suit challenging FDA's approval of mifepristone in *Alliance for Hippocratic Medicine v. FDA*.[496] Prominent attorneys at ADF, including Erin Hawley, a former law clerk of Chief Justice Roberts and the wife of Senator Josh Hawley,[497] primarily contested FDA's regulatory authority to approve mifepristone.[498] But Hawley and her colleagues also argued that because the plain text of "longstanding federal law"—the Comstock Act—barred mailing abortion-related items, FDA lacked the authority in 2021 to permit telehealth abortion.[499]

During oral argument, Justices Alito and Thomas spotlighted these Comstock claims.[500] But in *Alliance for Hippocratic Medicine*, the Court unanimously held that the plaintiffs lacked Article III standing to challenge FDA's approval of mifepristone, in an opinion whose conspicuous silence about Comstock left the door open for claimants who could establish standing to sue.[501] Comstock revivalism has only intensified, with new potential plaintiffs ready to file suit[502]

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495. For coverage of some of the other Comstock-related ordinances, see Mark Lee Dickson, *Lea County in New Mexico Becomes Sanctuary County for the Unborn After Final Vote*, Live Action (Dec. 9, 2022, 6:47 PM), https://www.liveaction.org/news/lea-county-new-mexico-sanctuary-county-unborn [https://perma.cc/4K5V-APLM]; Mark Lee Dickson, *City of Danville Becomes First "Sanctuary City for the Unborn" in Illinois, 67th in US*, Live Action (May 3, 2023, 5:37 PM), https://www.liveaction.org/news/city-danville-first-sanctuary-unborn-illinois [https://perma.cc/6PEH-C2ZN].

496. Complaint at 3-10, All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023) (No. 22-CV-00223) [hereinafter Alliance for Hippocratic Medicine Complaint].

497. Elizabeth Dias & Abbie VanSickle, *Erin Hawley: The Woman Arguing Against the Abortion Pill*, N.Y. Times (June 13, 2024), https://www.nytimes.com/2024/03/26/us/erin-hawley-abortion-pill-supreme-court.html [https://perma.cc/DW5L-BR2C].

498. *See* Alliance for Hippocratic Medicine Complaint, *supra* note 496, at 94-95.

499. *Id.* at 17.

500. Transcript of Oral Argument at 26-30, 47-48, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236) (recording Justice Alito asking why FDA failed to address the Comstock Act and Justice Thomas suggesting that the manufacturer of mifepristone might face a "Comstock Act problem").

501. *All. for Hippocratic Med.*, 602 U.S. at 387-97.

502. *See* Geoff Mulvihill, *The Supreme Court's Ruling on Mifepristone Isn't the Last Word on the Abortion Pill*, AP News (June 14, 2024, 3:29 PM EDT), https://apnews.com/article /abortion-mifepristone-supreme-court-kansas-idaho-missouri-5cc89d289ced29a1274423b4 3789397f [https://perma.cc/ZG9W-HX2Q] (reporting that the attorneys general of Mis-souri, Kansas, and Idaho had pledged to revive the arguments raised by the Alliance for Hippocratic Medicine in a separate suit); Jonathan Shorman & Daniel Desrochers, *Kansas, Missouri to Keep Fighting Abortion Drug After Supreme Court Upholds Access to It*, Kan. City Star (June 13, 2024, 12:52 PM), https://www.kansascity.com/news/politics-government /article289245660.html [https://perma.cc/L9PW-SADF] (reporting a statement from Mis-

and former Trump Administration officials—and the vice president-elect—vowing that a new "pro-life administration" would enforce the law as dictating that "organizations are not allowed to ship abortion pills [and] . . . other devices and equipment used for abortions."[503]

B. Abortion as Obscenity

In litigation, advocates have persuaded several judges to adopt a reading of the Comstock Act as a statute whose plain meaning imposes a comprehensive ban on mailing abortion-related articles.[504] To read the Comstock Act as imposing a total ban, revivalists selectively quote the abortion language in the statute rather than acknowledging that the law Congress enacted was an obscenity statute, and remains so today.[505] The Act currently begins by announcing its application to "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or

souri Attorney General Andrew Bailey promising to "mov[e] forward undeterred with our litigation to protect both women and their unborn children").

503. Brad Reed, *"On Agenda": Ex-Trump Health Aide Touts Highly Controversial Plan Hidden in Project 2025*, RAW STORY (July 10, 2024, 1:26 PM ET), https://www.rawstory.com/trump-project-2025-2668723604 [https://perma.cc/2CS9-9BXH] (quoting Katy Talento, a key former health advisor to Donald Trump, based on exchanges at the NatCon Conference). Talento is only the latest former Trump official to argue that a second Trump Administration would wield the Comstock Act as a ban. *See supra* note 469 and accompanying text. On Vance's support for enforcing the Comstock Act as a ban, see Diamond & Kornfield, *supra* note 470.

504. *See, e.g.*, All. for Hippocratic Med. v. FDA, 78 F.4th 210, 267-68 (5th Cir. 2023) (Ho, J., concurring in part and dissenting in part) (arguing that the "unambiguous meaning" of the Comstock Act forbids mailing of mifepristone and other abortifacients).

505. *See, e.g.*, All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 539 (N.D. Tex. 2023) (reasoning that the statute plainly declares "nonmailable" anything "advertised or described in a manner calculated to lead another to use it or apply it for producing *abortion*" (emphasis added) (quoting 18 U.S.C. § 1461 (2018))); Satanic Temple, Inc. v. Rokita, No. 22-cv-01859, 2023 WL 7016211, at *2 (S.D. Ind. Oct. 25, 2023) ("Multiple sources of law impose restrictions on providing abortion-inducing drugs by mail. Federally, the Comstock Act of 1873, still in force today, makes it a criminal offense to mail any 'article or thing designed, adapted, or intended for producing abortion.'" (quoting 18 U.S.C § 1461 (2018))). The Southern District of Indiana described the question whether "federal law . . . prevent[s] mailing abortion-inducing drugs" as "sharply contested," pointing to conflicting interpretations from the General Counsel of the U.S. Post Office and Missouri Attorney General. *Satanic Temple, Inc.*, 2023 WL 7016211, at *10 n.4.

immoral use."[506] To make their case that the statute covers the mailing of drugs for any abortion, revivalists omit the surrounding text's concern with things that can be used "for any indecent or immoral purpose,"[507] instead quoting only a few words of it.[508] They do so as if to imply that Congress in 1873 enacted an abortion ban to achieve the goals of the modern movement—that is, the punishment of those who transgress against the unborn child, and the protection of women from the supposed health effects of abortion.[509]

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506. 18 U.S.C. § 1461 (2018). This provision refers to articles and things for "procuring or producing of abortion. " *See id.* (referring to "where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced"). Procuring abortion was an intentional wrong that could be expressed as "producing abortion." *See supra* note 139 and accompanying text (quoting a law dictionary of the enactment era explaining that abortion was a "criminal offense" when "procured or produced with a malicious design or for an unlawful purpose"). Section 1462 refers only to things "designed, adapted, or intended for producing abortion." 18 U.S.C. § 1462 (2018). The statute adopted the language of "producing abortion" in 1909. *See* Act of Mar. 4, 1909, ch. 321, § 211, 35 Stat. 1088, 1129. At the time, the word "procure" was increasingly associated with prostitution. *See* William T. Harris & Frances Stur-geon Allen, Webster's New International Dictionary of the English Lan-guage 1712 (1911) (defining "to procure" as "to pimp"). In 1909, Congress supplemented or replaced "procure" with "produce," which *Webster's* defined to mean "to bring forth" or "to cause." *Id.* The language "procuring or producing abortion" in § 1461 remained when Congress revisited Comstock in 1940 and has not changed in the years since. *Compare* 18 U.S.C. § 1461 (1940) (containing the "procuring or producing abortion" language), *with* 18 U.S.C. § 1461 (2018) (same).

507. 18 U.S.C. § 1461 (2018).

508. For example, the Alliance Defending Freedom's (ADF's) brief in the Supreme Court quoted only a few words of the Act: "FDA's 2021 action also violates the Comstock Act . . . . That statute prohibits using 'the mails' to send any 'drug . . . advertised or described in a manner calculated to lead another to use or apply it for producing abortion.'" Brief for the Respondents, *supra* note 4, at 56 (quoting 18 U.S.C. § 1461 (2018)).

509. In the FDA litigation, ADF leaders drew on the woman-protective claims that became a staple of antiabortion advocacy in the late 1980s and early 1990s. *See, e.g.*, Brief for the Respondents, *supra* note 4, at 1 ("FDA's patently unreasonable actions here . . . jeopardize women's health throughout the nation . . . ."); *id.* at 17 ("FDA unlawfully and without adequate explanation removed safeguards it had once deemed necessary to protect women who use abortion drugs."). "Every woman . . . deserves" more, Erin Hawley wrote in a 2023 article for *World* magazine, than "a chemical drug to swallow that will end her child's life and put her own safety at risk." Erin Hawley, *A Vicious Tradition of Eugenics*, World (May 23, 2023), https://wng.org/opinions/a-vicious-tradition-of-eugenics-1684840403 [https://perma.cc/HU7Q-WA63]. On the rise of woman-protective arguments in the modern antia-bortion movement, see generally Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 Duke L.J. 1641 (2008). For an-other example of such argument, see Ziegler, *supra* note 488, at 121-22 (describing "right-to-life lawyers" as arguing that antiabortion bills "were needed to protect women").

After editing out of the statute words that suggest the law's preoccupation with sex, revivalists argue that the remaining text referring to "producing abortion" unambiguously covers *all* abortion. In its Supreme Court brief, ADF argued that the statute's application to the mailing of abortion drugs is unrestricted.[510] ADF and its amici also disparaged the 1930s federal cases that read the obscenity statute to permit mailing articles for health-related reasons and to require the government to prove a sender intended to send an article to be used for unlawful purposes.[511]

This revivalist reading fails to address key features of the statute's text and history.[512] To begin, we see no support for reading "producing abortion" to refer to all terminations of pregnancy. The original language of "procuring of abortion" did not refer to all terminations, but only those performed for

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We observe, however, that some politicians sympathetic to Comstock revival have embraced pronatalism and appeared to question the value of women who do not have biological children. *See* Adriana Gomez Licon, *Beyond 'Childless Cat Ladies,' JD Vance Has Long Been on a Quest to Encourage More Births*, HILL (Aug. 16, 2024, 12:38 AM ET), https://thehill.com /homenews/ap/ap-politics/ap-beyond-childless-cat-ladies-jd-vance-has-long-been-on-a-quest-to-encourage-more-births [https://perma.cc/SL53-UNA3] (reporting Vance's longer commitment to pronatalism and his comments that "childless cat ladies" lacked a "direct stake" in the nation's future); Bess Levin, *JD Vance Agrees "the Postmenopausal Female" Exists to Raise Grandchildren*, VANITY FAIR (Aug. 15, 2024), https://www.vanityfair.com/news /story/jd-vance-postmenopausal-females [https://perma.cc/LK4S-Z4TG] (detailing Vance's apparent agreement with a podcast host who suggested that postmenopausal wom-en primarily serve society by caring for children).

510. *See* Brief for the Respondents, *supra* note 4, at 56-58.

511. *Id.* at 57 ("Petitioners support their theory with old dicta from a smattering of circuits, most of which construed since-repealed language covering contraception."); *see also* Brief of Ethics and Public Policy Center as Amicus Curiae in Support of Respondents at 13, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236) (cherry-picking a few quotations from the 1930s cases, concluding that they did not "remotely establish a 'consensus interpretation' supporting such a proposition," and characterizing several of the cases as concerning only contraception even though they also discussed abortion); Amicus Brief of the American Center for Law and Justice in Support of Respondents at 8-18, *All. for Hippocratic Med.*, 602 U.S. 367 (Nos. 23-235, 23-236) [hereinafter Brief of the American Center for Law and Justice] (characterizing the cases similarly). For a discussion of abortion in the cases, see *supra* text accompanying notes 381, 385 and 397. For a discussion of these cases, see *supra* Section II.D.

512. We observe that revivalist arguments do not engage with statutory, historical, and doctrinal context as committed textualism would require. *See supra* note 21 and accompanying text. We have engaged with these materials without limiting our approach to the issues of interest to textualists, instead seeking to provide the kind of history of interest to interpreters across a range of perspectives and institutional contexts, including academic, judicial, legislative, and political.

wrongful and not lifesaving purposes.[513] While Congress in 1909 did change the language of the statute to refer more frequently to "producing abortion" rather than "procuring of abortion," the change is not significant. The terms "procuring" and "producing" were used interchangeably in the era of enactment;[514] Congress was still using the terms synonymously when the term "producing abortion" was first introduced into the statute's abortion provisions,[515] and reference to the "procuring of abortion" remains in the statute today.[516] The key point is that use of either term *with* "abortion" referred to a crime, the doing of which required proof of unlawful purpose.[517] In sum, usage suggests that the substitution of "producing abortion" for "procuring of abortion" was not a meaningful change in phraseology. The amended statute continued to refer to criminal or unlawful terminations for which a showing of intent was required, and it excluded terminations to save a life—just as the enacted statute had.

Differently put, the statute's application to the mailing of articles for "abortion" is *not* plain and absolute, contrary to what revivalists have repeatedly suggested.[518] Following the statute's language over time, we read the statute's reference first to "procuring of abortion" and then to "producing abortion" as

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513. *See supra* notes 138-144 and accompanying text.

514. *See supra* notes 137-140 and accompanying text.

515. The statute in 1909 applied to "every article or thing designed, adapted, or intended for preventing conception or producing abortion." Act of Mar. 4, 1909, ch. 321, § 211, 35 Stat. 1088, 1129. In the same provision, the 1909 text prohibits any written information about "where or by whom any act or operation of any kind for the *procuring or producing of abortion* will be done," using the terms interchangeably. *Id.* (emphasis added).

516. Historical revision notes in 1940 explain the statute's use of "producing" in light of the scienter requirements for a "principal" under 18 U.S.C. § 2 (1940). 18 U.S.C. § 2 note (2018) (Historical and Revision Note). The 1909 revision defined the term "principal" to include anyone who "directly commits any act constituting an offense" or "aids, abets, counsels, commands, induces, or procures its commission." Act of Mar. 4, 1909, § 332, 35 Stat. at 1152. In 1946, Congress clarified that the definition of "principal" included anyone "who causes the doing of an act which if done by him directly would render him guilty of an offense"—a clarification of the 1909 language. 18 U.S.C. § 2 (1946). The language "procuring or producing abortion" in the current version of 18 U.S.C. § 1461 survived Congress's revision of Comstock in 1940 and has not changed in the years since. *See* 18 U.S.C. § 1461 (2018).

517. The pairing of producing or procuring with abortion defines an intentional pregnancy termination, not a miscarriage, and identifies what may be a potential crime if not done for a lawful purpose, such as saving a woman's life. *See supra* notes 138-142, 506 and accompanying text.

518. *See supra* notes 508-509 and accompanying text; *see also* Brief of the American Center for Law and Justice, *supra* note 511, at 5 ("[T]he prohibition is simple, complete, and categorical.").

phrases that refer to criminal terminations—that is, they recognize the existence of lawful and unlawful terminations, even if the line between the two is ambiguous over time, as well as across and within states.

The turn to the statute's history to clarify meaning is warranted by the ambiguity of the term "abortion" standing alone. The meaning of "abortion" today is not plain; it remains contested and, as groups *opposed* to abortion emphasize, entangled with questions of health. Many opponents of abortion maintain, for example, that there is no need for life or health exceptions to abortion bans because lifesaving procedures are not, by definition, abortions.[519] "[A]n induced abortion should not be confused with a medical indication for separating a mother from her unborn child," explains the medical guidance of the Lozier Institute, an antiabortion research organization.[520] In the less than two years since the *Dobbs* decision, thirteen states hostile to abortion have already changed the definition of "abortion" in their state codes.[521] There is potentially

519. *See, e.g.*, *What Is AAPLOG's Position on "Abortion to Save the Life of the Mother?"?*, AM. ASS'N PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS (July 9, 2009), https://aaplog.org/what-is-aaplogs-position-on-abortion-to-save-the-life-of-the-mother [https://perma.cc/FZ7N-2H3P] (distinguishing between "abortion," defined as "the purposeful killing of the unborn in the termination of a pregnancy," and "treatment to save the mother's life," which "is NOT 'abortion to the save the mother's life'"); Caroline Wharton, *One of These Is Not Like the Oth-ers: Rape, Incest & Life of the Mother Abortion Exceptions*, STUDENTS FOR LIFE AM. (June 14, 2022), https://studentsforlife.org/2022/06/14/why-you-should-reject-rape-incest-life-of-the-mother-exceptions [https://perma.cc/3SSR-FTAC] (*"[A]bortions are never medically necessary*–and we mean never. This is because there is a fundamental difference between an abortion and procedures which might extract a child from a woman's body if she cannot be pregnant anymore due to health reasons . . . ."). *But see Facts Are Important: Understanding Ectopic Pregnancy*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/understanding-ectopic-pregnancy [https://perma.cc/T6P3-NKMH] ("Treatment for ectopic pregnancy requires ending a nonviable pregnancy. This treatment exists within the spectrum of lifesaving care during pregnancy, including induced abortion that also ends a pregnancy."); Ali Swenson, *Posts Falsely Claim Abortion Is Never Medically Necessary*, AP NEWS (July 11, 2022, 7:46 AM EST), https://apnews.com/article/fact-check-abortion-medically-necessary-342879333754 [https://perma.cc/P4R9-X7WE] (quoting physicians who say that "there are multiple situations in which abortion is medically necessary to save the life of the pregnant mother").

520. Ingrid Skop, *Fact Sheet: Medical Indications for Separating a Mother and Her Unborn Child*, CHARLOTTE LOZIER INST. (May 17, 2022), https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child [https://perma.cc/Z4Z8-CX8F].

521. *See* Greer Donley & Caroline Kelly, *Abortion Disorientation*, 74 DUKE L.J. 1, 52–53 (2024). Four states supportive of abortion rights have also changed their definitions since the *Dobbs* decision. *Id.* at 53. And two more—New York and Vermont—have added definitions for the first time. *Id.*

a further ambiguity: many abortion opponents view emergency contraceptives—and perhaps even the birth-control pill—as abortifacients.[522]

To this point, we have focused only on the word "abortion" and the phrases "producing abortion" or "procuring of abortion." But of course, these phrases appear in the context of a much broader statutory text concerned with criminalizing obscenity. The Comstock Act was not at the time of enactment and is not today a simple abortion ban. The preoccupation of Comstock and his allies was not protecting unborn life but preventing illicit sex.[523] Indeed, Comstock himself often failed to differentiate between contraceptives and abortifacients.[524] The breadth of the statute at the time of enactment is revealing: the project of defining *writings and articles enabling contraception* as obscene—indeed criminalizing them at all—was novel and a critical part of the Comstock law.[525] An antivice movement successfully convinced the federal courts to adopt a sexual-purity interpretation of the law. After enforcement of the law's contraceptive and abortion provisions declined and then functionally ended, Congress never meaningfully deliberated about the Comstock Act's abortion provisions, much less refashioned a broad obscenity law intended to deter what was then deemed illicit sex into a narrow, fetal-protective abortion ban.[526] During the half-century in which the Supreme Court protected decisions about abortion under the Constitution, any enforcement of the Comstock statute focused on sex and pornography, not abortion, as revivalists themselves have acknowledged.[527]

Finally, the contemporary language of the Comstock Act contains *two* scienter requirements, as the law did when enacted. The 1873 statute prohibited a sender from "knowingly" mailing writings and things "designed or intended for . . . procuring of abortion," a crime requiring that the sender intend that the recipient use mailed items for terminating a pregnancy for unlawful purposes.[528] The statute as currently codified has a similar structure. It declares "nonmailable matter" "[e]very article or thing designed, adapted, or intended for

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522. *See, e.g.*, Severino, *supra* note 469, at 485 (describing a common emergency contraceptive as a "potential abortifacient" that "can prevent a recently fertilized embryo from implanting in a woman's uterus").

523. *See supra* Section I.A.

524. *See supra* text accompanying note 179.

525. *See supra* text accompanying notes 90-91.

526. *See infra* note 529 and accompanying text.

527. Brief for Former U.S. Attorney General Edwin Meese III as Amicus Curiae Supporting Respondents at 19-20, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236) (detailing recent prosecutions for child pornography).

528. *See supra* text accompanying notes 133-136.

producing abortion, or for any indecent or immoral use," and then states the penalties that apply to "[w]hoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable."[529] Thus, both textual and historical evidence support the reasoning of the 1930s cases holding that to prove a Comstock violation the government would have to demonstrate the accused's intent to mail abortion-related materials to a recipient for unlawful purposes—a difficult standard to meet, especially given prevailing ambiguities about which terminations are unlawful.

In sum, revivalists' claims that the Comstock statute's meaning is plain and imposes a categorical ban on mailing abortion-related materials seem to us

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529. *See* 18 U.S.C. § 1461 (2018). It does not appear that in amending the Comstock Act in the years after 1940, Congress deliberated in any significant way about its abortion provisions. For a discussion of the 1971 amendments removing contraception from the Act, see *supra* note 455 and accompanying text. In 1978, proposals to expand or modify the Comstock Act came up as a minor part of a much broader effort to revise the entire federal criminal code. H.R. 13959, 95th Cong. § 6702(1)(C)(i) (1978); S. 1437, 95th Cong. (1978). None of these efforts to rewrite the criminal code succeeded. Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 111-29 (1998).

A second repeal bill appeared in 1996 on the heels of the passage of the Telecommunications Act of 1996. *See* Comstock Cleanup Act of 1996, H.R. 3057, 104th Cong. (1996). In 1996, Representative Henry Hyde proposed an amendment to 18 U.S.C. § 1462 referring to items sent by "interactive computer service." John Schwartz, *Abortion Provision Stirs On-line Furor*, WASH. POST (Feb. 8, 1996, 7:00 PM EST), https://www.washingtonpost.com/archive/business/1996/02/09/abortion-provision-stirs-on-line-furor/875a2c8e-2407-42e8-a0bd-e9f658a8f712 [https://perma.cc/APN3-CBBY]; *see* Telecommunications Act of 1996, Pub. L. No. 104-104, § 507(a), 110 Stat. 56, 137. Given Hyde's connections to the antiabortion movement, the amendment prompted questions about whether the Comstock Act would be interpreted to prohibit the mailing of abortion-related items and information, but Alan Coffey, general counsel to the House Judiciary Committee, insisted that Hyde had included the language "for its effect on indecent materials, not for the abortion provision." Schwartz, *supra*. As stated by Coffey, "The [abortion] language has been in the statute for many years, but it's not enforced. And it's probably unconstitutional because of the scope of Roe versus Wade." *Id.*

Hyde himself asserted that the "language [of the bill] in no way is intended to inhibit free speech about the topic of abortion"—and that the new provision covered only "the use of an interactive computer service for the explicit purpose of selling, procuring or facilitating the sale of drugs, medicines or other devices intended for use in producing abortions"—that is, "those commercial activities already covered in section 1462(c)" of the Comstock Act. 142 CONG. REC. 2220 (1996) (statement of Rep. Hyde). Sam Stratman, a staffer in Hyde's office, publicly explained that the abortion provision was "never enforced and other court decisions have rendered it unconstitutional." Eric Zorn, *Hyde's Tinkering with an Old Law Raises New Fears*, CHI. TRIB. (Mar. 20, 1996, 1:00 AM CST), https://www.chicagotribune.com/1996/03/20/hydes-tinkering-with-an-old-law-raises-new-fears [https://perma.cc/XQU4-C5Y2]. Congress declined to pass the Comstock Cleanup Act based on the assumption that Comstock was what Stratman called a "dead-letter law." *Id.*

plainly *wrong*. While it is true that the historical evidence set forth here shows that the understanding of the obscene shifted significantly since 1873, at no point was the statute understood or enforced as an absolute ban on the termination of pregnancy.[530] Rather, as we have shown, the statute's text—with its reference to "the prevention of conception and the procuring of abortion" and its second scienter requirement—was long understood to exempt certain mailings for the protection of health, a category that dramatically expanded over time.[531] Even if we were to put aside the ways the statute was understood at the time of enactment or as it was authoritatively construed in the 1930s, a fair reading of the text codified at 18 U.S.C. §§ 1461-1462 points in substantially the same direction, so long as these sections of the Code are read as a whole, and not in fragments.[532] The statute today continues to refer to the "procuring of abortion,"[533] and since 1909 has also employed an interchangeable phrase, "producing abortion"—each of which refers to terminations undertaken with wrongful intent.[534] Anyone who claimed, contrary to historical usage, that "abortion" refers to all terminations would have to contend with wide-ranging contemporary usage to the contrary today (conservatives themselves do not refer to all terminations as abortion[535]) and would have to explain why the statute characterized terminations to preserve a patient's life or organs as "indecent" or "immoral."[536]

Rather than establishing the plain meaning of the text, revivalists are projecting contemporary beliefs onto fragments of a nineteenth-century text to construct an abortion ban they know perfectly well that Americans today would not vote to enact.[537] We do not know whether revivalists exercising federal authority would confine their efforts to criminalizing the mailing of abortion-related materials. They might extend their twenty-first-century, culture-war-inflected reading of the statute to characterize *speech* about lawful access to abortion, as well as other articles facilitating sex or sexual expression, as cov-

530. *See supra* notes 136-149 and accompanying text.

531. *See supra* Section I.A.

532. For examples of fragmentary or selective quotations, see *supra* notes 505-509 and accompanying text.

533. *See supra* note 516 and accompanying text.

534. *See supra* notes 505-506 and accompanying text.

535. *See supra* notes 519-520 and accompanying text.

536. *See* 18 U.S.C. § 1461 (2018).

537. *See supra* notes 477-478, 506-509 and accompanying text.

ered by the Act's ban on mailing writings or things "for any indecent or immoral purpose."[538]

There was a time when the antiabortion movement took steps to distance itself from the sex obsession that defined the nineteenth-century antivice movement.[539] By the early 1990s, with the development of woman-protective claims, antiabortion leaders further repackaged their cause as a quest to secure equality for women as well as the unborn.[540] And for decades, abortion opponents had presented their campaign to overturn *Roe* as a defense of democracy—an effort to restore the abortion question to voters and their elected representatives.[541] That the contemporary antiabortion movement has made the Comstock Act so central to its agenda suggests a critical shift in the movement's priorities and identity, a willingness to embrace a law that has long symbolized government efforts to deny equality—and to undermine democracy.

538. 18 U.S.C. § 1461 (2018). Developments in state law suggest these possibilities. States are already drawing on religious-conscience discourse of "complicity" and "facilitation" to characterize providing information about out-of-state lawful options as actionable conduct rather than protected speech. *See, e.g.*, Linda Greenhouse, *Is There a Constitutional Right to Talk About Abortion?*, N.Y. TIMES (May 17, 2024), https://www.nytimes.com/2024/05/17/opinion/speech-abortion-supreme-court.html [https://perma.cc/99PJ-6WB7] (discussing this incipient constitutional conflict); *cf.* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2538-39 (2015) (discussing the rise and spread of state and federal statutes that characterized the re-fusal to refer and counsel patients about medical care as protected acts of conscience when the refuser believes that providing information about alternatives would facilitate the sinful conduct of another). And of course, states are already seeking to ban many things (e.g., arti-cles used for contraception, AIDS prophylaxes, and gender-affirming care) that facilitate sex or sexual expression some members of society deem "indecent or immoral." *See, e.g.*, Deanda v. Becerra, 96 F.4th 750, 753 (5th Cir. 2024) (holding that a state law mandating parental consent to contraception was not preempted by Title X).

539. *See* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 196 (2016) (describing how abortion opponents hoped the Court "might be willing to issue a sweeping decision affirming the constitutional rights of the unborn, just as it had issued several such decisions on behalf of African Americans and women"); JENNIFER L. HOLLAND, TINY YOU: A WESTERN HISTORY OF THE ANTI-ABORTION MOVEMENT 5 (2020) (arguing that abortion opponents "borrowed the new social currency of civil rights and put it to socially conservative ends").

540. *See supra* note 509 and accompanying text.

541. *See* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 739-49 (2024); *see also* ZIEGLER, *supra* note 488, at 37-55 (detailing antiabortion arguments based on democracy and the judicial role).

CONCLUSION

Comstock was once a subject of historical curiosity—for those who even recognized the name, a symbol of Victorian sexual prudery, censorship, and government overreach.[542] Within the last several years, however, the law has become the locus of movement-based antiabortion claims in national elections and in federal and state courts. It could yet play an important role in federal abortion policy.

Comstock's contemporary champions claim to have discovered a statutory text whose meaning is plain and can be applied to ban the mailing of all abortion-related materials. To construct this new reading of the statute as a national, no-exceptions abortion ban, revivalists cherry-pick words from statutes policing obscenity in the U.S. mails.[543] This Article demonstrates that revivalists misread the statute in ahistorical and antidemocratic ways. Even the most expansive interpretations of Comstock's obscenity provisions protected the doctor-patient relationship and did not cover mailings concerning all pregnancy terminations, but instead allowed doctors to protect life.[544] And, for nearly a century, judges have emphasized that this federal law banning obscenity in the mails banned *obscenity*—not sex and health care.

The antidemocratic character of these revivalist claims comes into focus as we consider how judges' understanding of the obscenity that the statute banned changed over time. Judges interpreted the language of moral value in the statute (e.g., "obscene" or "immoral") with attention to evolving mores about intimate and family life, and with attention to the public's alienation from the law—that is, the public's growing belief that use of the criminal law to prohibit nonprocreative sex and speech about it as obscene was "Comstockery."[545] As we show, the 1930s cases not only were grounded in the statute's text and history, but they also responded to the American public's emerging understandings of freedom of speech and intimate life.[546] This history demonstrates the textual *and* democratic authority of the 1930s cases that have guided official judgments about the law's meaning in the last century.[547]

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542. *See supra* notes 18-19 and accompanying text.

543. *See supra* notes 505-508 and accompanying text.

544. *See supra* Section I.A.

545. *See supra* Section II.D.

546. *See supra* Sections II.B-C, III.A.

547. As we have seen, government officials looked to these cases in codifying the Comstock statute, in interpreting the Constitution decades later in the *Griswold* case, and decades after

Revivalists disparage the significance of these 1930s decisions,[548] as if conflicts over the Comstock statute concerned the advocates' or the judges' mere policy preferences. But these cases were grounded in the text of the statute *and* responded to the public's changing beliefs about democracy. Was a democracy even worthy of the name if the government could use the threat of criminal law to control the speech and private lives of its members? As this objection gathered force across generations, it assumed form as a question of *constitutional* magnitude—one that aligned critics of Comstock with labor activists and a peace movement in a quest for new civil liberties. Conflicts over obscenity under the Comstock Act gave birth to understandings of democracy that the Supreme Court would draw on in defining a citizen's liberties under the First Amendment and the Fourteenth Amendment thirty years later.[549]

Our inquiry into why, in the wake of *Dobbs*, antiabortion groups seized on this long-slumbering obscenity statute as an instrument of contemporary culture-war politics reveals the antidemocratic nature of their Comstock claims. Now that the Supreme Court has overturned *Roe*, revivalists including ADF and the groups that collaborated in the creation of Project 2025 seek to criminalize abortion from the moment of fertilization nationwide;[550] yet American

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that, in reasoning about the statute's meaning in the wake of *Dobbs*. *See supra* text accompanying notes 53, 57, 399, 448.

548. Brief for the Respondents, *supra* note 4, at 57; *see supra* note 511 and accompanying text.

549. *See supra* Section III.B.

550. ADF CEO Kristen Waggoner has explained that the group hoped to establish that embryos and fetuses qualified as rights-holding persons under the Fourteenth Amendment, a conclusion intended to make any abortion unconstitutional. Ian Ward, *The Group Behind* Dobbs *Does Not Want to Talk About What Comes Next*, POLITICO (Mar. 25, 2024, 5:00 AM EDT), https://www.politico.com/news/magazine/2024/03/25/head-of-alliance-defending-freedom-kristen-waggoner-speaks-on-mifepristone-00148565 [https://perma.cc/8BPX-SEH3]. Project 2025's proposed prohibitions on abortion have garnered support from an array of conservative groups, including Americans United for Life and Students for Life of America. *See Project 2025 Reaches 100 Coalition Partners, Continues in Preparation for Next President*, HERITAGE FOUND. (Feb. 20, 2024), https://www.heritage.org/press/project-2025-reaches-100-coalition-partners-continues-grow-preparation-next-president [https://perma.cc/2VDA-N8Q8]. Americans United for Life has promoted what it calls the Lincoln Pro-posal, a plan for a Republican president to use executive power to enforce the idea of fetal personhood under the Fourteenth Amendment. *See* Catherine Glenn Foster, Chad Pecknold & Josh Craddock, *The Lincoln Proposal: An Executive Order to Restore Constitutional Rights to All Human Beings*, AMS. UNITED FOR LIFE 8, https://aul.org/wp-content/uploads/2021/09/Lincoln-Proposal.pdf [https://perma.cc/AJ2X-Z5TU] (detailing plans to use executive power to progress toward the national and "ultimate goal of abortion's abolition"). Leaders of both Students for Life and Americans United for Life (as well as other leading Project 2025 coalition members, including Concerned Women for America and the Family Research Council) have signed on to what movement members call the New North Star Letter, which

politics unfolding in the wake of *Dobbs* shows them that the public will not enact such a ban through ordinary democratic means.[551] To avoid public backlash, or at least mitigate or redirect it, advocates misread the 1873 postal obscenity statute as a nationwide, no-exceptions abortion ban that can be enforced through litigation or executive action. They claim the statute means things it never has, and they reason about the Comstock law as an ordinary law—as if the public had ordinary opportunities for debate over its terms, enactment, revision, and repeal.

The revivalists' strategy of cherry-picking a few words out of a statute so that it is not recognizable as an obscenity statute, and then ignoring the statute's historical context, plays upon a normalizing assumption: that a statute's mere presence in the U.S. Code proves it was the fruit of ordinary democratic processes. But in this Article, we have demonstrated the many senses in which the Comstock law was enacted and persisted on the books in conformity with procedures that today the American public would view as flagrantly unconstitutional. Putting the pieces together, we can see that questions about the law's meaning and democratic legitimacy converge: revivalists are employing a law enacted and preserved by what Americans now view as unconstitutional means to impose a "law" Americans did not and would not enact.

In an era when only a minority of Americans were allowed to vote, an all-male electorate decided to ban speech and articles concerning birth control in the U.S. mails. Even after the enfranchisement of women, extending from the 1920s to the passage of the Voting Rights Act in 1965, women lacked the power to shape law. At the time of *Griswold* and *Roe*, few women were in Congress, on the federal courts, or on the faculties of elite law schools.[552] As recently as 1992, there were only two women in the Senate, and even after that election, widely heralded as the "Year of the Woman," only five.[553]

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seeks to institute a national ban through the recognition of fetal personhood. *See The New North Star*, LIVE ACTION 3-5 (June 15, 2023), https://www.liveaction.org/wp-content /uploads/2023/06/Equal-Protection-Coalition-Letter.pdf [https://perma.cc/7A4X-TX5W]("The same constitutional principles that ensured equal protection for Black Americans also protect defenseless children in the womb—from New York to California and everywhere in between.").

551. *See supra* notes 477-479.

552. *See supra* note 407 and accompanying text.

553. On the number of women in the Senate in 1992, see *supra* note 407 and accompanying text. On the "Year of the Woman" and the election of four new woman senators, see Michael S. Rosenwald, *No Women Served on the Senate Judiciary Committee in 1991. The Ugly Anita Hill Hearings Changed That.*, WASH. POST (Sept. 18, 2018, 3:18 PM EDT), https://www.washingtonpost.com/history/2018/09/18/no-women-served-senate-judiciary-committee-ugly-anita-hill-hearings-changed-that [https://perma.cc/L9YS-33M4].

But it is the First Amendment conditions of the law's enforcement that make Comstock a distinctively antidemocratic statute. As we have seen, those who called for free love and voluntary motherhood were targeted and arrested,[554] as were civil libertarians who dared break the law and call for its repeal.[555] The Comstock statute was insulated from criticism and entrenched against reform for generations by censorship whose effect was to deform the democratic political process for generations after, stigmatizing political speech about sex and reproduction, inhibiting mobilization, and intimidating politicians from responding to public demands for change.[556]

The 1873 statute is a graveyard of Equal Protection Clause and First Amendment violations—a textbook example of the kind of law that *Carolene Products*, decided only two years after *One Package*, identified as constitutionally suspect.[557] These conditions persisted in law at least until the era of *Roth*, *Griswold*, and *Roe*.[558] The development of this constitutional law helped alleviate the chill Comstock had created, yet paradoxically, they erased generations of Comstock prosecutions *and* the resistance to them from constitutional memory.[559] In subsequent decades, when the Comstock statute had long fallen into disuse, few would have had reason to know of, much less to mobilize around, repeal of the abortion provisions of the postal obscenity statute.[560]

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554. *See supra* notes 97, 207-211, 264-265 and accompanying text.

555. *See supra* notes 212-217, 290-297, 347-357 and accompanying text.

556. *See supra* Section III.B.

557. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (observing that "[i]t is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation[] is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation" and citing concerns with "restrictions upon the right to vote," "restraints upon the dissemination of information," and "interferences with political organizations"). These dynamics shaped politics for much of the twentieth century; courts responded only slowly, first under the statute and then the Constitution. *See supra* Sections III.A-B.

558. *See supra* note 445 and accompanying text. On persisting deformities of the political process that constrained mobilization in this era, see generally NeJaime & Siegel, *supra* note 407.

559. *See supra* Section III.B.

560. Some may see claims for revival of the Comstock Act as presenting an issue of desuetude. *See* Cohen, Donley & Rebouché, *supra* note 19, at 347 (discussing desuetude in the Comstock context); *see also* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49-50 (discussing the "old common law idea of desuetude" in which "laws that are hardly ever enforced are said, by courts, to have lapsed, simply because they lack public support" and shouldn't be arbitrarily enforced, an idea not expressly embraced by American courts). Others analogize Comstock to so-called "zombie laws"—laws enjoined by a constitutional decision since overturned, as, for example,

There seems to be only one gift in the claims for Comstock's revival: Comstock revivalists have disturbed a nearly century-long settlement that obscured crucial parts of our constitutional past. When revivalists insist they have discovered a plain-meaning, no-exceptions abortion ban that has been largely unenforced and sleeping in the U.S. Code for nearly a century, they invite us to examine the history of the Comstock Act from the vantage point of the twenty-first century. And they have provoked remarkable constitutional discoveries.

The long struggle over the Comstock Act identifies the people's role in shaping the constitutional canon, showing how cases like *Roth*, *Griswold*, and *Roe* built upon understandings forged decades earlier by the men and women who resisted the state's efforts, under the postal obscenity law, to control political speech and the sexual and reproductive lives of the American people. Their claims, spanning generations, are part of the American traditions—and the American vernacular—of liberty, equality, and democracy. These chapters of national experience played a key role in developing modern understandings of free speech and sexual and reproductive freedom, however their constitutional memory has been repressed.

Recovering these repressed constitutional memories is all the more crucial after *Dobbs*, when the Roberts Court has declared that the abortion right is no

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Roe was. *See* Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wis. L. Rev. 1063, 1065 (defining a zombie statute as "legislation rendered unenforceable by a constitutional decision or other laws but that nevertheless 'remain[] on the books'" (quoting Howard M. Wasserman, *Zombie Laws*, 25 Lewis & Clark L. Rev. 1047, 1049 (2022))); Howard M. Wasserman, *Zombie Laws*, 25 Lewis & Clark L. Rev. 1047, 1051 (2022) (explaining that zombie laws "are alive in that they remain on the statute books . . . [and] are enforceable by that departmentalist executive acting on an independent constitutional judgment" but "dead in that enforcement efforts are dead-on-arrival in court" until an adverse precedent is reversed).

Observe that current efforts to "revive" Comstock's abortion provisions present notice-and-consent problems of even greater magnitude than reviving a once-enjoined abortion ban. Comstock revivalists seek to enforce the abortion provisions of a law that (1) have not been actively enforced for nearly a century; (2) since the statute's enactment, have been interpreted to allow access to at least some health-based abortions; and (3) have never been interpreted as a no-exceptions ban on abortion. We can put this differently: the public had and still has no reason to be aware of the law revivalists seek to enforce, given that the government had long ceased enforcing its relevant provisions, authoritative cases interpreted the law as providing substantial access to abortion if the government resumed enforcing it, and the law has never been enforced as revivalists now propose its "plain meaning" requires. *Cf.* Joel Johnson, *Dealing with Dead Crimes*, 111 Geo. L.J. 95, 122 (2022) ("Not only do dead crimes undermine the rule of law in prosecutions and investigations, but their continued existence also causes collateral effects that extend well beyond those contexts. Dead crimes exacerbate racial biases in policing practices, significantly diminish the rights of individuals in other areas of the law, and entrench the social stigma surrounding covered behavior longer than is warranted.").

part of the Constitution or the nation's history and traditions in a decision that casts the authority of *Griswold*, *Lawrence v. Texas*, and other substantive-due-process decisions into doubt.[561] Without a long pedigree in history and tradition to constrain it, the Court has suggested, the kind of right to autonomy in intimate life recognized in *Roe* and *Planned Parenthood v. Casey* "could license fundamental rights to illicit drug use, prostitution, and the like."[562]

There are certain ironies here. In suggesting that, without history to constrain it, a right to autonomy in intimate life is likely to legitimate licentious, incipiently illicit, or criminal activity, the Court seemed to reason within the legacy of a Comstock tradition it never named. As this Article shows us, *Dobbs*'s history was at best partial: the Court said nothing about federal and state Comstock legislation in its survey of abortion law, and it derived American traditions from statutes and decisions about abortion in which women had no say. In other words, the Court's turn to a granular kind of history failed to impose objective fact-based constraints, instead enabling selective accounts of the past that conceal rather than constrain an interpreter's value-based judgments.[563]

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561. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 225 (2022) ("Even though the Constitution makes no mention of abortion, [*Roe*] held that it confers a broad right to obtain one."); *id.* at 241 ("Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion."); *id.* at 363 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history': Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, 'there was no support in American law for a constitutional right to obtain [contraceptives].'" (alteration in original) (quoting *id.* at 241 (majority opinion))).

562. *See id.* at 257 (majority opinion) ("These attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)) (citing Compassion in Dying v. Washington, 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc))).

563. For an account of how *Dobbs* selectively represented the historical record to advance a values-based argument, see Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1184-93 (2023) [hereinafter Siegel, *Memory Games*]. We have each critically analyzed the Court's claims that its history-and-tradition methods impose judicial constraint. *See, e.g.*, Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 565-67 (2024) ("An appeal to facts about the past in constitutional argument can directly or indirectly express values—forms of argument I have called 'constitutional memory' claims. In this Article, I show how my account of constitutional memory undermines the judicial-constraint justification for conservative historicism, as well as the levels-of-generality claims associated with it." (footnote omitted)); Reva B. Siegel,

But if turning to the past cannot free constitutional interpretation from value-based judgments as *Dobbs* imagines, it can still serve as an aid to interpretation. Looking to the past can guide the application of constitutional principles, teaching us about the kinds of experiences in which particular rights were forged and about the scenes in which principles acquired intelligible meaning. Constitutional memories of this kind delimit the application of particular principles. It often takes sustained contestation for Americans to persuade one another to enlarge a principle's domain of application, as debates over colorblindness illustrate.[564] As importantly, history can teach us about the struggles of ordinary Americans who taught us why these rights matter—why these rights are *American* rights.

In outcasting abortion rights—and by extension other sexual and reproductive liberties that were not historically recognized as rights—the Court set up a false dichotomy, speaking as if liberty in intimate life is fundamentally different than other constitutional rights, such as freedom of speech, which in this imaginary existed in a recognizably familiar shape, fully formed in the distant past. But as this Article's history reminds us, modern understandings of freedom of speech—and the understanding of sexual and reproductive liberty that substantive-due-process decisions vindicate—did not spring fully formed from the text of the Constitution, from the common law, or from traditions of American legal practice.

As we have shown, ideas about rights of freedom of speech and of sexual and reproductive freedom were honed in conflicts between citizens and their

The History of History and Tradition: The Roots of Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F 99, 108 (2023) ("[A] backward-looking standard that appears to fix the Constitution's meaning in the past in fact vindicates the interpreters' values and functions as a veiled form of conservative living constitutionalism."); Mary Ziegler, *The History of Neutrality:* Dobbs *and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 190 (2023) (emphasizing that "framing a method as neutral," as the Court did in *Dobbs*, "may disguise the political origins or resonance of an opinion").

564. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV 1323, 1359 (2006) (observing that "the principles and memories that make up a constitutional tradition have particular fields of reference, rendering intelligible some institutions and practices, and not others" and that "an implicit or explicit frame of reference relates particular principles and memories to particular domains of social life"); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006) ("When movements succeed in contesting the application of constitutional principles, they can help change the social meaning of constitutional principles and the practices they regulate."); *see also* Balkin & Siegel, *supra*, at 937-42 (discussing debates over application of the colorblindness principle to racial-data collection at different stages in civil-rights debates).

government, many of them concurrent.[565] This history can guide constitutional interpretation—not because it provides interpreters with facts free of value or a roster of rights frozen in the distant past—but because it is a domain in which we can learn more about the conflicts in which constitutional principles were forged and about the life-stakes of those controversies for those who waged them. History of this kind, which this Article has explored, shows that our constitutional democracy was not born fully formed but instead evolved as ordinary Americans reckoned with government officials over the shape of their government. History of this kind shows that our constitutional commitments have authors before and after ratification, some of whom we remember and many others whom we have yet to uncover and to honor.

In the 1920s, courts upheld convictions for disseminating publications advocating socialism, like Benjamin Gitlow's,[566] as well as convictions for publications providing sexual education, like Mary Ware Dennett's.[567] A case challenging a criminal conviction is a lightning rod that can galvanize public attention;[568] in Dennett's case, it brought the civil-liberties bar to her defense.[569] These high-profile conflicts with the government, connecting politics, work, and family, changed citizens' beliefs about liberty and democracy and then the beliefs of judges, whose opinions crystallized the public's evolving

565. *See supra* text accompanying note 311 (observing that in the Progressive Era, "conflicts over censorship of birth control converged with conflicts over censorship of speech criticizing World War I" and that "[c]ourts regularly authorized the government to censor dissident political speech").

566. *See* Gitlow v. New York, 268 U.S. 652, 667 (1925) (upholding Benjamin Gitlow's conviction under New York's criminal anarchy statute for advocating socialism, recognizing that freedom of speech is a liberty the Fourteenth Amendment's Due Process Clause protects, but reasoning that "a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace"). The 7-2 decision prompted Justices Holmes and Brandeis to dissent. *See id.* at 673 (Holmes, J., joined by Brandeis, J., dissenting) ("Every idea is an incitement.").

567. *See supra* text accompanying notes 346-350.

568. *See supra* text accompanying notes 350-355.

569. A civil-liberties bar began bringing cases challenging obscenity and sedition prosecutions at a time when both restrictions on speech were commonly viewed as constitutional. In the World War I era, for example, Dennett not only pursued liberty for those seeking sex education or contraception but also worked to organize and to defend war protesters, and then to help found what would become the ACLU. *See supra* note 328 and accompanying text. When prosecuted for obscenity, she was then defended by ACLU lawyer Morris Ernst and the broader civil-liberties community, including the ACLU defense committee formed to advance her case. *See supra* notes 347, 356-357 and accompanying text. On the civil-liberties bar that grew up challenging these prosecutions, see WHEELER, *supra* note 347, at 40-41; and Weinrib, *The Sex Side of Civil Liberties*, *supra* note 19, at 363-64.

views into law. Americans have long sought liberty to control their intimate and family lives—claims that animated enslaved people's quest for freedom and for equal citizenship,[570] as well as women's centuries-long quest for the vote.[571] So, too, generations of Comstock critics brought to bear new understandings of democracy, free speech, liberty, and equality in helping change obscenity doctrine, even if federal judges barely spoke of the postal statute's critics. By the 1930s, judges' common sense about what was obscene was very different than in the 1890s.[572] Their understanding of obscenity had been shaped by citizen-critics of the Comstock statute, whom their decisions scarcely mentioned.

From this vantage point, we can see that much more guides decisions interpreting the Constitution's liberty guarantee than the sanctity of the marital bedroom and the penumbras of the Constitution's text (sources to which the Court pointed in *Griswold*) or medical authority and *Lochner*-era case law (sources to which the Court pointed in *Roe*) or the right to define one's "concept of existence" (sources in *Casey* about which the Court complained in *Dobbs*). There is both law and national experience at the root of substantive-due-process cases, even if the Justices deciding *Roth*, *Poe*, *Griswold*, *Roe*, and *Casey* scarcely adverted to it.[573]

This matters all the more now that the Roberts Court disparages reasoning from principles of autonomy and dignity in matters of intimate life and insists

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570. *See* Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values 4-6, 10, 169-80 (1997) ("The people who struggled for abolition and reconstruction regarded [the] denial of family liberty as a vice of slavery that inverted concepts of human dignity, citizenship, and natural law."); Lyle Cherneff, Note, *Remembering* In re Turner*: Popular Constitutionalism in the Reconstruction Era*, 133 Yale L.J. 2443, 2519 (2024) ("If the reality of slavery's sexual and familial violence had been consistently entered on the record, our nation's courts might be forced to conclude that the Thirteenth Amendment included the child's right to be free from domestic violence as well as forced labor. Or that a woman's right to be free from forcible pregnancy was a matter of constitutional relevance."); Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 Sup. Ct. Rev. 111, 166-81 (explaining that the Reconstruction Congress was concerned to liberate Black women from sexual and reproductive abuse and arguing that "*Dobbs* exemplifies the manner in which the Court strips the impetus for the Reconstruction from the Constitution, while yet claiming to center its Framers' concerns").

571. *See* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 Geo J.L. & Pub. Pol'y 19, 24 (2022) (demonstrating that from generation to generation, women's arguments for enfranchisement included the need to change the law governing family life—including the right to control sex and reproduction—and showing how erasure of these arguments for women's enfranchisement makes "constitutional doctrines about liberty and equality in the family appear to lack historical antecedents").

572. *See supra* Section III.A.

573. *See supra* Section III.B.

that the meaning of the liberty guarantee can be discerned from the text of statutes and judicial decisions understood in granular detail. If we are to look to evidence of the nation's history and traditions of *this* kind to guide judicial interpretation of the due-process liberty guarantee, as the Roberts Court has now ruled, what past understandings will this approach entrench? Whose voices will it empower to decide freedom's meaning for us today and whose voices will it exclude?

As this Article demonstrates, by expanding the evidence of tradition we examine, we may arrive at fundamentally different understandings of freedom's meaning. Reasoning in fidelity to the historical record, we can see that the nation's traditions emerged out of struggles over law, struggles that included ordinary Americans as well as lawmakers. Recalling these struggles shapes our understanding of constitutional principles and the practices to which they apply—and it provides evidence of tradition in which ordinary Americans are not silent, or sidelined, but instead have and express views about the exercise of state authority. If those Americans were unjustly denied citizenship or suffrage, we can include their voices—precisely as Justice Thomas does in so often quoting Frederick Douglass—"as a source of revered authority that can guide us in debating who we are and what we are to do, and so give voice to our identity, our ideals, and our future," recovering "the voices of these constitution makers whose only fault was to be so far ahead of their times that their peers were not yet ready to listen to them."[574]

A court reasoning about the nation's traditions can consult official accounts of the law, to be sure, but it can *also* consider the public's views, including the views of people who were denied a voice in drafting, enacting, and enforcing the law, as women and people of color were.[575] Turning to the past for guidance in interpreting the liberty guarantee, a court can look for views of the whole people as we understand them today, an approach much like conserva-

574. *See* Siegel, *supra* note 571, at 52 & n.162, 57-58.

575. *See, e.g.*, James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 679 (2016) ("Originalists err in viewing the 'public' that is the source of meaning as a unitary entity comprised of the very elites who were benefiting from the exclusionary practices. In actuality there was no definitive 'public,' but instead a series of publics, some who were legally and socially privileged and dominant (white men in particular), and others who operated as dissenting communities that developed their own normative discourse and challenged dominant views and interests (feminists, African-Americans)."); Alexander Zhang, *Externalist Statutory Interpretation*, 134 YALE L.J. 447, 455 (2024) (endorsing "a theory of statutory interpretation that is more inclusive of diverse and historically marginalized peoples, grounded in the realities of lay politics, and capable of reflecting the social nature of statutory interpretation").

tive Justices employ in interpreting the Second Amendment.[576] A court need not restrict its account to the perspectives of those originally considered fit to govern, as *Dobbs* did. Including the perspectives of the governed as well as their governors is critical in deciding *how* laws define the nation's history and traditions, and why.

Democratizing constitutional memory[577] in this way demonstrates that the American people asserted claims about free speech, intimate life, and reproductive freedom long before courts recognized these rights under the judicially enforceable Constitution. The postal obscenity law came to demonstrate the kind of government overreach—"Comstockery"—that has taught Americans the meaning of liberty. It was the people's acts of conscience—their willingness to speak out, to resist and to break the law, and to endure arrest and incarceration—that helped build the foundations of our constitutional law. If there is any feature of the Comstock story that warrants reviving, it is the voices of these forgotten authors of our constitutional present.

576. *See* Siegel, *supra* note 76, at 906, 911-20 (reviewing Supreme Court decisions on the Second Amendment, abortion, and religious freedom, and finding that "the conservative Justices have repudiated past practices when those practices expressed racism or nativism to which the Justices objected").

577. *See* Siegel, *Memory Games*, *supra* note 563, at 1200-04; *id.* at 1204 ("As we recover the roots of *Roe* in popular conviction, we can create a new historical context for the Court's ruling in *Dobbs*, and a new understanding of our own 'history and traditions.' It becomes clearer that the Court cannot wholly destroy what it did not solely create. By democratizing our claims on constitutional memory, we enable struggle over the Constitution's past, and its future.").