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

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Abstract. *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 de facto national ban on abortion. Claims on the Comstock Act have been asserted in the medication abortion case now before the Supreme Court and in the campaign for the Presidency. This Article offers one of the first legal histories of the Comstock Act that reaches from its enactment to its post-*Dobbs *reinvention, offering critical resources for evaluating claims for revived enforcement of Comstock that are now being asserted in courts and in politics. The history this Article uncovers undermines revivalists' claims about the Comstock statute's meaning and the democratic legitimacy of reviving its enforcement. Yet the Article's significance ranges well beyond the revival debate, as it uncovers in conflicts over Comstock's enforcement 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.*

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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 censorship provoked conscientious objection and popular resistance; over time, enforcement declined, and the law receded from view when federal courts ruled in the 1930s that Congress did not intend for obscenity law to interfere with Americans' health.[5] The public's response to "Comstockery" played an important role in germinating our traditions of free speech and of sexual and reproductive freedom.[6]

Antiabortion advocates now seek to revive Comstock—by reading the 1873 obscenity law as a national ban on abortion that, in *Dobbs*'s wake, the movement cannot persuade Americans to enact.[7] Claims framing the Comstock Act as an abortion ban have been asserted in the medication abortion case the Supreme Court

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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), available at https://perma.cc/K9YX-CQKM (quoted *infra* notes 117-119 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. §§ 1461-1462 (2018) as well as 19 U.S.C. § 1305 (2018); 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*, NBER Working Paper 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] *See infra* Sections II.D, III.A. Congress repealed the provision on contraception in 1971. *See* Pub. L. No. 91-662, 84 Stat. 1973 (1971). *See infra* Section III.A.

[6] *See infra* Sections II.D, III.A.

[7] 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), 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*].

will decide this term, in city councils and in state courts, and on the presidential campaign trail.[8] These arguments typically read the abortion provisions of the Comstock law as if the statute were the fruit of ordinary democratic processes and the meaning of the statute was "clear," "plain," and unchanged from the time of the statute's enactment one hundred and fifty years ago.[9] In advancing these claims, advocates cherry-pick elements of a 150-year old obscenity statute, ignoring the inconvenient remainder, in the hopes of finding a sympathetic court or administration to enforce it.[10] The history this Article uncovers undermines revivalists' claims about the Comstock statute's meaning and the democratic legitimacy of reviving its enforcement.

There is a significant body of scholarship on the Comstock statute, written primarily outside of law and before the *Dobbs* decision[11] on which we have drawn in

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[8] For analysis of these arguments in the context of the medication abortion case the Supreme Court will decide this Term, see *infra* Section IV.B. For discussion of the role of Comstock in presidential politics, see Caroline Kitchener, Josh Dawsey & Hannah Knowles, *Trump Wins Back Antiabortion Movement as Activists Plot 2025 Crackdown*, WASH. POST (Jan. 5, 2024, 6:00 AM EST), https://www.washingtonpost.com/politics/2024/01/05/trump-abortion. *See infra* notes 406-418 and accompanying text.

[9] *See, e.g.*, Respondents' Brief in Opposition at 50, FDA v. All. for Hippocratic Med., No. 23-235 (U.S. Nov. 9, 2023) (arguing that the government "permit[ed] mail-order chemical abortion in violation of the Comstock Act"); *see also* All. for Hippocratic Med. v. FDA, No. 2:22-CV-223-Z, 2023 WL 2825871, at *16-17 (N.D. Tex. Apr. 7, 2023) ("Here, the plain text of the Comstock Act controls."); All. for Hippocratic Med. v. FDA, 78 F.4th 210, 267-68 (2023) (Ho, J., concurring) (contending statute's meaning is "clear").

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

[11] 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 MOD. AM. 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

an effort to make sense of these developments. 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."[12] Legal scholarship on Comstock's obscenity provisions barely addresses cases on contraception and abortion;[13] and cases conferring constitutional rights to make decisions concerning contraception and abortion scarcely mention Comstock.[14]

This Article's legal history provides new resources for analyzing a question on which the revival debate has focused—what these provisions of Comstock mean—and for considering another question the revival debate has *obscured*—whether these provisions of Comstock have sufficient democratic legitimacy to enforce today. We show that the meaning of "abortion" and thus of the Comstock law is not now and has never been "plain" or absolute. The Comstock statute was an innovative form of obscenity law that covered both communications and articles for "unlawful abortion" and for "procuring of abortion," and later for "producing abortion."[15] At the time of enactment, "abortion" meant what is now called "miscarriage," and was not generally a crime—yet an allegation of unlawful agency (e.g. "causing unlawful abortion" or "procuring of abortion") could make terminating pregnancy a crime, but not if

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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); 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).

[12] *See infra* text accompanying note 118.

[13] 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 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).

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

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

undertaken to save a life, a question that doctors had discretion to determine.[16] In short, at the time of enactment the statute's application to terminations today termed "abortion" was neither clear nor absolute. Nor is our contemporary understanding of abortion clear or absolute. Opponents today insist "abortion" covers terminations undertaken to save a woman's life, for example, in cases of ectopic pregnancy.[17] We show aspects of the statute's meaning that were underdetermined at enactment—for example, how it applied to health care—were interpreted differently over time.[18]

This historical approach connects questions of interpretation and democratic legitimacy, strengthening the authority of courts that interpreted the statute in the 1930s. We demonstrate that the government employed the postal obscenity statute to ban communications and things associated with sex, contraception, and abortion—and to target and chill political speech of those who sought freedom of expression and self-determination in intimate life *and called for the statute's repeal.*[19] Courts initially sanctioned and then limited many of the prosecutions, narrowing the most extreme Victorian interpretations. In the 1930s, when federal courts interpreted the obscenity statute to prohibit illicit sex, but not to deny citizens access to needed health care, judges were not only adopting a fair reading of the statute rooted in its enactment language but also responding to decades of popular resistance that enforcers of the statute had tried to censor.[20] As this Article shows, federal enforcement of the postal obscenity law evolved with the American public's understanding of democracy and freedom and of the Constitution itself. The story of Comstock censorship unearths lost popular roots of modern First Amendment and sexual- and reproductive-liberties law,[21] recounting the stories of men and of women who could not vote who were targeted, surveilled, and arrested under federal and state Comstock laws for denouncing Comstock censorship, for asserting a right to free love or voluntary motherhood, and for seeking relief from Congress and the courts.[22] This Article recovers their constitutional claims.

This Article provides a history of Comstock that is of interest to Americans asking questions about the statute from different institutional vantage points. A reader predicting how judges would interpret the statute might analyze it through the lens of textualism, appreciating that many judges are committed to textualism and that

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[16] *Id.*

[17] *See infra* notes 446-448 and accompanying text. For further discussion of enactment and language, see *infra* Sections I.A & IV.B.

[18] *See infra* Sections I.A., II.D., & IV.B.

[19] *See infra* Parts I- II.

[20] *See infra* Section I.A., II.D.

[21] *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).

[22] For a source discussing whether a law banning *dissemination of information about contraception* was constitutional in 1963, see *infra* note 395.

approaches to textualism vary, differing on how context informs meaning.[23] But textualism is not the sole measure of the statute's meaning. A modern interpretive method will not help us understand the reasoning of judges in the late nineteenth or early twentieth century, nor should a method *concerned about constraining judges* provide a framework for *legislators* deciding whether to amend or repeal a statute,[24] nor guide the judgments of an official in the executive branch deciding whether and how to enforce the law, nor guide a citizen deciding how to vote. (A voter could mobilize against the Comstock law because of how she predicts those in power will enforce it, or simply because the law is an instrument and symbol of coercion.) Finally, we invite all readers

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[23] 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*, 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).

[24] *See* Manning, *supra* note 23, at 96:

> [T]he choice [between textualism and purposivism] will ultimately depend on which criterion more appropriately describes the duties of federal judges who, under the premises of our system of government, operate subject to the constraints of legislative supremacy (within constitutional boundaries). Purposivists argue that legislative supremacy is better served not by the judge who attends to every last clue about the social usage of the chosen words, but rather by someone who is sensitive to the policy concerns underlying the legislative choice-even when they contradict the apparent import of the text. Properly understood, textualism rests on the competing idea that the accepted semantic meaning of the enacted text represents a meaningful-indeed, superior-basis for implementing legislative supremacy.

See also Clint Bolick, *The Case for Legal Textualism*, HOOVER INSTITUTION, Feb. 27, 2018, https://www.hoover.org/research/case-legal-textualism (essay by a judge on the Arizona Supreme Court and Hoover fellow justifying textualism as promoting judicial constraint and preserving the legislature's democratic authority).

whether they are concerned about adjudication, legislation, administration or voting to consider the constitutional implications of the statute's antidemocratic pedigree. *What kind of a law is Comstock?* In making decisions about how to interpret, amend, repeal, enforce, or vote on a law mandating censorship and coercion, does it matter that, *for generations*, Americans who sought to participate in debate about the law and to mobilize for its repeal were obstructed and punished for doing so? The history that follows raises all these questions—questions so numerous and interactive that no one Article could resolve them satisfactorily. As the revival campaign unfolds, our hope is that they are taken up by historians, officials, and citizens.

With these concerns in view, the Article organizes its account of the Comstock law as a narrative history that provides context of different kinds on which readers can draw to evaluate competing claims about the statute's meaning and legitimacy that are now arising in courts and in politics. We locate Comstock's abortion provisions in *semantic* and *policy* context,[25] showing how a provision censoring the mailing of communications and "any article or thing designed or intended for the prevention of conception or procuring of abortion [or] any article or thing intended or adapted for any indecent or immoral use or nature"[26] came to be enacted as part of a postal obscenity statute.[27] We in turn locate the statute's provisions in *doctrinal* context, showing how the statute's redefinition of obscenity—to include not only *speech* about illicit sex but also *communications and things* enabling self-abuse, contraception and abortion *that could incite illicit nonprocreative sex*—produced confusion because it radically diverged from common-law conceptions of obscenity prevailing at the time of the statute's enactment that focused on speech and images, not things.[28] We then trace the "sexual-purity" mobilizations that, in the decades after enactment, developed a new conception of obscenity in federal case law,[29] and show how enforcement of that "sexual-purity" understanding of obscenity by a network of public and private censors provoked conscience-based resistance, widespread popular backlash,[30] and finally cases in the 1930s recognizing that the obscenity statute restricted access to illicit sex, not needed health care.[31] Finally, the Article locates the obscenity law in *political and constitutional* context, documenting how public and private censors employed the Comstock law as authority for high profile prosecutions targeting Americans who spoke out in support of free love, woman suffrage, and voluntary motherhood, ultimately alienating and enraging the American public, which came to view the censorship project as "Comstockery."[32]

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[25] *See supra* note 24 (discussing why textualists and purposivists focus respectively on semantic and policy context as means of respecting legislative supremacy).
[26] *See infra* text accompanying note 118.
[27] *See infra* Section I.A.
[28] *See infra* Sections I.C-D.
[29] *See infra* Section I.D.
[30] *See infra* Part II.
[31] *See infra* Section II.D.
[32] *See infra* Sections II.A-C, III.A. For an Ngram that vividly illustrates this story, see *infra* note 240.

As we show, understanding the Comstock law as an obscenity statute has implications for evaluating the statute's meaning and democratic legitimacy. State obscenity decisions of the era typically focused on threats posed by profanity, public nudity, and erotic images.[33] The Comstock statute destabilized obscenity as a category, sweeping in not only erotica, but also *speech and things* that would incite nonprocreative sex, a view that grouped together items enabling self-abuse, contraception, and abortion.[34] By classifying writings and articles that enabled the prevention of conception and procuring of abortion as obscene, the federal government expanded the category of the obscene, policing not only non-marital and extra-marital sex, but for the first time, *marital nonprocreative* sex as a threat to public order—at a time of dramatically declining birth rates,[35] rising immigration,[36] and the ascendance of a woman suffrage movement that was challenging traditional family roles.[37] The Comstock Act employed new tools to enforce traditional family roles—a feature of its history that bears on its meaning and democratic legitimacy.

As the enacting Congress well appreciated, the speech Comstock viewed as obscene included *political* speech, especially the speech of advocates who connected women's and men's emancipation in the public and private spheres. Only four months before the law's enactment, Anthony Comstock, acting as a paid detective of the New York Young Men's Christian Association (YMCA)'s Committee on Obscene Literature (renamed the New York Society for the Suppression of Vice in November 1873), 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

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[33] *See id.*

[34] *See infra* notes 107-108, 152 and accompanying text.

[35] 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*, 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*].

[36] 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 11, at 103-12.

[37] 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*].

vulgar or indecent character."[38] Woodhull, a prominent advocate for woman suffrage and free love, a successful stock broker, and the first woman to declare her candidacy for the Presidency, had objected to the public's willingness to tolerate the sexual infidelities of a prominent minister that it would not tolerate in women.[39] Given her sphere-bending accomplishments and her willingness to speak in public about sex, Woodhull made clear that claims for gender emancipation would unsettle both the public and private order of gender itself.[40] It was no accident that Woodhull's 1873 acquittal under the then existing federal obscenity law reinforced the commitment of Comstock and his allies to enact a more effective obscenity law.[41]

We introduce the Woodhull example not only to illustrate how Congress expected the new law to work, but of course to illustrate that Congress was enacting a law that would be flatly unconstitutional today. Congress sought to suppress not only things, but political speech that Congress saw as inciting illicit—that is, nonprocreative—sex. Over the decades of his reign as postal inspector, Comstock singled out advocates who dared conscientiously to break the law to advocate for "free love"—"free lust," as Comstock called it[42]—as well as those who asserted their right to access contraception and "voluntary motherhood."[43] In the same spirit, Comstock targeted for arrest Americans who criticized his program of censorship and sought to organize Americans to seek the obscenity law's amendment or repeal.

We show that *chill was a primary aim* for the architects of a sexual-purity reading of the statute.[44] Even though, as the Comstock story illustrates, the Court did not then interpret the First Amendment to constrain government censorship as it does today,[45] we employ the chill concept to show the democratically illegitimate ways that government entrenched the Comstock law against change, by preventing legislators or voters from speaking out against the government or mobilizing for the statute's repeal. We employ the First Amendment concept of chill to highlight that the Comstock regime was a regime of state censorship that *restricted constitutionally significant expression,*

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[38] *See* SOHN, *supra* note 11, 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 et al., *supra* note 11, at 55. For discussion of the arrangements by which private actors were involved in enforcing federal criminal law in this era, see *infra* Section I.B. For the 1865 law, see Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 507 (1865).

[39] *See* ELLEN DUBOIS, SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE 83-93 (2020); Siegel, *She the People*, *supra* note 37, at 971-73.

[40] *See infra* notes 94-95 and accompanying text.

[41] On Woodhull's acquittal and its influence on Comstock, see Escoffier et al., *supra* note 11, at 55; DONNA DENNIS, LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK 252 (2009) [hereinafter DENNIS, LICENTIOUS GOTHAM].

[42] *See* ANTHONY COMSTOCK, TRAPS FOR THE YOUNG 160, 163-64 (2d ed. 1884) (using the term "free-lust" to attack the free love movement) [hereinafter COMSTOCK, TRAPS FOR THE YOUNG].

[43] *See infra* Sections II.A-C.

[44] *See infra* note 227 & accompanying text.

[45] *See* Gibson, *supra* note 13, at 293-309 (discussing how the Court limited application of the First Amendment to the louis postal censorship statute for much of the statute's life).

in constitutionally significant ways. The impact of this censorship radiated well beyond those individuals the government immediately threatened with arrest. Describing this "chilling effect," the Court has recently explained "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries."[46] The concept of chill thus focuses attention on the ways that for generations erratic and unpredictable enforcement of federal obscenity law—and of the state laws that copied Comstock—changed politics.

We show that Comstock censorship—which targeted political leaders for arrest and forbade discussion of sex education, birth control, and abortion—deformed democratic politics and prevented the law's repeal. By the 1930s, advocates for voluntary motherhood were able to persuade judges to repudiate the sexual-purity interpretation of obscenity and to recognize that nonprocreative sex between married heterosexual couples and access to the means of controlling reproduction as integral to "health" was not obscene. Yet even then, as we show, persisting chill inhibited legislative change.[47] Comstock-style laws banning *discussion* of birth control were considered constitutional till the 1960s.[48] The Justices who wrote *Griswold* and *Roe* came of professional age within Comstock's health paradigm, even as none mentioned the statute.[49] These accommodations in the statute's interpretation and enforcement effaced the memory of conflict over Comstockery, without resolving it. It is a fascinating question whether to read the decades of savage attack on unenumerated rights that most recently found expression in the reversal of *Roe*—as an expression of Comstock chill.

We conclude by analyzing the contemporary debate, raising questions about the Comstock statute's meaning and about the legitimacy of reviving its enforcement, given its democracy deficits past and present.[50] As we show, revivalists advance claims about the "plain meaning" of the abortion provisions of the Comstock statute as an invitation for judges and officials friendly to the antiabortion cause to read into long unenforced provisions of the obscenity statute new, twenty-first-century meanings and create a national abortion ban they cannot persuade the American public to enact. The ultimate goal of revivalists is to shape the Constitution that emerges in *Dobbs*'s wake, by deterring the exercise of reproductive liberties protected by state law and, once

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[46] Counterman v. Colorado, 143 S. Ct. 2106, 2114 (2023) (citations omitted).

[47] *See infra* Part III.

[48] *See infra* note 395 and accompanying text. As compared to criminalization, health—as a language and an institutional framework for regulating sex, reproduction, and debate about them—was both emancipatory and constraining. Many gained forms of freedom, while others, outside sexual norms the medical community sanctioned, did not. Over the decades, the health framework greatly expanded access to sexual and reproductive health care, but with varying state restrictions that fell the most heavily on those outside the institution of marriage, on those lacking financial resources and race privilege, and on sexual minorities. In the end, however, the health framework liberalized access and was an incubator for change. *See infra* Section III.A.

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

[50] *See infra* Part IV.

again, by inhibiting democratic struggles for new rights. The revival movement seeks to protect unborn life at the expense of sexual and reproductive freedom, rather than employ noncarceral means that can coordinate the protection of both.

This Article offers perspectives on revivalist claims that are distinct from and complementary to those set forth in the 2022 Office of Legal Counsel (OLC) memo.[51] OLC 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.[52] "This conclusion is based upon a longstanding judicial construction of the Comstock Act, which Congress ratified and USPS itself accepted."[53]

Along with the OLC Memo, this Article rejects the revivalist claim that Comstock's ban on mailing abortion-related materials is plain and absolute. We explore the statute's meaning through a range of historic evidence on which the OLC does not focus and that strengthens the authority of the 1930 court decisions requiring the government to show a sender intends that the recipient of abortion-related items will use them unlawfully. Our historical sources show that the authority of these decisions was rooted in a fair reading of the federal obscenity statute and in deep public support forged in popular conflict over the statute's enforcement.[54] The judges in the 1930s cases were direct witness to the Comstock prosecutions that chilled and deformed democratic processes that might have otherwise enabled repeal or amendment of the law, and reasoned about the role and reach of obscenity law in ways that coordinated fidelity to the statute, and, implicitly, to the Constitution,[55] in cases decided just years before the Supreme Court's decision *United States v. Carolene Products*.[56]

The Article unfolds in four parts. Part I examines the enactment of Comstock and the invention of new understandings of obscenity by societies for the suppression of vice that enforced the Comstock Act. A social mobilization we call the anti-vice movement read the statute as a sexual-purity mandate—an interpretation ultimately adopted by the Supreme Court in 1896. Part II traces the emergence amongst younger suffragists of organized resistance to the government's use of the criminal law to

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[51] *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., No. 23-235 (U.S. Feb. 26, 2024) (discussing legislative history and cases).

[52] *See* OLC Memo, *supra* note 50, at 1-2.

[53] *Id.* at 2.

[54] 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.

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

[56] United States v. Carolene Prods., 304 U.S. 144 (1938). For discussion, see *infra* notes 475-476 and accompanying text.

enforce sexual purity, the public's growing support for the new conceptions of constitutional democracy the feminist movement espoused, and the movement's success in persuading judges in the 1930s to define obscenity in terms that recognized citizens' prerogative to make decisions about their health. Part III shows how Comstock censorship repressed important features of our constitutional history that bear on the law's democratic legitimacy, past and present. "Comstock chill" inhibited legislative action and found indirect expression in the judicial decisions in the 1930s recognizing that federal obscenity law did not obstruct citizens access to health care. And it suggests how the nation's experience living under Comstock censorship and growing opposition to it supplied foundations for landmark First Amendment and substantive due process precedents, even as those decisions are silent about Comstock and the resistance the law inspired. 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 enforcing the Comstock Act as an abortion ban today, and suggests how this inquiry into Comstock revival identifies lost foundations of free speech and sexual and reproductive liberties law.

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."[57] State courts applied this definition to profane speech, public nudity, and erotic images.[58] The Comstock Act destabilized existing obscenity law by banning not just the mailing of *communications* and speech about illicit sex but also the mailing of *items* and *objects* deemed obscene. The Comstock law was novel in a second sense: it swept in items and communications related to 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*.[59]

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[57] 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).

[58] *See infra* notes 65-68 and accompanying text.

[59] 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.[60] 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.[61] 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"[62]—was a hallmark of nineteenth-century obscenity cases.[63] But for most of the century, as Frederick Schauer explains, "there remained no definition of what obscenity was."[64]

Prior to the 1870s, state common law defined any number of acts as threats to the public order, including public nudity,[65] profanity in public spaces (especially where women and children were present),[66] public exhibition of racially ambiguous images of monsters,[67] and the public display of erotic images.[68] When Congress began dabbling in morals regulations in 1842, the federal Tariff Act barred the importation of "all indecent and obscene prints, paintings, lithographs, and transparencies"[69] (the

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

[61] Manchester, *supra* note 57, at 46-47; SCHAUER, *supra* note 60, at 3-7.

[62] *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).

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

[64] SCHAUER, *supra* note 60, at 6.

[65] 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).

[66] *See* SCHAUER, *supra* note 60, 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."

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

[68] *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 60, at 4-7.

[69] 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

law also banned the lottery in Washington DC).[70] While tariff prosecutions focused on erotic images, the definition of obscenity in state law generally remained "local, customary, and discretionary."[71] What made obscenity a threat to the public order—and what the public order required—remained ill-defined.

Starting in the mid-nineteenth century, Horatio Storer, a professor at Harvard Medical School, led the American Medical Association (AMA) in a campaign to criminalize abortion throughout pregnancy that reshaped debates about obscenity.[72] Storer and other antiabortion activists fused fetal-protective arguments with special disdain for married women who had abortions, proposing a model ordinance imposing a harsher penalty if "said offender be a married woman."[73] Other claims focused on the relative birth rates of Catholic and Protestant women.[74] Married women, particularly white, upper-class ones, raised particular concern, for they seemingly wanted to trade childbearing for other pursuits like voting.[75] Storer stressed that he would not transplant women "from their proper sphere, to the pulpit, the forum, or the cares of state."[76] While Storer and his colleagues campaigned for state abortion bans, Congress passed another obscenity law:[77] an 1865 postal law to address various wartime concerns[78] that set out fines and a prison term for persons mailing obscene books and pamphlets.[79] At the time, the antiabortion movement presented its cause as a fight to protect unborn life, correct differential birth rates, and ensure that married women played their God-given role—concerns that diverged in important respects from those of an emerging anti-vice movement that was especially preoccupied with illicit sex.

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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*].

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

[71] 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.

[72] 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*].

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

[74] HORATIO STORER, WHY NOT? A BOOK FOR EVERY WOMAN 29, 80 (Bos., Lee and Shepard 1867); *see also* STORER, ON CRIMINAL ABORTION, *supra* note 73, at 41.

[75] Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 924-30 (2023).

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

[77] *See* COTT, *supra* note 11, at 124-26.

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

[79] *Id.*

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.[80] 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.[81]

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.[82] In 1874, he organized a branch of the Railway Literary Union to stop the distribution of obscene literature via the rails.[83] This helped to launch McAfee's work in anti-vice societies later in the decade.[84]

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 communications*, including "any obscene or indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, [or] instrument."[85] It was also the first to describe *objects* as obscene, including any other "article for indecent or immoral use," including any "article or medicine for the prevention of conception or the procuring of abortion."[86] At the time, state statutes criminalizing abortion were relatively new, while prohibitions of contraception were just beginning.[87] In either case, defining either one as obscene was novel.[88]

In 1868, the year that New York amended its law,[89] *R. v. Hicklin*, a British decision, defined as obscene material that had a "tendency … to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[90] *Hicklin*, harkening back to an traditional conception

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[80] SOHN, *supra* note 11, at 40-54; WERBEL, *supra* note 11, at 43-65.

[81] DENNIS, LICENTIOUS GOTHAM, *supra* note 41, at 242-50.

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

[83] *Id.*

[84] *Id.*

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

[86] *Id.* On the novelty of this proposal, *see* DENNIS, LICENTIOUS GOTHAM, *supra* note 41, 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'").

[87] On the nineteenth-century movement to criminalize abortion, *see supra* notes 72-75 & 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")

[88] *See supra* note 86 & accompanying text.

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

[90] [1868] 3 QB 360 (Eng.).

of obscenity, concerned a salacious anti-Catholic political tract, not abortion or contraception, and would not be cited in the United States for more than a decade, when American courts began to employ it to expand the reach of obscenity law.[91]

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.[92] Comstock was especially infuriated by the acquittal of Victoria Woodhull in 1873.[93] In 1872, Woodhull had written of an alleged affair conducted by one of the nation's best-known preachers, Pastor Henry Ward Beecher of Brooklyn, with a female parishioner.[94] Woodhull, who insisted on the importance of sexual self-determination for women, denounced the hypocrisy of Beecher's affair.[95] "My judges," she wrote, "preach against 'free love' openly and practice it secretly."[96] The 1865 statute under which Woodhull was charged did not cover newspapers,[97] the kind of gap Comstock sought to close with the bill that would become the Comstock Act.[98]

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 would pose practical difficulties to enforce. Differentiating abortifacients, contraceptives, and even placebos seemed all but impossible at the time Comstock was lobbying Congress.[99] There remained no scientifically proven way for physicians to establish a pregnancy before a patient could detect fetal movement (nor would there be for nearly a century).[100] Most medical guides advised women to wait

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[91] 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.

[92] DENNIS, LICENTIOUS GOTHAM, *supra* note 41, at 270.

[93] Escoffier et al., *supra* note 11, at 55; DENNIS, LICENTIOUS GOTHAM, *supra* note 41, at 252. For discussion of Comstock's targeting of Woodhull, see *supra* notes 38-42.

[94] 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).

[95] *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*. Robert Shaplen, *The Tilton-Beecher Affair*, NEW YORKER (June 5, 1954), https://www.newyorker.com/magazine/1954/06/12/the-beecher-tilton-case-ii.

[96] *The Free Love Queen*, *supra* note 95, at 1.

[97] Escoffier et al., *supra* note 11, at 55.

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

[99] *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).

[100] *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

until they had missed two periods before suspecting pregnancy,[101] 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.[102] It was equally hard to determine how, if at all, the drugs and devices Comstock targeted worked.[103] Common remedies were marketed as curing female troubles, presented as emmenagogues for restoring blocked menstruation,[104] contraceptives, or abortifacients, or indeed, as all three.[105] Others quite clearly had no effect at all.[106]

Comstock and his allies, however, scarcely paused to draw distinctions because their objection was that abortion, contraception, and even placebos incentivized sexual impurity: while erotica stoked lust for both boys and girls, anything marketed as a contraceptive or abortifacient would facilitate licentiousness by allowing users to

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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).

[101] FRIEDENFELDS, *supra* note 100, at 170.

[102] KAREN WEINGARTEN, PREGNANCY TEST 58 (2023); *see also* FRIEDENFELDS, *supra* note 100, at 165-70.

[103] RIDDLE, *supra* note 99, 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").

[104] 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.

[105] 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.

[106] 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."

conceal their sin,[107] a common theme in newspaper reporting of the era.[108] It was concern about "free lust" that led Comstock to pursue the suffragist and free lover Victoria Woodhull,[109] and it was anxiety about abortion and contraception incentivizing licentiousness that he expressed when lobbying to Congress, armed with a suitcase of confiscated items he deemed obscene.[110] Comstock kept detailed lists of the items he confiscated, including "articles made of rubber for immoral purposes,"[111] such as dildos, which Comstock described as "in the form of the male organ of generation, for self-pollution."[112]

Comstock 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."[113] The prohibited items all were seen to incite sex.[114] 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

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[107] *See infra* note 152 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 86, at 192 (quoting Comstock's diary denouncing "obscene publications, abortion implements, and other incentives to crime").

[108] *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.").

[109] *See supra* notes 94-95 and accompanying text.

[110] WERBEL, *supra* note 11, 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").

[111] 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).

[112] WERBEL, *supra* note 11, 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 115 (quoting Comstock discussing the confiscation of "rubber articles for masturbation").

[113] *See infra* note 118 and accompanying text.

[114] *See supra* notes 107-112 and accompanying text.

manufacturing rubber goods," "newspapers," "and letters from all parts of the country."[115] 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."[116]

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 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."[117] 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.[118]

A third provision barred the importation of "any of the hereinbefore-mentioned articles or thing."[119]

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

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[115] *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").

[116] *Id.*; *see also* BROUN & LEECH, *supra* note 86, at 153 (reporting on Merriam's focus on the purity of women).

[117] 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)).

[118] Act of Mar. 3, 18 73, ch. 258, sec. 2, 17 Stat. 598.

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

writings or articles "designed or intended for . . . procuring of abortion?" [120] The meaning of the term "abortion" at the time of enactment helps to explain why. In 1873, the term "abortion" was synonymous with "miscarriage."[121] In 1851, Alexander Burrill's *A New Law Dictionary and Glossary*, one of the main law dictionaries of the era, stated that the crime of abortion occurred not when any miscarriage occurred but rather when miscarriage was "procured or produced with a malicious design or for an unlawful purpose"[122]—an account of the crime echoed in state cases of the era[123] and by *Black's Law Dictionary* more than fifty years later.[124] Section Two thus covered mailing of writings or articles "designed or intended for . . . procuring of abortion," that is, *sent with an intention that they would be employed for an unlawful purpose*. Relatedly, leading treatises, including one co-authored by Horatio Storer, leader of the campaign

[120] 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.

[121] 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").

[122] 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").

[123] *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."

[124] 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).

against abortion in the states,[125] 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."[126] 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.[127]

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."[128] 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.[129] Even at the height of a sexual-purity interpretation of Comstock, some courts assumed that the Comstock Act permitted physicians to communicate directly

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[125] 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).

[126] 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.")

[127] 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.

[128] REAGAN, *supra* note 125, at 61; *see also* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 36 (1984) ("The removal of the abortion decision from public scrutiny by defining it as a question of "medical judgment," combined with the semantic ambiguity built into the phrase to "save the life of the mother," meant that a wide range of practices on abortion could be undertaken in good faith.").

[129] REAGAN, *supra* note 125, at 63-64.

with their patients or with one another about abortion or contraception for reasons of health.[130] The pattern in these reported cases suggests that prosecutions focused on censoring physicians or others who advertised, published, or communicated health advice to the general public.[131] 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."[132] Debate about the statute's application to protection for health continued well after the statute's passage, reaching a fever pitch by the 1930s.[133]

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.[134] Other social-reform organizations flourished in major urban centers, addressing 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.[135]

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[136]—but both declined the modest annuity that accompanied the role, depending instead financially on the wealthy benefactors who funded anti-vice societies.[137] In addition to his stipend from the anti-vice society, Comstock collected often-significant bounties

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[130] 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").

[131] *See id.* .

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

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

[134] 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.

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

[136] 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 41, at 239.

[137] *See* KEMENY, *supra* note 11, at 22; GEORGE MCKENNA, THE PURITAN ORIGINS OF AMERICAN PATRIOTISM 213 (2007).

authorized by Congress to anyone who effectuated an arrest under the federal law—$1,250 in 1875, for example, at a time when the average American earned $776 in a year.[138]

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.[139] 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.[140] 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.[141] And for years, the membership of anti-vice societies was initially limited to white men, who saw policing sexuality as an area in which they were uniquely qualified.[142]

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."[143] 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."[144] 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,[145] or opening the door to "licentiousness without its direful consequences."[146]

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

[139] WAYNE FULLER, MORALITY AND THE MAIL IN NINETEENTH-CENTURY AMERICA 111-39 (2010); ALAN C. CARLSON, GODLY SEED: AMERICAN EVANGELICALS CONFRONT BIRTH CONTROL, 1873-1973, at 72-86 (2017).

[140] KEMENY, *supra* note 11, at 8-20; PAULA M. KANE, SEPARATISM AND SUBCULTURE: BOSTON CATHOLICISM, 1900-1920, at 306-25 (2017).

[141] BEISEL, *supra* note 11 at 11.

[142] Guilfoyle, *supra* note 135, at 640-44.

[143] *See infra* note 152 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.

[144] *See infra* note 152 and accompanying text.

[145] COMSTOCK, *supra* note 108, at 427; *see also* BROUN & LEECH, *supra* note 86, at 192 (quoting Comstock's diary denouncing "obscene publications, abortion implements, and other incentives to crime").

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

Franklin S. Fitch, a prominent Cincinnati anti-vice activist, argued that the more that women and children were exposed to indecent information, the more illegitimacy rates would soar and marriage rates would plummet.[147] "The poor wrecks of womanhood who lurk in the streets," explained Lieutenant Governor Stewart Woodward at the first annual convention of the New York Society for the Suppression of Vice (NYSSV), "had once been as sweet and good and pure as any woman in any home until they had been swept away by the tide of passionate desire."[148] These threats to sexual purity, anti-vice activists argued, came disproportionately from men of color. "A large proportion of those engaged in the nefarious traffic," Comstock argued in 1875, "are not native American citizens."[149]

To save boys, girls, and women from being debauched, anti-vice crusaders sought to ensure that women who had sex bore children, and that women who had children stayed at home and dedicated themselves to childrearing. "As soon as the babe is born the duty of the mother is changed," Comstock explained in 1883. "This gift from heaven is no small thing, to be entrusted to an ignorant and often vicious servant girl."[150] Infrequently, Comstock borrowed fetal-protective rhetoric and railed against "ante-natal murderers,"[151] 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.[152]

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147 *Suppression of Vice: Celebrating the Fourth Anniversary of the Cincinnati Branch of the Society for the Suppression of Vice*, CIN. ENQUIRER, May 26, 1880, at 4.

148 *The Suppression of Vice: The Society's Work and Aims*, N.Y. TIMES, Jan. 28, 1876, at 8 [hereinafter *The Suppression of Vice*].

149 FOURTH ANNUAL REPORT FOR THE NEW YORK SOCIETY FOR THE SUPPRESSION OF VICE 11 (1878) [hereinafter FOURTH ANNUAL REPORT].

150 COMSTOCK, TRAPS FOR THE YOUNG, *supra* note 42, at 245.

151 *Id.* at 154.

152 SECOND ANNUAL REPORT, *supra* note 146, at 9 (framing abortion as a strategy for women to "conceal their own lapse from chastity"); FOURTH ANNUAL REPORT, *supra* note 149, 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 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

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."[153] "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."[154]

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.[155] Data in Chicago tell a similar story.[156]

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.[157] 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."[158]

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.[159] 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,

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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 108 and accompanying text. Case law also stressed the importance of sexual purity, including in cases related to abortion. *See infra* Section I.D.

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

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

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

156 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).

157 BROUN & LEECH, *supra* note 86, at 178.

158 SECOND ANNUAL REPORT, *supra* note 146, at 9.

159 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.

emmenagogues, and even childbirth and adoption.[160] At a time when stigma around abortion was growing, Restell criticized censors and defended the importance of care for women in New York newspapers.[161] Restell committed suicide before her trial concluded, but she was only one of several providers prosecuted under the law.[162]

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.[163] 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.[164] A New York district court upheld both men's convictions anyway.[165]

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).[166]

After Foote published an expanded edition book on sex and contraception in marriage,[167] 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.[168] A New York district court rejected Foote's argument;[169] without settling 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.[170]

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160 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).

161 *Id.*

162 *Id.* at 279-81.

163 United States v. Kelly, 26 F. Cas. 695, 696-97 (C.C.D. Nev. 1876) (upholding the conviction of a defendant who advertised to "all married ladies, whose delicate health or other circumstances prevent an increase in their families"); United States v. Whittier, 28 F. Cas. 591, 591 (C.C.E.D. Mo. 1878) (upholding the conviction of a doctor who responded to a decoy letter).

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

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

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

167 RABBAN, *supra* note 13, at 39.

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

169 *Id.*

170 For the terms of this debate, 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

A sexual-purity interpretation also reinforced prevailing racial hierarchies.[171] 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."[172] Under a sexual-purity interpretation of the Comstock Act, such a letter would not excite the passions of innocent youth,[173] but the Michigan court treated accusations of interracial sex differently.[174] 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."[175]

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 mailed female contraceptives were far more common than those for dealers of condoms.[176] 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.[177]

The Supreme Court's decision in *Ex parte Jackson* dispensed with then-common constitutional arguments against the Comstock Act.[178] 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.[179] Field

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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 190); *but see Foote*, 25 F. Cas. at 1141; United States v. Whittier, 28 F. Cas. 591, 591 (C.C.E.D. Mo. 1878) (upholding the conviction of a doctor who responded to a decoy letter from a purported patient); United States v. Breinholm, 208 F. 492, 493 (D. Wa. 1913) (upholding an indictment against a provider who responded to a decoy letter from someone posing as a patient).

[171] 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 146, 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 11, at 112-15.

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

[173] *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").

[174] *Pratt*, 27 F. Cas. at 611-13.

[175] *Id.* at 612.

[176] Burton, *supra* note 156, at 172.

[177] 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 11, at 229 (detailing Colgate's campaign to market Vaseline as a contraceptive).

[178] 96 U.S. 727 (1878).

[179] *Id.* at 728.

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.[180]

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 and suffrage proponent.[181] 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.[182] 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.[183] Further, Heywood harshly criticized Comstock as a "religious monomaniac" and argued that a sexual-purity interpretation of the law had suppressed "free inquiry."[184] When Comstock arrested Heywood in 1877, Bennett, another proponent of suffrage and legal birth control,[185] announced a crusade to continue mailing *Cupid's Yokes*.[186]

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.[187] It was also 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.[188] 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.[189] This effort failed: a jury concluded that Heywood's political speech would suggest "impure and libidinous thoughts in the young and the inexperienced."[190]

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[180] *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").

[181] WOOD, *supra* note 166, at 65; BEISEL, *supra* note 11, at 87.

[182] *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).

[183] On Heywood's life, see JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 164-68 (3d ed. 2012). On Bennett's case, see United States v. Bennett, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879).

[184] EZRA HEYWOOD, CUPID'S YOKES: OR, THE BINDING FORCES OF CONJUGAL LIFE 7-11 (Princeton, Mass., Co-operative Publishing Co. 1876).

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

[186] *See* RABBAN, *supra* note 13, at 37; FULLER, *supra* note 139, at 114.

[187] *See* Regina v. Hicklin, [1868] 3 QB 360 (Eng.).

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

[189] *Bennett*, 24 F. Cas. at 1101-1102.

[190] *Id.* at 1102. *See* United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889) (upholding a conviction for mailing a pamphlet entitled "Dr. Clarke's Treatise on Venereal, Sexual, and Special Diseases" and reasoning that "[t]he word 'obscene' ordinarily means something that is offensive to chastity [and] offensive to pure-minded persons. [I]t means a book . . . containing immodest and indecent matter, the

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,[191] clarifying that the term "writing" applied to material "whether sealed as first-class matter or not."[192] 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.[193] Founded in 1874, the Woman's Christian Temperance Union (WCTU) launched a Department for the Promotion of Purity in Literature and Art in 1883.[194] 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.[195] 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.[196] 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.[197] People who received sealed letters or 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

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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.))).

[191] On the 1888 expansion, see FULLER, *supra* note 139, at 137-39; and DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 74-75 (1977).

[192] FOWLER, *supra* note 191, at 75.

[193] 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).

[194] PARKER, *supra* note 193, at 235; FRANCIS COUVARES, MOVIE CENSORSHIP AND AMERICAN CULTURE 74 (2006).

[195] PARKER, *supra* note 193, at 38.

[196] 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).

[197] 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 155, at 451.

Postmaster General for a final decision.[198] Victims of sexual harassment,[199] angry spouses,[200] feuding colleagues,[201] and resentful neighbors[202] turned to the Comstock Act to make their personal disputes into criminal cases. Husbands anxious that their wives received circulars advertising abortion or contraceptive remedies contacted postal inspectors too.[203]

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.[204] 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."[205] Nor was the Eighth Circuit sympathetic in 1909 to the author of a free love publication telling the story of a South Dakota unmarried woman who died during an illegal abortion.[206]

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."[207] The court acknowledged that Durant's speech was defamatory but insisted that it did not threaten sexual purity by exciting "the animal passion."[208]

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[198] On the private letters sent to postal inspectors, see FULLER, *supra* note 139, at 133-34; and Burton, *supra* note 156, 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.

[199] 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).

[200] 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.

[201] 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.

[202] 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.

[203] 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).

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

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

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

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

[208] *Id.*

An Indiana district court reached a similar conclusion when Cora Anderson received a "vinegar valentine," sent, in the era, to reject suitors or insult rivals.[209] The court concluded that the valentine "would repel, rather than excite, feelings of an impure, licentious, or unchaste character."[210] 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.[211] Courts applied a similar understanding of sexual purity in cases about sex education, abortion, and contraception.[212]

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.[213] Populist Indiana newspaperman Dan Swearingen had denounced a political opponent as a man "filthier, rottener than the rottenest strumpet that prowls the streets at night."[214] The Supreme Court agreed with Swearingen that his article was not likely to lead to nonprocreative sex and was therefore not obscene.[215] 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.[216] 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.[217]

F. Chill and Underenforcement

Swearingen was a tremendous victory for the anti-vice movement, but punishment remained relatively rare—and prison time even rarer. 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.[218] 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.[219] After 1915, NYSSV arrests related to

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[209] *See* United States v. Males, 51 F. 41, 41, 42-43 (D. Ind. 1892).
[210] *Id.*
[211] United States v. Moore, 104 F. 78, 79-80 (D. Ky. 1900).
[212] 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).
[213] Swearingen v. United States, 161 U.S. 446 (1896).
[214] *Id.* at 447-49.
[215] *Id.* at 450-51.
[216] *See supra* Section I.A and accompanying text.
[217] *Swearingen*, 161 U.S. at 451.
[218] BROUN & LEECH, *supra* note 86, at 172.
[219] Burton, *supra* note 156, at 189.

abortion or contraception, which had never comprised a majority, all but dried up, with a little over one a year.[220]

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,[221] Congress replaced the bounty funding that Comstock and McAfee had enjoyed with a regular salary.[222] 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.[223]

In 1915, Comstock died.[224] McAfee had passed away six years before, the year that Congress had most recently expanded the statute so closely associated with his colleague.[225] Comstock claimed, by that time, to have arrested more than 4,000 people for obscenity-related offenses and driven 15 to suicide.[226]

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."[227]

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.[228] A younger generation of suffragists had a much 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

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[220] Hovey, *supra* note 155, at 437.

[221] *See* Zier, *supra* note 136, 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).

[222] Zier, *supra* note 136, at 9-10.

[223] 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).

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

[225] *Necrological Report of the Alumni Association of Princeton Theological Seminary*, *supra* note 82, at 105.

[226] EDWARD DE GRAZIA, LEANING BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 5 (1993); STONE, *supra* note 13, at 192-93.

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

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

dialogue available to the disfranchised.[229] 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.[230] 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.[231]

Lastly, we show how these conflicts changed fundamental premises of judges who enforced the federal statute,[232] 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.[233]

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.[234] Woodhull, the first woman to campaign for the Presidency, spent

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

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

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

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

[233] *See infra* notes 341-346.

[234] *See* DUBOIS, *supra* note 39, at 83-93 (discussing Woodhull's congressional testimony); Siegel, *She the People*, *supra* note 37, 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* Horowitz, *supra* note 38, at 408, 414-15; 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 &

election night of 1872 and all of November in jail, only to be arrested again shortly after her release.[235] Leadership of the 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.[236] 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.[237]

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,[238] 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."[239] Usage of the term "Comstockery" soared.[240] By the teens, silent films made a mockery of Comstock's efforts to keep sex out of the public sphere.[241] And suffrage emerged as a mass movement, organizing parades and pickets to dramatize its demand to amend the Constitution.[242]

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[243]—began to speak and act in open opposition to

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Co., Publishers 1871) ("Yes, I am a Free Lover. 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."). She joined many in the suffrage movement in criticizing marriage as "legalized prostitution." *Id.* at 20.

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

236 *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).

237 *See supra* Part I.

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

239 *Id.*

240 *See* "*Comstockery*," GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=Comstockery&year_start=1800&year_end=2019&case_insensitive=on&corpus=en-2019&smoothing=3.

241 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).

242 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 39, at 205-38.

243 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

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.[244] In a famous speech after ratification of the suffrage amendment setting out a wide-ranging agenda for the National Woman's Party in support of "[w]omen's freedom, in the feminist sense,"[245] 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.'"[246] 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.[247] 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.[248]

VIEWER, https://books.google.com/ngrams/graph?content=feminism&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3.

[244] 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").

[245] 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*].

[246] *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).

[247] COTT, *supra* note 243, 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.

[248] *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").

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.[249] 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.[250] But by the progressive era feminists reasoned differently. It was the *public and political demand* for birth control that was new, and the first mass-mobilized challenge to Comstock.

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

In the decade before the Nineteenth Amendment's ratification, a growing circle of feminists debated the social arrangements needed to support what Eastman would call "[f]reedom in the feminist sense."[251] A key locus of this conversation was a network of women in New York's Greenwich Village who organized themselves in 1912 as "Heterodoxy."[252] 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.[253]

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.[254] 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.[255]

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

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[249] For sources discussing the drop in birth rate, and the different contraceptive practices Americans employed, see *supra* note 35.

[250] On claims to self-ownership in matters of sex and reproduction asserted by suffragists, see Siegel, *Democratization*, *supra* note 246, at 464-65.

[251] Eastman, *Now We Can Begin*, *supra* note 245.

[252] 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.

[253] *See* COTT, *supra* note 243, at 37-50.

[254] 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.

[255] 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.

York (1917),[256] 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[257]—were employed by the politically disempowered to amplify their voice in conflicts that spanned across national borders.[258]

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.[259] Sanger's own mother had died of tuberculosis after conceiving eighteen times in 22 years—eleven live births and seven pregnancies ending in miscarriage.[260] 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.[261]

Sanger, then a protégé of Goldman's, was moved to action.[262] Sanger openly published contraceptive information in 1914 in a magazine "The Woman Rebel," which Comstock confiscated.[263] But Sanger left for Europe rather than face trial.[264] 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.[265] Sanger returned from Europe, and opened the first birth control clinic in the United States; by 1916,

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256 *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).

257 *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.

258 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) (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).

259 *See* CHESLER, *supra* note 11, at 62-63.

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

261 *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).

262 *See* CHESLER, *supra* note 11, at 81 ("Margaret quite clearly adopted her feminist ideology, and much of the rhetoric she later claimed as her own, from Emma Goldman.").

263 *See id.* at 102.

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

265 *See* Dorothy Wardell, *Margaret Sanger: Birth Control's Successful Revolutionary*, 70 AM. J. PUB. HEALTH 736, 739 (1980); CHESLER, *supra* note 11, at 126-27.

Sanger and her sister Ethel Byrne were arrested for violating New York's "mini-Comstock" statute.[266] Charged with fitting a birth control device, Sanger was arrested with her sister Ethel Byrne; they were 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.[267]

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.[268] *The Washington Times* reported from the District of Columbia on the trial of William Sanger—detailing Sanger's story of entrapment by an agent of Comstock.[269] Representing himself, William Sanger explained what was at stake in his trial in a speech 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 . . . .[270]

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.[271] 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

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[266] GOLDMAN, *supra* note 264, at 88.

[267] *See* CHESLER, *supra* note 11, at 154-55. On Byrne's strike, see *infra* notes 276-277 and accompanying text.

[268] 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*, at 561. For an N-gram depicting the rise and shifts in the term "birth control," see "*birth control*," GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=birth+control&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3.

[269] *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*].

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

[271] *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.

feet, . . . cheering, shouting opinions of the judge and court and declaring that the prisoner had been treated unjustly."[272]

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.[273]

The *Salt Lake Telegram* devoted four articles in one issue to questions raised by Sanger's trial extensively quoting Sanger in her own defense.[274] Other stories attested to Comstock's declining authority, emphasizing that his use of the criminal law to 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.[275]

When Sanger's sister, Ethel Byrne, was jailed, she made national headlines by undertaking a hunger strike.[276] The *New York Times* and other papers provided the public graphic details.[277]

Through these acts of civil disobedience to the nation's obscenity laws, women sought to speak in politics even when they could not vote. The government crushed Sanger and Byrne's resistance: they were convicted and jailed, and courts simply refused to address their challenges to the constitutionality of laws banning birth control.[278]

But incarceration amplified rather than silenced their voices.[279] In convicting Sanger, the New York Court of Appeals for the first time construed a provision of the

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

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

[274] 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.

[275] *Id.*

[276] CHESLER, *supra* note 11, 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").

[277] *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).

[278] 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.

[279] 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).

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.[280] The public was fascinated by the claims of Comstock resisters, and their stories were accorded increasingly positive coverage.[281]

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.[282] 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."[283]

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—premised 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.[284] *United States v. Dennett* was ultimately overshadowed by the subsequent decisions it enabled.[285]

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[280] *See infra* Section III.A (discussing case). Earlier rulings under the Comstock Act had hinted that physicians might be exempt from prosecution when communicating directly with their patients, but these conclusions came primarily in dicta. *See supra* notes 130 & 170 and accompanying text.

[281] *See* Flamiano, *supra* note 268, at 563 ("An examination of 44 articles in 5 magazines revealed a pattern of predominately positive portrayals of birth control.").

[282] *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).

[283] *See Woman Advocate of Birth Control Outlines Defense*, *supra* note 273 (reporting in a January 1916 issue of the *St. Louis Dispatch* an interview with Sanger originally published in Alexander Berkman's *The Blast*).

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

[285] *See infra* notes 332-332 and accompanying text.

Dennett was born the year Comstock jailed Woodhull.[286] 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,[287] 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 covered in the press.[288] 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.[289]

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.[290]

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).[291] 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 protest,[292] 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,[293] 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.

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

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[286] CHEN, *supra* note 254, at 3 (reporting that Dennett was born in April of 1872).
[287] *Id.* at 43-57.
[288] *Id.* at 56, 64-125.
[289] *Id.* at 105-06.
[290] *Id.* at 171-76.
[291] *Id.* at 180-82.
[292] *Id.* at 120-25.
[293] *Id.* at 207-08.

control.[294] 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."[295] Dennett attacked advocates of sexual purity—those who "accept sex relations as necessary for parenthood and demand complete suppression otherwise;"[296] 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."[297]

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.[298] 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.[299] 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.[300]

In 1924, Dennett actually succeeded in securing sponsors and a joint congressional hearing for a bill exempting communication about contraception from federal obscenity law.[301] Testifying before a joint hearing of a Judiciary Subcommittee on the Cummins-Vaile bill, Dennett emphasized the haste in which the Comstock

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

[295] *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'").

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

[297] *Id.*

[298] *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").

[299] CHEN, *supra* note 254, at 211-13, 219-22.

[300] *Id.*

[301] *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").

statute had been passed, inviting Congress to clarify its understanding of obscenity.[302] 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.[303]

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.[304] 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 law, a bill Dennett opposed as likely to exclude the poor.[305] 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.[306]

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[302] *Cummins-Vaile Bill Hearing*, *supra* note 301, 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.

[303] *Cummins-Vaile Bill Hearing*, *supra* note 301, at 10-11 (statement of Mary Ware Dennett).

[304] *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).

[305] *Birth Control Bill Evokes Protest from Catholics*, TIDINGS, Apr. 18, 1924, at 3. On Sanger's proposals, see CHESLER, *supra* note 11, at 231-34. On Dennett's objection to Sanger's approach, see CHEN, *supra* note 254, 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").

[306] *See infra* note 397 and accompanying text. *See generally* Pub. L. No. 91-662, 84 Stat. 1973 (1971) (repealing provisions on contraception).

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.[307]

In 1922, the post office ruled the pamphlet obscene, even as religious, educational, and medical leaders recommended it, and the pamphlet's readership grew.[308] 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.[309] Within two weeks Dennett was indicted—targeted, she suspected, for her advocacy[310]—and soon thereafter tried and convicted for violating the Comstock Act.[311]

The Brooklyn trial court's decision provoked a storm of protest.[312] The press invoked the wide variety of civic, religious, and medical authorities who had approved of Dennett's pamphlet[313] and criticized classification of the pamphlet as obscene by depicting Dennett as a maternal, even grandmotherly figure.[314] This refrain was

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[307] MARY WARE DENNETT, THE SEX SIDE OF LIFE 5 (6th ed. 1919). [add on movement for sexual education]

[308] *See* CHEN, *supra* note 254, at 241-42.

[309] *Id.* at 79-80.

[310] *Id.* at 80; *see also* GARY, *supra* note 13, at 36-39 (noting that "Dennett was not surprised" to be indicted).

[311] GARY, *supra* note 13, at 39, 50; Weinrib, *The Sex Side of Civil Liberties*, *supra* note 13, at 355.

[312] Weinrib, *The Sex Side of Civil Liberties*, *supra* note 13, 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 . . .").

[313] *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?").

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

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."[315] Editorials derided the New York court for enforcing beliefs even more pernicious than Tennessee's law banning teaching of evolution in the public schools,[316] 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."[317]

The Executive Committee of the recently founded ACLU expanded its conception of civil liberties to support Dennett,[318] and formed a defense committee headed by John Dewey, who launched a national campaign on Dennett's behalf.[319] Dewey, who evidently recognized that he shared common commitments with Dennett,[320] 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*

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315 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").

316 *Now Tennessee Can Laugh at New York*, *supra* note 314, 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.").

317 *Modern Czardom*, *supra* note 313, 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'").

318 Weinrib, *The Sex Side of Civil Liberties*, *supra* note 13, 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.").

319 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 Ware Dennett*, 15 FRONTIERS 145, 155 (1995).

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

> *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*.[321]

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*[322] 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*[323] and *United States v. One Package of Japanese Pessaries*.[324]

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 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.[325] "[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."[326] 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.[327]

It was not sex that threatened society, Judge Hand reasoned, so much as the sexual-purity reading of the obscenity statute itself. Judge Hand rejected the perspective of sexual-purity censors who would restrict any depiction of sex that might stimulate those with the most prurient imaginations. The obscenity statute could not refer to "everything which might stimulate sex impulses," or "much chaste poetry and

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[321] Letter from John Dewey to Morris Ernst, *reprinted in* 17 THE LATER WORKS OF JOHN DEWEY, 1925-53: 1885-1953 (2008) (emphasis added).
[322] 39 F.2d 564 (2d. Cir. 1930).
[323] 72 F.2d 705 (2d. Cir. 1934).
[324] 86 F.2d 737 (2d Cir. 1936). On Ernst's work in these cases, *see* GARY, *supra* note 13, at 46-60, 180-214, 238-49.
[325] *Dennett*, 39 F.2d at 565-67.
[326] *Id.* at 567.
[327] *Id.* at 568. [add]

fiction, as well as many useful medical works would be under the ban."[328] He ruled that the statute "must not be assumed to interfere with serious instruction regarding sex matters unless the terms . . . are clearly indecent."[329]

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[330]—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.[331]

The impact of the *Dennett* case was immense, even as citations to the decision have ceased in recent decades.[332] At that time the decision was handed down, an ACLU pamphlet explained the case was pathbreaking because it "'*involves the whole method of determining obscenity*, the rules of evidence in trials, and the constitutionality of the law under which the Post Office Department operates its censorship.'"[333] 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."[334] 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.[335]

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[328] *Id.*

[329] *Id.* at 569.

[330] *See supra* notes 187-190 and accompanying text (discussing adoption of *Hicklin* standard in the *Bennett* case); GARY, *supra* note 13, 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 190 (reporting on a case applying the Hicklin standard for obscenity to a pamphlet on the symptoms of venereal disease).

[331] *Dennett*, 39 F.2d at 569.

[332] According to Westlaw's "Citing References" function, there have been 49 citations of *Dennett* in other cases, 41 of which occurred within the first 30 years after *Dennett* was decided, and none since 1985. *See infra* notes 384-388 and accompanying text (discussing how the Warren Court invoked *Dennett* in modernizing obscenity law in the 1950s).

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

[334] WEINRIB, *supra* note 13, at 363 (citation omitted).

[335] 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").

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*[336] holding that a doctor importing a diaphragm from a doctor did not violate federal obscenity laws.[337] Dennett had been arguing that democracy required freedom of information since the 1920s, and Judge Hand's decision in her case overturned many of the premises of the sexual-purity interpretation of obscenity, including the threat the most extreme, *Hicklin*-informed versions of it posed to science. Since the New York Court of Appeals decision in her case, Sanger had been arguing for legislation clarifying medical authority under the statute.[338]

From the late nineteenth century to the 1930s, there was disagreement about the kind of communications about health that the Comstock Act permitted.[339] 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.[340] 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.[341] And in the *Dennett* case, Judge Hand had shifted the standard for assessing obscenity away from *Hicklin*, ensuring that claims for medical exemptions would no longer be assessed from the standpoint of the most prurient member of the community.[342]

Going even farther, in 1930, in *Youngs Rubber Corporation v. C.I. Lee*,[343] the Second Circuit enforced a patent for Trojan brand condoms on the grounds that they could be used for lawful purposes.[344] Though the case focused on contraceptives, the Second Circuit implied that a sweeping sexual-purity interpretation of the law

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

337 *See infra* Section III.A.

338 *See supra* note 305 and accompanying text.

339 *See e.g.*, supra Section I.A (discussing 1873 text and enactment history); *supra* notes 168, 170, 190, and accompanying text (discussing Foote prosecution and Clarke prosecution). In the Victorian era, courts were generally concerned with communications addressed to the general public (including books and advertisements), not doctor-patient communications.

340 *See* GARY, *supra* note 13, 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.

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

342 *See supra* notes 330-335 and accompanying text.

343 45 F.2d 103 (2d Cir. 1930).

344 Tone, *Making Room*, *supra* note 152, at 67-68 (describing the significance of the patent litigation).

misunderstood the law's provisions on both contraception and abortion, and returned to the text of the statute and cases interpreting it. 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."[345] The "prevention of disease" was not such a purpose, nor was "the prevention of conception, where that is not forbidden by local law."[346] As the court explained, "[t]he 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."[347] In discussing contraceptives and abortifacients, the court did not tie this standard for assessing the legality of distributing items for "contraceptive or abortifacient uses" to a physician-patient communication.[348] *Youngs Rubber* nonetheless illustrates how the condom's multiple functions and the public interest in increasing access to it for reasons of sex and health played a role in judicial interpretation of the statute's language.[349]

"Health" in these cases signified a lawful use under the Comstock Act. Health was also the language in which public talked about over-the-counter products that were designed to promote contraception—a "euphemism" as Sanger's biographer put it.[350] "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.'"[351]

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

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

346 *Id.* 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.").

347 *Id.* at 108.

348 *Id.* at 109.

349 *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).

350 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").

351 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").

pregnancy,[352] women used as both a contraceptive *and* an abortifacient.[353] 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."[354]

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.[355] Recognizing doctors' role in protecting health meant that there were legitimate purposes for communicating and sending articles about controlling birth in the U.S. mails.

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 by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients."[356] 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.'"[357]

These cases established 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.[358] Codification

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[352] *See supra* notes 99-100 and *infra* note 353 and accompanying text.

[353] RIDDLE, *supra note* 99, at 250-253; *see also* Sarah E. Patterson, Being Careful: Progressive Era Women and the Movements for Better Reproductive Health Care 145-146 (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).

[354] *Id.* at 385 (discussing *The Incompatible Marriage: Is it a Case for Doctor or Lawyer?*, MCCALL'S MAG., May 1933, at 107).

[355] *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.[356] *One Package*, 86 F.2d at 739; *see also* OLC Memo, *supra* note 51, 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.

[356] *One Package*, 86 F.2d at 739; *see also* OLC Memo, *supra* note 51, 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.

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

[358] 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

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.'"[359] Most but not all states adopted this understanding as a matter of state law: Connecticut and Massachusetts were among the hold-outs, adamantly refusing in the wake of *One Package* to shift interpretation of the state's mini-Comstock law in response.[360]

III. COMSTOCK'S CHILL AND ANTIDEMOCRATIC LEGACY IN LAW AND POLITICS

While the 1930s cases curbed the greatest excesses of Comstockery and responded to popular mobilization against its censorship, in so doing these decisions helped entrench both the statute and the chill it produced. This chill persisted—repressing an important chapter of our constitutional history that bears on the statute's democratic legitimacy—and helps explain why the statute remained on the books.

As we have seen, the public's response to government coercion of speech and sex was clear: Over time the authority of Comstock resisters to speak for the community grew. By the 1930s, their stories moved federal judges to explain the wrongs of obscenity in terms of a public order in which there was a role for sexual expression between married couples whose "health" required access to the means of controlling reproduction. In this era, the federal government's enforcement of the

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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 v. United States*, 229 F. Supp. 960, 964 (7th Cir. 1915), which interpreted the Comstock Act to create an exception for abortions for "an operation to save life." For 1930s cases, see *Davis v. United States*, 62 F.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."

[359] 18 U.S.C. § 1461 (Historical and Revision Note, quoting *Youngs Rubber*, 45 F.2d. at 103).

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

contraceptive and abortion provisions of Comstock had for the most part ceased.[361] State enforcement also declined in its wake.[362]

Yet, even as enforcement and interpretation of the reproductive provisions of federal obscenity law shifted in response to fierce and sustained public resistance, there are important respects in which the censors' project succeeded. The legacy of Comstock censorship and surveillance outlasted the more spectacular prosecutions by generations, stigmatizing and chilling discussion of sex and reproduction in a range of contexts, including politics and constitutional law.

We employ the First Amendment concept of chill as an analytic to emphasize that Comstock enforcement restricted constitutionally significant expression, in constitutionally significant ways. Chill highlights, as John Dewey recognized, that obscenity law not only reflected social norms, but shaped them: 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.[363] 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.

Comstock's legacy did not end in the 1930s. As obscenity law changed, chill evolved in form. Even as Anthony Comstock disappeared, his work mocked as "Comstockery," his influence persisted, naturalized, expressed as understandings about public order whose distant roots are no longer recognized.

In what follows we show how Comstock chill shaped the health interpretation of the statute's obscenity provisions. In the 1930s, courts ruled that in adopting an obscenity statute to govern the mails, Congress did not interfere with the practice of medicine or compromise the health of the American people.[364] Judges who enforced the statute this way were faithful to its text and to the public's reaction to sexual-purity prosecutions. At the same time, when judges reasoned in frames of "health" to identify a legitimate sphere of market, professional, and personal activities properly free of the censors' control, they were employing euphemisms about sex and reproduction that

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[361] *See* KENNEDY, *supra* note 350, 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").

[362] *See* Hovey, *supra* note 155, 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").

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

[364] *See supra* Section II.D.

had grown up under Comstock censorship.[365] On reflection, it is a matter of common sense that the government's repressive sexual-purity regime shaped public resistance, including the understandings about health that supplanted it.

We demonstrate how Comstock chill persisted after the cases of the 1930s—and indeed, well into the era in which abortion and contraception were recognized as reproductive rights. To do so, we first look back at the events we have recounted in Part II and then look forward into the modern era. Section A shows how chill channeled change, producing legislative lock-up and shaping the very court decisions that rejected censorship. We show how courts found in the language of health authority for resisting the censors' sexual-purity and *Hicklin*-inspired interpretation of the statute—and as they corrected Victorian excesses in interpreting the statute, repressed more fundamental challenges that called for the statute's repeal or contested the very constitutionality of government control of reproductive choice. *Health provided judges authority for legislatively faithful, democratically responsive interpretation of the statute, enabling judges to respond to the public where political actors would not. At one and the same time, the health interpretation of the Comstock law eradicated all reference to the protests and popular convictions that gave it democratic authority.*

In Section B, we close with a brief account of ties between the 1930s cases and modern substantive due process law, showing how early constitutional cases built on understandings forged in Comstock conflict while effacing all reference to the no-longer enforced provisions of the obscenity statute, and the claims of those who first opposed them now lost to constitutional memory.

In short, examining how the Comstock regime distorted democratic dialogue shows the law's dramatic departure from democratic premises and recovers repressed parts of the nation's history and traditions. We show that the chill produced by the statute persisted after the modern interpretation of the statute emerged in the 1930s—and even after the decision of key due process rulings in the 1960s and 1970s. The ongoing chill created by Comstock reinforces concerns about the statute's antidemocratic origins, providing historical perspective of interest to those who engage with the statute in law and politics.

A. Comstock Chill: From Sexual Purity to Health

In the early twentieth century, responsibility for oversight of sex, contraception, and abortion shifted in significant part from government censors to the institutional auspices of medicine. Chill shaped these developments: Growing numbers of (married) women secured access to contraception and in some cases

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[365] *See supra* notes 351-353 and accompanying text (illustrating "health" served as euphemism for contraception); Patterson, *supra* note 353, at 67 ("Companies advertised their devices for their hygienic properties and germ killing ability in order to avoid accusations of impropriety or obscenity that could be leveled at contraceptive devices if they were advertised overtly as contraceptives."); *see generally* ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA 39, 83, 170 (2001) (discussing over-the-counter market in contraception in the era of Comstock enforcement).

abortion, authorized by doctors, for women's health, rather than as a matter of constitutional right. As compared to criminalization, this regime of health—both a language and an institutional framework for regulating sex and reproduction—was both emancipatory and constraining.

Consider how chill evolved in the 1918 prosecution and incarceration of Margaret Sanger. 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 conjugal happiness.[366] 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.[367] At the same time, the court upheld Sanger's and Byrne's convictions because, as nurses, they were not licensed to dispense contraception to their patients.[368]

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.[369] The standard of "health" the New York Court recognized accommodated Sanger and Byrnes' claims in a way that preserved male control.[370] Still, her decision pointed to a promising path forward.

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[366] *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").

[367] 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.").

[368] 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. REPUB, Feb. 2, 1917, at 2[*].

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

[370] *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 294, at 4.

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.[371]

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, at least in electoral politics. Sixty years of censorship and surveillance of communications concerning abortion and contraception as obscene chilled politics, obstructing pathways of change, even when expressed in the discourse of health.[372] Despite numerous polls showing supermajority support for legalizing access to contraception, especially during the Depression,[373] advocates were unable to move a virtually all-male Congress,[374] whose members professed support but in the end withheld support, intuiting that the vote to legalize access was politically fraught and entangled in questions of gender, claims of "race suicide," and religion.[375]

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[371] 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 350, at 219-20. On the government's role in silencing Byrne, see *supra* note 368.

[372] *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").

[373] 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 372, 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 125 at 134; *see also* KENNEDY, *supra* note 350, at 140 (discussing rising and even greater support among women in this era).

[374] *See History of Women in the U.S. Congress*, *supra* note 304 (showing eight women in Congress for most of the 1930s, typically one woman in the senate).

[375] 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 11, 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

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[376]—or injury by douching with Lysol, during the 1930s widely advertised for feminine hygiene, that is, birth control.[377] 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."[378]

But in the end, despite public demand and open lawbreaking, legislative lock-up persisted. Men who grew up under Comstock were more comfortable with inaction, unwilling publicly to sanction practices that enabled the separation of sex and childbearing, preferring to leave them hidden and marked by law as obscene. Given the political exigencies of the era, advocating openly for abortion would have been even more politically costly, particularly with potential AMA allies, and perhaps unnecessary when some of the drugs to which women turned were used as contraceptives and abortifacients.[379]

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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 preserve the status quo was more widespread. *See* Benjamin, *supra* note 372, at 359-60; Himes, *supra* note 372, at 61. Considerations of gender, see *supra* notes 372-374 and accompanying text, religion, and race all seem to have played a role.

376 *See* REAGAN, *supra* note 125, at 135 ("Medical studies and sex surveys demonstrated that women of every social strata turned to abortion in greater numbers during the Depression"); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 41-50 (1984) (explaining that "illegal abortion flourished" during the Depression).

377 *See supra* note 354 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 351, 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 372, at 63-64; Tone*, Contraceptive Consumers*, *supra* note 351, at 486.

378 *See* Himes, *supra* note 372, at 63-64.

379 *See* Patterson, *supra* note 353, at 159-60 (discussing advocates' relations with AMA); *see supra* note 353 and accompanying text (discussing abortifacients).

At times, when legislatures persist in acting in counter-majoritarian ways, courts may prove more democratically responsive than the political branches.[380] Federal courts played this role in the 1930s. Judges refused to convict Dennett and Sanger, reading the language of the obscenity statute on terms responsive to its text and history, to public opinion, and to families' health exigencies even as Congress remained reticent to act.[381] As Judge 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."[382]

B. From Health to Privacy: Substantive Due Process Law

The terms on which the courts navigated legislative lock up and chill in the 1930s foretell the path of constitutional development in the 1960s and 1970s, with one striking twist. 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.[383] 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*,[384] when the Court ruled that "obscenity is not . . . constitutionally protected speech or press,"[385] Justice Brennan simultaneously rejected a sexual-purity understanding of obscenity, repudiating the *Hicklin* test for obscenity and citing *Dennett* as he held that "sex and obscenity are not synonymous."[386] As Justice Brennan incorporated into the First Amendment understandings produced in Comstock conflict—that "[s]ex . . . is one of the vital problems of human interest and public concern"[387]—he referenced an

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[380] *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).

[381] *See* Benjamin, *supra* note 372, at 60 (discussing relationship between legislative campaign and judicial decision in *One Package*).

[382] *One Package*, 86 F.2d at 739.

[383] 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).

[384] 354 U.S. 476 (1957).

[385] *Id.* at 485.

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

[387] *Id.*

excerpt of the postal obscenity statute that was edited to exclude its language about contraception and abortion.[388] The dissent invoked Comstock to express the view that the statute's censorship of speech in fact offended the First Amendment.[389] 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"[390]—overturned a decision of the Ninth Circuit holding that the homophile magazine *ONE* violated the Comstock Act.[391] Like *Roth*, *ONE* made no mention of the statute's provisions on abortion and contraception.[392]

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.[393] 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.[394] 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*.[395] As public resistance grew during the 1960s, the Court began to address Fourteenth Amendment challenges to state laws criminalizing reproductive choice, two of which were Comstock-era laws restricting contraception. The Court constitutionalized understandings forged in the earlier cases interpreting the statute, yet it did so without mentioning the reproductive provisions of federal obscenity law.

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[388] 354 U.S. 476, 479 n.1 (1957) (quoting excerpted version of 18 U.S.C. § 1461 (2018)).

[389] *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.

[390] Briker, *supra* note 11, at 56.

[391] 355 U.S. 371, 371 (1958).

[392] *Id.* For more on the significance of *ONE*, see Ball, *supra* note 11, at 230; Briker, *supra* note 11, at 254-56; and CARLOS BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY (2017).

[393] *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*).

[394] 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).

[395] *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).

In *Griswold v. Connecticut*,[396] when the Court faced the question it avoided four years earlier in *Poe* and struck down Connecticut obscenity law banning the use of contraception, it held that married couples have a federal constitutional right to make decisions about using contraception free from control by the state, saying nothing about the unenforced provisions of federal obscenity law still on the books. Congress repealed the contraceptive language in the Comstock law in 1971,[397] a low-salience development that the Court did not mention a year later in *Eisenstadt v. Baird*,[398] 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."[399] 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.[400]

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,[401] the Supreme Court sought authority—not by invoking the memory of

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396 381 U.S. 479 (1965).

397 *See* 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).

398 405 U.S. 438 (1972).

399 *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.

400 410 U.S. 113, 130-57 (1973).

401 *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").

Americans who resisted Comstock censorship—but instead by invoking the authority of marriage and medicine, fundamental institutions of American life.

Griswold summoned the dystopia of police invading the marital bedroom.[402] *Roe* famously discussed the abortion decision as the *physician*'s right, jointly exercised with his patient.[403] 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.[404] 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 to limit the criminalization of intimate life, producing a body of law that is still subject to jurisprudential and political attack and defense, even after *Roe*'s overturning. Whatever can be said about this heated and still escalating debate, it has not been about Comstock—that is, not until *Roe*'s overruling.

In the aftermath of *Dobbs*, by contrast, mainstream antiabortion organizations have coalesced around reviving Comstock's enforcement 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 have advanced several Comstock claims, asserting that the statute bars the mailing of items related to abortion.[405] And surrogates for the presumptive Republican nominee have proposed that the Department of Justice revive enforcement of the abortion provisions of the Comstock law as the national ban on abortion antiabortion groups

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[402] 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.").

[403] *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.").

[404] *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).

[405] *See supra* note 9 and accompanying text; *infra* notes 424, 429, and accompanying text. These claims are also likely to figure centrally in arguments before the Supreme Court this spring.

seek.[406] Support for reviving Comstock as an abortion ban is widespread within the antiabortion movement and includes historically pragmatic organizations like Americans United for Life,[407] financial powerhouses in the Christian legal movement like the Alliance Defending Freedom,[408] newly powerful activists in Students for Life,[409] and GOP powerbrokers tied to the Heritage Foundation.[410]

Why, after so many years, have abortion opponents made the Comstock Act the centerpiece of their legal agenda? Since the 1960s, the movement has not seen the destruction of abortion rights as its only or ultimate goal.[411] 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.[412]

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

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406 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. Kitchener et al., *supra* note 8.

407 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.

408 *See infra* Section IV.A.

409 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.

410 *See supra* note 406 and accompanying text.

411 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].

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

before and after the Court's decision in *Roe*.[413] Each state to consider a ballot initiative on abortion since 2022 has passed one, including conservative states like Ohio.[414]

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. "We don't need a federal ban," explained Comstock revivalist Jonathan Mitchell, "when we have Comstock on the books."[415] It is for this reason ~~t~~hat contemporary abortion opponents *speak through* Comstock, using the long-unenforced provisions of the statute[416] 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"[417]—presumably out of concern that voters might mobilize against it.

A. Reviving the Comstock Act

The idea for reviving the Comstock Act began in a search for creative public-private enforcement strategies. In 2019, Mark Lee Dickson, a Texas activist and preacher,[418] collaborated with Jonathan Mitchell, the former Texas solicitor general, to develop a private-enforcement mechanism, initially with the primary aim of preventing a federal court from adjudicating the constitutionality of the law.[419] The two created a

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[413] *See Support for Abortion*, *supra* note 7; Laura Santhanam, *Support for Abortion Rights Has Grown In Spite of Bans and Restrictions, Poll Shows*, PBS NEWSHOUR (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. PERSP. 117, 120 (1976).

[414] Zernike, *Ohio Vote, supra* note 7.

[415] 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.

[416] 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 361-362 and accompanying text.

[417] Lerer & Dias, *supra* note 415.

[418] 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), https://www.azmirror.com/blog/abortion-free-america-initiative-seeks-more-sanctuary-cities-for-the-unborn-across-u-s.

[419] *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.

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.[420] 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.[421] 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."[422]

Mitchell proposed that Comstock could be read as a ban on all abortion procedures, not just those involving pills sent through the mail.[423] 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."[424] "Even though the Comstock law does not ban abortion literally," Mitchell explained, "it bans the shipment or receipt of any abortion-related equipment."[425] And any abortion, Dickson and Mitchell reasoned, required the use of something sent in the mail.[426]

Shortly after *Dobbs*, Dickson and Mitchell proposed a new brand of "sanctuary city" ordinance in Hobbs, New Mexico, that required abortion clinics operating within

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[420] *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).

[421] 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).

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

[423] Mark Lee Dickson, *City of Edgewood Considers First "Sanctuary City for the Unborn" Ordinance Since HB7*, LIVE ACTION (Apr. 7, 2023), 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").

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

[425] 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.

[426] Jazmin Orozco Rodriguez, *Small Rural Communities Are Becoming Abortion Access Battlegrounds*, NBC NEWS (May 21, 2023), https://www.nbcnews.com/health/womens-health/small-rural-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").

city lines to get a license; the licensing requirements, in turn, required compliance with Mitchell and Dickson's interpretation of the Comstock Act.[427] Other ordinances citing the Comstock Act would follow.[428]

In November 2022, the Alliance Defending Freedom, a leading voice in the Christian legal movement, made Comstock central to its suit in *Alliance for Hippocratic Medicine v. Food and Drug Administration*.[429] 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.[430] This claim is part of the briefing in the Supreme Court in *Food and Drug Administration v. Alliance for Hippocratic Medicine* in which ADF argues for the Alliance that the Comstock Act ban on mailing applies to all abortion, whether lawful or unlawful, and disparages the many federal cases that say otherwise.[431]

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 far-reaching ban on mailing abortion-related articles. In *Alliance for Hippocratic Medicine*, Judge Matthew Kacsmaryk granted a motion for preliminary injunction in the spring of 2023 that would have withdrawn the approval of mifepristone, 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*."[432] When the Fifth Circuit ruled, affirming Kacsmaryk's conclusions that the FDA lacked the authority to modify restrictions on mifepristone in 2016 and 2021,[433] Judge James Ho alone addressed Comstock in a separate opinion, again reading Comstock as banning the mailing of

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[427] 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.

[428] 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), 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), https://www.liveaction.org/news/city-danville-first-sanctuary-unborn-illinois.

[429] Complaint at 3-10, All. for Hippocratic Med. et al. v. FDA, No. 2:22-cv-00223-Z, 2023 WL 2825871 (N.D. Tex. filed Nov. 18, 2022) [hereinafter Alliance for Hippocratic Medicine Complaint].

[430] *Id.* at 111.

[431] Brief for the Respondents at 56-57, FDA v. All. for Hippocratic Med., No. 23-235 (U.S. Feb. 22, 2024).

[432] All. for Hippocratic Med. v. FDA, No. 2:22-cv-00223-Z, 2023 WL 2825871, at *16 (N.D. Tex. Apr. 7, 2023). Rather than issuing a traditional injunction, Kacsmaryk stayed the effective date of each of the challenged actions, and the FDA appealed. *Id.*

[433] All. for Hippocratic Med. v. FDA, 76 F.4th 210, 240-55 (5th Cir. 2023).

articles for abortion.[434] Before the Supreme Court, the Alliance is reiterating that comprehensive view of the statute's reach, opposing the argument that "Comstock applies only to 'unlawful abortions'" on the ground that "the text contains no such limitation."[435]

To support this reading, revivalists selectively quote the Comstock law to construct it as an abortion ban, rather than recognizing that the law Congress enacted was a broad obscenity statute, and remains so today. The Act is 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. . . ."[436] To make their case that that the statute covers the mailing of drugs for any abortion, revivalists omit all of the surrounding text and its concern with things that can be used "for any indecent or immoral purpose,"[437] and quote only a few words of the text[438] 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.[439]

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[434] *Id.* at 266 (Ho, J., concurring in part and dissenting in part).

[435] Brief for the Respondents, *supra* note 431, at 57.

[436] 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 122 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 AND FRANCES STURGEON ALLEN, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1712 (1911) (defining "to procure" as "to pimp"). Older dictionaries, contemporaneous with the original Comstock Act, defined to "procure" as "to bring about" or "to cause." *See* By the early 1900s, 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).

[437] 18 U.S.C. § 1461 (2018).

[438] 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, *supra* note 431, at 56 (citing 18 U.S.C. § 1461 (2018)).

[439] In the FDA litigation the ADF's leaders reason about abortion in 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 431, 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

After editing out of the statute words that suggest the law's concern with immoral and indecent 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[440] and disparaged the 1930s federal cases that read Comstock to permit mailing communications and articles for health-related reasons.[441]

Congress did change the language of the statute to refer more frequently to "producing" rather than "procuring" of abortion, a change the historical revision notes explained in light of the scienter requirements for a "principal" under 18 U.S.C. § 2.[442] By the early twentieth century, "procuring" had come to be associated with prostitution, and this may be why Congress adopted the phrase "producing."[443]

But does this change make the statute's application to the mailing of articles for "abortion" plain and absolute, as revivalists have repeatedly suggested?[444] Interpreters may differ in the weight they accord the 1873 statute, but as we show, the prohibition on persons mailing things for "producing abortion" remains ambiguous today, and is clarified in key respects by the historical meaning of the 1873 statute's prohibition on writings and things "designed or intended for . . . procuring of abortion," a crime requiring that the sender intend that the recipient used mailed items for unlawful purposes which efforts to save life did not satisfy.[445] The discretion historically afforded doctors helps explain why judges interpreted the Comstock Act as allowing actions to protect health, even as they disagreed about the scope.

Today, the meaning of "abortion" is not plain; it remains contested and, as groups *opposed* to abortion emphasize, entangled in questions of health. These groups

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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 421, at 90-97.

[440] Brief for the Respondents, *supra* note 431, at 56-57.

[441] *Id.* at 57.

[442] The statute adopted the language of "producing abortion" in 1909. *See* 35 Stat. 1088 (1909). *Compare* 18 U.S.C. § 334 (1940) *with* 18 U.S.C. § 1461 (2018). The historical revision notes refer to 18 U.S.C. § 2.

[443] At the time, the word "procure" was increasingly associated with prostitution. *See* WILLIAM T. HARRIS AND FRANCES STURGEON ALLEN, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1712 (1911) (defining "to procure" as "to pimp"). Older dictionaries, contemporaneous with the original Comstock Act, defined to "procure" as "to bring about" or "to cause." Procure" meant to "bring about" or "cause." PORTER, *supra* note 121 at 1142; *see also* GOODRICH AND PORTER, *supra* note 121 at 1142. By the early 1900s, 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.

[444] *See supra* notes 9, 431; *see also* Brief for American Center for Law and Justice as Amicus Curiae Supporting Respondents at 5, FDA v. All. for Hippocratic Med., No. 23-235 (U.S. Feb. 26, 2024) (asserting that "the prohibition is simple, complete, and categorical").

[445] *See supra* notes 120-127 and accompanying text.

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.[446] "An induced abortion should not be confused with a medical indication for separating a mother from her unborn child," explains the medical guidance of the Lozier Institute.[447] 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.[448] Contemporary conservative interpreters may further interpret the Comstock Act to apply to emergency contraceptives and even the birth control pill, which many abortion opponents qualify as abortifacients.[449]

Given ambiguities in the text in 1873 and today so many of which involve health, the law's abortion provisions require reading in context,[450] an approach that the revivalists' selective quotation of the law seems designed to avoid.[451] The ambiguity of the statute's application in cases of threats to health or life is all too evident to anyone who reads the abortion provisions of the law in textual, legislative, doctrinal, and historical contexts rather than reading only the brief excerpts pulled out by revivalists.

These historical contexts together amplify the authority of the 1930s cases that grappled in good faith with many complexities of the statute's text and judicial interpretation to arrive at an interpretation focused on the senders' purposes[452]—addressing considerations that revivalists' dismissive attacks ignore. The revivalists' absolutist reading waves away much statutory language and 150 years of history,

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446 *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 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*, 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.

447 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.

448 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.

449 *See, e.g.*, PROJECT 2025, *supra* note 406, at 485 (describing common emergency contraceptives as a "potential abortifacient" that "can prevent a recently fertilized embryo from implanting in a woman's uterus").

450 *See supra* note 23 (citing a range of textualists on the importance of considering different kinds of context in determining the meaning of a text).

451 *See supra* note 436-439 and accompanying text.

452 *See supra* Section II.D.

scoffing at the concern with unlawful action that runs through both. Rather than establishing the plain meaning of the text, revivalists are projecting contemporary beliefs onto excerpts of a nineteenth-century text to construct an abortion ban they know perfectly well that Americans today would not vote to enact—because it would threaten their freedom and their health.[453]

C. Comstock's Post-Dobbs Chill

Comstock revivalists seek to chill the exercise of reproductive rights by expansively reading the federal law as criminalizing the act of terminating a pregnancy, and suggest that with a Republican in office, anyone exercising an abortion right has committed a federal felony.[454] ADF's work in *Alliance for Hippocratic Medicine*, too, seeks to change the exercise of reproductive rights recognized in positive law by effectively barring access to a drug used in more than half of all abortions.[455]

Comstock revival comes at a time when antiabortion groups have lost a number of struggles about state and federal liberties. Since *Dobbs*, state courts and voter-driven ballot initiatives have expanded the number of states that recognize abortion rights in positive law.[456] And Americans in states that have banned or severely restricted abortion since *Dobbs* seek to exercise their rights to interstate travel to access abortion out of state.[457] Revivalists hope to reinvent the Comstock Act as an abortion ban that can trump state constitutional protections and make interstate travel irrelevant.

Further, by disparaging reproductive rights and intimidating those who seek to exercise them, Comstock revivalists seek to short-circuit an ongoing process of popular constitutional meaning-making that has unfolded in state ballot initiatives, state courts, and grassroots movements.[458] Comstock revivalists seek to denigrate these new constitutional meanings by suggesting that they violate federal criminal law—and by contending that no state constitutional right will ultimately be enforceable.

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. In the 1960s what would become the antiabortion movement

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[453] *See supra* notes 415-417 and accompanying text.

[454] *See id.*

[455] Rachel K. Jones et al., *Medication Abortion Now Accounts for More than Half of All Abortions in the United States*, GUTTMACHER INST. (Feb. 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions.

[456] *See State Court Abortion Litigation Tracker*, BRENNAN CTR. (Nov. 17, 2023), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker; Zernike, *Ohio Vote*, *supra* note 7.

[457] Claire Cain-Miller et al., *Despite State Bans, Legal Abortions Didn't Fall Nationwide in the Year After* Dobbs, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/upshot/abortion-numbers-dobbs.html (detailing data showing that many patients traveled across state lines).

[458] On this process, see Zernike, *Why Democracy, supa* note 7.

portrayed its cause not as a fight to police sexual purity but as a quest to secure constitutional equality for the unborn.[459] By the early 1990s, with the development of woman-protective claims, antiabortion leaders further repackaged their cause as a quest to secure equality for women as well as the unborn.[460] 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.[461]

Antiabortion leaders, in a word, long sought to present their interest in criminalizing abortion as an interest in equality and democracy. 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.[462] 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 "plain meaning" can be applied without great trouble in the present day. This Article shows that revivalists attempt to construct a new, categorical ban on abortion by cherry-picking words from statutes policing obscenity in the United States mails;[463] that text of the Comstock Act was not absolute;[464] and that interpretation of the statute evolved over decades of social contestation and responsive judicial interpretation.[465] As it follows the statute's enactment and enforcement, the Article identifies forgotten

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[459] *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 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").

[460] *See supra* note 439 and accompanying text.

[461] *See* Melissa Murray & Kate Shaw, Dobbs *and Democracy*, 127 HARV. L. REV. 728, 730-72 (2024); *see also* ZIEGLER, *ROE*, *supra* note 421, at 56-77 (detailing antiabortion arguments based on democracy and judicial role).

[462] *See supra* notes 11-13 and accompanying text.

[463] *See supra* notes 438-440 and accompanying text.

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

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

democratic roots of statutory and constitutional cases that limit the criminalization of intimate life.[466]

Examining Comstock's provisions on abortion in their larger statutory context, we see that the Comstock law was and is an *obscenity statute*. At a time of plummeting birth rates, rising immigration, and evolving family roles, Congress adopted the first law banning obscenity in the mails to include contraception and abortion, condemning erotica and other aids to sex without reproductive consequences as "indecent" and "immoral."[467] There is much evidence that the Act's reference to "procuring of abortion" covered only acts undertaken with criminal intent, and not abortion for medical purposes, and this widely recognized understanding clarifies ambiguities in the law's references to "producing abortion;" while there is little historical evidence for the revivalists' reading of the statute's abortion provisions as an absolute ban.[468] As this Article's history shows, over the decades, the law's enforcers developed strategies to surveil and to regulate nonprocreative sex, as well as to censor talk about sex and reproduction, to increasing public resistance. Courts initially responded by developing an understanding of obscenity premised on sexual purity—in which nearly any reference to sex or reproduction *is* obscene. But even then many judges emphasized that the statute did not criminalize the doctor-patient relationship.

When courts interpreted the Comstock Act more clearly to differentiate obscenity from communications about sexual and reproductive health, their rulings did not narrow the statute. These decisions, which built on nineteenth-century readings of the law as protective of patient-physician communications related to health,[469] narrowed only the most extreme interpretations of the law that emerged in the Victorian era. In that era, when the most sweeping reading of *Hicklin* held sway, some judges looked not to the effect of speech or an item on a typical member of the community but to its effect on the most susceptible of the community, those who would be sexually aroused by reading about the symptoms of venereal disease or the arrest of a dealer of contraception.[470] It was this interpretation of the obscenity statute that courts repudiated in the 1930s by offering a fair reading of the obscenity statute's text, structure, and historical context. The 1930s decisions were principled in a second sense. They accommodated intensifying resistance to censorship enforcing extreme, sexual-purity understandings of obscenity, and for this reason, read the statute to distinguish obscenity from the kinds of control over sex and reproduction necessary

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

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

[468] *See supra* notes 121-126 and accompanying text.

[469] Even in the nineteenth century, courts were aware of the contemporary meaning of "procuring of abortion" and often assumed that the statute did protect some physician-patient communications. *See supra* notes 130-132 and accompanying text.

[470] *See supra* note 190 (reporting on a case applying the *Hicklin* standard for obscenity to a pamphlet on the symptoms of venereal disease).

to health.[471] These decisions were important accounts of the government's statutory interest in policing obscenity with constitutional resonance.

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 contemporary meanings. Revivalists have taken a law that was enacted to rid the mails of stimulants to indecent sex and transformed it into a law that would protect unborn life by prohibiting the mailing of any abortion-related article in the United States mails. 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.[472]

This points to a deeper problem with reviving Comstock that debate over its meaning obscures. Reviving the abandoned provisions of the Comstock Act and enforcing them today would be antidemocratic. The government abandoned enforcement of the sexual-purity understanding of federal obscenity law in response to the public's sustained repudiation of the censors' project. The public's view of the obscenity statute as Comstockery—as *illegitimate*—led to the statute's declining enforcement and evolving interpretation in the 1930s. If obscenity statutes controlling reproduction were unenforceable by reason of desuetude in the 1960s at the time *Griswold* was decided,[473] how much more so now, another sixty years later?

The democratic problem with Comstock revival, however, runs deeper than desuetude, the public beliefs that contributed to declining enforcement and evolving interpretation of federal and state obscenity laws of this kind. Arguments for revival, *especially* textualist claims that disparage the significance of the statute's historical context, *assume the Comstock statute's procedural and democratic legitimacy*: they 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.

Comstock's history shows the deepest problems with reviving enforcement of the law is 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.

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[471] *See supra* Sections I.D, II.D.

[472] 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 417.

[473] *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 13, at 347.

Aggravating women's exclusion from deliberation over the law's passage is the government's long running effort to prevent women and men from securing the law's repeal. Unlike other laws enacted under voting restrictions we would today call unconstitutional, *this statute was insulated from criticism and repeal by generations of censorship and surveillance whose effect was to deform the democratic political process for generations after.*[474] The 1873 statute that was enacted and remained on the books is a graveyard of Equal Protection and First Amendment violations—a textbook example of the kind of law that *Carolene Products*,[475] decided only two years after *One Package*, identified as constitutionally suspect.[476] These conditions persisted in law at least until the era of *Griswold* and *Roe.*[477]

It seems eerily fitting that advocates seek to revive provisions of a statute that lack democratic legitimacy for ends they understand the public opposes. A presidential candidate who will not support a national abortion ban because he understands it would alienate voters maintains the support of antiabortion groups through promises to appoint executive branch officials who would ban abortion pills by reviving enforcement of Comstock.[478] Strategists seem to hope that the threat of reviving this democratically illegitimate statute will intimidate people from exercising state constitutional rights or engaging in the democratic dialogue that *Dobbs* promised would be the result of *Roe's* demise. They trust that there are sympathetic judges who will sanction revived enforcement of Comstock, dismissing all the interpretive and democratic objections to the law's revival.

There would seem to be only one 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

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[474] *See* Part III.

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

[476] *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* Sections III.A, III.B.

[477] 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* note 395 and accompanying text. On persisting deformities of the political process that constrained mobilization in this era, see NeJaime & Siegel, *supra* note 401.

[478] *See* Kitchener et al., *supra* note 8.

reproductive lives of the American people—a story that gives new meaning to American traditions of liberty 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.