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

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In the aftermath of 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 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, the Article recovers a lost constitutional history of the statute that explains why its understanding of obscenity has evolved so dramatically in the 150 years since it was enacted. We show that the Comstock law was the first to include writings and articles enabling contraception and abortion in federal obscenity law, condemning them along with erotica and sex toys as stimulants to illicit sex. Yet 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*,[1] the Court reversed *Roe v. Wade*,[2] 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*.[3] *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."[4]

Comstock "revivalists" now seek to reinvent the Comstock statute, reading the 1873 obscenity law as an absolute ban on abortion that Americans never enacted and, as revivalists recognize, Americans would never enact today.[5] Comstock's contemporary champions claim to have discovered a statutory text whose meaning is plain and can be applied to ban shipment of abortion-related materials without exception—a claim they asserted in the Supreme Court in *FDA v. Alliance for Hippocratic*

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[1] 597 U.S. 215 (2022).

[2] 410 U.S. 113 (1973).

[3] *Dobbs*, 597 U.S. at 250-51.

[4] An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use, ch. 258, § 2, 17 Stat. 598, 598-99 (1873), https://perma.cc/K9YX-CQKM (quoted *infra* notes 132-135 and accompanying text). The original text included communications and articles concerning contraception and abortion in the law's prohibition of obscenity in publications, mailing, and importation. *Id.* The statute as amended over the years is codified at 18 U.S.C. §§ 1461-62 (2018) as well as 19 U.S.C. § 1305 (2018) (linking to the statute as codified); its current provisions include abortion in a long list of communications and items deemed indecent, immoral, or obscene. States soon copied these provisions of federal law. *See* MARY WARE DENNETT, BIRTH CONTROL LAWS: SHALL WE KEEP THEM CHANGE THEM OR ABOLISH THEM 268-308 (1926) (containing appendices with state laws); Martha J. Bailey, *"Momma's Got the Pill": How Anthony Comstock and Griswold Shaped U.S. Childbearing* (Nat'l Bureau of Econ. Rsch., Paper No. 14675, 2009), https://www.nber.org/papers/w14675; Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 3-4 (1966).

[5] After *Dobbs*, polls have consistently shown support for abortion rights. *See* 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. Voters faced with ballot initiatives to expand reproductive liberties since *Dobbs* have chosen to do so on all eight occasions they were given the opportunity. *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 [hereinafter Zernike, *Ohio Vote*]; 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 [hereinafter Zernike, *Why Democracy*]. Ipsos likewise found that majorities supported the availability of abortion medication by mail, with more than seventy percent 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.

Medicine,[6] in Project 2025, a high-profile transition plan for the next Republican president,[7] and in the campaign of Donald Trump for the Presidency.[8] Comstock revivalists who insist the statute's meaning is plain and absolute are calling for enforcement of the statute in ways it never has been understood or enforced.[9] Like so many revivalists, they invoke the authority of a past they are inventing. Responding to these growing claims that a nineteenth-century obscenity law is a twenty-first century abortion ban, Americans have begun to mobilize for Comstock's repeal.[10]

In responding to revivalist claims, this Article offers a wide-ranging statutory and constitutional history of the Comstock Act. We analyze the Comstock Act as contemporaries understood it—as obscenity law—and demonstrate how and why understandings of obscenity changed under the law as enacted and enforced. The 1873 postal statute was the first to include writings and articles that facilitated contraception and abortion in federal obscenity law.[11] 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.[12] In the late nineteenth century, Americans promoting what they called *sexual purity* encouraged the law's enforcement to prevent nonprocreative sex outside and inside of marriage.[13] They prosecuted Americans who sought birth control, abortion, or information about either one, targeting in particular those who called for free speech, voluntary motherhood, and the statute's reform or repeal.[14] These Victorian obscenity prosecutions earned the name of "Comstockery" and aroused generations of resistance—resistance that over time helped shift understandings of the obscenity the law prohibited and the health care it protected.[15] Comstock resistance gave birth to modern understandings of democracy, free speech, and sexual and reproductive freedom—understandings that emerged first under the statute and, ultimately, under the Constitution.[16]

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[6] 602 U.S. 367 (2024). On the role of Comstock claims in the *Alliance* litigation, see *infra* notes 478-481 and accompanying text.

[7] *See infra* note 455 and accompanying text.

[8] *See infra* notes 455, 483 and accompanying text.

[9] *See infra* Section IV.B.

[10] 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.

[11] *See infra* notes 89-90 and accompanying text.

[12] *See infra* Sections I.A, II.C-II.D.

[13] *See infra* notes 161-163. For discussion of judicial understandings of sexual purity, see *infra* Section I.D.

[14] *See infra* Section I.D.

[15] *See infra* Part II.

[16] *See infra* Sections II.D. & III.B. For an N-gram showing usage of "Comstockery" surge with litigation under the statute in the 1930s and under the Constitution in the 1960s, see *infra* note 266 and Figure 1.

There is a significant body of scholarship on the Comstock statute written primarily outside of law and before the *Dobbs* decision[17] on which we have drawn in an effort to make sense of claims about the statute. But there is remarkably little *legal* scholarship examining enforcement of Comstock's provisions criminalizing writings and articles "for the prevention of conception or procuring of abortion."[18] Legal scholarship on Comstock's obscenity provisions barely addresses cases on

[17] There is a rich historiography on the anti-vice movement and the cultural moment to which Anthony Comstock contributed. Some work, like that of Nicola Beisel, Whitney Strub, and Paul Kemeny, tells the origin story of the anti-vice movement to which Comstock belonged. For a sample of this work, see NICOLA KAY BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA (1998); WHITNEY STRUB, OBSCENITY RULES: *ROTH V. UNITED STATES* AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION (2013); PAUL C. KEMENY, THE NEW ENGLAND WATCH AND WARD SOCIETY (2017); ROBERT CORN-REVERE, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA (2021); GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865-1920 (2003); NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 124-26 (2009); and Jeffrey Escoffier, Whitney Strub & Jeffrey Patrick Colgan, *The Comstock Apparatus*, *in* INTIMATE STATES: GENDER, SEXUALITY, AND GOVERNANCE IN MODERN US HISTORY 43-48 (Nancy F. Cott, Robert O. Self & Margot Canaday eds., 2021).

Other scholars have chronicled the work of Comstock resisters, civil libertarians, and publishers. Examples include HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA 364-370 (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 43-65 (2018). Still other work develops in-depth biographical portraits of key figures in the Comstock story, including Mary Ware Dennett and Margaret Sanger. Examples include ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA (2007); and Heather Munro Prescott & Lauren McIvor Thompson, *A Right to Ourselves: Woman's Suffrage and the Birth Control Movement*, 19 J. GILDED & PROGRESSIVE ERA 542, 542-48 (2020).

For work examining Comstock surveillance of same-sex relations, see Gregory Briker, *The Right to Be Heard: ONE Magazine, Obscenity Law, and the Battle Over Homosexual Speech*, 31 YALE J.L. & HUMAN. 49, 54 (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. WOMEN & L. 599, 662 (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, 230 (2014).

[18] *See infra* notes 147-148, 191 and accompanying text.

contraception and abortion;[19] and cases conferring constitutional rights to make decisions concerning contraception and abortion scarcely mention Comstock.[20]

The legal history this Article uncovers has both statutory and constitutional importance. Most immediately, it provides new resources for analyzing a question on which contemporary debate focuses—what contested provisions of Comstock mean—and for considering questions the debate has *obscured*—whether the abortion provisions of this statute have sufficient democratic legitimacy to enforce today.

Our account provides a variety of historical resources for analyzing Comstock's text as enacted and interpreted over time.[21] This account makes clear that,

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[19] Laura Weinrib is one of the few legal scholars to identify the importance of Mary Ware Dennett's case in the development of modern civil liberties, and to chronicle the decision's erasure in the canon. *See* Laura Weinrib, *The Sex Side of Civil Liberties:* United States v. Dennett *and the Changing Face of Free Speech*, 30 L. & 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 has recently published a painstakingly researched biography of lawyer Morris Ernst, who brought key cases challenging Victorian understandings of obscenity law, including Dennett's. BRETT GARY, DIRTY WORKS: OBSCENITY ON TRIAL IN AMERICA'S FIRST SEXUAL REVOLUTION (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 (2017); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920, at 28-37 (1997). For one of the more thorough surveys of the case law, see Michael T. Gibson, *The Supreme Court and the Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 293-309 (1986). David Cohen, Rachel Rebouché, and Greer Donley have recently addressed Comstock in a prominent analysis of the use of medication abortion and its legal regulation. David Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 320, 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. (forthcoming 2024); Ebba Brunnstrom, Note, *Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post*-Dobbs, 55 COLUM. HUM. RTS. L. REV. 1, 3-43 (2023) (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 Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006); *id.* at 91 (arguing that textualists "give primacy to the semantic context-evidence," where purposivists "give precedence to policy context-evidence"); *see also* 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 (2014) (reviewing AKHIL R. AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012)) (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 Eskridge, Brian Slocum & Kevin Tobias, *Textualism's Defining Moment*,

contrary to revivalists' claims, the meaning of Comstock's abortion provisions has never been "plain" or absolute.[22] At the time of enactment, "abortion" meant what is now called "miscarriage," and was not generally a crime; an allegation of unlawful agency (e.g., the statute refers to "causing unlawful abortion" or "procuring of abortion") 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 knowingly mail items with the awareness that they would be used unlawfully.[24] Courts reasoned that the Comstock Act's obscenity provisions did not apply to the doctor-patient relationship,[25] even as the kinds of exempted health-related mailings evolved over the life of the statute.[26]

It is on this story of obscenity's evolution that the Article focuses. It is from this vantage point that we can see how changing understandings of the statute's meaning and democratic legitimacy are connected. Comstock confronted Americans with the question of 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.

Comstock destabilized understandings of obscenity by including writings and things for controlling birth amidst prohibited erotica.[27] Enacted at a time of

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123 COLUM. L. REV. 1611, 1661-62 (2023) (explaining that in Indian law cases, Justices inconsistently rely upon historical and social context since, in *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 . . . [and] 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 (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 (justifying textualism as promoting judicial constraint and preserving the legislature's democratic authority).

[22] *See infra* notes 135-148 and accompanying text.

[23] *Id.* For further discussion of enactment and language, see *infra* Sections I.A & IV.B. Many contemporaneous accounts of unlawful abortion applied to procedures undertaken with criminal intent only after quickening. *See infra* notes 138-140 and accompanying text. As Part IV discusses, Congress later amended the statute to refer to "producing" rather than "procuring" abortion, a change that did not change the statute's scope, as we show in *infra*, Section IV.B.

[24] *See infra* notes 140, 141, 506-508 and accompanying text.

[25] During the first sixty years after the statute's passage, we have not identified any prosecution based on direct communication within the physician-patient relationship. *See infra* notes 147-148, 191 and accompanying text.

[26] *See infra* Section II.D.

[27] *See infra* notes 89-90 and accompanying text.

plummeting birth rates,[28] surging immigration,[29] and a growing movement for woman suffrage—the postal censorship law inserted the federal law government into Americans' sexual and reproductive lives in unprecedented ways.[30] The Comstock law's convoluted and moralizing text[31] provided flexible authority for the postal inspectors, anti-vice societies, and courts that used the law to impose their vision of sexual purity.[32] Censors enforcing the law created a new and remarkably invasive criminal-law regime for surveilling the United States mails—then the primary infrastructure for commerce, politics, and communications in American life.[33]

In the first decades after its enactment, the federal government employed the postal obscenity statute 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.[34] By the early

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[28] Fertility 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 ANNALS DEMOGRAPHIC HIST. 143 (June 2019); *see id.* at 171 (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, *with* Andrea Tone, *Black Market Birth Control: Contraceptive Entrepreneurship and Criminality in the Gilded Age*, 87 J. AM. HIST. 435, 456 (2000) [hereinafter Tone, *Black Market Birth Control*].

[29] The nineteenth century saw the influx of millions of European immigrants, with numbers 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 anti-vice activism, see BEISEL, *supra* note 17, at 103-12.

[30] 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) [hereinafter Siegel, *She the People*].

[31] *See infra* notes 132-135. 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* notes 153-156 and accompanying text.

[32] The mails had taken 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 (2008). 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.* As the historian Richard John explains, many 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." SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 11 (2009).

[33] HENKIN, *supra* note 32, at 23-52 (describing the importance of the mails to market participation); WINIFRED GALLAGHER, HOW THE POST OFFICE CREATED AMERICA: A HISTORY 208-229, 270 (2017) (detailing how the advent of cheap, fast mailing of magazines, newspapers, and catalogues shaped politics, consumer practices, and intimate life).

[34] *See infra* Section I.A.

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.[35] In the 1930s, federal courts began to limit the kinds of writings and things deemed obscene under the statute, reading the law with attention to its double scienter requirement and characterizing more communications and things as legitimate forms of health care exempt from criminalization under the statute; not only exchanges between doctors and patients or books about sex education, but also condoms and diaphragms, might be integral to Americans' health.[36] In distinguishing obscenity from communications and articles for the protection of "health" under the statute, judges were adopting a fair reading of the statute's language that responded to decades of judicial discussion, as well as popular resistance that enforcers of the statute had tried to censor.[37] Even as there was a consensus from the beginning that health was excepted from the statute's ban on obscenity, the courts' understanding of the distinction between obscenity and health evolved with the American public's understanding of democracy and freedom and of the Constitution itself.

The story of the Comstock Act is at every turn a story about the Constitution. The law enacted rested on constitutional premises fundamentally different than our own, and contestation over the statute's enforcement played an important role in engendering modern understandings of free speech and sexual and reproductive freedom.[38] The history of Comstock enforcement unearths lost popular roots of modern First Amendment and sexual- and reproductive-liberties law.[39] Americans who were arrested under federal and state Comstock laws acted on changing beliefs about government's power to control speech and sex that guided judges as they interpreted the statute in the 1930s.

Once we appreciate that the story of the statute is also a story about the Constitution, we can examine struggle over the Comstock Act as part of the "history and traditions" that the Roberts Court deems central to the Constitution's interpretation today,[40] even if *Dobbs* never mentions Comstock. The body of case law this Article examines suggests, first, that there is a continuous tradition of health-based

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[35] *See infra* notes 287-308 and accompanying text.
[36] *See infra* Sections II.C-II.D.
[37] *See infra* Sections I.A. & II.D.
[38] *See infra* Sections III.B & III.C.
[39] *See infra* Section III.B (showing how the Second Circuit's decision in the *Dennett* case lies at the foundations of modern First Amendment approaches to obscenity doctrine); *id.* (showing the connections between the 1930s Comstock cases and modern substantive-due-process law).
[40] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022) ("[G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term 'liberty.' When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.").

access to reproductive care in the United States.[41] Second, it reveals the roots of modern understandings of sexual and reproductive freedom.[42] Third, the evidence arrayed in this Article not only supports new understandings of the nation's history and traditions, but new methods of ascertaining those traditions. The Article demonstrates how shifts in case law interpreting the Comstock Act responded to the arguments of Americans who otherwise lacked authority to make law.[43] In the process it shows that statutes are not the only or best evidence of the nation's history and traditions—and may even provide a misleading basis on which to draw inferences about those traditions for constitutional purposes today. Given all this, Comstock's history provides important resources for demonstrating that America has a tradition of protecting access to health care that might even comprehend contraception and more.

In important respects, the constitutional history of the Comstock Act is a story of change, with emerging understandings of democracy, free speech, and sexual and reproductive liberty changing the practices that law viewed as obscene. But the constitutional history of Comstock we recount is also a story of preservation. The obscenity law was enacted and then preserved on the books, entrenched against reform or repeal by forms of government action that today we would view as unquestionably unconstitutional and that branded certain forms of political speech, intimate behavior, and reproductive decision-making as unworthy long after enforcement of the obscenity statute had ceased.[44]

Questions about the statute's democratic legitimacy as soon as enforcement began. A Congress from which women were excluded passed the Comstock Act at time when women were barred from participating in the law's adoption, interpretation, or enforcement. The law criminalized access to birth control at a time when women had no right to say no to sex in marriage.[45] And the Comstock 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

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[41] *See* Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization: A History-and-Tradition Right to Access after* Dobbs *and the 2023 Term 20-33*, VA. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881886. As we show, in the years immediately after its enactment, the Comstock Act exempted certain forms of health care, *see infra* notes 147-148 and accompanying text, a category of "health" that evolved over time, as courts began to include condoms and other drugs for reproductive control available over the counter, *see infra* notes 371-389 and accompanying text.

[42] *See infra* Section III.B.

[43] *See id.*

[44] *See infra* Part III.

[45] Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) (showing that "[a]t common law, husbands were exempt from prosecution for raping their wives").

libertarians who criticized censors' efforts to suppress political speech and crush the movement for the statute's reform or repeal.[46]

Congress understood that the postal obscenity statute it was enacting would criminalize political speech.[47] 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 the sexual infidelities of a prominent minister that would not have been tolerated in a woman.[48] 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.[49]

As Woodhull's prosecution prefigured, anti-vice activists targeted for criminal prosecution those who dared speak out against laws enforcing women's inequality in private and public life—chilling for generations after political speech about intimate relations. Describing this "chilling effect," the Court has recently explained "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries."[50] We employ the concept of chill to focus attention on the ways that erratic and unpredictable enforcement of federal obscenity law—and of the state laws that copied Comstock[51]—changed politics. In this way, Comstock censors entrenched

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[46] *See infra* notes 187-193, 203-210, 294-311, 339-351 & accompanying text.

[47] *See infra* Section I.A.

[48] *See* ELLEN DUBOIS, SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE 83-93 (2020); Siegel, *She the People*, *supra* note 30, at 971-73. 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 argument's and arrest, see *infra* notes 103-105, 187-190, 204-210 and accompanying text.

[49] 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." *See* SOHN, *supra* note 17, at 66-75; Helen Lefkowitz Horowitz, *Victoria Woodhulll, Anthony Comstock, and Conflict over Sex in the United States in the 1870s*, 87 J. AM. HIST. 403, 420 (2003); Escoffier, Strub & Colgan, *supra* note 17, at 55. For the 1865 law, see Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 504, 507 (1865). On Woodhull's acquittal and its influence on Comstock, see Escoffier, Strub & Colgan, *supra* note 17, at 55; DONNA DENNIS, LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK 252 (2009) [hereinafter DENNIS, LICENTIOUS GOTHAM]. For further discussion of Woodhull's influence on the Comstock Act and broader debates about voluntary motherhood, see *infra* notes 97-105 and accompanying text.

[50] Counterman v. Colorado, 600 U.S. 66, 75 (2023).

[51] 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. ALAN C. CARLSON, GODLY SEED: AMERICAN EVANGELICALS CONFRONT BIRTH CONTROL, 1873-1973, at 35 (2017). Connecticut, which passed a law struck down in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was the only state to criminalize contraceptive use. *Id.* For further discussion of these laws and their twentieth century constitutional analysis, see *infra* Section III.

and insulated the Comstock law against change, preventing legislators or voters from speaking out against the government or mobilizing for the statute's repeal.[52]

As one understands the generations of state action that preserved 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. After long attacking the abortion right as antidemocratic, opponents have secured its overruling, yet seek to restrict access to abortion even more than *Dobbs* has. Revivalists cherry-pick words out of the 150-year-old obscenity statute, ignoring its concerns about sexual vice or health and instead reading the law as it was never understood or enforced: as a nationwide, no-exceptions, fetal-protective abortion ban. Here, meaning and democratic legitimacy again meet. Revivalists read new, twenty-first-century meanings into the Comstock statute *in order to create a national abortion ban they cannot persuade the American public to enact.*[53] Remains of a law enacted, enforced, and preserved on the books by unconstitutional means are twisted to impose on the American people Comstockery: a regime that would criminalize access to health in ways the American people have long opposed.

Along with the 2022 Office of Legal Counsel (OLC) memo on the Comstock Act's application to abortion,[54] this Article rejects the revivalist claim that Comstock's ban on mailing abortion-related materials is plain and absolute. OLC has explained that to violate the Comstock Act, the government must show that a sender intends that the recipient of abortion-related items will use them unlawfully—following federal decisions of the 1930s of which Congress was aware when it codified and amended the statute.[55] "This conclusion is based upon a longstanding judicial construction of the Comstock Act, which Congress ratified and USPS itself accepted."[56]

The Article provides wide-ranging textual, doctrinal, historical, and constitutional support for the authority of those cases, diverging from the OLC Memo in two important respects. First, the Article rejects the view that courts adopted an interpretation of the statute that was "narrower than a literal reading might suggest" and shows that the 1930s cases provided an authoritative reading of the statute that

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[52] In Part III, we identify Comstock "chill," showing how the persisting criminalization of political speech about sex and reproduction deformed democratic politics until the 1960s revolution in First Amendment law, and long after.

[53] *See infra* Section IV.A.

[54] *See* Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C., 2022 WL 18273906, at *1-2, *5 (Dec. 23, 2022) [hereinafter OLC Memo]; *see also* 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 cases).

[55] *See* OLC Memo, *supra* note 54, at *1-2.

[56] *Id.* at *2.

"narrowed" *prior case law*—not the statute itself.[57] Second, the Article does not depend on congressional ratification alone 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. We conclude that the 1930s decisions whose continuing authority the OLC affirms were rooted in a fair reading of the federal obscenity statute *as well as in* deep public support forged in popular conflict over the statute's enforcement.[58] The judges in the 1930s cases were direct witnesses to the Comstock prosecutions that chilled and deformed democratic processes that might have otherwise 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 *United States v. Carolene Products*.[60]

The Article unfolds in four parts. Part I recounts the drive to revolutionize federal obscenity law that culminated in passage of the Comstock Act and examines the law's provisions. It then shows how an anti-vice movement came to read the new obscenity statute as a sexual-purity mandate—interpreting it to apply to items and speech thought likely to incentivize illicit sex. We show that even at the height of a Victorian interpretation of the statute, courts distinguished health from obscenity, and held that the Comstock Act did not reach exchanges between patients and physicians, or communications between doctors. 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 that the feminist movement, civil libertarians, and other critics of Comstockery espoused. And it shows how Comstock critics persuaded judges in the 1930s to define obscenity in terms that recognized not only doctors,' but also citizens' prerogative to make decisions about their sexual and reproductive health.

Part III examines ways in which conflicts over Comstock censorship have shaped our constitutional history. It demonstrates how generations of government action criminalizing speech about sex and reproduction deformed democratic politics

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[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 54, 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.* 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* Sections II.D & III.A. On revivalist interpretive claims, see *infra* Section IV.B.

[59] *See infra* Section III.B.

[60] United States v. Carolene Prods., 304 U.S. 144 (1938). For further discussion, see *infra* notes 535-536 and accompanying text.

and inhibited legislators from responding to demands for reform of obscenity law that the public supported by wide margins. It shows how courts responded in the face of this legislative lockup in both the 1930s and later, in landmark decisions on the First Amendment and substantive due process. While repudiating sexual-purity accounts of obscenity and limiting the criminalization of sexual and reproductive health under the Comstock Act, judges in the 1930s also placed decisional power in the hands of physicians, especially as far as women patients were concerned, and did not mention the constitutional principles for which advocates fought: fundamental freedoms of democratic and intimate life. Finally, Part III connects statutory and constitutional history, demonstrating how the nation's experience living under Comstock censorship supplied foundations for landmark First Amendment and substantive-due-process precedents in the latter half of the twentieth century, even as those decisions are silent about Comstock and the resistance the law inspired. We show how judicial response erased the memory of democratic struggles that engendered these statutory and constitutional cases.

Finally, Part IV explores why the Comstock Act has emerged from obscurity as the cornerstone of 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. A Conclusion identifies a series of democracy problems in reinventing the Comstock Act as a plain-meaning, no-exceptions, nationwide abortion ban, and suggests how the Article's inquiry into the enactment and enforcement of the Comstock Act identifies lost foundations of free speech and sexual- and reproductive-liberties law—and an alternative understanding of the nation's history and traditions that is of constitutional 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 "contrary to public order and natural feeling."[61] The Comstock Act destabilized existing obscenity law by banning not only the mailing of writings and images but also the mailing of *items* and *objects* deemed obscene. This included communications and articles that enabled contraception and abortion, which had not previously been part of obscenity law. With these changes, Congress sought to suppress political speech and articles believed to incite illicit—that is, nonprocreative—sex. Over time, censors responding to the anti-vice 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]

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[61] FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 73 (2d ed., London, J. Butterworth 1816). The common law of obscene libel, like 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 (1896).

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 "the common law is the guardian of the morals of the people"[65]—was a hallmark of nineteenth-century obscenity cases.[66] But for most of the century, as Frederick 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] public exhibition of racially ambiguous images of monsters,[70] and the public display of erotic images.[71] When Congress began dabbling in morals regulations in 1842, the federal Tariff Act barred the importation

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[63] FREDERICK SCHAUER, THE LAW OF OBSCENITY 3-7 (1976); *see also* Manchester, *supra* note 61, at 37-57.

[64] Manchester, *supra* note 61, at 46-47; SCHAUER, *supra* note 63, at 3-7.

[65] *See, e.g.*, State v. Appling, 25 Mo. 315, 317 (1857) (applying to an obscenity case "an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law" (citing 1 WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 46 (3d ed. 1843))); Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 94 (Pa. 1815); Barker v. Commonwealth, 19 Pa. 412, 413 (1852).

[66] Bell v. State, 31 Tenn. (1 Swan) 42, 45-46 (1851).

[67] SCHAUER, *supra* note 63, at 6.

[68] Some state obscenity laws applied to public nudity explicitly. *See* State v. Hazle, 20 Ark. 156, 158 (1859). Other states, like Tennessee, 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 (1842).

[69] *See* SCHAUER, *supra* note 63, at 11. For examples, see *Bell*, 31 Tenn. at 47-48, which affirmed the conviction of a man convicted of uttering obscene words in public who bragged about having sex with and contracting venereal disease from another man's female relatives; *Appling*, 25 Mo. at 317, which affirmed under the common law a conviction for a man who used "vulgar, obscene, and indecent language in the presence of both men and women."

[70] Knowles v. State, 3 Day 103, 107-08 (Conn. 1808) (affirming a conviction for displaying an image of a "horrible and unnatural monster").

[71] *See* Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 100-02 (Pa. 1815) (upholding a conviction of a man accused of displaying a "lewd, scandalous, and obscene painting"); Commonwealth v. Holmes, 17 Mass. (17 Tyng) 336, 336-37 (1821) (erotic print); Commonwealth v. Landis, 8 Phila. 453 (Pa. 1870) (sex manual). 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.

of "all indecent and obscene prints, paintings, lithographs, and transparencies"[72] (the law also banned the lottery in Washington DC).[73] While tariff prosecutions focused on erotic images, the definition of obscenity in state law generally remained "local, customary, and discretionary."[74] 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 newly forming American Medical Association (AMA) in a campaign to criminalize abortion as it never been, even at the time of the founding.[75] Storer and other antiabortion activists fused fetal-protective arguments with claims about the threat abortion posed to 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."[76] Other claims focused on the relative birth rates of Catholic and Protestant women.[77] Married women, particularly white, upper-class ones, raised particular concern, for they seemingly wanted to trade childbearing for other pursuits like voting.[78] Storer stressed that he would not transplant women "from their proper sphere, to the pulpit, the forum, or the cares of state."[79] While Storer and his colleagues campaigned for state abortion bans, Congress passed another obscenity law:[80] an 1865 postal law to address various wartime concerns[81] that set out fines and a prison term for persons mailing obscene books and pamphlets.[82] At the time, the antiabortion movement presented its cause as a fight to

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[72] Tariff Act of 1842, ch. 270, sec. 28, 5 Stat. 548, 566-67. The anticontraceptive and antiabortion language of the Comstock Act was later incorporated into the Tariff Act of 1930, 19 U.S.C. § 1305(a) (2018). 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 L. & SOC. INQUIRY 369, 384 (2002) [hereinafter Dennis, *Obscenity Law*].

[73] Act of Aug. 31, 1842, ch. 282, 5 Stat. 578.

[74] 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); United States v. One Case Stereoscopic Slides, 27 F. Cas. 255, 255-56 (D. Ma. 1859), which involved sexualized slides; and Anonymous, 1 F. Cas. 1024, 1024-25 (D.N.Y. 1865), which concerned sexual images on snuff boxes.

[75] JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 79-99 (1979); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 300-12 (1992) [hereinafter Siegel, *Reasoning from the Body*].

[76] HORATIO STORER, ON CRIMINAL ABORTION IN AMERICA 99 (Phila., H.B. Lippincott & Co. 1860) [hereinafter STORER, ON CRIMINAL ABORTION].

[77] HORATIO STORER, WHY NOT? A BOOK FOR EVERY WOMAN 29, 80 (Bos., Lee and Shepard 1867); *see also* STORER, ON CRIMINAL ABORTION, *supra* note 76, at 41.

[78] Reva B. Siegel, *How History and Tradition Perpetuates Inequality:* Dobbs on *Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 904, 924-30 (2023).

[79] HORATIO STORER, IS IT I? A BOOK FOR EVERY MAN 89 (Bos., Lee and Shephard 1868).

[80] *See* COTT, *supra* note 17, at 124-26.

[81] *See* Act of Mar. 3, 1865, ch. 89, sec. 16, 13 Stat. 507.

[82] *Id.*

protect unborn life, correct differential birth rates, and ensure that married women played their God-given role—focusing on different aspects of public order than an emerging anti-vice movement that was especially preoccupied with illicit sex.

The American anti-vice movement mobilizing around the time of the 1865 law's passage was much broader than any one man, but Anthony Comstock played an outsized role in its rise. One of seven children, Comstock revered his mother, Polly, who died in childbirth when Comstock was ten.[83] By the early 1870s, already a Civil War veteran, he had become active in the Young Men's Christian Association (YMCA), which was lobbying for an expansion of New York's state obscenity law.[84]

R.W. McAfee, another leader of the anti-vice movement, was raised Presbyterian in Missouri, and hoped to become a minister before his eyesight prevented him from progressing.[85] In 1874, he organized a branch of the Railway Literary Union to stop the distribution of obscene literature via the rails.[86] This helped to launch McAfee's work in anti-vice societies later in the decade.[87]

Comstock's allies in the New York YMCA promoted a new state obscenity law offering a different vision of the public order and threats to it. The bill not only covered *speech and images*, including "any obscene or indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, [or] instrument."[88] It was also the first to describe *objects* as obscene, targeting any "article for indecent or immoral use," including any "article or medicine for the prevention of conception or the procuring of abortion."[89] At the time, prohibitions of contraception were just beginning, and criminal restrictions on abortion were in flux.[90] In either case, defining either one as obscene was novel.[91]

These changes converged with other developments in the law of obscenity. In 1868, the year that New York amended the state's obscenity law,[92] a British decision, *R. v. Hicklin*, defined as obscene material that had a "tendency … to deprave and

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[83] SOHN, *supra* note 17, at 40-54; WERBEL, *supra* note 17, at 43-65.

[84] DENNIS, LICENTIOUS GOTHAM, *supra* note 49, at 242-50.

[85] *Necrological Report of the Alumni Association of Princeton Theological Seminary*, 5 PRINCETON THEOLOGICAL SEMINARY BULL. 66, 105 (1911).

[86] *Id.*

[87] *Id.*

[88] Act of Apr. 28, 1868, ch. 430, 1868 N.Y. Laws 856.

[89] *Id.* On the novelty of this proposal, *see* DENNIS, LICENTIOUS GOTHAM, *supra* note 49, at 224-25 (explaining that the New York bill "broadened the scope of common-law prohibitions against obscenity" and "went against nearly three decades of law enforcement practice"); HEYWOOD BROUN & MARGARET LEECH, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD 142 (1928) (explaining that it was in the 1868 bill that "first appeared the phrase 'for the prevention of conception'").

[90] On the nineteenth-century movement to criminalize abortion, *see supra* notes 75-78 and accompanying text. On the novelty of contraceptive regulation, *see* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 175 (explaining that "there were few explicit regulations of contraception until the 1870s").

[91] *See supra* notes 89-90 and accompanying text.

[92] On the passage of the bill, see *The Obscene Democracy*, N.Y. TRIB., Apr. 25, 1868, at 4.

corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[93] *Hicklin* directed judges to define obscenity with attention to those in the community they imagined most susceptible to depravity. 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 allies in the YMCA became convinced of the need for a new national statute,[95] provoked in particular by the 1873 acquittal of the suffragist Victoria Woodhull under the existing federal obscenity statute.[96] Her prosecution expressed 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-known preachers, Pastor Henry Ward Beecher of Brooklyn, with a female parishioner.[97] Woodhull insisted on the importance of sexual self-determination for women and denounced the hypocrisy of Beecher's affair.[98] 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.[99] Free lovers advocated for both liberty and equality: they criticized male sexual dominance in marriage and called for more equal relations between the sexes, 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

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[93] [1868] 3 QB 360 (Eng.).

[94] The case first received attention in United States v. Bennett, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879). For further discussion of the case, see *infra* Section I.D.

[95] DENNIS, LICENTIOUS GOTHAM, *supra* note 49, at 270.

[96] Escoffier et al., *supra* note 17, at 55; DENNIS, LICENTIOUS GOTHAM, *supra* note 49, at 252. For discussion of Comstock's targeting of Woodhull, see *supra* notes 48-49.

[97] On the so-called Beecher-Tilton scandal, see RICHARD WIGHTMAN FOX, TRIALS OF INTIMACY: LOVE AND LOSS IN THE BEECHER-TILTON 154-57, 294-96 (1999); Helen Lefkowitz-Horowitz, *Victoria Woodhull, Anthony Comstock, and the Conflict over Sex in the United States in the 1870s*, 87 J. AM. HIST. 403, 403-34 (2000).

[98] *The Free Love Queen: Victoria Woodhull's Screed and Defense*, CHARLESTON DAILY NEWS, May 26, 1871, at 1. The original letter ran in the *New York World*. *See* Robert Shaplen, *The Tilton-Beecher Affair*, NEW YORKER (June 5, 1954), https://www.newyorker.com/magazine/1954/06/12/the-beecher-tilton-case-ii.

[99] 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 8-15, 34 (2021); John Spurlock, *The Free Love Network in America, 1850-1860*, 21 J. SOC. HIST. 765, 765-79 (1988).

[100] Spurlock, *supra* note 99, at 768 (quoting Francis Barry, 25 THE LIBERATOR 120 (Aug. 22, 1856)); *see also* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 114, 161 (3d ed. 2012) ("Free lovers opposed prostitution, criticized male sexual dominance in marriage, and envisioned a society in which women would have greater equality with men.").

of involuntary servitude.[101] "The term 'marriage,'" Berry wrote, "has, by common consent, been applied to a system of which love has 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 3,000 people at New York's Steinway Hall in 1871.[105] "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."[106] 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 own self-proclaimed moral code.[107] 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.[108] The 1865 statute under which Woodhull was charged did not cover newspapers,[109] the kind of gap Comstock sought to close with the bill that would become the Comstock Act.[110]

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[101] SANDRA SCHROER, STATE OF THE "UNION:" MARRIAGE AND FREE LOVE IN THE LATE 1800S 14-31 (2013); JOANNE E. PASSETT, SEX RADICALS AND THE QUEST FOR WOMEN'S EQUALITY 11-15, 54-61 (2003). On the legal history of marital rape, *see* Hasday, *supra* note 45, at 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, 678 (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.").

[102] Spurlock, *supra* note 99 at 768. Many champions of free love, like Harmon, 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 Transatlanic Free Love Community in the Fin de Siècle*, 25 J. VICTORIAN CULTURE 95, 103 (2020).

[103] D'EMILIO & FREEDMAN, *supra* note 100, at 108 ("The 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] VICTORIA CLAFLIN WOODHULL, *The Principles of Social Freedom, Address Delivered in Steinway Hall, New York (Nov. 20, 1871)*, *in* A SPEECH ON THE PRINCIPLES OF SOCIAL FREEDOM 23 (New York, Woodhull, Claflin & Co., Publishers 1871).

[106] *Id.*

[107] *See supra* notes 97-98 and accompanying text.

[108] On the divisions Woodhull prompted within suffragism in the 1870s, see SALLY MCMILLAN, 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.

[109] Escoffier et al., *supra* note 17, at 55.

[110] Act of Mar. 3, 1873, ch. 258, 17 Stat. 598.

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 to treat contraceptives and abortifacients as obscene would prove challenging to enforce for several reasons. In the era, it was all but impossible to differentiate abortifacients and contraceptives.[111] And further, science had no way for physicians to establish a pregnancy before a patient could detect fetal movement (nor would there be for nearly a century).[112] Most medical guides advised women to wait until they had missed two periods before suspecting pregnancy,[113] 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.[114] It was equally hard to determine how, if at all, the drugs and devices Comstock targeted worked.[115] Common remedies were marketed as curing female troubles, presented as emmenagogues for

[111] *See* JOHN M. RIDDLE, EVE'S HERBS: A HISTORY OF ABORTION AND CONTRACEPTION IN THE WEST 256-59 (1997) (explaining the "difficulty of making legal distinctions between menstrual regulators and abortives" or telling whether a drug was an "antifertility agent" or drug for birth control).

[112] *See* LARA FRIEDENFELDS, THE MYTH OF THE PERFECT PREGNANCY: A HISTORY OF MISCARRIAGE IN AMERICA 38, 165-69 (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 (1986). Reliable pregnancy testing was not available until the 1970s. *See, e.g.*, Evan Bernick & Jill Weber Lens, *Abortion, Original Meaning & the Ambiguities of Pregnancy*, 126 MICH. L. REV. (forthcoming 2024) (on file with authors).

[113] FRIEDENFELDS, *supra* note 112, at 170.

[114] KAREN WEINGARTEN, PREGNANCY TEST 58 (2023); *see also* FRIEDENFELDS, *supra* note 112, at 165-70.

[115] RIDDLE, *supra* note 111, at 256-59 (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").

restoring blocked menstruation,[116] contraceptives, or abortifacients, or indeed, as all three.[117] Others quite clearly had no effect at all.[118]

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 for both boys and girls, anything marketed as a contraceptive or abortifacient would facilitate licentiousness by allowing married women to shirk their sexual and reproductive obligations and permitted users to conceal their sin,[119] a common theme in newspaper reporting of the era.[120] It was concern about "free lust" that led Comstock to pursue Woodhull,[121] and it was anxiety

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[116] In the early modern period, as Monica Eppinger writes, a missed period was seen as the source of potentially serious health risks. Monica E. Eppinger, *The Health Exception*, 17 GEO. J. GENDER & L. 666, 679 (2016). In the nineteenth century, this health justification for the use of abortifacients and emmenagogues justified "medical intervention before quickening." *Id.* at 700.

[117] For examples, see *The Great English Remedy: Sir John Clarke's Female Pills*, DET. FREE PRESS, Oct. 3, 1864, at 3 (advertising a "sure and safe remedy for female difficulties and obstructions"); *Doctor Meas Accoucheur*, BALT. SUN, Nov. 2, 1865, at 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 (a classified ad for a doctor who claimed to "treat all diseases incident to women"). Recognizing the blurring of the 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 the cure of female complaints or private diseases," including compounds "designed to prevent conception, or tending to produce miscarriage or abortion." Act of Apr. 3, 1869, ch. 106, 1869 Mich. Laws 175.

[118] Those accused of selling drugs for abortion or contraception routinely claimed to be marketing placebos that had no effect. See, for example, United States v. Bott, 24 F. Cas. 1204, 1204-05 (C.C.S.D.N.Y. 1873), in which two defendants claimed to have marketed snake-oil remedies, or Bates v. United States, 10 F. 92, 95 (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."

[119] *See infra* note 164 and accompanying text. Comstock described publications explaining strategies for birth control as "incentives 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 THE YOUTH CORRUPTED 427 (N.Y., 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").

[120] *See* Patricia Cline Cohen, Married Women and Induced Abortion in the United States 1820-1860 (July 22, 2022) (manuscript at 4), https://ssrn.com/abstract=4197554 (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" and "more than 4/5 of my cases involved single women" and of "the 40 married women, more than half had illicit pregnancies. . . . Like the pregnant spinster, these wives sought abortion to hide their shame"); Lawrence Friedman & Hutchison Fan, *High and Low: Abortion in the Press in the Late 19th Century and Early 20th Century*, CLEVELAND ST. L. REV. (forthcoming 2024) (manuscript at 2) (on file with authors) (analyzing newspaper coverage of abortion in late nineteenth- and early twentieth-century newspapers and reporting that the first "big theme" that "stand[s] out" "was 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.").

[121] *See supra* note 97 and accompanying text.

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.[122] Comstock kept detailed lists of the items he confiscated, including "articles made of rubber for immoral purposes,"[123] such as dildos, which Comstock described as "in the form of the male organ of generation, for self-pollution."[124]

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 and immoral use."[125] 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 listed items that Comstock had confiscated, making no mention of items related to contraception or abortion while stressing that Comstock had gathered "[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."[126] In his final push to see the bill passed, Merriam insisted that the bill was needed to protect the "purity and beauty of womanhood" from "the insults of this trade."[127]

The lawmakers who passed the Comstock Act remarked on the rush with which the law was enacted.[128] Senator James G. Blaine brought the bill up for Senate consideration two days before the end of session, and Merriam then pressed the House to pass the Senate bill before even referring it to committee.[129] 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-

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[122] WERBEL, *supra* note 17, 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").
[123] YOUNG MEN'S CHRISTIAN ASSOCIATION OF THE CITY OF NEW YORK COMMITTEE FOR THE SUPPRESSION OF VICE, IMPROPER BOOKS, PRINTS, ETC. 4 (New York, 1874) (reporting on Comstock's seizures since March 1872).
[124] WERBEL, *supra* note 17, at 77 (citing pages 4-5 of a New York YMCA Committee for the Suppression of Vice 1872 report titled "Private and Confidential: Obscene Books, Etc. Summary Report"); *see infra* note 126 (quoting Comstock discussing the confiscation of "rubber articles for masturbation").
[125] *See infra* note 126 and accompanying text.
[126] *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 warning: "For be it known that wherever these books go, or catalogues of these books, there you will ever find, as almost indispensable, a complete list of rubber articles for masturbation or for the professed prevention of conception").
[127] *Id.*; *see also* BROUN & LEECH, *supra* note 89, at 153 (reporting on Merriam's focus on the purity of women).
[128] *See* GAINES FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY 59-63 (2002) (arguing that the haste in which Comstock passed led to "imprecise legislation that Congress had to revise").
[129] *Id.* at 61-62; CONG. GLOBE, 42d Cong., 3d Sess. app. 297 (detailing the machinations leading to the passage of the law).

moribund procedure that counted the number of lawmakers for or against a measure without recording individual votes.[130] The House passed the bill, with President Ulysses S. Grant signing it the next day.[131] 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 similar 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., the United States territories, and other places over which the U.S. had exclusive jurisdiction, 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."[132] A second provision on the U.S. mails provided that

> 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.[133]

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.[134] A third provision barred the importation of "any of the hereinbefore-mentioned articles or things."[135]

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130 *See supra* note 128 and accompanying text.

131 FOSTER, *supra* note 128, at 62-63.

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

133 Act of Mar. 3, 1873, ch. 258, sec. 2, 17 Stat. 598.

134 *Id.*

135 Act of Mar. 3, 1873, ch. 258, sec. 3, 17 Stat. 598. For the inflation estimate, see U.S. INFLATION CALCULATOR, https://www.in2013dollars.com.

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?"[136] In fact, 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."[137] "Procuring of abortion," by contrast, referred to a crime. In 1851 one of the main law dictionaries of the era, stated that the crime "procuring of abortion" occurred only "after the period of quickening" and only when miscarriage was "procured or produced with a malicious design or for an unlawful purpose"[138]—an account of the crime echoed in state cases of the era.[139] Other prominent dictionaries, including *Black's Law Dictionary*, defined an unlawful abortion as applying only to procedures procured for illegal purposes after quickening.[140] Section Two of the

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[136] Courts would ultimately come to harmonize Section One and Two 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 (2d Cir. 1936). For further discussion of these cases, see *infra* Section II.D.

[137] CHAUNCEY GOODRICH AND NOAH PORTER, NEW ILLUSTRATED EDITION OF DR. WEBSTER'S UNABRIDGED DICTIONARY 5 (1864); *see also* NOAH PORTER, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 5 (1891) (defining abortion as "the act of giving premature birth; . . . miscarriage").

[138] ALEXANDER BURRILL, A NEW LAW DICTIONARY AND GLOSSARY 10 (1850-1851); *see also* JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE UNION 45 (Phila., T.K. Collins 1868) (explaining that "in this country, it has not been held an indictable offense at common law to administer a drug, or to perform an operation on a woman with her consent, with the intention and for the purpose of causing an abortion without averring that . . . such woman was quick with child").

[139] *See* Com. v. Bangs, 9 Mass. 387, 387 (Mass. 1812) (discussing a prosecution for "administering a potion with the intent to procure an abortion"); State v. Drake, 30 N.J.L. 422, 425 (N.J. 1863) (explaining that "[t]o 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 (N.J. 1849) (discussing a law making abortion a crime "if any person or persons maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child"); Mills v. Com., 13 Pa. 631, 633 (Pa. 1850) (requiring proof of "an intent to cause and procure miscarriage and abortion"); State v. Moore, 25 Iowa 128, 131 (Iowa 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, 398-399 (Cal. 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 (Colo. 1872) (concluding that "[i]t is the administering the noxious substance or the use of the instrument with intent to produce miscarriage that makes up the crime."

[140] In 1910, *Black's Law Dictionary* defined abortion as "the miscarriage or 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." HENRY CAMPBELL BLACK, A LAW DICTIONARY CONTAINING THE DEFINITIONS OF TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ENGLISH AND MODERN 8 (1910); *see also* THE CENTURY DICTIONARY: AN ENCYCLOPEDIC LEXICON OF THE ENGLISH LANGUAGE 16

Comstock Act thus covered mailing of writings or articles "designed or intended for . . . procuring of abortion," that is, *employed to terminate pregnancy for an unlawful purpose*. (The abortion provision of Section Two thus had two scienter requirements: the sender had to "knowingly deposit for mailing . . . the hereinbefore-mentioned articles or things," that is to mail things knowing that they would be used for unlawful terminations.[141])

Relatedly, leading treatises, including one co-authored by Horatio Storer, leader of the campaign against abortion in the states,[142] identified *lawful* purposes, establishing that a defendant lacked criminal intent when "abortion [was] necessitated at the hands of physicians to save the mother's life."[143] Recognizing that contemporaries understood "abortion" as "miscarriage," and that the crime of abortion required the intentional production of miscarriage, helps to explain why judges interpreted the Comstock Act as allowing medical interventions, even as they disagreed about the scope.[144]

(William D. Whitney and Benjamin Smith eds., 1895) (explaining that "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, MAXIMS, AND AN EXPOSITION ON THE PRINCIPLES OF LAW 7 (1893) ("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 138, at 13.

141 *See supra* note 134 and accompanying text.

142 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 (2010).

143 HORATIO STORER & FRANKLIN FISKE HEARD, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 89 (Bos., Little, Brown & Co. 1868); *see also* EDWIN HALE, A SYSTEMATIC TREATISE ON ABORTION 314 (Chi., 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 the child.")

144 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? Senator Conkling worried that in the haste to pass the statute, the Senate did not fully grasp the meaning of the law they were enacting. CONG. GLOBE, 42d Cong., 3d Sess., 1525 (1873).

> 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 regards 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.

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. Buckingham maintained that the amendment worked "no material alteration" of the previous language. *Id.* at 1524-25. The House retained the reference to "unlawful abortion" in Section One of the Comstock Act, which regulated the publication, possession, or distribution of obscene materials, and in Section Two, which addressed mailing items deemed to be obscene, instead employed the phrase "procuring of abortion." *Compare* Act of Mar. 3, 1873, ch. 258, sec. 1, 17 Stat. 598, *with* Act of Mar. 3, 1873, ch. 258, sec. 2, 17 Stat. 598.

In this era, the law afforded doctors treating patients considerable discretion in making this decision because pregnancy was quite dangerous and the distinction between saving life and protecting health was hard to draw: as the historian Leslie Reagan explains, "[d]etermining when an abortion was necessary—and thus legal—was left to the medical profession."[145] One of the most common justifications for life-saving abortions in the nineteenth century, excessive vomiting, struck some as a health rather than life justification—and in any case, gave physicians discretion to intervene.[146] Even at the height of a sexual-purity interpretation of Comstock, courts assumed that the Comstock Act permitted physicians to communicate directly with their patients or with one another about abortion or contraception for reasons of health.[147] It does not appear that Comstock prosecutions focused on communications between doctors and their patients.[148] The pattern in these reported cases suggests that

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145 REAGAN, *supra* note 142, at 61; *see also* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 33-36 (1984) (arguing that nineteenth-century bans gave doctors "almost unlimited discretion" about when and how to apply a life exception); Siegel & Ziegler, *supra* note 41, at 20-35 (detailing a thick custom of physician discretion in cases of threats to life or health).

146 REAGAN, *supra* note 142, at 63-64.

147 Burton v. United States, 142 F. 57, 62 (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) ("proper 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 (S.D.N.Y. 1876) (discussing 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").

148 We have found no appellate record of a conviction based on communications within a doctor-patient relationship. Some the cases involving contraception and abortion involved books or pamphlets available to the public. *Foote*, 25 F. Cas. at 1141-42 (upholding a book about birth control); United States v. Kelly, 26 F. Cas. 695, 696-97 (D. Nev. 1876) (upholding the conviction in a case of a "quack 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, 962-63 (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. Wa. 1913) (rejecting defendant's demurrer in a case where 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) (letter to physician from the partner of a prospective abortion patient); United States v. Somers, 164 F. 259 , 259-60 (S.D. Cal. 1908) (same); Kemp v. United States, 41 App. D.C. 539, 540-42 (D.C. 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 appear to have concerned prospective patients or those posing as such. Pilson v. United States, 249 F. 328, 329 (2d Cir. 1918); United States v. Tubbs, 94 F. 356, 356-58 (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). In other cases, it is unclear who the author of the decoy letter was pretending to be.

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).[149] In 1915, in an interview with *Harper's*, 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."[150] Debate about the statute's application to protection for health continued well after the statute's passage, reaching a fever pitch by the 1930s.[151]

B. Public-Private Enforcement

In the ten years after the passage of the Comstock Act, anti-vice societies were founded in major urban centers across the country.[152] These societies for the suppression of vice in some ways resembled other "preventative societies" given quasi-governmental powers, such as groups focused on issues from animal abuse to temperance, but anti-vice groups differed in the kinds of members they attracted, the relationships they forged with government, and the law enforcement powers they sometimes exercised.[153]

Both Comstock and McAfee had official government roles—Comstock was named a special agent of the U.S. Post Office in 1873 and McAfee in 1884[154]—but both declined the modest annuity that accompanied the role, depending instead financially on the wealthy benefactors who funded anti-vice societies.[155] In addition to his stipend from the anti-vice society, Comstock collected often-significant bounties authorized by Congress to anyone who effectuated an arrest under the federal law—

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, 424 (1896) (decoy letter posing as "Susan Budlong" intended to discern whether 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. For example, a detective posing as a prospective patient solicited the defendant for a contraceptive. The defendant initially responded by sending an advertisement for products he sold. After another exchange, the defendant sent a contraceptive and a letter about how to use it and in what dosage. Ackley v. United States, 200 F. 217, 219-21 (8th Cir. 1912). None of these, however, appear to have involved communications in an established patient-physician relationship.

149 *See supra* notes 147-148 and accompanying text.

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

151 *See infra* Section II.D.

152 For examples, see *A New Reform Association: Establishment of the Society for the Suppression of Vice*, N.Y. TRIB., Nov. 29, 1873, at 5; *A Good Move: A Society for the Suppression of Vice*, CIN. ENQUIRER, Mar. 21, 1878, at 1; *Suppression of Vice: Organizing the Chicago Branch*, CHI. TRIB., Sept. 27, 1879, at 7.

153 Timothy Guilfoyle, *The Moral Origins of Political Surveillance: The Preventative Society in New York: 1867-1918*, 38 AM. Q. 637, 640-44 (1987).

154 On McAfee's appointment, see Magdalene Zier, *How Comstockery Went West* (manuscript at 3) (on file with authors); on Comstock's appointment, see DENNIS, LICENTIOUS GOTHAM, *supra* note 49, at 239.

155 *See* KEMENY, *supra* note 17, at 22; GEORGE MCKENNA, THE PURITAN ORIGINS OF AMERICAN PATRIOTISM 213 (2007).

$1,250 in 1875, for example, at a time when the average American earned $776 in a year.[156]

The anti-vice movement 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.[157] Catholic leaders also at times backed this anti-vice movement 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.[158] Generally, however, the anti-vice societies represented the interests of white, male, Protestant urban elites: more than a quarter of those who funded anti-vice societies in New York or Boston were millionaires.[159] And for years, the membership of anti-vice societies was initially limited to white men, who saw policing sexuality and marriage as an area in which they were uniquely qualified.[160]

C. *A New Understanding of Obscenity*

Anti-vice activists reacted to new constitutional and political challenges to the role of women in the family and the nation with a new understanding of obscenity—one they identified as materials or items that threatened "sexual purity."[161] Proponents of this vision of sexual purity had concern about the sexual behavior of boys as well as girls—and saw no reason to distinguish contraception and abortion because both permitted women to have sex without pregnancy and thus allowed them to hide their "sin."[162] 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,[163] or opening the door to "licentiousness without its direful consequences."[164]

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156 MARC STEIN, VICE CAPADES: SEX, DRUGS, AND BOWLING FROM THE PURITANS TO THE PRESENT 80 (2017).

157 WAYNE FULLER, MORALITY AND THE MAIL IN NINETEENTH-CENTURY AMERICA 111-39 (2010); CARLSON, *supra* note 51, at 72-86.

158 KEMENY, *supra* note 17, at 8-20; PAULA M. KANE, SEPARATISM AND SUBCULTURE: BOSTON CATHOLICISM, 1900-1920, at 306-25 (2017).

159 BEISEL, *supra* note 17, at 11.

160 Guilfoyle, *supra* note 153, at 640-44.

161 *See infra* notes 171-173 and accompanying text. Comstock himself described his agenda as ensuring that young men and women would "live a pure life." *Comstock to Young Men*, WASH. POST, Apr. 4, 1892, at 8.

162 *See infra* notes 176-179 and accompanying text.

163 COMSTOCK, *supra* note 119, at 427; *see also* BROUN & LEECH, *supra* note 89, at 192 (quoting Comstock's diary denouncing "obscene publications, abortion implements, and other incentives to crime").

164 SECOND ANNUAL REPORT FOR THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE 5 (1876) [hereinafter SECOND ANNUAL REPORT].

Anti-vice activists railed particularly strongly against free love because of the threat it represented to the division of sexual and reproductive labor within *marriage*—and the demands free lovers made in the name of freedom of speech and freedom of the press.[165] 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.'"[166] 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."[167] A.F. Beard, another anti-vice activist, mocked 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."[168]

To save boys, girls, and women from being debauched, anti-vice crusaders sought to reinforce the roles assigned in marriage and 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. "This gift from heaven is no small thing, to be entrusted to an ignorant and often vicious servant girl."[169] Infrequently, Comstock borrowed fetal-protective rhetoric and railed against "ante-natal murderers,"[170] but far more often, anti-vice 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.[171]

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165 *See infra* notes 167-168 and accompanying text.

166 Broun and Leech, *supra* note 89, at 120-21.

167 *Anthony Comstock: Moral Detective—Talk on the Social Evil*, CIN. ENQUIRER, Jun. 6, 1905, at 4 [hereinafter *Moral Detective*]. Comstock consistently pursued those who critiqued marriage. *See Sanctity of Marriage Disavowed by Sun Worshippers, Who Revive Cult in Gotham*, CIN. ENQUIRER, May 25, 1908, at 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 divorces, the separations, and in the domestic associations that have not been consecrated by marriage." FOURTH ANNUAL REPORT FOR THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE 24 (1878) [hereinafter FOURTH ANNUAL REPORT].

168 A. F. Beard, *The National Liberal League Congress*, 18 CHRISTIAN UNION 378 (1878). McAfee also arrested those who critiqued marriage in the terms used by the free love movement. *See The Slenker Scandal: The Free Love Advocate Being Prosecuted by the Postal Authorities*, ST. LOUIS POST-DISPATCH, Apr. 30, 1887, at 12; *Woman Author Is Declared Guilty*, CHI. TRIB., Jun. 6, 1905, at 4.

169 COMSTOCK, TRAPS FOR THE YOUNG, *supra* note 49, at 245.

170 *Id.* at 154.

171 SECOND ANNUAL REPORT, *supra* note 164, at 9 (framing abortion as a strategy for women to "conceal their own lapse from chastity"); FOURTH ANNUAL REPORT, *supra* note 167, at 3-4 (denouncing abortion and contraceptive methods 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) [hereinafter Tone, *Making Room*] (arguing that for anti-vice activists, "pregnancy performed a civilizing function, serving as society's only 'brake on lust'" (citation omitted)). In *Our Day*, a purity publication on whose board he served, Comstock

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."[172] "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."[173]

The anti-vice 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 percent, only around 10 percent of the whole, offered abortion alone.[174] Data in Chicago tell a similar story.[175]

A 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.[176] In the view of anti-vice activists, anything that was argued to prevent conception or procure abortion was a problem for the same reason as 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."[177] Free love literature posed an acute danger: it suggested that the moral order imposed by nineteenth-century marriage was inherently equal and

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framed abortion in similar terms: as being indistinguishable from contraception as a lure for lust, and establishing that his allies worked to suppress "articles for criminal abortion, preventing conception, aiding seduction, and for unreportable immoral use." Anthony Comstock, *Success in the Suppression of Vice*, OUR DAY, 1888, at 298. The Reverend James 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." Rev. James Buckley, *The Suppression of Vice*, 135 N. AM. REV. 495, 500 (1883); *see also A Conspiracy Against Virtue*, ZION'S HERALD, June 6, 1878, at 188 (describing abortion and contraceptive drugs as "the most loathsome appliances for the accomplishment of the lowest crimes without entailing their natural consequences"); *see also Comstock and the Clergymen*, N.Y. TIMES, Mar. 23, 1880, at 3 ("The principal object of the work was . . . the maintenance of moral purity among the youth of America"); *The Work of Suppressing Vice*, GOLDEN RULE, Dec. 12, 1889, at 169 (Comstock describing the suppression of "articles for immoral use" as preventing the defilement of "the foundations of moral purity"). For newspaper coverage of abortion in this era, see *supra* note 120 and accompanying text. Case law also stressed the importance of sexual purity, including in cases related to abortion. *See infra* Section I.D.

172 *The Appetite for Lascivious Reading*, COURIER J., Aug. 19, 1878, at 3.

173 James Monroe Buckley, *Suppression of Vice*, 135 N. AM. REV. 495, 496 (1882).

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

175 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).

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

177 SECOND ANNUAL REPORT, *supra* note 164, at 9.

unjust.[178] "[T]he diabolical weapons they can use," Comstock explained of free lovers in 1879, "would upset the mind and morals of the country."[179]

D. Sexual Purity in the Courts

In the decades after the statute's passage, anti-vice activists selectively used the Comstock Act to prosecute their own critics.[180] In 1878, for example, Comstock famously arrested Madame Restell, the nation's best known "female physician" who had become synonymous with abortion, but who also offered contraceptives, emmenagogues, and even assisted with childbirth and adoption.[181] At a time when stigma around abortion was growing, Restell criticized censors and defended the importance of care for women in New York newspapers.[182] Restell committed suicide before her trial concluded, but she was only one of several providers prosecuted under the law.[183]

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 without fearing a possible pregnancy.[184] John Bott, charged in 1873 with depositing an abortifacient powder in the mail, claimed that the drug was actually harmless; John Whitehead likewise insisted that his nostrums were actually useless.[185] A New York district court upheld both men's convictions anyway.[186]

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).[187]

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178 *See supra* notes 167-171 and accompanying text.

179 *Moral Detective*, *supra* note 167, at 4.

180 On high-profile abortion arrests in the era, see *Important Arrests: The United States Marshal Captures Seven Alleged Abortionists*, BOS. DAILY GLOBE, Oct. 10, 1878, at 8; *Comstock's Western Raid*, N.Y. TIMES, Nov. 17, 1876, at 8; *A Rival of Madame Restell*, N.Y. TRIB., May 10, 1888, at 8; and *Secret Vice: Annual Meeting for the Society for Its Prevention*, CIN. ENQUIRER, May 7, 1878, at 2.

181 NICHOLAS SYRETT, MADAME RESTELL: NINETEENTH-CENTURY AMERICA'S MOST FAMOUS FEMALE PHYSICIAN AND THE CAMPAIGN TO MAKE ABORTION A CRIME 87-102, 120-88 (2023).

182 *Id.*

183 *Id.* at 279-81.

184 *Kelly*, 26 F. Cas. at 696-97 (upholding the conviction of a defendant who advertised to "all married ladies, whose delicate health or other circumstances prevent an increase in their families"); *Whittier*, 28 F. Cas. at 591 (upholding the conviction of a doctor who responded to a decoy letter).

185 United States v. Bott, 24 F. Cas. 1204, 1204-05 (C.C.S.D.N.Y. 1873).

186 *Id.* Other courts reached a similar conclusion. *See* Bates v. United States, 10 F. 92, 95 (N.D. Ill. 1881).

187 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) (detailing 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),

After Foote published an expanded edition book on sex and contraception in marriage,[188] Comstock arrested him in 1874. Foote argued that the statute did not treat "medical advice given by a physician" as obscene, even when the advice covered abortion or contraception.[189] A New York district court rejected Foote's argument,[190] at the same time distinguishing the question whether physicians could be prosecuted under the law for communicating directly with their patients or when speaking to one another about medical matters.[191] Other courts would stress that the statute did not criminalize communications about health between physicians and patients.[192]

A sexual-purity interpretation also reinforced prevailing racial hierarchies.[193] 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."[194] Under a sexual-purity interpretation of the Comstock Act, such a letter would not excite the passions of innocent youth,[195] but the Michigan court treated accusations of interracial sex differently.[196] 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."[197]

In practical terms, enforcement of the Comstock Act had a clear class and gender dimension too. In McAfee's Chicago territory, prosecutions against those who

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https://blogs.harvard.edu/preserving/2016/06/17/dr-edward-foote-freethinker-for-the-sexual-emancipation-of-women [https://perma.cc/Y3RM-KEHF].

188 RABBAN, *supra* note 19, at 39.

189 United States v. Foote, 25 F. Cas. 1140, 1140-41 (C.C.S.D.N.Y. 1876).

190 *Id.*

191 *See* Burton v. United States, 142 F. 57, 62 (8th Cir. 1906) (distinguishing books and pamphlets directed to the public from "a communication from a doctor to his patient"); United States v. Smith, 45 F. 476, 478 (E.D. Wis. 1891) ("proper 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) (quoted *infra* note 214).

192 *See supra* notes 147-148, 191 and accompanying text.

193 Most of those targeted in the early years after passage of the Comstock Act by the New York Society for the Suppression of Vice (NYSSV) were immigrants. FIRST ANNUAL REPORT FOR THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE 6 (1875); SECOND ANNUAL REPORT, *supra* note 164, at 11. Later on, the NYSSV and its government partners arrested people born in America as often as they did immigrants. But as Nicola Beisel explains, Comstock and his colleagues still reasoned from race, presenting vice as a problem created by foreigners. BEISEL, *supra* note 17, at 112-15.

194 United States v. Pratt, 27 F. Cas. 611 (E.D. Mich. 1875).

195 *See* United States v. Wroblenski, 118 F. 495, 496 (E.D. Wis. 1902) (quashing indictment in case involving sealed letter accusing 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, 51-52 (D. Ind. 1892) (quashing indictment of man who mailed letter suggesting that a woman liked to have her "picture taken again in men's clothing" because letter, while "grossly libelous," did not "suggest libidinous thoughts, or excite impure desires").

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

197 *Id.* at 612.

mailed female contraceptives were far more common than those for dealers of condoms.[198] While Comstock pursued immigrants and women in contraception and abortion cases, Samuel Colgate, a member of NYSSV's executive committee, oversaw a marketing campaign centered on contraception without facing any consequences.[199]

Contemporaries challenged these targeted prosecutions, raising free speech and other constitutional objections that the Supreme Court rejected. In 1878 *Ex parte Jackson* dispensed with then-common constitutional arguments against the Comstock Act.[200] In an opinion by Justice Stephen Field, the Supreme Court held that the power to "establish post-offices and post roads" included the authority to regulate what could be mailed.[201] 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.[202]

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.[203] By the time he was arrested in 1877, Heywood had already penned a popular suffrage tract circulated by the National Association for Woman's Suffrage.[204] 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.[205] 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.[206] "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."[207] Heywood challenged Comstock as a "religious monomaniac" and argued that a sexual-purity interpretation of the law had suppressed "free inquiry."[208] When Comstock responded by arresting

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198 Burton, *supra* note 175, at 172.

199 D.M. BENNETT, AN OPEN LETTER TO SAMUEL COLGATE TOUCHING THE CONDUCT OF ANTHONY COMSTOCK AND THE N.Y. SOCIETY FOR SUPPRESSION OF VICE 8-9 (N.Y., Liberal Publisher 1879); *see also* WERBEL, *supra* note 17, at 229 (detailing Colgate's campaign to market Vaseline as a contraceptive).

200 96 U.S. 727 (1878).

201 *Id.* at 728.

202 *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 discussion of the free speech challenges of the era, see Gibson, *supra* note [15]

203 WOOD, *supra* note 187, at 65; BEISEL, *supra* note 17, at 87.

204 *See* EZRA HEYWOOD, UNCIVIL CONSENT: AN ESSAY TO SHOW THE INJUSTICE AND IMPOLICY OF RULING WOMAN WITHOUT HER CONSENT (Princeton, Mass., Co-operative Publishing Co. 1871).

205 On Heywood's life, see D'EMILIO & FREEDMAN, *supra* note 100, at 164-68. On Bennett's case, see United States v. Bennett, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879).

206 EZRA HEYWOOD, CUPID'S YOKES: OR, THE BINDING FORCES OF CONJUGAL LIFE 8 (Princeton, Mass., Co-operative Publishing Co. 1876).

207 *Id.*

208 *Id.* at 11-12.

Heywood in 1877, Bennett, another proponent of suffrage, free love, and legal birth control,[209] announced a crusade to continue mailing *Cupid's Yokes*.[210]

Bennett became the first U.S. 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 anti-vice activists might conjure up.[211] 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 in the adoption of a sexual-purity reading of the statute. At common law, a great deal of profane speech might qualify as obscene.[212] 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.[213] This effort failed: a jury concluded that Heywood's political speech would suggest "impure and libidinous thoughts in the young and the inexperienced."[214]

E. Revenge and Sexual Purity under the Comstock Act

The anti-vice 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,[215] clarifying that the term "writing" applied to material "whether sealed as first-class matter or not."[216] This was a sweeping change, extending the statute not only to the newspapers and periodicals sent through second-class mails but also the letters and private correspondence sent through first-class mail.[217] 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.[218] Founded in 1874, the Woman's Christian Temperance Union (WCTU)

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

[210] *See* RABBAN, *supra* note 19, at 37; FULLER, *supra* note 157, at 114.

[211] *See* Regina v. Hicklin, [1868] 3 Q.B. 360 (Eng.).

[212] *See supra* Section I.A.

[213] *Bennett*, 24 F. Cas. at 1101-02.

[214] *Id.* at 1102. *See Clarke*, 38 F. at 733 (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. [I]t 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 United States v. Bennett, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879); and Regina v. Hicklin, [1868] 3 QB 360, 371 (Eng.))).

[215] On the 1888 expansion, see FULLER, *supra* note 157, at 137-39; and DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 74-75 (1977).

[216] FOWLER, *supra* note 215, at 75.

[217] FULLER, *supra* note 157, at 86, 150-158.

[218] LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 72 (2002); ALLISON MARIE PARKER, PURIFYING AMERICA: WOMEN, CULTURAL REFORM, AND PRO-CENSORSHIP ACTIVISM, 1873-1933, at 13-87 (1997).

launched a Department for the Promotion of Purity in Literature and Art in 1883.[219] The WCTU formed part of a broader social-purity movement that included the precursor to the Parent Teacher Association (PTA), the National Association of Colored Women, and the National Education Association.[220] 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 allowed married women the right to refuse sex, or if women educated their children about sex.[221] 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.[222] People who received writings they found objectionable strategically pursued relief under the Comstock Act by notifying local postmasters or anti-vice activists; these bureaucrats, in turn, sent material they deemed suspect to the Postmaster General for a final decision.[223] Victims of sexual harassment,[224] angry spouses,[225] feuding colleagues,[226] and resentful neighbors[227] turned to the Comstock Act to make their personal disputes into criminal cases. Husbands anxious that their wives received

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219 PARKER, *supra* note 218, at 235; FRANCIS COUVARES, MOVIE CENSORSHIP AND AMERICAN CULTURE 74 (2006).

220 PARKER, *supra* note 218, at 38.

221 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).

222 The number of arrests in New York involving personal disputes increased considerably after 1888—from roughly eleven percent of the NYSSV total between 1895 and 1900 to twenty-five percent of the total between 1908 and 1915. Hovey, *supra* note 174, at 451.

223 On the private letters sent to postal inspectors, see FULLER, *supra* note 157, at 133-34; and Burton, *supra* note 175, 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 asking anti-vice activists to wield the law in personal disputes. *The Suppression of Vice: A Day with Anthony Comstock and His Work*, WASH. POST, Mar. 18, 1888, at 10.

224 Miss A.B. Vann, a mill worker, turned over a letter sent to her by the mill owner threatening to expose her for being in a "funny position with Dave R." unless she began an affair with him. Parish v. United States, 247 F. 40, 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).

225 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. *Jealous Wife Under Arrest*, N.Y. TIMES, Jan. 7, 1900, at 14.

226 Comstock arrested Edward 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.

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

circulars advertising abortion or contraceptive remedies contacted postal inspectors too.[228]

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.[229] In 1900, a Missouri court likewise upheld the conviction of a married man who sent a letter inviting another woman to meet him in a rented room to "pass some pleasant afternoons together."[230] 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.[231]

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, for accusing a witness in a criminal case against Durant of being "a lying scoundrel."[232] The court acknowledged that Durant's speech was defamatory but insisted that it did not threaten sexual purity by exciting "the animal passion."[233]

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.[234] The court concluded that the valentine "would repel, rather than excite, feelings of an impure, licentious, or unchaste character."[235] 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.[236] Courts applied a similar understanding of sexual purity in cases about sex education, abortion, and contraception.[237]

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.[238] Populist Indiana newspaperman Dan Swearingen had denounced a political opponent as a man "filthier, rottener than the rottenest strumpet

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[228] Charles Dickinson, upset that his wife had received a circular, advertising "under thin veil, a medicine to produce abortion," called the circular to Anthony Comstock's attention in 1895. Letter from Charles Dickinson to Anthony Comstock (Oct. 31, 1895) (on file with the National Archives and Records Administration Records, RG 28, Box 27, Postal Inspection Folder, 1832-1970).

[229] United States v. Martin, 50 F. 918, 919-21 (W.D. Va. 1892).

[230] United States v. Moore, 129 F. 159, 162-63 (W.D. Mo. 1904)

[231] Knowles v. United States, 170 F. 409, 411-12 (8th Cir. 1909).

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

[233] *Id.*

[234] *See* United States v. Males, 51 F. 41, 41, 42-43 (D. Ind. 1892).

[235] *Id.*

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

[237] United States v. Whittier, 28 F. Cas. 591, 591 (C.C.E.D. Mo. 1878); Bates v. United States, 10. F. 92, 95-96 (C.C.N.D. Ill. 1881). On the application of the statute to patient-physician communications, *see supra* note 191 and accompanying text.

[238] Swearingen v. United States, 161 U.S. 446 (1896).

that prowls the streets at night."[239] The Supreme Court agreed with Swearingen that his article was not likely to lead to nonprocreative sex and was therefore not obscene.[240] The Court tied its reasoning to the common law of obscene libel, but for years, that had not been understood to apply only to erotica, much less to abortion or contraception.[241]

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.[242]

F. Chill and Underenforcement

Swearingen was a tremendous victory for the anti-vice 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.[243] Historian Shirley Burton identified only 130 prosecutions for abortion or birth control in Chicago between 1873 and 1913, and only seven that resulted in a prison sentence.[244] After 1915, NYSSV arrests related to abortion or contraception, which had never comprised a majority, all but dried up, with a little over one a year.[245]

Inconsistent enforcement did nothing to undermine the forms of chill 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 anti-vice societies,[246] Congress replaced the bounty funding that Comstock and McAfee had enjoyed with a regular salary.[247] Anti-vice activists went to ridiculous new lengths after the 1909 amendments. In 1911, for example, postal inspectors confiscated a report of the Chicago Anti-Vice Commission because it discussed vice.[248]

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[239] *Id.* at 447-49.
[240] *Id.* at 450-51.
[241] *See supra* Section I.A and accompanying text.
[242] *Swearingen*, 161 U.S. at 451.
[243] BROUN & LEECH, *supra* note 89, at 172.
[244] Burton, *supra* note 175, at 189.
[245] Hovey, *supra* note 174, at 437.
[246] *See* Zier, *supra* note 154, at 9-10. For more on salary reform of bureaucrats, see NICHOLAS PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1740-1940, at 117 (2013).
[247] Zier, *supra* note 154, at 9-10.
[248] Clipping, *Report Held Up*, CHI. EVENING POST, Oct. 14, 1911, (on file with the Ralph Ginzburg Papers, Box 8, Folder 1, Wisconsin Historical Society); *see also Bar Report from Mail*, N.Y. TIMES, Sept. 16, 1911, at 7 (detailing postal inspectors' decision to confiscate a report from the society for the suppression of vice because they believed that it violated the Comstock Act); *Bar Vice Report from U.S. Mail*, DET. FREE PRESS, Sept. 27, 1911, at 2 (same).

In 1915, Comstock died.[249] McAfee had passed away six years before, the year that Congress had most recently expanded the statute so closely associated with his colleague.[250] Comstock claimed, by that time, to have arrested more than 4,000 people for obscenity-related offenses and driven 15 to suicide.[251]

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."[252]

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.[253] 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 moving into a more militant phase of struggle for political voice, divided among themselves, but more prepared than their forebears to enter in direct conflict with the state, and to view escalation of conflict as a mode of democratic dialogue available to the disfranchised.[254] 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—to engage in conscience-based lawbreaking to invite (unjust) arrest—in order to conduct a conversation with the American people.[255] And we show how these conflicts—conducted outside and inside the courts and publicized in newspapers published 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.[256] (Appeals to "Comstockery" surged with arrests and adjudication in the 1910s, 1930s, and 1960s.)[257]

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[249] *Anthony Comstock Dies*, WASH. POST, Sept. 22, 1915, at 2; *Anthony Comstock, Vice Fighter, Is Dead*, BOS. GLOBE, Sept. 22, 1915, at 5.

[250] *Necrological Report of the Alumni Association of Princeton Theological Seminary*, *supra* note 85, at 105.

[251] EDWARD DE GRAZIA, LEANING BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 5 (1993); STONE, *supra* note 19, at 192-93.

[252] *Western Society for the Suppression of Vice*, INTERIOR, Apr. 28, 1892, at 23.

[253] *See infra* Section II.B.

[254] *See infra* Section II.A.

[255] *See infra* Section II.B.

[256] *See infra* Section II.C.

[257] *See infra* note 266 and accompanying text.

Lastly, we show how these conflicts changed fundamental premises of judges who enforced the federal statute,[258] leading judges to embrace the view that Americans' health required sexual expression and the means of controlling birth. We observe that while the case law primarily addressed access to contraception, judges explained this health-based interpretation of the law to apply to both abortion and contraception.[259]

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 just testified in Congress with leaders of the suffrage movement that women had a right to vote under the Fourteenth Amendment and had given prominent lectures on behalf of free love.[260] Woodhull, the first woman to campaign for the Presidency, spent election night of 1872 and all of November in jail, only to be arrested again shortly after her release.[261] 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.[262] 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.[263]

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[258] *See infra* Section II.D.

[259] *See infra* Section II.D.

[260] *See* DUBOIS, *supra* note 48, at 83-93 (discussing Woodhull's congressional testimony); Siegel, *She the People*, *supra* note 30, at 971-73 (situating Woodhull's testimony in constitutional arguments of suffragist movement); *see also* James W. Fox, Jr. *Publics, Meanings & the Privileges of Citizenship*, 30 CONST. COMMENTARY 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* VICTORIA CLAFLIN WOODHULL, *The Principles of Social Freedom, Address Delivered in Steinway Hall, New York (Nov. 20, 1871)*, *in* A SPEECH ON THE PRINCIPLES OF SOCIAL FREEDOM 27 (New York, Woodhull, Claflin & Co., Publishers 1871) (quoted *supra* text accompanying note 105). She joined many in the suffrage movement in criticizing marriage as "legalized prostitution." *Id.* at [20.]

[261] LOIS BEACHY UNDERHILL, THE WOMAN WHO RAN FOR PRESIDENT: THE MANY LIVES OF VICTORIA WOODHILL 232-33 (1995).

[262] *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 (2020).

[263] *See supra* Part I.

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,[264] 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."[265] Usage of the term "Comstockery" soared.[266] By the teens, silent films made a mockery of Comstock's efforts to keep sex out of the public sphere.[267] And suffrage emerged as a mass movement, organizing parades and pickets to dramatize its demand to amend the Constitution.[268]

By the early twentieth century, a group of women in the suffrage movement—who called themselves "feminists" and were concerned to secure equality in modes of life as well as the capacity to vote[269]—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.[270] In

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[264] *Bernard Shaw Resents Actions of Librarians*, N.Y. TIMES, Sep. 26, 1905, at 1.

[265] *Id.*

[266] *See* "*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%27; *infra* Figure 1.

[267] 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 (describing the debut of sex symbols including Theda Bara).

[268] Leslie Goddard, "Something to Vote For": Theatricalism in the U.S. Women's Suffrage Movement 171-321 (June 2001) (Ph.D. dissertation, Northwestern University) (ProQuest); DUBOIS, *supra* note 48, at 205-38.

[269] In chronicling the emergence of feminism in early twentieth century, Nancy Cott observes that "Feminism . . . 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 N-gram depicting the rise and shifts in the term feminism, 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.

[270] In 1917, Sanger began publishing *The Birth Control Review*, announcing that if woman "must break the law to establish her right to voluntary motherhood," "then the law shall be broken." Margaret Sanger, *Shall We Break the Law?*, 1 BIRTH CONTROL REV. 4, 4 (1917); *see also* JAEL SILLIMAN, MARLENE GERBER FRIED, LORETTA ROSS & ELENA R. GUTIÉRREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE 52 (2004) (observing that in 1918 the Women's Political Association of Harlem was the first African-American women's club to schedule a lecture 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, 141 (Kathy Peiss & Christina Simmons 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").

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]omen's freedom, in the feminist sense,"[271] 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 and essential in our propaganda as 'equal pay.'"[272] 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 legal disabilities.[273] Yet Eastman spoke for the future. By the end of the decade, even Alice Paul's paper *Equal Rights* would express support of birth control.[274]

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.[275] Nor was the demand for reproductive autonomy new. Woman'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.[276] 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

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[271] Crystal Eastman, *Now We Can Begin*, LIBERATOR 23-24 (Dec. 1920), https://www.marxists.org/history/usa/culture/pubs/liberator/1920/12/v3n12-w33-dec-1920-liberator.pdf [https://perma.cc/SW5J-2LV4] [hereinafter Eastman, *Now We Can Begin*].

[272] *Id. See* Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 469-73 (2020) [hereinafter Siegel, *Democratization*] (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, the international peace movement, and helped found the ACLU, see generally AMY ARONSON, CRYSTAL EASTMAN: A REVOLUTIONARY LIFE (2020).

[273] COTT, *supra* note 269, at 70-71. For Eastman's proposal, see Crystal Eastman, *Alice Paul's Convention*, LIBERATOR 9-10 (Apr. 1921), https://www.marxists.org/history/usa/culture/pubs/liberator/1921/04/v04n04-w37-apr-1921-liberator.pdf.

[274] *Feminism and Birth Control*, EQUAL RTS., Aug. 20, 1927, at 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 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").

[275] For sources discussing the drop in the birth rate, and the different contraceptive practices Americans employed, see *supra* notes and accompanying text.

[276] On claims to self-ownership in matters of sex and reproduction asserted by suffragists, see Siegel, *Democratization*, *supra* note 272, at 464-65.

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."[277] A key locus of this conversation was a network of women in New York's Greenwich Village who organized themselves in 1912 as "Heterodoxy."[278] Heterodoxy's wide-ranging conversations—and prominent invited speakers—addressed questions of politics and culture with topics including economic equality across classes, gender equality in the market and the household, sexual freedom, and birth control.[279]

These conversations proved a seedbed of activism. Anarchist-socialist Emma Goldman led the way in speaking openly on birth control, including the topic in her lectures as early as 1910.[280] In 1912, Mary Ware Dennett, who was then organizing for the National American Woman Suffrage Association (NAWSA), 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.[281]

Within years, the group began actions designed to educate public opinion in support of changing the law. Before women were granted the right to vote in New York (1917),[282] the campaign started as a series of direct actions in 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[283]—were employed by the politically disempowered to amplify their voice in conflicts that spanned across national borders.[284]

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277 Eastman, *Now We Can Begin*, *supra* note 271.

278 Posters for meetings held in Greenwich Village in 1914 illustrate the group's wide-ranging interests and networks. *See, e.g.*, *What Is Feminism?*, WOMEN & AM. STORY, https://wams.nyhistory.org/modernizing-america/fighting-forsocial-reform/what-is-feminism.

279 *See* COTT, *supra* note 269, at 37-50.

280 CONSTANCE M. CHEN, "THE SEX SIDE OF LIFE": MARY WARE DENNETT'S PIONEERING BATTLE FOR BIRTH CONTROL AND SEX EDUCATION 161 (1996) (observing that "[b]y 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.

281 Mary Ware Dennett, Letter to the Editor, *The Status of Men*, FREEWOMAN, May 9, 1912, at 498-99, available at https://repository.library.brown.edu/studio/item/bdr:518550/PDF.

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

283 *See* William Smith & Kimberley Brownlee, *Civil Disobedience and Conscientious Objection*, OXFORD RSCH. ENCYCLOPEDIA POLS. (May 24, 2017), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-114?print=pdf.

284 In India, Mahatma Gandhi famously employed civil disobedience to challenge British colonial rule, taking inspiration from Henry David Thoreau's "On Civil Disobedience." *See* Alexander Livingston, *Fidelity to Truth: Gandhi and the Genealogy of Civil Disobedience*, 46 POL. THEORY 511, 512-14 (2018)

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.[285] Sanger's own mother had died of tuberculosis after conceiving eighteen times in 22 years—eleven live births and seven pregnancies ending in miscarriage.[286] One woman named Sadie Sachs whom Sanger cared for through a self-induced septic abortion came to represent for Sanger the women who desperately sought contraceptive information that doctors denied.[287]

Sanger, then a protégé of Goldman's, was moved to action.[288] Sanger openly published contraceptive information in 1914 in a magazine "The Woman Rebel," which Comstock confiscated.[289] But Sanger left for Europe rather than face trial.[290] 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.[291] 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,[292] convicted, and sentenced to a month in jail, which they served, Byrne conducting a hunger strike that helped galvanize media attention and inspire further resistance.[293]

These arrests and trials generated massive publicity nationwide. In the 1915-17 period, talk of "birth control" entered mainstream usage, and there was a surge of articles covering the topic.[294] *The Washington Times* reported from the District of

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(describing Mahatma Gandhi's theory and practice of civil disobedience). Suffragist Alice Paul learned civil disobedience strategies from Emmeline Pankurst while studying in England. *See* MARY WALTON, A WOMAN'S CRUSADE: ALICE PAUL AND THE BATTLE FOR THE BALLOT 87-88 (2015).

285 *See* CHESLER, *supra* note 17, at 62-63.

286 *See id.* at 33-34, 41.

287 *See id.* 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. CON. HIST. (2024).

288 *See* CHESLER, *supra* note 17, at 81 ("Margaret quite clearly adopted her feminist ideology, and much of the rhetoric she later claimed as her own, from Emma Goldman.").

289 *See id.* at 102.

290 *See* 3 EMMA GOLDMAN: A DOCUMENTARY HISTORY OF THE EARLY YEARS 87 (2003).

291 *See* Dorothy Wardell, *Margaret Sanger: Birth Control's Successful Revolutionary*, 70 AM. J. PUB. HEALTH 736, 739 (1980); CHESLER, *supra* note 17, at 126-27.

292 GOLDMAN, *supra* note 290, at 88.

293 *See* CHESLER, *supra* note 17, at 154-55. On Byrne's strike, see *infra* notes 302-303 and accompanying text.

294 For a quantitative and qualitative study, see Dolores Flamiano, *The Birth of a Notion: Media Coverage of Contraception, 1915-1917*, 75 JOURNALISM & MASS COMMC'N. Q. 560 (1998); *see also* Ana C. Garner, *Wicked or Warranted? US Press Coverage of Contraception 1873-1917*, 16 JOURNALISM STUD. 228 (2015) (tracing the rise in the coverage of contraception in the period). On mainstream usage of "birth control," see Flamiano, *supra* note 294, at 561. For an N-gram depicting the rise and shifts in the term "birth control," see "*birth control*," GOOGLE BOOKS NGRAM VIEWER,

Columbia on the trial of William Sanger, detailing Sanger's story of entrapment by an agent of Comstock.[295] Representing himself, William Sanger explained what was at stake in his trial in a remarkable speech anticipating constitutional developments of the twentieth century that the newspaper quoted at length:

> 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 literature. I deny, as well, the right to hold over the entire medical profession the laws of this obscenity statute . . . .[296]

During Sanger's trial,"[p]andemonium" broke out 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.[297] And when the judges reached a verdict convicting Sanger, the *Fall River Globe* reported that "[i]n a second nearly everyone in the courtroom was upon his feet, . . . cheering, shouting opinions of the judge and court and declaring that the prisoner had been treated unjustly."[298]

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 explaining "Mrs. Margaret Sanger Contends Law is Wrong in Classing Terms She Used in Her Literature as Obscene" and quoting at length from an article Sanger had written in her own defense.[299]

The *Salt Lake Telegram* devoted four articles in one issue to questions raised by Sanger's trial extensively quoting Sanger in her own defense.[300] Other stories attested to Comstock's declining authority, emphasizing that his use of the criminal law to

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https://books.google.com/ngrams/graph?content=birth+control&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3.

[295] *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 [hereinafter *To Fight in Court for Birth Control*].

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

[297] *Clash Over Comstock; Purity Congress Refuses to Listen to Attack Upon Anti-Vice Man*, FALL RIVER DAILY EVENING NEWS, July 19, 1915, at 5. *See also Riot in Court When Sanger is Convicted*, BOS. HERALD, Sept. 11, 1915.

[298] *Riot in Court When Sanger is Convicted*, FALL RIVER GLOBE, Sept. 11, 1915, at 2.

[299] *Woman Advocate of Birth Control Outlines Defense*, ST. LOUIS POST-DISPATCH, Jan. 19, 1916, at 3.

[300] Kenneth W. Payne, *Threat of Prison Won't Stop 'Woman Rebel' From Making 'Birth Control' National Issue*, SALT LAKE TELEGRAM, Jan. 18, 1916, at 13; *Birth Control Now Before Trial Court*, SALT LAKE TELEGRAM, Jan. 24, 1916, at 1; *Birth Control Leagues Formed*, Salt Lake Telegram, Jan. 18, 1916, at 13; *Leading British Thinkers Appeal to Wilson on Behalf of Mrs. Sanger*, Salt Lake Telegram, Jan. 18, 1916, at 13; *Court at Odds over Guilt of Mrs. Sanger*, Salt Lake Telegram, Jan. 18, 1916, at 13.

target Sanger and punish discussion of controlling birth was a First Amendment issue, and reporting that prominent English intellectuals had spoken out opposing America's suppression of public debate.[301] The press also extensively covered Byrne's hunger strike,[302] with the *New York Times* and other papers provided the public graphic details.[303]

The government crushed Sanger 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 control.[304] But incarceration amplified rather than silenced their voices.[305] In convicting Sanger, the New York Court of Appeals for the first time construed a provision of the state obscenity statute that exempted 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.[306] The public was fascinated by the claims of Comstock resisters, and their stories were accorded increasingly positive coverage.[307] 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,"[308]despite the judge's requirement that a physician prescribe contraception.

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[301] *Id.*

[302] CHESLER, *supra* note 17, at 102-03, 152-53 (observing that Ethel Byrne was sentenced to a month in jail, and "she made headlines and secured her release through a hunger strike modeled on the attention-getting exploits of the British suffragists").

[303] *Mrs. Byrne Now Fed By Force*, N.Y. TIMES, Jan. 28, 1917, at 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 88-97 (2014).

[304] 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, Jan. 9, 1917, at 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.

[305] 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).

[306] *See infra* Section III.A (discussing case). Earlier rulings under the Comstock Act had focused on potential protection within the physician-patient relationship. *See* notes 147-148 and accompanying text.

[307] *See* Flamiano, *supra* note 294, at 563 ("An examination of 44 articles in 5 magazines revealed a pattern of predominately positive portrayals of birth control.").

[308] PETER ANDREAS, SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA 202 (2013); *see also* TONE, *supra* note 51, at 107-108 (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).

Change was in the air. In this period, conflicts over the censorship of birth control converged with conflicts over censorship of speech criticizing World War I. Courts regularly authorized government to censor dissident political speech.[309] 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 obscenity statute: "Nothing can be accomplished without the free and open discussion of the subject."[310]

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 the shadow of Sanger. In fact, 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 decisions holding that James Joyce's *Ulysses* was not obscene and then authorizing importation of contraceptive articles in the *One Package* decision.[311] *United States v. Dennett* was ultimately overshadowed by the subsequent decisions it enabled.[312]

Dennett was born the year Comstock jailed Woodhull.[313] 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. When she failed to heal from her last pregnancy in 1905, doctors warned her that having another child would kill her yet offered no advice about contraception. The couple ended sexual relations,[314] and while Dennett was recovering from surgery, her husband began a relationship with a family friend which he insisted on continuing as part of their marriage; a separation and then an acrimonious divorce ensued that was widely

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[309] *See, e.g.*, Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917); John Sayer, *Art and Politics, Dissent and Repression: The Masses Magazine Versus the Government, 1917-18*, 32 AM. J. LEGAL HIST. 42 (1998); Laura Weinrib, *The Limits of Dissent: Reassessing the Legacy of the World War I Free Speech Cases*, 44 J. SUP. CT. HIST. 278 (2019).

[310] *See Woman Advocate of Birth Control Outlines Defense*, *supra* note 299, at 3. (reporting in a January 1916 issue of the *St. Louis Dispatch* an interview with Sanger originally published in Alexander Berkman's *The Blast*).

[311] *See infra* Section II.D.

[312] *See infra* notes 355-359 and accompanying text.

[313] CHEN, *supra* note 280, at 3 (reporting that Dennett was born in April of 1872).

[314] *Id.* at 43-57.

covered in the press.[315] When her husband refused to support the family, Dennett found salaried suffrage work, and by 1910 she was gaining national reputation as a suffragist and appointed corresponding secretary of NAWSA.[316]

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 entitled "The Sex Side of Life: An Explanation for Young People," in which 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.[317] Movements for sex education were then several decades' old,[318] but Dennett's book broke ground by framing sex as a distinctively human and valuable form of self-expression.[319] "It is not a nasty thing," she wrote. "It should mean everything that is highest and happiest in human life."[320]

It was William Sanger's trial that same year that provoked Dennett into taking 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).[321] During World War I, Dennett worked with Crystal and Max Eastman to found the National Civil Liberties Bureau (later the American Civil Liberties Union), for which she mobilized war protests.[322] Then, as 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,[323] 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.

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315 *Id.* at 56, 64-125.

316 *Id.* at 105-06.

317 *Id.* at 171-76.

318 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 100, at 155; Bryan Strong, *Ideas of the Early Sex Education Movement in America*, 12 HIST. ED. Q. 129, 136-41 (1972) (describing the work of the early sex education movement to "teach sexual morality" and "instruct students in the principles of sexual hygiene"). Advances in knowledge about venereal disease, a major problem of the era, inspired physicians to found their own organizations on sex education. KRISTY SLOMINSKY, TEACHING MORAL SEX: A HISTORY OF RELIGION AND SEX EDUCATION 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 AMERICA 40-51 (2000) (chronicling the work of doctors like Morrow to establish that "the moral life was a hygienic life").

319 *See infra* notes 320-323 and accompanying text.

320 MARY WARE DENNETT, THE SEX SIDE OF LIFE 15 (6th ed. 1919).

321 *Id.* at 180-82.

322 *Id.* at 120-25.

323 *Id.* at 207-08.

In the pages of Sanger's new *Birth Control Review*, Dennett reported, and rebutted, the objections of New York legislators 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.[324] 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."[325] Dennett attacked advocates of sexual purity—those who "accept sex relations as necessary for parenthood and demand complete suppression otherwise;"[326] and she described Comstock laws as "enslaving a great part of the population" and "inflict[ing] upon our womanhood a state of poverty, degradation, illness and death unequaled in the whole history of our times."[327]

Dennett soon decided to reorganize the NBCL as the Voluntary Parenthood League (VPL) 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.[328] She invited Sanger to serve on the executive committee, but in 1919, rather than join in supporting Dennett's "clean repeal" bill, Sanger gave support to an incremental reform bill that sought to authorize birth control information for doctors only—still ambitious in an era when the AMA supported criminalization of contraception.[329] Tensions mounted as Sanger attempted unsuccessfully to deter England's birth-control leader Marie Stopes from dealing with Dennett, and then in 1921 decided to start her own organization called the American Birth Control league (ABCL). The conflict never abated, reflecting differences of values, strategy, and temperament.[330]

In 1924, Dennett actually succeeded in securing sponsors and a joint congressional hearing for a bill exempting communication about contraception from

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[324] Mary Ware Dennett, *Six-Hour Weeks and Birth Control*, 3 BIRTH CONTROL REV. 4, 4 (1919).

[325] *Id.* at 5; *see also* Mary Ware Dennett, Letter to the Editor, *Voluntary Parenthood*, N.Y. TIMES, Feb. 11, 1922, at 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,"* 3 BIRTH CONTROL REV. 20 (1919) (attacking sexual purity as contrary to American traditions of liberty: "the 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'").

[326] Mary Ware Dennett, *The Stupidity of Us Humans*, 3 BIRTH CONTROL REV. 5 (1920).

[327] *Id.*

[328] *See Work on Congress Begins*, 3 BIRTH CONTROL REV. 13 (1919) (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").

[329] CHEN, *supra* note 280, at 211-13, 219-22.

[330] *Id.*

federal obscenity law.[331] Testifying before a joint hearing of a Judiciary Subcommittee on the Cummins-Vaile bill, Dennett emphasized the haste in which the Comstock statute had been passed, inviting Congress to clarify its understanding of obscenity.[332] And, in Congress as she had in New York, Dennett insisted 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.[333]

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 now were allowed to vote. At the time of Cummins-Vaile there was only *one* woman serving in the Congress.[334] It did not help that even as Catholic leaders opposed the bill, Sanger also continued in her opposition to Dennett's bill, and thereafter attracted attention through her competing, better-funded ABCL, which supported bills allowing doctors to access contraception under federal obscenity

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[331] *Id.* at 234-35; *see also Cummins-Vaile Bill: Hearing on H.R. 6542 & S. 2290 Before the Subcomm. of the Comms. on the Judiciary*, 68th Cong. 1-3 (1924) [hereinafter *Cummins-Vaile Bill Hearing*] (providing the text of the bill, which was "[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").

[332] *Cummins-Vaile Bill Hearing*, *supra* note 331, at 11 (statement of Mary Ware Dennett) (explaining that "[w]hen the measure came up for action it was passed very hurriedly without debate at all."); *Effort to Lift Ban Upon Birth Control Facts*, AM. GUARDIAN, Feb. 15, 1924, at 5.

> 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.

Id.

[333] *Cummins-Vaile Bill Hearing*, *supra* note 331, at 10-11 (statement of Mary Ware Dennett).

[334] *See History of Women in the U.S. Congress*, CTR. AM. WOMEN & POLS., https://cawp.rutgers.edu/facts/levels-office/congress/history-women-us-congress (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).

law, a bill Dennett opposed as likely to exclude the poor.[335] In fact, in the years after women first were allowed to participate in electoral politics, Congress was not willing to enact either proposal—and would not for another half century.[336]

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 for its forthrightness in explaining to young people the physiology of sex, but also, too, 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.[337]

In 1922, the post office ruled the pamphlet obscene, even as religious, educational, and medical leaders recommended it, and the pamphlet's readership grew.[338] After lawyer Morris Ernst, general counsel of the newly formed American Civil Liberties Union, spoke to Dennett's group, he offered to bring suit, appealing to the Supreme Court if necessary.[339] Within two weeks Dennett was indicted—targeted, she suspected, for her advocacy[340]—and soon thereafter tried and convicted for violating the Comstock Act.[341]

The Brooklyn trial court's decision provoked a storm of protest.[342] The press invoked the wide variety of civic, religious, and medical authorities who had approved

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335 *Birth Control Bill Evokes Protest from Catholics*, TIDINGS, Apr. 18, 1924, at 3. On Sanger's proposals, see CHESLER, *supra* note 17, at 231-34. On Dennett's objection to Sanger's approach, see CHEN, *supra* note 280, at 213; *see also* Cathy Moran Hajo, *Voluntary Parenthood League*, *in* ENCYC. 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").

336 *See infra* note 439 and accompanying text. *See generally* Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. 1973 (1971) (repealing provisions on contraception).

337 DENNETT, THE SEX SIDE OF LIFE, *supra* note 320, at 5.

338 *See* CHEN, *supra* note 280, at 241-42.

339 *Id.* at 79-80.

340 *Id.* at 80; *see also* GARY, *supra* note 19, at 36-39 (noting that "Dennett was not surprised" to be indicted).

341 GARY, *supra* note 19, at 39, 50; Weinrib, *The Sex Side of Civil Liberties*, *supra* note 19, at 355.

342 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 . . . .").

of Dennett's pamphlet[343] and criticized classification of the pamphlet as obscene by depicting Dennett as a maternal, even grandmotherly figure.[344] This refrain was repeated across the nation: "It's 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 post office authorities, the New York clergy, the United States attorney's office and educational circles into a lather."[345] Editorials derided the New York court for enforcing beliefs even more pernicious than Tennessee's law banning teaching of evolution in the public schools,[346] 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."[347]

The Executive Committee of the recently founded ACLU expanded its conception of civil liberties to support Dennett,[348] and formed a defense committee headed by John Dewey, who launched a national campaign on Dennett's behalf.[349]

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343 *See Modern Czardom*, CHATTANOOGA DAILY TIMES, May 6, 1929, at 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*, PASADENA POST, Apr. 11, 1919, at 9 ("This editorial is 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?").

344 *Now Tennessee Can Laugh at New York*, WHITTIER NEWS, May 15, 1929, at 10.

345 Jessie Henderson, *New Book on Sex Brews Hot Debate*, CHATTANOOGA DAILY TIMES, Feb. 3, 1929, at 32; Estelle Lawton Lindsey, *Disturbing Elements Creating Discussion*, PASADENA POST, Apr. 11, 1929, 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. This editorial is a protest . . . ."); *Grandmother's Treatise on Sex Brings Arrest*, PETALUMA ARGUS-COURIER, Apr. 29, 1929, at 1 (objecting to the conviction of a "a gray-haired grandmother").

346 *Now Tennessee Can Laugh at New York*, *supra* note 344, 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 calling the trial "narrow-minded fanaticism at its worst" and one of the most amazing bits of bigoted nonsense in recent years.").

347 *Modern Czardom*, *supra* note 343, at 4 (quoting *Baltimore Evening Sun* as observing that millions of Americans "'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'").

348 Weinrib, *The Sex Side of Civil Liberties*, *supra* note 19, at 364-65; *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.").

349 This committee grew from eight to over fifty national leaders including Alice Stone Blackwell, Mrs. Jacob Riis, and Rabbi Stephen Wise. *See* John M. Craig, *"The Sex Side of Life": The Obscenity Case of Mary*

Dewey, who evidently recognized that he shared common commitments with Dennett,[350] 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 interference, the latter is equivalent in my judgment to putting a large premium on real indecency and obscenity of thought and action.*[351]

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

Represented by Morris Ernest, Dennett appealed to the Second Circuit where Judge Augustus Hand decided her case *United States v. Dennett*[352] in 1930, and in that decade, with his cousin Judge Learned Hand, two other cases of critical importance to evolving understandings of federal obscenity law—*United States v. One Book Entitled* Ulysses *by James Joyce*[353] and *United States v. One Package of Japanese Pessaries*.[354]

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

In *Dennett*, Judge Hand ruled that "The Sex Side of Life" was not obscene. Drawing from Dennett's reasoning, he rejected key elements of the sexual-purity understanding of obscenity. A first critical premise of the opinion was that sexual

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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 (April 17, 1930) (on file with The Schlesinger Library, Radcliffe College, Harvard Univ.). 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 The Schlesinger Library, Radcliffe College, Harvard Univ.).

350 Laura M. Westhoff, *The Popularization of Knowledge: John Dewey on Experts and American Democracy*, 35 HIST. EDUC. Q. 27, 33-34 (1995).

351 Letter from John Dewey to Morris Ernst, *reprinted in* 17 THE LATER WORKS OF JOHN DEWEY, 1925-53: 1885-1953 (2008) (emphasis added).

352 39 F.2d 564 (2d Cir. 1930).

353 72 F.2d 705 (2d Cir. 1934).

354 86 F.2d 737 (2d Cir. 1936). On Ernst's work in these cases, *see* GARY, *supra* note 19, at 46-60, 180-214, 238-49.

expression is a *valuable* dimension of human relationships. Quoting at length from the introduction to Dennett's pamphlet, the opinion showed how the pamphlet systematically situated sex in the context of love.[355] "[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."[356] 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.[357]

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 not refer to "everything which might stimulate sex impulses," or "much chaste poetry and fiction, as well as many useful medical works would be under the ban."[358] He ruled that the statute "must not be assumed to interfere with serious instruction regarding sex matters unless the terms . . . are clearly indecent."[359]

It is here in the *Dennett* opinion that a modern approach to obscenity was born. Rather than look at the effect of selectively excised passages on the most susceptible readers—as the traditional *Hicklin* test required[360]—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.[361]

The impact of the *Dennett* case was immense, even as citations to the decision have ceased in recent decades.[362] 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

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[355] *Dennett*, 39 F.2d at 565-67.
[356] *Id.* at 567.
[357] *Id.* at 568.
[358] *Id.*
[359] *Id.* at 569.
[360] *See supra* notes 213-214 and accompanying text (discussing adoption of *Hicklin* standard in the *Bennett* case); GARY, *supra* note 19, at 11-12 (discussing the *Hicklin* obscenity standard in the courts and observing that the "entire work did not matter either—just an offending passage or image was enough for prosecutors"). *See supra* note 214 (reporting on a case applying the *Hicklin* standard for obscenity to a pamphlet on the symptoms of venereal disease).
[361] *Dennett*, 39 F.2d at 569.
[362] 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 432-452 and accompanying text (discussing how the Warren Court invoked *Dennett* in modernizing obscenity law in the 1950s).

under which the Post Office Department operates its censorship.'"[363] As Professor Laura Weinrib has observed: "Within a few years of the Second Circuit's decision, civil libertarians were aggressively advocating not only open sex education but also artistic freedom and even, in some cases, birth control."[364] 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.[365]

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*[366] holding that a doctor importing a diaphragm from another doctor did not violate federal obscenity laws. In these developments we can see the practices characterized as "health" and "obscenity," lawful and unlawful, shifting[367]

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.[368] 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.[369] And in the *Dennett* case, Judge 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.[370]

Going even farther, in 1930, in *Youngs Rubber Corporation v. C.I. Lee*,[371] the Second Circuit enforced a patent for Trojan brand condoms on the grounds that they

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[363] AM. CIV. LIBERTIES UNION, THE PROSECUTION OF MARY WARE DENNETT FOR "OBSCENITY" 9 (1929).

[364] WEINRIB, *supra* note 19, at 363 (citation omitted).

[365] 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 "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 that the "question in each case is whether a publication taken as a whole has a libidinous effect").

[366] United States v. One Package, 86 F.2d 737 (2d Cir. 1936).

[367] *See infra* Section III.A.

[368] *See* GARY, *supra* note 19, at 238 ("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.

[369] *Bours*, 229 F. at 964 ("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.")

[370] *See supra* notes 355-361 and accompanying text.

[371] 45 F.2d 103 (2d Cir. 1930).

could be used for lawful purposes.[372] 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."[373] This intent requirement was consistent with the statute as enacted,[374] 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."[375] The court acknowledged the condom's dual function as licit, so long as consistent with local law, and more importantly, emphasized the condom's health-regarding 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."[376] 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.[377]

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. [378] Public-health concerns drove these changes in part. A policy preaching abstinence to the military failed to contain the spread of venereal disease during and immediately after World War I.[379] 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.[380] By the early 1930s,

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372 Tone, *Making Room*, *supra* note 171, at 67-68 (describing the significance of the patent litigation).

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

374 *See supra* Section I.A.

375 *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.").

376 *Id.* at 108.

377 *Id.* at 109.

378 *See* Joshua Gamson, *Rubber Wars: Struggles over the Condom in the United States*, 1 J. HIST. SEXUALITY 262 (1990); *see generally* ALEXANDRA 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).

379 *See infra* notes 380-381 and accompanying text.

380 LORD, *supra* note 378, at 41-42; *see also* RICKIE SOLINGER, PREGNANCY AND POWER: A HISTORY OF REPRODUCTIVE POLITICS IN THE UNITED STATES 105 (2d ed. 2019) ("Now the military discussed the inevitability of male sexual activity and the fact that soldiers had to be supplied with condoms in the interest of public health").

portrayals of male sexual aggressiveness as natural or even laudable were widespread.[381] *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.[382] "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.'"[383]

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,[384] women used as both a contraceptive *and* an abortifacient.[385] One of the most popular "health" remedies of the era to regulate birth was Lysol. A 1933 women's magazine, *McCall*'s, promised the wife that regular use of the antiseptic "Lysol would ensure 'health and harmony . . . throughout her married life."[386]

In *One Package*, Morris Ernst presented Judge 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.[387]

Federal obscenity law, Judge Hand ruled in *One Package*, did not "prevent the importation, sale, or carriage by mail of things which might intelligently be employed

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[381] TONE, *supra* note 308, at 106 (reporting that after 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 and a "new, more indulgent perception of male sexuality").

[382] 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").

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

[384] *See supra* notes 111-112 and *infra* note 385 and accompanying text.

[385] RIDDLE, *supra* note 111, at 250-53; *see also* Sarah E. Patterson, Being Careful: Progressive Era Women and the Movements for Better Reproductive Health Care 145-46 (2020) (Ph.D. dissertation, State University of New York at Albany) (ProQuest) (relating the stories of women in the interwar period who used certain drugs interchangeably for both contraception and abortion).

[386] Tone, *Contraceptive Consumers*, *supra* note 383, at 485.

[387] *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.

by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients.'"[388] In this way, Hand expanded the range of lawful purposes under the Comstock Act, from life-saving to "promoting the well-being of patients," an end that could enfold distributing a pessary for birth control as lawful under the statute. Quoting *Youngs Rubber*, Judge 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.'"[389] The Second Circuit recognized that there were legitimate health-regarding purposes for communicating about and sending articles for controlling birth in 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 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, amongst a wide swath of the American public, including intermediaries and interested third parties.[390]

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.'"[391] Most but not all states adopted this understanding as a matter of state law: Connecticut

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[388] *One Package*, 86 F.2d at 739; *see also* OLC Memo, *supra* note 54, at *1-2, *5. For discussion of contextualizing the courts' reasoning in these cases in developments of the early twentieth century, see *supra* Section II.D.

[389] *See One Package*, 86 F.2d at 738 (quoting *Youngs Rubber Corp.*, 45 F.2d at 108).

[390] Some cases authorized mailings involving medical personnel, including pharmacists. Often, the cases go much farther, 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 Corp.* These cases all discuss lawful contraception and abortion, and thus shift the burden of proof onto the prosecution to demonstrate that any mailing involving communications or articles about reproduction violated the statute through a showing of intent or otherwise.

For an early and prominently cited case, see *Bours*, 229 F. Supp. at 964, 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.3d 473, 474-75 (6th Cir. 1933), 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 Corp.*'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, 512 (2d Cir. 1938), which applied a similar 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."

[391] 18 U.S.C. § 1461 (Historical and Revision Note, quoting *Youngs Rubber*, 45 F.2d at 103).

and Massachusetts were among the hold-outs, adamantly refusing in the wake of *One Package* to shift interpretation of the states' mini-Comstock laws in response.[392]

III. COMSTOCK'S LEGACIES IN POLITICS AND IN CONSTITUTIONAL LAW

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 the contraceptive and abortion provisions of Comstock appears to have ceased.[393] State enforcement declined in its wake.[394] Decades of advocacy amplified the dramatic shifts in sexual and family mores[395] that guided Comstock decisions in the 1930s and dislodged the most expansive sexual-purity understandings of obscenity.[396]

These now-forgotten statutory decisions expressed a twentieth-century understanding of democracy as requiring individual freedom from government control. Judges interpreting the Comstock Act in the 1930s anticipated emerging constitutional understandings; 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. From this vantage point, 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 popular outcry, there are critical respects in which the *censors'* project succeeded. Judges interpreting the Comstock Act who characterized practices once branded "obscene" as necessary for "health" often made doctors gatekeepers—especially in matters concerning women's sexual and reproductive health. And, as we show, they typically did so without mention of the advocates who fought for these changes or the constitutional principles for which they struggled: fundamental freedoms of democratic and intimate life. Comstock resisters thus promoted new constitutionally informed understandings of obscenity even as the very statutory decisions for which they advocated effaced their roles as midwives of constitutional modernity.

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[392] *See* Brooks, *supra* note 4, at 4-5.

[393] *See* Kennedy, *supra* note 382, at 242 (reporting that time of the district court's ruling in *One Package*, counsel for Sanger's and Dennett's organizations found that federal government cases under obscenity "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").

[394] *See* Hovey, *supra* note 174, at 437 (analyzing enforcement statistics in New York City); Abraham Stone & Harriet Pilpel, *Social and Legal Status of Contraception*, 10 Current Legal Thought 374, 376 (1943-44) (describing recent state enforcement as "sporadic").

[395] *See supra* note 28 and accompanying text (discussing a massive decline in birth rates in the first decades of the twentieth century).

[396] *See supra* Sections II.C-II.D.

More fundamentally, Comstock resisters sought broader legislative change but failed in every effort at legislative reform. Precisely because advocates persuaded judges to abandon most extreme readings of obscenity, yet failed to secure legislative repeal or reform of the obscenity law, significant vestiges of the Comstock Act remain in force today.[397]

Why, given broad-based public support for change,[398] were advocates like Dennett or 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 were unable to significantly shape the law for at least a half century thereafter.[399] 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.[400]

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.[401] The core problem advocates faced was 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.

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397 Even the American Civil Liberties Union, which had just begun a court-centered campaign, was not yet framing sex as a civil liberty. *See* LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 3, 40-56 (2013) (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 338-341.

398 *See supra* notes 343-351 (describing popular newspaper coverage of Comstock resistance and the litigation it engendered); *infra* note 415 (reporting popular support for birth control expressed in polls) and accompanying text.

399 *See infra* note 400 and accompanying text.

400 In 1965, only two Article III judges were women; by 1973, when *Roe* was decided, there were only three. 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 93d 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 334. 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 and 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).

401 For examples from the nineteenth century including Ezra Heywood, D.M. Bennett, and Edward Foote, *see supra* notes 187-190, 204-213 & accompanying text. In the twentieth century, civil libertarians like Max Eastman, John Dewey, Jacob Riis, and Morris Ernst played a significant role in resistance to Comstock. *See supra* notes 322, 348-351, 339, 368 & accompanying text.

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 1970s[402]—it is hard for us to grasp how deeply federal and state Comstock prosecutions deformed the democratic process. We call these legacy effects of the Comstock prosecutions "chill." We employ the First Amendment concept of chill to emphasize that (1) Comstock enforcement often involved state action threatening speech that today would be constitutionally protected expression[403] and that (2) generations of prosecutions unpredictably targeting and surveilling speech about sex and reproduction stigmatized that speech in ways that radiated far beyond the original prosecutions.[404] Chill highlights, as John Dewey recognized, that obscenity law did not only reflect, but also 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.[405] Obscenity law helped mark public claims about sex and reproduction as *obscene*, as dirty, shameful, and unworthy—as the expression of base animal impulse rather than liberty, conscience, or constitutional right.

The result of these forces was that legislatures proved unwilling or incapable of reforming obscenity legislation even as the public—a majority of which may never have supported the laws in the first instance—proved increasingly alienated from the law. Legislative inaction persisted, even in the face of broad-based demand for change, expressed not only through polls but also through flagrant breaking of laws that diverged from popular morality.

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[402] 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. 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, as late as 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* McCoy Jr., *infra* note 439 (making a similar argument in 1963).

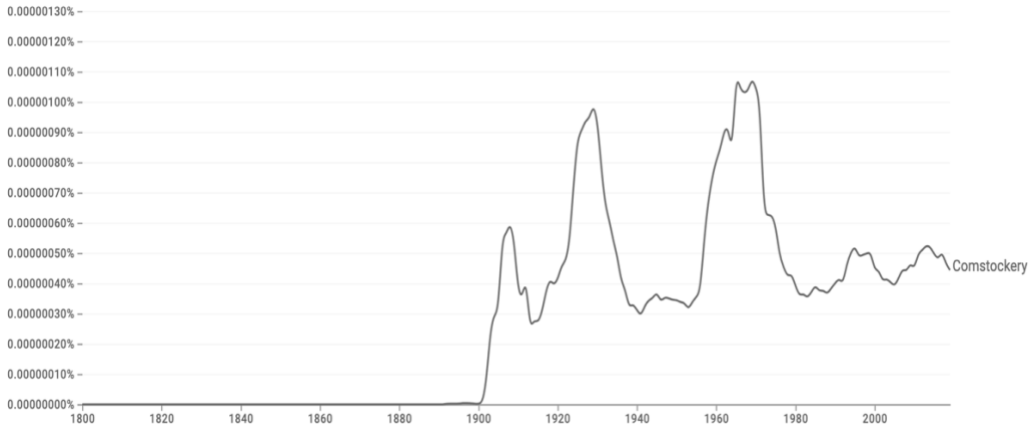
[403] For First-Amendment law in the era of Comstock and ensuing decades, see Gibson, *supra* note 19, at 293-309.

[404] *See supra* note 50 and accompanying text.

[405] *See supra* Section II.C.

In these circumstances of legislative lockup, we show, courts ultimately stepped in, first in the 1930s and then again in the 1960s, to align prohibitions on obscenity with evolving public norms.
By reconnecting the decisions interpreting obscenity statutes to the popular mobilizations that helped motivate those decisions, we show, first, that the 1930s cases repudiating sexual-purity beliefs about sex were responding to claims on constitutional values, even if judges did not acknowledge those claims and, second, that these objections to "Comstockery" found direct constitutional expression in the decisions of the 1960s.[406]

Figure 1. Usage of "Comstockery" from 1800-2000



Unsurprisingly, courts that responded to advocates' claims translated those claims into the language of law in ways that narrowed them. As importantly, judges responded to their advocacy in terms that eradicated memory of the democratic mobilizations that had prompted new understandings of the law.

In some sense, this was to be expected. Judges interpreting a statute or the Constitution have authority to do so insofar as they find their warrant in the statute or in the Constitution. Ordinary Americans helped judges understand that in a democracy, citizens must be free to express themselves without control by the state. Yet given the stigma that surrounded these advocates and their arguments, judges did not view them as sufficiently authoritative to recognize in interpreting either the statute or the Constitution.

In the discussion that follows, we reflect briefly on forces that constrained change under the statute and the Constitution. We look back in Section III.A. at the conditions under which advocates challenged Comstock in the early twentieth century

[406] *See supra* note 266 and accompanying text (charting increased usage of the term Comstockery during the 1930s and 1960s).

and then forward in Section III.B. to cases on the constitutionality of laws criminalizing obscenity and contraception decades later.

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.[407] 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.

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 protection 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 a 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 because it denied women the right to voluntary motherhood and to sex in the marital relationship.[408] The judge responded to Sanger and Byrne's constitutional arguments without ever recognizing those arguments as claims on the Constitution or conscience, instead reading into the provision of the state's Comstock law that allowed men access to condoms for "cure or prevention of disease" statutory permission for doctors to prescribe contraception for married women also.[409] At the same time, the

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[407] On the breadth of understandings of "life" and physician discretion, see REAGAN, *supra* note 142, at 61; LUKER, *supra* note 145, at 36; Siegel and Ziegler, *supra* note 145 at 21-32.

[408] *See* Appellants' Brief at 9, People v. Sanger, 179 App. Div. 939, 166 N.Y.S. 1107 (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 15-16 (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").

[409] People v. Sanger, 118 N.E. 637, 637-38 (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.").

court upheld Sanger's and Byrne's convictions because, as nurses, they were not licensed to dispense contraception to their patients.[410]

Sanger had challenged the obscenity law on the ground that women should be able to choose motherhood and protect their health, without compromise of sexual freedom. What her case set in motion was a compromise in which (some) women could secure access to contraception, but not as a matter of right.[411] The standard of "health" the New York Court recognized accommodated Sanger and Byrnes' claims in a way that preserved male control.[412] The spread of 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."[413]

Margaret Sanger learned from her encounter with the law. Whether we count this as an expression of chill, 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 to persuade men in elected office and the judiciary to advance her cause.[414]

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 advocating 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 chill obstructed political advocacy. Men on the Hill were obviously "embarrassed" in discussing the legal regulation of

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[410] The judge upheld Sanger 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.

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

[412] *Sanger*, 118. N.E. at 637-38. ("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."). 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 reasons. Dennett reported that legislators were unwilling to modify the ban on contraception which they believed would preserve "moral standards" and prevent "race suicide." Dennett, *Six-Hour Weeks*, *supra* note 324, at 4.

[413] TONE, *supra* note 308, at 108; *see also supra* Section II.D.

[414] For a report of how the reasoning of the New York Court of Appeals in her case helped change Sanger's views about the prospects for change, see KENNEDY *supra* note 382, at 219-20.

obscenity or contraception with women.[415] Despite numerous polls showing supermajority support for legalizing access to contraception, especially during the Depression,[416] advocates were unable to move a virtually all-male Congress to change the statute.[417] Congressmen professed support for changing the Comstock law but in the end withheld that support.[418] They understood that the vote to legalize access was politically fraught and entangled in questions of gender, claims of "race suicide," and religion.[419] Because women remained at the nation's political margins, members of

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415 *See* Hazel C. Benjamin, *Lobbying for Birth Control*, 2 PUB. OP. Q. 48, 59 (1938) (reporting on incremental process 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 Himes, *Birth Control and Clinical Perspective*, ANNALS AM. ACAD. POL. & SOC. SCI. 29, 63 (1932) (discussing "embarrassed legislators").

416 Contemporaries were well-aware of widespread contraceptive practice, and of reliance on abortion. *See* Note, *Contraceptives and the Law*, 6 U. CHI. L. REV. 260, 265 (1939) (estimating numbers). The public sought change. *See* Benjamin, *supra* note 415, at 49-50 (discussing numerous polls supporting legalization of contraceptive access). In 1936, the American Institute of Public Opinion, the forerunner of Gallup, found that 70 percent of Americans responded that "the distribution of information on birth control should be legal." George Gallup et al., *American Institute of Public Opinion Research*, 2 PUB. OP. Q. 373, 390 (1938). For contemporary coverage of this polling, see *Birth Control Poll Votes 70% For Liberal Law*, N.Y. HERALD TRIB., Nov. 29, 1936, at A2. For further detail, see *Institute of Public Opinion, Large Majority Believes Distribution of Birth Control Data Should Be Legalize*d, WASH. POST, Nov. 29, 1936, at B1. One 1937 poll found that nearly 80 percent of American women approved of birth control use. REAGAN, *supra* note 142, at 134; *see also* KENNEDY, *supra* note 382, at 140 (discussing rising and even greater support among women in this era).

417 *See History of Women in the U.S. Congress*, *supra* note 334 (showing eight women in Congress for most of the 1930s, with typically one woman in the Senate).

418 *See* Benjamin, *supra* note 415, 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.").

419 In addition to women's continuing status as outsiders in politics, historians point to Catholic opposition as an obstacle to Sanger and Dennett's efforts to amend the statute. *See* PETER ENGELMAN, A HISTORY OF THE BIRTH CONTROL MOVEMENT IN AMERICA 163-66 (2011); JEAN BAKER, MARGARET SANGER: A LIFE OF PASSION 224-25 (2011); CHESLER, *supra* note 17, 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 Comstock, arguing that legalizing birth control would "exterminate the Anglo-Saxon race" because "the negroes are out-begetting 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. Other Catholic leaders joined in. *See Birth Control "Race Suicide,"* ATLANTA CITY PRESS, Dec. 19, 1935, at 2 (Archbishop Patrick Hayes of New York arguing that "use of birth control involves the risk of race suicide"); *Birth Control Trend Opposed*, ESCANABA DAILY PRESS, July 18, 1934, at 2 (the International Lions Association 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 Comstock, but as Dennett indicated, the political impulse to

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[420]—or injury by douching with Lysol, during the 1930s widely advertised for feminine hygiene, that is, birth control.[421] A growing number of scientific experts now advised legalization of the contraceptive market so that it could be regulated both for efficacy and safety. As one described the problem of "Embarrassed Legislators," a campaign was needed "until the legislators give the people what they want."[422]

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 sanction 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, particularly with potential AMA allies, and in any event perhaps unnecessary as some of the drugs to which women turned were used both as contraceptives and abortifacients.[423]

At times, when legislatures persist in acting in evidently counter-majoritarian ways, judges may prove more democratically responsive than the political branches.[424] In the 1930s, Judge Hand responded to the arguments of Dennett and Sanger as the political branches would not. In refusing to convict each of them, he read the language of the obscenity statute on terms responsive to its text and history, to public opinion,

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preserve the status quo was more widespread. *See* Benjamin, *supra* note 415, at 359-60; Himes, *supra* note 415, at 61. Considerations of gender (see *supra* notes 415-417 and accompanying text), religion, and race all seem to have played a role.

420 *See* REAGAN, *supra* note 142, 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 145145, at 41-50 (explaining that "illegal abortion flourished" during the Depression).

421 *See supra* note 386 and accompanying text. The Lysol ads were widespread during the depression, and the product's use as a contraceptive left women susceptible to pregnancy and to burns. *See* Tone, *Contraceptive Consumers, supra* note 383, 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. Failure to regulate the market for contraception meant that sellers could prey on families' economic desperation. *See* Himes, *supra* note 415, at 63-64; Tone*, Contraceptive Consumers*, *supra* note 383, at 486.

422 *See* Himes, *supra* note 415, at 63-64.

423 *See* Patterson, *supra* note 385, at 159-60 (discussing advocates' relations with AMA); *see supra* note 385 and accompanying text (discussing abortifacients).

424 *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 counter-majoritarianism in courts to the "democratic failings of the democratically elected branches"); *id.* at 116-17 (discussing dynamic illustrated in article in which courts respond to a widespread change in public attitudes and policy preferences to which the political branches have failed to respond).

and to families' health exigencies even as Congress remained reticent to act.[425] 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 wellbeing of their patients."[426] The decisions were statutory. But the federal courts of appeal that repudiated sexual-purity understandings of obscenity in the 1930s were reasoning from a different understanding of constitutional democracy that conflict over Comstock had engendered. Even these victories, however, were far from complete, largely erasing both the history of Comstock resistance and the understandings of democracy, free speech, and reproductive liberty that it advocated.

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. But there are other continuities as well: the constitutional cases not only erased the memory of the Comstock resisters, but, going farther, erased the very connection between statutory and constitutional conflicts. 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.[427] The younger members of these Courts wrote constitutional decisions that drew on understandings forged in Comstock conflict, while no longer mentioning the unenforced provisions of federal law. 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 Victorian logic of the *Hicklin* test helped forge a fateful shift in obscenity law. In 1957, in *Roth v. United States*,[428] the Court ruled that "obscenity is not . . . constitutionally protected speech or press,"[429] yet Justice Brennan rejected a sexual-purity understanding of obscenity: he repudiated the *Hicklin* test for obscenity and cited *Dennett* as he held that "sex and obscenity are not synonymous."[430] As Justice Brennan incorporated into the First Amendment understandings produced in Comstock conflict—that "[s]ex . . . is one of the vital

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[425] *See* Benjamin, *supra* note 415, at 60 (discussing relationship between legislative campaign and judicial decision in *One Package*).

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

[427] 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, Justice William Brennan in 1906, and Justice Harry Blackmun in 1908. *See* TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 303, 311, 315, 358, 388 (2001).

[428] 354 U.S. 476 (1957).

[429] *Id.* at 485.

[430] *Id.* at 487 & n.21 (citing *Dennett*).

problems of human interest and public concern"[431]—he referenced an excerpt of the postal obscenity statute that was edited to exclude its language about contraception and abortion.[432] The dissent invoked Comstock to express the view that the statute's censorship of speech in fact offended the First Amendment.[433] A per curiam handed down the following year in *ONE Magazine v. Olsen*—viewed by later historians as "a necessary first step in the evolution and growth of the movement for gay rights"[434]—overturned a decision of the Ninth Circuit holding that the homophile magazine *ONE* violated the Comstock Act.[435] Like *Roth*, *ONE* made no mention of the statute's provisions on abortion and contraception.[436]

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.[437] In 1961, in *Poe v. Ullman*, the Court refused to hear a challenge to Connecticut's obscenity statute banning the use of contraceptives, with several of the Justices discussing Comstock and the federal law.[438] 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*.[439]

As public resistance to these restrictions grew during the 1960s, the Court began to address Fourteenth Amendment challenges to state laws criminalizing

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[431] *Id.*

[432] 354 U.S. 476, 479 n.1 (1957) (quoting excerpted version of 18 U.S.C. § 1461 (2018)).

[433] *Id.* at 512 (Douglas, J., dissenting). For a more recent commercial speech case discussing the history of the statute, see *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), which discusses whether the Post Office could differentially treat circulars for condoms.

[434] Briker, *supra* note 17, at 56.

[435] 355 U.S. 371, 371 (1958).

[436] *Id.* For more on the significance of *ONE*, see Ball, *supra* note 17, at 230; Briker, *supra* note 17, at 254-56; and CARLOS BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY (2017).

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

[438] Poe v. Ullman, 367 U.S. 497, 519-20 (1961) (Douglas, J., dissenting); *id.* at 547-48 n.12 (Harlan, J., dissenting). *See* Ryan C. Williams, *The Paths to* Griswold, 89 NOTRE DAME L. REV. 2155 (2014) (addressing the jurisprudential debates through which the Court addressed movement questions).

[439] *See* Kenneth D McCoy Jr., *Constitutionality of State Statutes Prohibiting the Dissemination of Birth Control Information*, 23 LA. L. REV. 773, 775-76 (1963) (arguing "[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* note 51 and accompanying text.

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*,[440] the Court faced the question it avoided four years earlier in *Poe*. It struck down the Connecticut obscenity law banning the use of contraception and held that married couples have a federal constitutional right to make decisions about using contraception free from criminal control by the state.[441] Yet the Court said nothing about the unenforced provisions of federal obscenity law still on the books.[442] The Court's silence about the contraceptive provisions of federal obscenity law in *Griswold* is especially striking given that in oral argument in the case, the Court *did* discuss the Comstock Act and accepted without objection the interpretation of obscenity law developed in *One Package*; 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.[443] In this laughter, we see chill shaping the Court's deliberations in *Griswold* even as the Court reached the constitutional question judges ignored a half century earlier in *Sanger* and avoided in *Poe*.

In deciding *Griswold*, the Court was careful *sub silentio* to distinguish Comstock, emphasizing that the case concerned "a law . . . forbidding the use of contraceptives rather than regulating their manufacture or sale."[444] But the Court went further, suggesting that constitutional protection was required to prevent the state from inflicting an unimaginable intrusion on its citizens. Emphasizing that "state regulation may not be achieved by means that sweep unnecessarily broadly and thereby invade the area of protected freedoms," the Court asked: "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."[445]

The Court's appeal to this dystopian prospect as ground for recognition of a privacy right protecting the use of contraception from criminalization 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 as obscene and unleashed a regime of criminal surveillance and censorship. The Court was speaking as if this dreaded prospect had never occurred. This erasure preserved

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[440] 381 U.S. 479 (1965).

[441] *Id.* at 484-86.

[442] 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).

[443] Transcript of Oral Argument at 11-12, 20-21, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).

[444] *Griswold*, 381 U.S. at 485.

[445] *Id.* at 485-86.

the vestiges of the statute by minimizing its harms. Like the 1930s cases before it, *Griswold* provided important forms of relief from the coercion of the criminal law, even as it effaced the roots of these constitutional understandings, locating them in the ancient institution of marriage, and not in a movement seeking civil liberties and voice for women in politics and in the family.

Congress repealed the contraceptive language in the Comstock law in 1971,[446] a scarcely noticed development that the Court did not bother to mention a year later in *Eisenstadt v. Baird*,[447] 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."[448] And the following year, when the Court extended the right to privacy recognized in *Griswold* and *Eisenstadt* to decisions about abortion in *Roe v. Wade*, neither the majority nor the dissent mentioned the abortion provisions of the federal statute, reasoning about the constitutional question as if the Comstock law did not exist.[449]

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,[450] the Supreme Court sought authority—not by invoking the memory of Americans who resisted Comstock censorship—but instead by invoking the authority

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[446] *See* Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. 1973 (1971). The 1971 amendment passed with scant attention, and without any mention of abortion. In a search of articles in the *New York Times* and *Washington Post*, 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. The sponsors of the bill spoke briefly in the House and Senate, but there was no opposition or debate on the record. 116 Cong. Rec. H20629, S43257 (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. 91-1105, at 3-4 (1970).

[447] 405 U.S. 438 (1972).

[448] *Id.* at 453. The Court was once again silent, although Justice Douglas cites a source called *The Progeny of Comstockery* for background on the policies underlying the Massachusetts law. *Id.* at 458 n.2.

[449] 410 U.S. 113, 130-57 (1973).

[450] *See* Douglas NeJaime & Reva B. Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U L. REV. 1902, 1923 (2021) (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," and that "the groups developed forms of protest" (e.g. speak outs and coming out) "to contest their criminalization," and "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").

of marriage and medicine, fundamental institutions of American life that men might respect.

Griswold summoned the dystopia of police invading the marital bedroom.[451] *Roe* famously discussed the abortion decision as the *physician*'s right, jointly exercised with his patient.[452] In these shadowy referents, we can see memory of 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 in reasoning about women as full and equal rightsholders.[453] Yet speaking of privacy and of doctors making decisions for their women patients, the Justices responded to a new generation of advocates who employed new strategies of protest to challenge the stigma of criminalization and to urge that the law recognize Americans' authority to make decisions about sex and reproduction on their own behalf.

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 advanced several Comstock claims, asserting that the statute barred the mailing of items related to abortion.[454] And surrogates for Donald Trump, the Republican nominee for President, have proposed that the Department of Justice enforce the abortion provisions of the Comstock law as the national ban on abortion antiabortion groups seek; Trump's vice presidential pick, J.D. Vance, has called for the Comstock

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[451] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) ("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] *See Roe*, 410 U.S. at 162-66 (explaining that "for the period of pregnancy prior to this '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.").

[453] *See* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1878 (2010) (tracing the progressive shift in the courts understanding of abortion during the 1960s and 1970s from a doctors' rights 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, Kate Shaw, & Reva B. Siegel eds., 2019) (observing that *Roe* preceded the Court's equal protection sex discrimination cases).

[454] *See infra* notes 455, 478-481 and accompanying text.

Act to be enforced as an abortion ban.[455] Support for Comstock as an abortion ban is widespread within the antiabortion movement and includes historically pragmatic organizations like Americans United for Life,[456] financial powerhouses in the conservative Christian legal movement like the Alliance Defending Freedom,[457] newly powerful activists in Students for Life,[458] and GOP powerbrokers tied to the Heritage Foundation.[459]

Why, after so many years, have abortion opponents made the Comstock Act the centerpiece of their legal agenda? Since the 1960s, the movement has sought more than the destruction of abortion rights.[460] 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.[461]

Now, with *Roe* overturned, opponents of abortion are constitutionally free to campaign for a national ban. But voters have overwhelmingly opposed the policies the

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455 PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 459, 562 (2023) [hereinafter PROJECT 2025]. Roger Severino, the former head of the new civil rights enforcement division in the Department of Health and Human Services, authored *Project 2025*'s recommendations that HHS "stop promoting or approving mail-order abortions in violation of long-standing federal laws that prohibit the mailing and interstate carriage of abortion drugs." *Id.* at 459. 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/. 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. PROJECT 2025, *supra*, at 562. On Hamilton's work in the first Trump Administration, see Michael Shear, *Trump and Aides Drove Family Separation at the Border*, N.Y. TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/14/us/politics/trump-family-separation.html. Severino has since established that antiabortion leaders fully expect Donald Trump to enforce the Comstock Act if he is reelected. Caroline Kitchener, Josh Dawsey & Hannah Knowles, *Trump Wins Back Antiabortion Movement as Activists Plan 2025 Crackdown*, WASH. POST (Jan. 5, 2024, 6:00 AM EDT), https://www.washingtonpost.com/politics/2024/01/05/trump-abortion/. On Vance's interpretation of the Comstock Act, *see* Dan Diamond & Meryl Cornfield, *Vance Urged the DOJ to Enforce the Comstock Act, Crack Down on Abortion Pills*, WASH. POST (Jul. 17, 2024, 7:21 PM EDT), https://www.washingtonpost.com/health/2024/07/17/jd-vance-abortion-comstock-vice-presidential-nominee/.

456 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.

457 *See infra* Section IV.A.

458 Emily Bazelon, *How a 150-Year 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.

459 *See supra* note 455 and accompanying text.

460 MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 32-39, 232 (2022) [hereinafter ZIEGLER, DOLLARS FOR LIFE].

461 Mary Ziegler, *Originalism Talk: A Legal History*, 2014 B.Y.U. L. REV. 869, 870-75.

antiabortion movement promotes. Polls conducted after the decision show record-high support for abortion rights, numbers that even seem to exceed the high numbers before and after the Court's decision in *Roe*.[462] Each state to consider a ballot initiative on abortion since 2022 has passed one, including conservative states like Ohio.[463]

Comstock revival has emerged as a tool to create an abortion ban that would be unachievable in democratic politics—and a vehicle for Republican surrogates to demand a national ban that it would be too politically risky for candidates to assert in their own voices. Amidst the public's growing opposition to further criminalization, the Comstock Act has emerged as the antiabortion movement's stealth ban. "We don't need a federal ban," explained Comstock revivalist Jonathan Mitchell, the former Texas solicitor general, "when we have Comstock on the books."[464] It is for this reason that contemporary abortion opponents *speak through* Comstock, using the long-unenforced provisions of the statute[465] as a platform for their own vision of the constitutional order. Mitchell is concerned not to draw *too* much attention to Comstock—"I think the pro-life groups should keep their mouths shut as much as possible until the election"[466]—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,[467] collaborated with Mitchell to develop a private-enforcement mechanism, initially with the primary aim of preventing a federal court from adjudicating the

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462 *See Support for Abortion*, *supra* note 5; Laura Santhanam, *Support for Abortion Rights Has Grown In Spite of Bans and Restrictions, Poll Shows*, PBS (Apr. 26, 2023), https://www.pbs.org/newshour/health/support-for-abortion-rights-has-grown-in-spite-of-bans-and-restrictions-poll-shows. For polls documenting support for abortion rights before and after *Roe*, see generally BEFORE *ROE V. WADE*: VOICES THAT SHAPED DEBATE BEFORE THE SUPREME COURT DECISION 212-20 (Reva B. Siegel & Linda Greenhouse eds., 2010). Writing in the 1970s, William Ray Arney and William H. Trescher observed that the 1973 National Opinion Research Center survey "showed a remarkable liberalization of abortion attitudes on the part of all groups and subgroups of American society"—and that support remained fundamentally unchanged in the years immediately following. *Trends in Attitudes Toward Abortion, 1972-1975*, 8 FAM. PLAN. PERSPS. 117, 120 (1976).

463 Zernike, *Ohio Vote, supra* note 5.

464 Lisa Lerer & Elisabeth 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.

465 For sources documenting the decline in enforcement of federal and state law before and after the Second Circuit's decision in *One Package*, see *supra* notes 388-390 and accompanying text.

466 Lerer & Dias, *supra* note 464.

467 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; Jenna Ebbers, *"Abortion Free America:" Initiative Seeks More Sanctuary Cities for the Unborn Across the 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.

constitutionality of the law.[468] 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.[469] These ordinances became a blueprint for a state law, SB8, passed by the state in 2021 and upheld by the Supreme Court later that year.[470] Beyond exploring private enforcement, Mitchell came to his ideas about the Comstock Act through 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 those who violated it in the past."[471]

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.[472] He acknowledged that federal precedent did not agree with 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 materials through the mails."[473] "Even though the Comstock law does not ban abortion literally," Mitchell explained, "it bans the shipment or receipt of any abortion-related equipment."[474] And any abortion, Dickson and Mitchell reasoned, required the use of something sent in the mail.[475]

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468 *See* Sabrina Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html; Alan Feuer, *The Texas Abortion Law Creates a New Bounty Hunter. Here's How It Works*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html.

469 *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. For an overview of one such sanctuary city statute, see CITY OF AMARILLO PROPOSED SANCTUARY UNBORN ORDINANCE: KEY POINTS, SANCTUARY CITIES FOR THE UNBORN (Oct. 12, 2023) (on file with authors).

470 MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION 165-66 (2023) [hereinafter ZIEGLER, *ROE*.]. For the Court's decision in *Jackson*, see Whole Woman's Health v. Jackson, 595 U.S. 30 (2021).

471 Jonathan Mitchell, *The Writ of Erasure Fallacy*, 104 VA. L. REV. 933, 986-87 (2018).

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

473 Complaint at 1-5, City of Eunice v. Torres, No. D-506-CV-2023-00407 (N.M. 5th Dist. Ct., filed Apr. 17, 2023).

474 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.

475 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-

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.[476] Other ordinances citing the Comstock Act would follow.[477]

In November 2022, the Alliance Defending Freedom, a leading voice in the conservative Christian legal movement, made Comstock central to its suit challenging the FDA's approval of mifepristone in *Alliance for Hippocratic Medicine v. Food and Drug Administration*.[478] Prominent attorneys in ADF, including Erin Hawley, a former law clerk of Chief Justice John Roberts and the wife of populist Republican Josh Hawley, primarily contested the FDA's authority to approve mifepristone under Subpart H of the Code of Federal Regulations. But Hawley and her colleagues also argued that because the plain text of Comstock's "longstanding federal law" barred mailing abortion-related items, the FDA lacked the authority in 2021 to permit telehealth abortion.[479]

During argument, Justices Samuel Alito and Clarence Thomas repeatedly spotlighted these Comstock claims.[480] But in *Alliance for Hippocratic Medicine*, the Court unanimously held that the plaintiffs lacked Article III standing to challenge the 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.[481] Comstock revivalism has only intensified, with new potential plaintiffs ready to file suit[482] and

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communities-are-becoming-abortion-access-battlegrounds-rcna84921 (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").

476 City of Hobbes, N.M., An Ordinance Amending Title V of the Hobbes Municipal Code Requiring Abortion Providers to Comply with Federal Law, Ord. No. 1147, 2023.

477 For coverage of some of the other Comstock-related ordinances, see Mark Lee Dickson, *Lee 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; Mark Lee Dickson, *City of Danville Becomes First "Sanctuary City for the Unborn" in Illinois,* LIVE ACTION (May 3, 2023, 5:37 PM), https://www.liveaction.org/news/city-danville-first-sanctuary-unborn-illinois.

478 Complaint at 3-10, All. for Hippocratic Med. et al. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023) (No. 2:22-cv-00223-Z) [hereinafter Alliance for Hippocratic Medicine Complaint].

479 *Id.* at 111.

480 Transcript of Oral Argument at FDA v. All. for Hippocratic Med. at 26-30, 48, 90, 602 U.S. 367 (2022) (Nos. 23-235, 23-236) (Justices Alito asking why the FDA failed to address the Comstock Act and Justice Thomas suggesting that the manufacturer of mifepristone might face a "Comstock problem").

481 FDA v. All. for Hippocratic Med., 602 U.S. 367, 387-97 (2024).

482 *See* Geoff Mulvihill, *The Supreme Court's Ruling Isn't The Last Word on Mifepristone*, AP (June 14, 2024, 3:29 EDT), https://apnews.com/article/abortion-mifepristone-supreme-court-kansas-idaho-missouri-5cc89d289ced29a1274423b43789397f# (reporting that the attorneys general of Missouri, Kansas, and Idaho had pledged to revive the arguments raised by the Alliance for Hippocratic Medicine in a separate suit); Jonathan Shorman and Daniel Desrochers, *Kansas, Missouri to Keep Fighting Abortion Drug after*

former Trump Administration officials and Trump's running mate 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."[483]

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.[484] To read the Comstock law 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.[485] The Act currently begins by announcing its application to "Every 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 immoral use . . . ."[486] To make their case that the statute covers the mailing of drugs for any abortion, revivalists omit all of the surrounding text and

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Supreme Court Upholds Access to It, KANSAS CITY STAR (June 13, 2024, 12:52 PM) https://www.kansascity.com/news/politics-government/article289245660.html (Missouri Attorney General Andrew Bailey promising to move forward undeterred with our litigation to protect both women and their unborn children").

[483] Brad Read, *"On Agenda:" Ex-Trump Health Aide Touts Highly Controversial Plan Hidden in Project 2025*, Raw Story, July 10, 2024, https://www.rawstory.com/trump-project-2025-2668723604/ (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 455 and accompanying text. On Vance's support for enforcing Comstock Act as a ban, *see* Diamond and Cornfield, *supra* note 455.

[484] *See, e.g.* All. for Hippocratic Med. v. FDA, 76 F.4th 210, 266 (5th Cir. 2023) (Ho, J., concurring in part and dissenting in part).

[485] 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"*).

[486] 18 U.S.C. § 1461 (2018). The code provision refers to articles and things for "procuring or producing of abortion." *See id.* ("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 137 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."). 18 U.S.C. § 1462 (2018) refers only to things "designed, adapted, or intended for producing abortion." *See id.* The statute adopted the language of "producing abortion" in 1909. *See* 35 Stat. 1088 (1909). At the time, the word "procure" was increasingly associated with prostitution. *See* WILLIAM T. HARRIS & FRANCES STURGEON ALLEN, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 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.* at 1712. The language "procuring or producing abortion" in 18 U.S.C. § 1461 remained when Congress revisited Comstock in 1940 and has not changed in the years since. *Compare* 18 U.S.C. § 334 (1940) *with* 18 U.S.C. § 1461 (2018).

its concern with things that can be used "for any indecent or immoral purpose,"[487] and quote only a few words of the text[488] as if Congress had enacted an abortion ban to achieve the goals of the modern movement: the punishment of those who transgress against the unborn child and the protection of women from the supposed health effects of abortion.[489]

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 brief before the Supreme Court, the Alliance argued that the statute's application to the mailing of abortion drugs is unrestricted[490] and disparaged the 1930s federal cases that read the obscenity statute to permit mailing articles for health-related reasons and required the government to prove a sender intended to send an article to be used for unlawful purposes.[491]

The revivalist reading fails to address key features of the statute's text and history.[492] To begin with, we see no support for reading "producing abortion" to refer to all terminations. The original language of "procuring of abortion" did not refer to all terminations, but only those performed for wrongful and not lifesaving purposes.[493] While Congress did change the language of the statute to refer more frequently to "producing abortion" rather than "procuring of abortion," the change does not seem significant. The terms procuring and producing were used interchangeably in the era

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[487] 18 U.S.C. § 1461 (2018).

[488] The Alliance brief in the Supreme Court quotes 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 Alliance for Hippocratic Medicine at 56, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236).

[489] In the FDA litigation, ADF leaders draw 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 488, 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 deserved more, 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. On the rise of the woman-protective arguments in the modern antiabortion movement, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); ZIEGLER, *ROE*, *supra* note 470, at 90-97.

[490] Brief for the Respondents, *supra* note 488, at 56-57.

[491] *Id.* at 57. For discussion of these cases see Section II.D.

[492] We observe that revivalist arguments do not engage with statutory, historical, and doctrinal context as committed textualists would require. *See supra* note 21 & 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.

[493] *See supra* notes 137-143 and accompanying text.

of enactment,[494] and Congress was still using the terms synonymously in 1909 when the term "producing abortion" was first introduced into the statute's abortion provisions.[495] The key point, here as at the time of enactment, was the usage of procuring or producing *with* abortion, a phrase that referred to a crime, the doing of which required proof of unlawful purpose.[496] In sum, usage suggests that the substitution of "producing abortion" for "procuring of abortion" was not a meaningful change in phraseology; and, the amended statute continued to refer to criminal or unlawful terminations for which a showing of intent was required, and 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, as revivalists have repeatedly suggested.[497] Following the statute's language over time, we read the statute's reference first to "procuring of abortion" and then to "producing abortion" as phrases that refer to criminal terminations—that is, they suppose the existence of lawful and unlawful terminations, even if the line between the two is ambiguous, 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 in questions of health. Many opponents of abortion maintain, for example, that there is no need for life or health exceptions to abortion bans because life-saving procedures are not, by definition, abortions.[498] "An induced abortion should not be confused with

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[494] *See supra* note 137 and accompanying text.

[495] The statute in 1909 applied to "every article or thing designed, intended, or adapted for preventing conception or producing abortion." 35 Stat. 1088 (1909). At other places, 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*," using the terms interchangeably. *Id.* (emphasis added).

[496] 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. The 1909 revision defined the term "principal" to include anyone who "directly commits an offense" or "aids, abets, counsels, commands, induces, or procures its commission." 35 Stat. 1088, § 332 (1909). In 1940, 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. § 334 (1940). The language "procuring or producing abortion" in 18 U.S.C. § 1461 remained when Congress revisited Comstock in 1940 and has not changed in the years since.

[497] *See supra* notes 488-489 and accompanying text; *see also* Brief for American Center for Law and Justice as Amicus Curiae Supporting Respondents at 5, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236) (asserting that "the prohibition is simple, complete, and categorical") (footnote omitted).

[498] *See Is APPLOG'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; *Why You Should Reject Rape, Incest, and Life of the Mother Exceptions*, LOZIER STUDENTS LIFE AM. (June 14, 2022), https://studentsforlife.org/2022/06/14/why-you-should-reject-rape-incest-life-of-the-mother-exceptions ("*Abortions are never medically necessary*—and we mean never. This is because there is a fundamental difference between an abortion and procedures

a medical indication for separating a mother from her unborn child," explains the medical guidance of the Lozier Institute.[499] In the less than two years since the *Dobbs* decision, fifteen states hostile to abortion have already changed the definition of "abortion" in their state code.[500] There is potentially a further ambiguity: Many abortion opponents view emergency contraceptives and even the birth control pill as abortifacients.[501]

To this point we have focused only the word abortion or the phrases "producing abortion" or "procuring of abortion." But of course, these phrases appear in the midst 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 congressional allies was not protecting unborn life but preventing illicit sex.[502] Indeed, Comstock himself often failed to differentiate between contraceptives and abortifacients.[503] 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.[504] 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 concerned to deter what was then deemed illicit sex into a narrow, fetal-protective abortion ban.[505] 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.[506]

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which might extract a child from a woman's body if she cannot be pregnant anymore due to health reasons."); American College of Obstetricians and Gynecologists, *Understanding Ectopic Pregnancy*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/understanding-ectopic-pregnancy; Ali Swenson, *Posts Falsely Claim Abortion Is Never Medically Necessary*, AP NEWS (July 12, 2022), https://apnews.com/article/fact-check-abortion-medically-necessary-342879333754.

499 Ingrid Skop, *Medical Indications for Separating a Mother and Her Unborn Child*, CHARLOTTE LOZIER INST. (May 22, 2022), https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child.

500 Greer Donley & Caroline Kelly, *Abortion Disorientation*, 74 DUKE L.J. (forthcoming 2024) (manuscript at 39-53) (available at https://papers.ssrn.com/sapers.cfm?abstract_id=4729217). Three states supportive of abortion rights have also changed their definitions since the *Dobbs* decision. *Id.* at 53-55.

501 *See, e.g.*, PROJECT 2025, *supra* note 455, at 485 (describing common emergency contraceptives as a "potential abortifacient" that "can prevent a recently fertilized embryo from implanting in a woman's uterus").

502 *See supra* Section I.A.

503 *See supra* note 176 and accompanying text.

504 *See supra* notes 90-91 and accompanying text.

505 *See infra* note 508 and accompanying text.

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

Finally, observe that the contemporary language of the Comstock Act contains *two* scienter requirements, as the law did when enacted. The 1873 statute prohibited a sender "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.[507] The statute as currently codified has a similar structure. It declares "nonmailable matter" "[e]very article or thing designed, adapted, or intended for 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. . . . "[508] Thus, both textual and historical evidence supports 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 standard difficult to prove, 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 plainly

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[507] *See supra* notes 132-135 and accompanying text.

[508] See 18 U.S.C. § 1461 (1940). 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 discussion of the 1971 amendments removing contraception from the Act, see *supra* note 446 and accompanying text. In 1978, in the course of one of several failed attempts to overhaul the federal criminal code, 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, 99th Cong. (1978). None of these efforts to rewrite the code succeeded. Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 119-123 (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." 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." John Schwartz, *Abortion Provision Stirs Online Furor*, WASH. POST, Feb. 9, 1996, at C1. "The abortion language has been in the statute for many years, but it's not enforced," Coffee explained. *Id.* "And it's probably unconstitutional because of the scope of *Roe v. Wade*." *Id.*

Hyde himself asserted that "nothing should be interpreted to free speech about the topic of abortion"—and that the new provision covered only "use of an interactive computer service for the explicit purpose of selling, procuring or facilitating the sale of drugs, medicines or other devices […] already covered in section 1462(c)" of the Comstock Act. 142 CONG. REC. 1145 (1996). Following the passage of the Telecommunications Act, Attorney General Janet Reno pledged not to enforce the new provisions of the Comstock Act in the abortion context, 142 CONG. REC. S. 1600 (1996), and 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, at B1. It was based on the assumption that Comstock was what Stratman called a "dead-letter law" that Congress declined to pass the Comstock Cleanup Act. *Id.*

wrong, especially in light of the unargued-for character of these claims and failure to address considerable textual and historical evidence to the contrary. It is not sufficient to disparage the reasoning of the 1930s cases—as revivalists have[509]—without addressing the longstanding understanding that an obscenity law does not intervene in the doctor-patient relationship or criminalize health care as well as the language on senders' intent that the 1930s cases are credibly interpreting.[510] At the very least the meaning of the Comstock statute is ambiguous, not plain, and the law's abortion provisions require reading in textual, doctrinal, and historical context,[511] an approach that the revivalists' selective quotation of the law seems designed to avoid.[512]

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.[513] Nor do we know whether revivalists exercising federal authority would confine their efforts to criminalizing mailing abortion-related materials: they might extend their twenty-first-century-culture-wars reading of the statute to characterize *speech* about lawful access to abortion, as well as other articles facilitating sex or sexual expression, as covered by the Act's ban on mailing writings or things "for any indecent or immoral purpose." [514]

There was a time when the antiabortion movement took steps to distance itself from the open misogyny and sex obsession that defined the nineteenth-century anti-vice movement. the nineteenth-century anti-vice movement.[515] By the early 1990s, with

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509 *See supra* note 491 and accompanying text.

510 *See id.*

511 *See supra* note 21 accompanying text (citing a range of textualists on the importance of considering different kinds of context in determining the meaning of a text).

512 *See supra* notes 486-489 and accompanying text.

513 *See supra* notes 462-463, 486-489 and accompanying text.

514 *See supra* note 4 (linking to the text of 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 (discussing this incipient constitutional conflict). *Cf.* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politic*s, 124 YALE L.J. 2516, 2538-39 (2015) (discussing rise and spread of state and federal statutes that characterized refusal 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 (for example, articles used for contraception, AIDS prophylaxes, and gender-affirming care) that facilitate sex or sexual expression some members of the society deem "indecent or immoral." *See, e.g.*, Deanda v. Becerra, 96 F.4th 750 (5th Cir. 2024), which held that a state law mandating parental consent to contraception was not preempted by Title X.

515 *See* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 196-206 (2016) (arguing that abortion opponents sought to secure equal protection for the unborn similar to what the Supreme Court had created in decisions "on behalf of African-Americans

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.[516] And for decades abortion opponents have presented their campaign to overturn *Roe v. Wade* as a defense of democracy—an effort to restore the abortion question to voters and their elected representatives.[517] 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.

CONCLUSION

Until recently, Comstock was a subject of historical curiosity, for those who even recognized the name, a symbol of Victorian sexual prudery, censorship, and government overreach.[518] Within the last several years, however, the law has suddenly become the locus of movement-based antiabortion claims in national elections and federal and state courts.

Comstock's contemporary champions claim to have discovered a statutory text whose meaning is plain and can be applied to ban shipment of abortion-related materials without exception. This Article shows that to construct a new, categorical ban on abortion, revivalists cherry-pick words from statutes policing obscenity in the United States mails;[519] that 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;[520] and, for nearly a century, judges have emphasized that that federal law banning obscenity banned *obscenity*—not sex and health. Over time, Americans have increasingly emphasized that there are constitutional stakes in distinguishing between the prohibited and the protected. In following the statute's enactment and enforcement over decades of social contestation and responsive judicial interpretation,[521] the Article identifies forgotten democratic roots of statutory and constitutional cases that limit the criminalization of speech, health, and intimate life.[522]

When courts interpreted the Comstock Act to differentiate obscenity from communications about sexual and reproductive health, their rulings did not narrow

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and women"); JENNIFER HOLLAND, TINY YOU: A WESTERN HISTORY OF THE ANTI-ABORTION MOVEMENT 66 (2020) (arguing that abortion opponents developed a strategy that allowed them to espouse "equality while also maintaining the racial equalities that structured their lives").

[516] *See supra* note 489 and accompanying text.

[517] *See* Melissa Murray & Kate Shaw, Dobbs *and Democracy*, 127 HARV. L. REV. 728, 730-72 (2024); *see also* ZIEGLER, *ROE, supra* note 470, at 56-77 (detailing antiabortion arguments based on democracy and judicial role).

[518] *See supra* notes 17-19 and accompanying text.

[519] *See supra* notes 486-488 and accompanying text.

[520] *See supra* Section I.A.

[521] *See supra* Sections I.C-D., III.B-D.

[522] *See supra* Sections II.D, III.B.

the statute. These decisions narrowed only the most expansive Victorian interpretations of the statute. With intensifying public resistance to Comstockery—censorship premised on the premise that all sex is obscene—courts enforcing the statute repudiated expansive conceptions of obscenity and distinguished obscenity from the kinds of control over sex and reproduction necessary for health.[523] As they emphasized these distinctions, judges pointed to language in the statute requiring the government to prove that a sender knew a recipient would use mailed items for unlawful purposes.[524] As we have shown, these interpretations of the Comstock statute responded to constitutional claims and had constitutional resonance.[525] Thirty years later the Supreme Court began to impose limits on obscenity and recognize the freedom of reproductive health and intimate life as interests as protected by the Constitution.[526] The story of this struggle offers rich evidence of the nation's history and traditions from which we can draw guidance today. It shows that America has a history and tradition of protecting access to reproductive healthcare from control by criminal law,[527] that Americans have long valued sexual freedom,[528] and that statutes are one, and not always the most democratic, expression of the nation's values. Democracies are defined in part by the forms of family life they respect.

When we examine the abortion provisions of the Comstock Act in their textual, legislative, doctrinal, and historical contexts, we can see that the modern antiabortion movement is constructing a national abortion ban by excerpting words from abandoned provisions of federal obscenity law and infusing this old text with new movement meanings. Victorians enacted the obscenity law to rid the mails of stimulants to the kinds of sex that they believed would threaten marriage and gender roles in public and private life. Revivalists now claim the law is an instrument to rid the mails of threats to the unborn, and seek to criminalize health care as Victorians did not. Vindicating the revivalists' claims, through courts or the executive branch, would not realize some plain meaning of the text but instead would impose the will of a powerful social movement on a polity that evidently rejects its carceral approach to protecting life.[529]

This points to a deeper problem with enforcing Comstock as a total ban on abortion that debate over its meaning obscures. Reading the statute as a plain-meaning, no-exceptions, nationwide abortion ban would be antidemocratic. The Comstock statute prohibits obscenity, not health care. Even judges who developed the Victorian

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[523] *See supra* Sections I.D, II.D.
[524] *See supra* Sections I.A., II.D. & IV.B.
[525] *See supra* Section III.A.
[526] *See supra* Section III.B.
[527] *See supra* Section I.A and Part II.
[528] *See supra* Section I.A and Part II.
[529] An appreciation of the public's opposition to the plan to revive enforcement of the abortion provisions of the Comstock law no doubt prompted Jonathan Mitchell to insist it was important for the movement to proceed with its plans in ways that would not arouse voter attention before the election. *See* Lerer & Dias*, supra* note 464.

Hicklin-infused sexual-purity understanding of obscenity recognized this and protected the doctor-patient relationship. The public's view of the sexual-purity approach as Comstockery—as an overly expansive understanding of obscenity that illegitimately encroached on democracy, liberty, and equality—led to the statute's declining enforcement and to cases in the 1930s affirming that federal obscenity law allowed Americans to protect health, as decisions on condoms and pessaries illustrate. These developments were not only statutory; they were constitutional. Of course, judges in the 1930s could not appeal to late-twentieth century constitutional cases—but their interpretation of the statute's text anticipated understandings of the First and Fourteenth Amendments that would emerge in the next half century.

For these reasons, enforcing the revivalists' interpretation of Comstock's abortion provisions presents democracy problems greater than desuetude,[530] the public beliefs that contributed to declining enforcement and evolving interpretation of federal and state obscenity laws of this kind. Arguments for enforcing the Comstock statute as an abortion ban, *especially* claims of the revivalists' kind that disparage the abortion provision's textual, doctrinal, and historical context, assume that the law was duly enacted by a democratically legitimate body *and* that the public had ordinary opportunities for debate over its terms, enactment, *revision*, *and repeal*.

But Comstock's history shows that the law was *not* enacted and enforced in conformity with ordinary presuppositions of contemporary democracy. There is the fundamental fact that only a minority of adults were entitled to vote on the statute's enactment, and those whose lives would be the most affected by the law were the least able to shape its terms. And there is the fact that this obscenity statute was adopted and enforced to preserve Victorian conceptions of public order and authority:[531] to intimidate and silence leaders in the suffrage and free-love movements who protested laws enforcing women's inequality across spheres,[532] and to target those who claimed the right to free love or to control the timing of birth.[533]

But it is the First-Amendment conditions of the law's enforcement that make Comstock a super-antidemocratic statute. Not only did women's disenfranchisement and sex-role stereotypes shape the law's enactment and enforcement; the *statute was then insulated from criticism and entrenched against reform or repeal by generations of censorship whose effect was to deform the democratic political process for generations after*.[534] The 1873 statute is a graveyard of Equal Protection and First Amendment violations—a textbook example

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530 *See* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27 (describing desuetude as "judicial invalidation of a law that had become hopelessly out of touch with existing social conventions"). For a discussion of desuetude in the Comstock context, see Cohen et al., *supra* note 19, at 347.

531 The common law libel of obscenity, like sedition and blasphemy, protected public order and authority. *See supra* note 63 and accompanying text.

532 For discussion of the statute's enactment as arising out of Comstock's failed efforts to convict and incarcerate Victoria Woodhull, see *supra* notes 103-109 and accompanying text.

533 *See supra* Parts I, II.

534 *See supra* Part III.

of the kind of law that *Carolene Products*,[535] decided only two years after *One Package*, identified as constitutionally suspect.[536] These conditions persisted in law at least until the era of *Griswold* and *Roe*.[537] At no point during the law's revision did the government acknowledge the unconstitutional conditions attending the law's enactment and enforcement.[538]

Revivalists amplify Comstock's shameful legacy when they reinvent provisions of a statute that lack democratic legitimacy to achieve ends they understand the public today opposes. Misleading the public seems a key part of the strategy. A candidate who will not endorse a national ban that would alienate voters maintains the support of antiabortion groups by refusing to answer questions about the Comstock Act,[539] all while his running mate, proxies, and officials from his first administration pledge that

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[535] United States v. Carolene Prods., 304 U.S. 144 (1938).

[536] *See id.* at 152 n.4 (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 on the right to vote," "restraints upon the dissemination of information," and "interferences with political organizations" (citations omitted)). These dynamics shaped politics for much of the twentieth century, with courts only slowly responding, first under the statute and then the Constitution. *See supra* Sections III.A, III.B.

[537] Two years before the Court's decision in *Griswold*, 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. *See supra* note 439 and accompanying text. On persisting deformities of the political process that constrained mobilization in this era, see NeJaime & Siegel, *supra* note 450.

[538] In amending the statute Congress did not discuss—much less repudiate—state action in adopting, enforcing and entrenching the Comstock Act against change that violated guarantees of equal protection and free speech as presently understood. *See supra* notes 446, 508 and accompanying text.

Of course, not all judges may require Congress expressly to repudiate past violations to "cleanse" a statute of discriminatory taint. Judges may view reenactment without repudiation as sufficient to cleans a statute of discriminatory taint or other past unconstitutional conduct if the judges view sex discrimination as more acceptable than discrimination on the basis of race or religion at issue in the Supreme Court's discriminatory-taint case law. *See* Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 78, at 932-35. For discussion of the Comstock Act in light of recent taint case law, see Danny Li, The Comstock Act's Equal Protection Problem 123 MICH. L. REV. (forthcoming 2024) (manuscript at 14) (available at https://ssrn.com/abstract=4808921) (concluding that "the current Comstock Act is tainted because succeeding legislative actions neither grappled with the law's problematic history nor reenacted its abortion provision"); *id.* at 16-17 ("The law of how to purge discriminatory taint . . . at a minimum requires some engagement with and/or reenactment of the tainted provision" but reporting that "a number of courts of appeal have adopted discriminatory-taint tests that require seemingly minimal engagement with taint by law makers at T_2"). At the same time, Congress or other constitutional interpreters might interpret the Court's taint cases more stringently than some appellate courts have.

[539] *Read the Full Transcript of Donald Trump's Interviews with* Time, TIME (Apr. 30, 2024), https://time.com/6972022/donald-trump-transcript-2024-election; Danielle Kurtzleben, *Why Anti-Abortion Advocates Are Reviving a 19th-Century Sexual Purity Law*, NPR (Apr. 10, 2024), https://www.npr.org/2024/04/10/1243802678/abortion-comstock-act.

he will turn Comstock into an abortion ban.[540] They trust that there are sympathetic judges who will sanction enforcement of Comstock's abortion provisions, dismissing all the interpretive and democratic objections to the law's contemporary enforcement.

Finally, in exposing as contemporary constructions revivalist claims, we uncover the very features of the nation's history and traditions that revivalists seek to repress. Comstock's history shows that even as criminal prohibitions on mailing of contraceptive and abortion materials were first written into law, access to health care under the statute was widely assumed and over time, expansively defended.[541] The Act's history shows that mailing contraception was criminally banned as obscene only *after* the Fourteenth Amendment's ratification and that these novel bans were thereafter continuously contested.[542] We can see here the roots of constitutional law that would grow to protect health, liberty, and equality in intimate life—*and* the outlines of history-and-tradition arguments in the Roberts Court. Perhaps most fundamentally, the history of the Comstock Act shows why the text of statutes is not the sole or best expression of a nation's traditions to guide the interpretation of the Constitution today.

This seems to be the only gift in claims for Comstock's revival. Comstock revivalists have disturbed a nearly century-long settlement that obscured crucial parts of our constitutional past. A long silence has persisted in the law about the roots of modern free speech and substantive due process cases. Understanding Comstock's history allows us to tell a different story about the origins of cases like *Roth*, *Griswold,* and *Roe*, one that reaches back to the men and women resisting the state's efforts, under Comstock, to control political speech and the sexual and reproductive lives of the American people—a story that deepens our understanding of American traditions of liberty, equality, and democracy. If there is any feature of the Comstock story that warrants reviving, it is the voices of these forgotten authors of our constitutional present.

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[540] *See supra* note 455 and accompanying text.

[541] We have shown first that the statute's reference to "procuring of abortion" concerned unlawful terminations and did not include physician efforts to save a pregnant woman's life—a purpose the law defined with deference to physician discretion. *See supra* notes 137-145 and accompanying text. Over the statute's life, including at the height of its sexual-purity interpretation, courts assumed that the criminalization of obscenity did not obstruct patients' access to their doctor. *See supra* notes 147-148, 191 and accompanying text. By the early twentieth century, sale of condoms for health purposes was widespread and not limited to the doctor-patient relationship, as *Youngs Rubber* and cases of the 1930s recognized. *See supra* Section II.D. For nearly a century, mailing articles for health has been lawful under the Comstock Act. *Id.*

[542] *See supra* note 90 and accompanying text.