THE COMSTOCK ACT'S EQUAL PROTECTION PROBLEM

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Following its victory in Dobbs, the antiabortion movement has set its sights on a national abortion ban. Affiliates of the second Trump Administration—including the vice president-elect—have endorsed the renewed enforcement of the 1873 Comstock Act as one avenue for implementing such a ban. This Essay argues that contemporary enforcement of the Comstock Act as a national abortion ban would be unconstitutional. The Act violates the Fifth Amendment's equal protection guarantee because it was enacted with the discriminatory purpose of inhibiting illicit sex to promote women's sexual purity. Only contemporary reenactment of the law without constitutionally suspect motives can purge the Comstock Act of its discriminatory intent. In the alternative, these serious constitutional doubts justify adopting a narrower construction of the law as a matter of constitutional avoidance.

INTRODUCTION

When the Supreme Court overturned *Roe v. Wade*[1] in *Dobbs v. Jackson Women's Health Organization*,[2] it insisted that its holding would "return the issue of abortion to the people's elected representatives."[3] The majority wrote that its decision "allows women on both sides of the abortion issue to seek to affect the legislative process," as "[w]omen are not without electoral or political power."[4] But now antiabortion advocates are back in court, seeking to revive the Comstock Act—enacted in 1873 when women were without electoral power—as a national ban on abortion. The

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1. Roe v. Wade, 410 U.S. 113 (1973).
2. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
3. *Id.* at 232.
4. *Id.* at 289. For a thoughtful discussion of the majority's appeal to democracy, see Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728 (2024).

Act is a postal obscenity law that criminalized "obscene Literature and Articles of immoral Use" in the mails,[5] including "any article or thing designed or intended for the prevention of conception or *procuring of abortion*."[6]

Although enforcement of the Act ceased nearly a century ago, antiabortion advocates today, facing political headwinds in the aftermath of *Dobbs*, argue that the statute's plain text imposes a sweeping national abortion ban.[7] In last term's medication abortion case before the Supreme Court, for instance, the plaintiffs argued that the approval of mail-order medication abortion (or, abortion pills) by the Food and Drug Administration (FDA) violated the Comstock Act.[8] At oral argument, two Justices—Samuel Alito and Clarence Thomas—expressed interest in the law's application.[9] In response, abortion rights advocates and the Biden Administration have argued that the statute should be construed narrowly, pointing to a series of circuit court decisions in the 1930s that limited the law's application to the mailing of items intended for use in *unlawful* abortions.[10] Reproductive rights scholars warn that "absent the narrowing construction applied" by these courts, "the law's plain terms could effectively ban *all* abortion nationwide because almost every pill, instrument, or other item used in an abortion clinic or by a virtual abortion provider moves through the mail or an express carrier at some point."[11]

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5. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use (Comstock Act), ch. 258, 17 Stat. 598 (1873) (codified as amended in scattered statutes).

6. *Id.* sec. 2, § 148 (emphasis added).

7. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317, 345–46 (2024) ("As the first courts to address the Act noted, the plain language of the Comstock Act is so broad that it would cover almost every medical instrument, supply, or drug that could possibly be used for any abortion."); I. Glenn Cohen, Eli Y. Adashi & Mary Ziegler, *The New Threat to Abortion Access in the United States—The Comstock Act*, 330 JAMA 405 (2023).

8. Brief for the Respondents at 56, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024) (Nos. 23-235, 23-236).

9. *See* Tierney Sneed, *Supreme Court Abortion Case Brings 19th Century Chastity Law to the Forefront*, CNN (Mar. 29, 2024, 5:00AM), https://www.cnn.com/2024/03/29/politics/comstock-act-alito-thomas-abortion/index.html [https://perma.cc/F8WZ-4ELH].

10. This view was adopted in a 2022 Office of Legal Counsel (OLC) memorandum. *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 *3–4 (Dec. 23, 2022); *see also* Brief for Former U.S. Department of Justice Officials as Amici Curiae in Support of Petitioners at 19, *All. for Hippocratic Med.*, 602 U.S. 367 (2024), (Nos. 23-235, 23-236). For additional textual arguments, *see* Victoria Nourse & William Eskridge, *Abortion and the Comstock "Chastity" Law Time Bomb*, WASH. MONTHLY (Apr. 15, 2024), https://washingtonmonthly.com/2024/04/15/abortion-and-the-comstock-chastity-law-time-bomb/ [https://perma.cc/6FEJ-JN92].

11. Cohen et al., *supra* note 7, at 346.

Ultimately, the Supreme Court resolved the case on jurisdictional grounds, concluding that the plaintiffs lacked Article III standing to challenge the FDA's abortion pill regulations.[12] But the specter of Comstock's revival remains. For one thing, three states have filed an amended complaint—seeking to cure jurisdictional defects and revive the underlying suit—that reasserts the Comstock claim.[13] The Comstock Act's revival, moreover, is looking especially likely in the wake of former President Donald Trump's victory in the 2024 presidential election. Project 2025, a comprehensive transition plan for the next Republican administration, lists the renewed enforcement of the Comstock Act as a federal ban on abortion pills as one of its priorities.[14] It "announc[es] a campaign to enforce the criminal prohibitions in [the Comstock Act] against providers and distributors of abortion pills that use the mail" by the "Department of Justice in the next conservative Administration."[15] And although President-Elect Trump sought to distance himself from Project 2025—and the Comstock Act—on the campaign trail, there are ample reasons to think that the second Trump Administration will indeed pursue the Act's revival.[16] For example, while the abortion pills case was pending before the Supreme Court, Vice President-Elect (and then-Senator) JD Vance signed a letter urging the Justice Department to use the Comstock Act to prosecute "the reckless distribution of abortion drugs by mail."[17] Months later, several Republican senators closely allied with the president-elect—including his pick for secretary of state—sent letters to major American pharmaceutical companies to "remind[] [them] that Federal law in 18 U.S.C. 1461-1462

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12. *All. for Hippocratic Med.*, 602 U.S. 367 (2024).

13. *See* Pam Belluck, *States Revive Lawsuit to Sharply Curb Access to Abortion Pill*, N.Y. TIMES (Oct. 21, 2024), https://www.nytimes.com/2024/10/21/health/abortion-pill-mifepristone-lawsuit.html [https://perma.cc/T5QD-78L9].

14. PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 459 (2023).

15. *Id.* at 562 (cleaned up).

16. *See* Alice Miranda Ollstein, *'It's Not a Pro-Life Position': Anger After Trump Says No to Comstock*, POLITICO (Aug. 20, 2024 4:56PM EDT), https://www.politico.com/news/2024/08/20/trump-comstock-enforcement-00175068 [https://perma.cc/U9FC-RRAS].

17. *See* Alison Durkee, *JD Vance and Project 2025 Want to Use This 19th Century Law to Ban Abortion—Without Congress*, FORBES (July 18, 2024, 10:42am), https://www.forbes.com/sites/alisondurkee/2024/07/18/jd-vance-and-project-2025-want-to-use-this-19th-century-law-to-ban-abortion-without-congress/ [https://perma.cc/6FW2-7ZEW]; Letter from Congressional Republicans to Merrick Garland, Attorney General, DOJ (Jan. 25, 2023), https://www.documentcloud.org/documents/24834197-20230123-letter-on-comstock-to-doj/ [https://perma.cc/7XDJ-2U2V]. It bears noting that although President-Elect Trump distanced himself from Project 2025 during the campaign, he has since named Russell T. Vought, one of Project 2025's architects, to lead the Office of Management and Budget. *See* Charlie Savage, Maggie Haberman & Jonathan Swan, *Trump Picks Key Figure in Project 2025 for Powerful Budget Role*, N.Y. TIMES (Nov. 22, 2024), https://www.nytimes.com/2024/11/22/us/politics/russell-vought-office-of-management-and-budget.html [https://perma.cc/9T7F-XV2P].

criminalizes nationwide using the mail, or interstate shipment by any express company or common carrier, to send or receive any drug that is 'designed, adapted, or intended for producing abortion.' "[18] Finally, it bears mentioning that Jonathan Mitchell, who successfully represented Trump in the ballot eligibility case before the Supreme Court last term,[19] is one of the leading proponents of the Comstock Act's revival.[20] Considering the deep ties between Comstock's contemporary proponents and the president-elect, worrying about the law's renewed enforcement is not overly alarmist.

Notably, Project 2025 explains that enforcement of the Comstock Act as a national abortion ban is possible today because, "[f]ollowing the Supreme Court's decision in *Dobbs*, there is now no federal prohibition on the enforcement of this statute."[21] This is incorrect. The Essay's thesis is simple: The Comstock Act is unconstitutional because it violates the Fifth Amendment's equal protection guarantee.[22] Its original enactment in 1873 was driven by discriminatory motives—namely, Congress's desire to promote women's sexual purity by discouraging illicit sex—and none of its subsequent amendments eliminated this invidious discrimination. Absent genuine reenactment that grapples with the discriminatory motives that underlie the law's abortion restrictions, the Act as it exists today cannot be constitutionally enforced.

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18. Cindy Hyde Smith, *Hyde-Smith, Lankford Lead Letters to Pharmacies on Abortion Drug Distribution* (May 8, 2023), https://www.hydesmith.senate.gov/hyde-smith-lankford-lead-letters-pharmacies-abortion-drug-distribution [https://perma.cc/PA4K-WV5S].

19. *See* Abbie VanSickle, *Who Were the Lawyers Arguing the Trump Ballot Case?*, N.Y. TIMES (Feb. 8, 2024), https://www.nytimes.com/2024/02/08/us/elections/jonathan-mitchell-trump-ballot-case.html [https://perma.cc/UAQ9-XP9Q].

20. *See* Sarah McCammon, *He Helped Craft the 'Bounty Hunter' Abortion Law in Texas. He's Just Getting Started*, NPR (May 8, 2023 5:11AM ET), https://www.npr.org/2023/05/08/1174552727/jonathan-mitchell-abortion-texas-sb8-roe-v-wade-dobbs [https://perma.cc/E626-NHP5].

21. PROJECT 2025, *supra* note 14, at 562.

22. Strikingly, in response to recent efforts to construe Comstock as a federal abortion ban, abortion rights advocates have largely left the constitutional dimensions of Comstock's enforcement today unaddressed. One recent student Note argues that the Comstock Act is unenforceable because its provisions are unconstitutionally vague. *See* Ebba Brunnstrom, Note, *Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-*Dobbs, 55 COLUM. HUM. RTS. L. REV. 1 (2024). Reva Siegel and Mary Ziegler's forthcoming Article *Comstockery* provides a crucial history of the law's enactment and evolving enforcement to show that, *contra* revivalist claims asserted by antiabortion advocates today, the meaning of the Comstock's abortion provisions is far from clear or plain. However, they stop short of making an argument for the law's constitutional invalidation. *See* Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751 [https://perma.cc/SA3D-BCT8] [hereinafter *Comstockery*].

Notably, this constitutional argument is rooted in the reasoning of *Dobbs* itself. Rejecting the equal protection case for a constitutional abortion right, the majority in *Dobbs* explained that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny *unless* the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.' "[23] The Court added that, on its own, "the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women."[24] But, as this Essay argues, the advocates and lawmakers who enacted the Comstock Act embraced the goal of preventing abortion (along with the distribution of contraception and obscene literature) exactly *because* they were motivated by invidiously discriminatory animus against women—that is, they sought to prevent abortion because they believed that access to abortion would encourage women to engage in illicit, extramarital sex which they viewed as an affront to Victorian ideals of women's sexual purity. Indeed, far from "mere pretext," the invidious discrimination was openly touted to promote Comstock's virtues. I thus conclude that, under the terms of *Dobbs*, the Comstock Act's abortion provisions are constitutionally suspect.

The Essay proceeds in three parts. Part I shows that the historical record of the Act's enactment is replete with animus-based reasoning. Anti-vice crusaders who advocated for the Act's passage made no secret that the law was enacted to codify Victorian-era ideals of women's religious and moral duties in the family and home. In addition to seeking more stringent obscenity laws to silence outspoken feminists, the anti-vice campaign enacted abortion restrictions to inhibit illicit sex and foster women's sexual purity. These anti-vice crusaders—chief among them Anthony Comstock—believed that abortion provided an avenue for women to escape the consequences of their "evil deed." This historical background, along with contemporary statements by enacting lawmakers and the procedural irregularity of the Act's passage, confirm the Comstock Act's discriminatory intent. Such a law, Part I concludes, easily falls under heightened scrutiny.

Part II completes the doctrinal argument, contending that none of the Comstock Act's twentieth-century amendments purged the law of its discriminatory motives. For one thing, no subsequent legislative action actually addressed the law's abortion provision. But more importantly, none of

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23. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (alteration in original) (emphasis added) (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)). Note that this portion of the majority opinion is arguably dicta because the Court was not squarely presented with an equal protection claim. *See* Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 68 (2023) (noting that "the parties had not asserted an equal protection claim on which the Court could rule" and the majority opinion, "in dicta, stated that precedents foreclosed the [equal protection] arguments").

24. *Dobbs*, 597 U.S. at 236 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993)).

Congress's twentieth-century amendments ratified the broader antiabortion construction of the Comstock Act that advocates seek to revive today. To the contrary, at best, Congress ratified the narrow construction of the law adopted by federal circuit courts in the 1930s (and OLC under the Biden Administration), limiting the law's abortion provision to illegal abortions. I conclude, then, that the Comstock Act's subsequent legislative history does not render constitutional its contemporary enforcement as an abortion ban. Finally, I argue in the alternative that the serious constitutional doubts raised by this Essay's constitutional challenge provide courts with a reason to adopt the Comstock Act's narrow construction as a matter of constitutional avoidance.

Having spelled out the core doctrinal argument, the Conclusion situates the case for invalidating Comstock in broader conversations about the role of judicial review—as opposed to democratic politics—in disputes over reproductive rights. It argues that constitutional invalidation of the Comstock Act is a quintessential example of representation-reinforcing judicial review that even opponents of judicial supremacy and anti-constitutionalists should support. And it suggests finally that invalidating the Comstock Act under sex equality doctrine has further value by linking the struggle for reproductive rights with the constitutional guarantees of equal protection.

I. THE CASE FOR INVALIDATION OF COMSTOCK UNDER EQUAL PROTECTION

In *Dobbs*, the Supreme Court rejected the theory that the Fourteenth Amendment's Equal Protection Clause offered "another potential home" for a constitutional right to abortion.[25] But in so doing, the Court did not categorically shut the door to equal protection challenges to abortion restrictions. Instead, the Court expressly stated that abortion regulations are subject to heightened scrutiny when they are enacted with discriminatory intent against women. That principle articulated in *Dobbs*, and in longstanding equal protection doctrine, underlies this Essay's constitutional argument, which posits that the Comstock Act is just such a regulation.

Responding to *amici* who argued that an abortion right can be grounded in the Equal Protection Clause, the *Dobbs* Court found first that "[n]either *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents."[26] Rather, the Court's precedents instructed that "a State's regulation of abortion is not a sex-based classification and is

25. *Id.*

26. *Id.*

thus not subject to the 'heightened scrutiny' that applies to such classifications."[27] Yet the Court proceeded to explain that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny *unless* the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.' "[28] And, the Court clarified, "the goal of preventing abortion does not," without more, "constitute invidiously discriminatory animus against women. Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures."[29] That standard of review, which the Court ultimately applied to uphold Mississippi's Gestational Age Act, is rational basis.[30]

So, according to this passage in *Dobbs*, if Congress today decided to enact a federal abortion ban to protect fetal life, that law may be upheld under rational-basis review.[31] But that rule, I argue here, does not apply to revivalist efforts to enforce the Comstock Act as a federal abortion ban today because historical background and legislative history confirm that the Act was enacted with discriminatory animus against women. It thus falls squarely into the category of abortion regulations enacted with "invidiously discriminatory animus against women" that the *Dobbs* Court acknowledged must be reviewed under a heightened standard of scrutiny.

The test for discriminatory animus in the equal protection context is a familiar one. The doctrine finds its roots in the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which articulated the so-called "*Arlington Heights* factors."[32] Under *Arlington Heights*, a challenger asserting an equal protection violation must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the enactment of the law.[33] The *Arlington Heights* inquiry is context dependent and fact intensive. As the Supreme Court explained, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such

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27. *Id.*

28. *Id.* (alteration in original) (emphasis added) (quoting *Geduldig*, 417 U.S. 484, 496 n.20 (1974)).

29. *Id.* at 236–37 (cleaned up).

30. *Id.* at 300 ("Under our precedents, rational-basis review is the appropriate standard for such challenges.").

31. This assumes, of course, that federal abortion bans do not also violate other constitutional guarantees. *But see* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1111 (2023) (arguing that even after *Dobbs*, any federal abortion ban, including the Comstock Act, would violate substantive due process).

32. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

33. *See* Hunter v. Underwood, 471 U.S. 222, 227–28 (1985); *Arlington Heights*, 429 U.S. at 266.

circumstantial and direct evidence of intent as may be available."[34] To that end, *Arlington Heights* enumerated several nonexhaustive factors for courts to consider including, (1) whether the law has disproportionate racial impact; (2) the "historical background" of the law; (3) any "[d]epartures from the normal procedural sequence" leading up to the law; and (4) "legislative or administrative history," including "contemporary statements by members of the decisionmaking body."[35]

The Supreme Court extended the *Arlington Heights* test to sex-based discrimination in its 1979 decision in *Personnel Administrator of Massachusetts v. Feeney*.[36] In assessing an equal protection challenge, the Court explained that "[c]ertain classifications . . . in themselves supply a reason to infer antipathy."[37] "Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and be upheld only upon an extraordinary justification."[38] But "[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination."[39] Gender-based classifications, the Court continued, "must bear a close and substantial relationship to important governmental objectives"—i.e., intermediate scrutiny—"and are in many settings unconstitutional."[40] The Court explained that discriminatory purpose can be found if "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[41]

The question this Part poses, then, is whether, under the *Arlington Heights* factors, the Comstock Act's abortion provisions were enacted in part because of discriminatory animus against women. I answer in the affirmative. Specifically, I argue that the law's proponents imagined that its abortion provisions would safeguard the sexual purity of women. At the outset, it should go without saying that enforcement of the Comstock Act's abortion provisions would have a disparate impact on women. The *Dobbs* Court said as much when it characterized abortion regulations as laws that regulate "a medical procedure that only one sex can undergo."[42] But the Court seemed to read the disparate-impact factor out of the equal protection analysis entirely when it stated that sex-based regulations of this kind

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34. *Arlington Heights*, 429 U.S. at 266.

35. *Id.* at 266–68.

36. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

37. *Id.* at 272.

38. *Id.*

39. *Id.* at 273.

40. *Id.* (citing Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977); Orr v. Orr, 440 U.S. 268 (1979)).

41. *Id.* at 279 (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977) (Stewart, J., concurring in judgment)).

42. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022).

are not, absent such discriminatory purposes, sex-based classifications for constitutional purposes.[43] That is, in the abortion context, the Court seemingly adopted the view that a regulation's disparate impact is not evidence of discriminatory purpose.[44] The Court cited its decision in *Geduldig v. Aiello*—a case the Court hadn't cited in the equal protection context in a half-century—for this proposition.[45] In *Geduldig*, the Court upheld the exclusion of pregnancy from a state's disability-benefits program, reasoning that pregnancy was "an objectively identifiable physical condition with unique characteristics" and concluding that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[46] While legal scholars would debate whether *Geduldig* had been superseded by subsequent precedent,[47] the majority's favorable citation of that holding in *Dobbs* suggests otherwise.[48]

The focus on my analysis, then, is on whether a discriminatory purpose is evinced by the Comstock Act's historical background, procedure, and legislative history. Each of these three factors supports an inference in the affirmative. Start with the law's historical background. As Reva Siegel and Mary Ziegler demonstrate, the 1873 enactment of the Comstock Act was the culmination of a nationwide anti-vice movement in which Anthony Comstock played an outsized role.[49] As the background historical conditions described below illustrate, the anti-vice movement sought to enact a sweeping federal obscenity law to codify Victorian-era ideals about the social order and, as relevant here, women's religious and moral duties in the family and home.

By the early 1870s, Anthony Comstock had become an active member of the Young Men's Christian Association (YMCA), which lobbied for an

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43. *See id.*

44. *But see* Washington v. Davis, 426 U.S. 229, 242 (1976) ("This is not to say that . . . a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination."); *Arlington Heights*, 429 U.S. at 266 ("The impact of the official action —whether it bears more heavily on one race than another may provide an important starting point." (internal quotation marks and citation omitted)).

45. *Dobbs*, 597 U.S. at 236.

46. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

47. *See, e.g.*, Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167 (2020).

48. Until *Dobbs*, the Court had not cited *Geduldig* in the equal protection context in a half-century. *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1136 n.30 (2023) ("[T]he Court's citation to *Geduldig* was designed to provoke. It was an argument from power, not reason, and a succinct expression of the opinion's repudiation of women's rights. Justice Alito's fidelity to pregnancy discrimination precedent from a half-century ago, before the rise of sex discrimination law, was a fitting prelude to a decision that overturned a half-century of substantive due process law—by tying the meaning of the due process liberty guarantee to laws enacted in 1868.").

49. *See generally Comstockery*, *supra* note 22 at 15–17.

expansion of New York's state obscenity law.[50] Alarmed by the proliferation of lurid sexual materials in New York City, the YMCA pushed for a new state obscenity law that would cover speech and communications, including "any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, [or] instrument."[51] But the law did not stop there. It also prohibited for the first time any other "article of indecent or immoral use," including any "article or medicine for the prevention of conception or procuring of abortion."[52] New York State enacted the novel obscenity law in 1868.[53]

Following the New York law's enactment, Anthony Comstock strengthened his hand by pursuing the widely publicized prosecution of Victoria Woodhull for violating an existing federal obscenity law prohibiting the mailing of any "obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character."[54] Woodhull was an outspoken feminist who advocated for women's suffrage, voluntary motherhood, and free love (she was also the first woman to declare her candidacy for the presidency).[55] In 1872, Woodhull and her sister Tennessee Claflin wrote in their newspaper about an alleged affair between a famous preacher, Reverend Henry Ward Beecher, and a female parishioner; the article denounced the hypocrisy of Beecher's affair. Comstock subsequently arrested the sisters on November 2, 1872—a mere four months before the Comstock Act's enactment—on charges of circulating obscene literature.[56] For Comstock, the ideas expressed by feminist free love advocates—that women were sexually enslaved by the existing institution of marriage—were by their very nature obscene.[57] As one biographer put it, "[l]iterature about women's *rights* violated everything he perceived to be natural and was, therefore, as obscene to Comstock as the most licentious pornography."[58]

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50. *Id. at 17*; *see also* AMY WERBEL, LUST ON TRIAL: CENSORSHIP AND THE RISE OF AMERICAN OBSCENITY IN THE AGE OF ANTHONY COMSTOCK 51–55 (2018) (describing the YMCA's lobbying efforts to enact the 1868 New York obscenity law); Geoffrey R. Stone, *Sex and the First Amendment: The Long and Winding History of Obscenity Law*, 17 FIRST AMEND. L. REV. 134, 136 (2019).

51. Act of Apr. 28, 1868, ch. 430, 1868 N.Y. Laws 856.

52. *Id.* at 856–57; *see* WERBEL, *supra* note 50, at 55.

53. Act of Apr. 28, 1868, ch. 430, 1868 N.Y. Laws 856.

54. *See Comstockery*, *supra* note 22, at 11 n.49 (quoting Act of Mar. 3, 1865, ch. 89, sec. 16, 13 Stat. 504, 507 (1865)); AMY SOHN, THE MAN WHO HATED WOMEN: SEX, CENSORSHIP, AND CIVIL LIBERTIES IN THE GILDED AGE 66–75 (2021).

55. *See Comstockery*, *supra* note 22, at 11.

56. NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 76–78 (1997).

57. *Id.* at 76.

58. ANNA LOUISE BATES, WEEDER IN THE GARDEN OF THE LORD: ANTHONY COMSTOCK'S LIFE AND CAREER 61 (1995).

Anthony Comstock's prosecution of the sisters was unsuccessful, but only because the Comstock Act had not been enacted in time. In the winter of 1872, Comstock traveled back and forth between New York and Washington—New York to support Woodhull's conviction and Washington to lobby Congress for a more robust federal obscenity law that would make it easier for him to charge feminist free lovers with obscenity.[59] The sisters were tried and acquitted in June 1873 (three months after the Comstock Act's enactment), with the judge instructing the jury that "under the [obscenity] act of 1872 newspapers were not included, the act of 1873 [i.e., the Comstock Act] being *specially framed* to cover the omission and meet the present case, and that therefore there was no evidence to sustain the prosecution."[60] In other words, the Comstock Act was designed to close gaps in existing federal obscenity law that resulted in Woodhull's acquittal.[61] As one account put it, "[t]he nation's broadest, most punitive obscenity act, and the first to categorize contraception as obscene, was drafted with the *specific intent* of sending two highly public and highly vocal women to prison."[62]

In addition to these events, the anti-vice reasoning that motivated the Comstock Act should be understood in tandem with contemporaneous antiabortion campaigns led by physicians that attacked contraception and abortion as inconsistent with marital obligations.[63] As Reva Siegel has previously described, these nineteenth-century antiabortion campaigns were also *antifeminism* campaigns resistant to the concept of voluntary motherhood, and which portrayed abortion as "reflecting a growing self-indulgence among American women" that caused them to derogate their maternal childbearing duties.[64] Like proponents of anti-vice measures, the antiabortion campaign's efforts to assert claims on women's health were always mediated by a pronatalist religious ethic.[65] Efforts to interfere with the procreative purpose of marriage were deemed "physiological sin" that posed a danger to women's physical, moral, and spiritual health.[66] One physician prominent in the antiabortion campaign lectured to his students at the University of Pennsylvania in 1872 that, "[i]t does, indeed, seem to be the law of Nature, that man must suffer the punishment of the onanist

59. SOHN, *supra* note 54, at 77.

60. BEISEL, *supra* note 56, at 80 (emphasis added) (first alteration in original).

61. *Comstockery*, *supra* note 22, at 17.

62. SOHN, *supra* note 54, at 80 (emphasis added); *see also* WERBEL, *supra* note 50, at 68 ("The broad additions of 'paper,' and 'writing' [in the Comstock Act] stemmed from Comstock's particular venom for news outlets such as *Woodhull and Claflin's Weekly*.").

63. *See* Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 982–86 (2015).

64. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 302 (1992).

65. *Id.* at 293–97.

66. *Id.* at 294–95.

if he parts with the 'seed of another life' in any other way than in that by which it tends to become fruitful," but "[t]he wife suffers the most, because she both sins and is sinned against. She sins, because she shirks those responsibilities for which she was created; she is sinned against, because she is defrauded of her [conjugal] rights."[67]

To be sure, the Supreme Court gave short shrift to this history in *Dobbs*. Acknowledging arguments that state criminal statutes regulating abortion were historically motivated by the notion that "abortion was leading White Protestant women to shirk their maternal duties," the majority replied that "the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th-century abortion laws."[68] "Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to . . . women?"[69] No, the Court said, because "[t]here is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being."[70] There, of course, the Court was concerned with whether a constitutional right to abortion was established at the time the Fourteenth Amendment was adopted. In responding to allegations of historical animus, the Court rejected the view that the discriminatory animus expressed by particular antiabortion campaigns could be imputed to all state criminal statutes.[71] But this reasoning leaves open the question posed by this Essay—whether the Comstock Act in particular was motivated by hostility to women.

And indeed, historical accounts confirm that the sex-discriminatory forms of reasoning espoused by antiabortion campaigns motivated support for abortion regulation in the Comstock Act. Historian Carroll Smith-Rosenberg argues that the American Medical Association's Committee on Criminal Abortion rallied support for the Comstock Act by describing the aborting wife as "unnaturally selfish and ruthless."[72] In 1916, psychologist and feminist thinker Leta Hollingworth argued that anti-obscenity laws were intended to force women to remain in their traditional roles of wives

67. William Goodell, Clinical Lecture on Conjugal Onanism and Kindred Sins (Feb. 1, 1872), *in* 2 PHILA. MED. TIMES 161, 161–62 (1872).

68. *Dobbs*, 597 U.S. at 253–54 (internal quotation marks omitted).

69. *Id.* at 254.

70. *Id.*; *see also* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 931–32 (2023) ("The Court's readiness to raise and dismiss evidence in the briefs that the anti-abortion campaign encouraged voters to enact abortion bans on the basis of nativism and sexism is yet another dimension of *Dobbs*'s gendered reasoning . . . .").

71. *Dobbs*, 597 U.S. at 254.

72. CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT 236 (1985).

and mothers by compelling them to bear and rear children.[73] Historian Amy Werbel notes that Comstock was alarmed about "the use of an abortion to cover up disgraceful extramarital sex," and making abortifacients illegal would make it difficult to cover up these "evil deeds."[74] Comstock described women who obtained abortions as motivated by a desire to flee the consequences of vice and "conceal their own lapse from chastity."[75] In short, anti-vice advocates at the time, chief among them Anthony Comstock, believed that abortion and obscenity—which included the expression of feminist *ideas*—posed a grave threat to the Victorian social order by encouraging illicit, extramarital sex inconsistent with women's familial and religious duties as wives and mothers. These forms of advocacy help constitute the historical background of the Comstock Act's enactment.

It was against this backdrop that Anthony Comstock traveled to Washington in December 1872 and January 1873 to lobby for the Comstock Act's enactment. This brings us to the two remaining *Arlington Heights* factors. The "legislative or administrative history" of the law, including "contemporary statements by members of the decisionmaking body,"[76] along with the law's irregular "procedural sequence"[77] further corroborate Comstock's discriminatory purpose. To be sure, the Comstock Act's legislative history is sparse. As one commentator described it, "Congress was anxious to reduce the amount of obscene literature and indecent articles then in circulation," so debate in the Senate was limited to "a matter of minutes" and "[c]onsideration in the House of Representatives was even more abbreviated."[78] But what statements we have mimic the discriminatory anti-vice reasoning espoused by Anthony Comstock.

With the YMCA's support, Comstock traveled to Washington, D.C., once in January 1873 and a second time in February, with what Werbel describes as "his traveling road show of obscenities" to lobby the Forty-

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73. Leta S. Hollingworth, *Social Devices for Impelling Women to Bear and Rear Children*, 22 AM. J. SOCIO. 19, 25 (1916) (noting laws which "conscript . . . women to bear children by legally prohibiting the publication or communication of the knowledge which would make child-bearing voluntary").

74. WERBEL, *supra* note 50, at 68–69; *see also id.* at 69 (noting that "Comstock's proposed additions to the federal law also undoubtably were a response to some of the many 'conjugal' catalogues that specifically marketed contraceptives to married women . . . . The evangelical lens through which Comstock viewed these materials made them especially dangerous in his mind, as they were aimed at humanity's 'weaker' sex.").

75. BEISEL, *supra* note 56, at 42; *see also* BATES, *supra* note 58, at 61 ("Comstock had a clear and narrow vision of appropriate behavior for men and women . . . . Comstock believed a woman's prime responsibility was rearing and educating children within the context of a father-dominated household.").

76. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

77. *Id.*

78. Note, *Judicial Regulation of Birth Control Under Obscenity Laws*, 50 YALE L.J. 682, 682 & n.7 (1941).

Second Congress for the Act's enactment.[79] The *New York Times* reported on January 31 that "[t]he enormity of the traffic in obscene literature has been made so apparent to members of Congress lately, that many of them express a willingness to vote for *any* measure that will put a stop to it, even to the stretching of a constitutional point, if necessary."[80] Another article described how Comstock "exhibited to a large number of Senators in the Vice President's room a collection of obscene books and pictures which he has obtained through the mails."[81] The *New York Herald* described Comstock's lobbying efforts in greater detail on February 24:

> A fellow named Comstock . . . came here a few weeks ago with a budget of indecent engravings and immoral articles, which he professed to have obtained in response to letters which he sent, enclosing money, to parties who advertised them for sale. His first exhibition was at the house of that statesman, Sub. [Samuel Clarke] Pomeroy, and the leading lights of the Young Men's Christian Association were invited by printed circulars to go there and gaze upon this collection. Then they were displayed in the room of [Vice President Schuyler] Colfax at the Capitol, and Comstock eloquently descanted on the necessity for a law not only to prevent the sale of the dirty trash, but to suppress all advertisements which did not meet his approval.[82]

In addition to obscene books and pictures,[83] Comstock also exhibited his collection of "dildoes" seized in the course of his many arrests—objects he described as "articles for self-pollution, for use by females."[84]

Following these exhibitions, the Comstock Act moved out of committee and through the Senate at a breakneck pace.[85] Indeed, the Act's expedited enactment was a "[d]eparture[] from the normal procedural sequence"[86] that stymied any reasoned deliberation by legislators over its contents. First introduced by Senator William Windom on February 11, 1873, the bill was adopted on February 21 with no debate and without a recorded vote, before being sent to the House.[87] One senator had complained on February 18 that they were, until then, unaware of the bill's

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79. WERBEL, *supra* note 50, at 64–66, 77; *see also* GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865-1920 51 (2002) (describing Comstock's "little shop of obscenity horrors").

80. *Obscene Literature*, N.Y. TIMES, Jan. 31, 1873 (emphasis added).

81. *Obscene Books and Pictures Sent Through the Mails*, N.Y. HERALD, Feb. 7, 1873, at 3.

82. *Comstock's Christianity Refused by the Senate*, N.Y. HERALD, Feb. 24, 1873, at 3.

83. Werbel notes that Comstock's seizures "common[ly]" included the "depiction of women as lustful agents in fulfilling their own sexual pleasure"—something Comstock viewed as obscene. WERBEL, *supra* note 50, at 84.

84. *Id.* at 77.

85. For an account of the law's hurried passage, see FOSTER, *supra* note 79, at 51–53.

86. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

87. WERBEL, *supra* note 50, at 65; SOHN, *supra* note 54, at 82–83.

existence, noting that "I, for one, should like to have an opportunity to examine the bill before voting upon it. I never have seen it before. I was not aware that there was such a bill here."[88] As the bill worked its way through Congress, Comstock continued his lobbying efforts in Washington "and even relaxed by writing letters trying to ensnare ten abortionists he had been pursuing."[89]

At Comstock's urging, the Speaker of the House, James Blaine, then introduced the Senate's bill, S. 1572, on the House floor on March 1, 1873.[90] Congressman Clinton Merriam of New York spoke first, moving to suspend normal House rules and vote on the bill straightaway without a House quorum, without referral to a House committee or even floor debate.[91] Several representatives disagreed with the expedited process, including Michael Kerr, a leader among House Democrats opposed to expansion of federal powers in the Reconstruction era.[92] Kerr moved for the bill's "reference to the Committee on the Judiciary" because "[i]ts provisions are extremely important, and they ought not to be passed in *such hot haste*," but Merriam "move[d] to suspend the rules" and Kerr's motion was rejected.[93] After Kerr insisted that "tellers" record the individual votes of the representatives on the matter of suspending the rules, the "ayes" prevailed and Merriam's motion was adopted. The House then approved the legislation by a two-thirds majority.[94] Two days later, on March 3, 1873, President Grant signed the bill into law.[95]

The only "contemporary statements by members of the decisionmaking body"[96] come from Merriam, who took to the House floor on March 1 to defend the law pending its passage. His remarks evince blatant discriminatory intent. "[T]he purposes of this bill," he said, "are so clearly in the best interests of morality and humanity, that I trust it will receive the unanimous voice of Congress."[97] Merriam first described obscenity as a

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88. CONG. GLOBE, 42d Cong., 3d Sess. 1437 (1873) (statement of Sen. Thurman).

89. FOSTER, *supra* note 79, at 52.

90. WERBEL, *supra* note 50, at 65; FOSTER, *supra* note 79, at 52.

91. SOHN, *supra* note 54, at 82–83; CONG. GLOBE, 42d Cong., 3d Sess. 2004 (1873).

92. *See* Albert House Jr., *Northern Congressional Democrats as Defenders of the South During Reconstruction*, 6 J. SOUTHERN HISTORY 46, 50 (1940).

93. CONG. GLOBE, 42d Cong., 3d Sess. 2005 (1873) (emphasis added).

94. *Id.*

95. WERBEL, *supra* note 50, at 66. As Gaines Foster recounts, the breakneck pace at which the Comstock law was passed forced Congress to correct imprecisions in the law three years later. *See* FOSTER, *supra* note 79, at 53 ("The 'hot haste' in which the Comstock Law, as it became known, passed resulted in imprecise legislation that, in 1876, Congress had to revise. After only brief debate, Congress reaffirmed its earlier decision to use the power over the mails to limit the dissemination of information about sexuality.").

96. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

97. *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,

threat to manhood, registering his confidence that "Congress will not only give all the aids of legislation for the annihilation of this trade, but that the outraged *manhood* of our age will place in the strongest possible manner its seal of condemnation upon the low brutality which threatened to destroy the future of this Republic"—especially as "no home, however carefully guarded, . . . has been safe from these corrupting influences."[98] Obscene materials "sent to positive destruction some promising boys, who, but for the deadly poison instilled into their young minds might have developed into wise and good men."[99] And, most relevant here, Merriam insisted that the Act was necessary to safeguard the "purity and beauty of womanhood" from "the insults of this trade."[100]

In the end, the act passed by Congress "presented contraception, abortion, and similar sex toys as of a piece—incitements to immorality, like erotica, and other articles of 'indecent' or 'immoral use.' "[101] The second provision, which governed U.S. mails, read as follows:

> 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 contraception 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 . . . .[102]

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

98. *Id.* (emphasis added). This Essay focuses on the discriminatory stereotypes about women that motivated the Comstock Act's enactment, but these remarks suggest that anti-vice laws were also expressly motivated by gender stereotypes about men.

99. *Id.*

100. *Id.*; BEISEL, *supra* note 56, at 39 ("Implicit in such rhetoric is a role for women—moral mothers who help guard the purity of the hearth."); HEYWOOD BROUN & MARGARET LEECH, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD 142 (1928) (noting Merriam's argument that "the purity and beauty of womanhood be suitably shielded"); *see also* Nicola Beisel, *Family Ideology, Class Reproduction, and the Suppression of Obscenity in Nineteenth Century New York* 15 (Ctr. for Rsch. on Soc. Org., Working Paper No. 397, 1989) (noting that for Comstock, "[t]he protection of women included both protection of womanhood as a whole from being debased by pornography, and protecting individual women from the insults of men inflamed by pornographic lust").

101. *Comstockery*, *supra* note 22, at 23.

102. Act of Mar. 3, 1873, ch. 258, sec. 2, 17 Stat. 598 (emphasis added).

After the law's enactment, Anthony Comstock was named a special agent of the U.S. Post Office and, as Siegel and Ziegler extensively survey, used the law to prosecute and censor its critics.[103]

This history is in service of a simple doctrinal point: The Comstock Act and its abortion provision were enacted in 1873 with discriminatory animus against women. Werbel condenses the discriminatory history of the Comstock Act's enactment effectively:

> With Victoria Woodhull threatening the privacy and authority of respectable men, and examples of "amorous" women run amok flooding even wealthy homes, these men needed to act, and fast, lest the "dildoe's" purchaser be their own daughters or wives. The threat from women seeking political and sexual empowerment was simply too terrible to ignore.[104]

As a matter of constitutional law, the paranoia over protecting women's sexual purity that drove the Comstock Act's enactment constitutes discriminatory intent. To be sure, this was not always the case. In the same year as the Comstock Act's enactment, the Supreme Court decided *Bradwell v. Illinois*, which upheld a law that denied the female plaintiff a license to practice law.[105] The Court reasoned that "as a married woman [she] would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client."[106] In a concurring opinion, Justice Bradley infamously declared that "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[107] Bradley's remarks reflect a nineteenth-century ideology of "True Womanhood" shared by the anti-vice movement by which "a woman judged herself and was judged by her husband, her neighbors and society" based on her "piety, purity, submissiveness and domesticity."[108] Piety was valuable insofar as "it did not take a woman away from her 'proper sphere,' her home" and "[p]urity was as essential as piety to a young

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103. *See Comstockery*, *supra* note 22, at 26–29. Comstock would also continue to enforce obscenity laws to prosecute free lovers and feminists like the Claflin sisters. For example, in 1877, Comstock arrested Ezra Heywood for publishing *The Binding Forces of Conjugal Life*, a tract which argued that "women were enslaved and love demeaned" by the institution of marriage. *See* BEISEL, *supra* note 56, at 87. The notion that "women should have the right to control their reproduction" was, in Comstock's view, obscene. *Id.*

104. WERBEL, *supra* note 50, at 86.

105. Bradwell v. Illinois, 83 U.S. 130, 132, 139 (1873) (noting that at the time the legislature enacted the statute governing admission to the bar it was generally regarded that "God designed the sexes to occupy different spheres of action").

106. *Id.* at 131.

107. *Id.* at 141 (Bradley, J., concurring).

108. Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. QUARTERLY 151, 152 (1966).

woman, its absence as unnatural and unfeminine. Without it she was, in fact, no woman at all, but a member of some lower order."[109]

Judicial recognition of the separate-spheres ideology expressed by the *Bradwell* Court would extend into the twentieth century.[110] In the 1948 case *Goesaert v. Cleary*, for example, the Supreme Court pointed to sex-based stereotypes about sexual morals to uphold sex-based distinctions.[111] The Court upheld a Michigan statute denying women the opportunity to be a licensed bartender unless she was "'the wife or daughter of the male owner' of a licensed liquor establishment."[112] The Court reasoned that "[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes," especially where the state has determined that such regulations are necessary to prevent "moral and social problems" that may result from employing women as bartenders.[113]

But beginning a half-century ago, the Supreme Court made clear that these forms of sex-discriminatory reasoning have no place in constitutional law.[114] In *Frontiero v. Richardson*, a plurality of the Court acknowledged that "our Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[115] The plurality then quoted Justice Bradley's concurrence at length to show just how "firmly rooted" this "paternalistic attitude" was.[116] Two decades later, in its landmark decision in *United States v. Virginia*, the Court held that the Constitution's guarantee of equal protection means that sex "classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."[117]

The Comstock Act was motivated by the very sex stereotypes and invidious ideology of romantic paternalism that the Court has since repudiated. Its proponents acted on the belief that abortion encouraged illicit, extramarital sex inconsistent with women's familial and religious duties by allowing women to have sex without pregnancy. That is, in practical terms,

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109. *Id.* at 153–54.

110. Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1198 (2016).

111. Goesaert v. Cleary, 335 U.S. 464 (1948).

112. *Id.* at 464.

113. *Id.* at 466.

114. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (noting that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.").

115. Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

116. *Id.*

117. United States v. Virginia, 518 U.S. 515, 534 (1996).

they viewed abortion, like contraception, as a lure for lust that allowed women to "conceal their own lapse from chastity."[118] Such sex-discriminatory reasoning sought to reinforce the roles assigned to women in marriage by ensuring that women who had sex bore children, that women who had children remained in the home, and that women dedicated themselves to their proper role of childrearing.[119] The Comstock Act's enactment, then, is itself one chapter in the country's "long and unfortunate history of sex discrimination."[120] It must therefore be subject to heightened scrutiny.

Under heightened scrutiny, the Comstock Act's abortion provision falls. Recall that in *Dobbs*, the Supreme Court held that abortion regulations are presumptively constitutional under rational-basis review. "A law regulating abortion," the majority wrote, "is entitled to a strong presumption of validity" and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[121] Under heightened scrutiny, however, the Comstock Act must be supported by an "exceedingly persuasive justification" for its sex-based classification—specifically, the law's regulation by sex-discriminatory means must be substantially related to the achievement of important governmental objectives.[122] To make that showing, its proponents may "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[123] And critically, unlike rational-basis review, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[124]

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118. *Comstockery*, *supra* note 22, at 30 n.178. As Siegel and Ziegler describe,

> 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, or opening the door to "licentiousness without its direful consequences."

Id. at 28.

119. *Id.* at 29 ("[A]nti-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.").

120. *Frontiero*, 411 U.S. at 684.

121. *Dobbs*, 597 U.S. at 301 (citations omitted). The Court proceeded to survey a long list of "legitimate interests" served by abortion regulations, including

> respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

Id.

122. *Virginia*, 518 U.S. at 531–33.

123. *Id.* at 533–34 (internal citation omitted).

124. *Id.* at 533.

To survey the history of Comstock's enactment is to show that the law cannot pass constitutional muster under this standard. Congress enacted the law without debate, without record, and without factual findings. Congressman Merriam's remarks on the House floor, which referred to preserving "manhood" and the "purity and beauty of womanhood," are infected with discriminatory animus and rely on overbroad generalizations about sex-based roles—generalizations inextricably tied to any purported justification about avoiding sexual impurity and protecting the family and home.[125] Justifications linking the protection of children from obscenity to abortifacients, moreover, are simply too attenuated and unfounded to pass muster. That is, aside from its underlying discriminatory animus, there was simply no support for Merriam's assertion that "wherever these [obscene] 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."[126] There is, in short, nothing in the legislative record that can save the Comstock Act's antiquated and discriminatory logic under heightened scrutiny. The law is therefore unconstitutional.

II. PURGING COMSTOCK'S DISCRIMINATORY INTENT AND CONSTITUTIONAL AVOIDANCE

Of course, the Comstock Act's history did not end in 1873. Congress amended the law several times in the twentieth century, most notably in 1971 when it removed the law's contraceptive provisions. Courts considering an equal protection challenge to the Comstock Act's enforcement, then, will have to grapple with whether these subsequent amendments purged Comstock's discriminatory taint. I argue in this Part that Comstock's subsequent amendments did nothing to purge its discriminatory taint for two reasons. First, the Act remains tainted because succeeding legislative actions reflect insufficient engagement with the discriminatory origins of the law's abortion provision—a provision that Congress has never reenacted. And second, Comstock's twentieth-century amendments are irrelevant to the equal protection analysis because the amending Congresses ratified a far more restrictive understanding of the Comstock Act than the antiquated understanding that antiabortion advocates seek to revive today. Given the discriminatory taint that remains tethered to that broader construction, I conclude that a court may decide, in the alternative, to adopt the narrower construction as a matter of constitutional avoidance.

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125. BEISEL, *supra* note 56, at 41.

126. Clinton Merriam, Obscene Literature: Speech of Hon. Clinton L. Merriam, of New York, in the House of Representatives, March 1, 1873, on the bill (S. 1572) for the suppression of trade in and circulation of obscene literature and objects of immoral use (Watertown, NY: Ingalls, Brockway, and Skinner Printers, 1873), at 5.

To frame the discussion, consider the prototypical case that poses the purge issue: A law is enacted with a discriminatory purpose at T_1. Then, the law is reenacted or amended at T_2. A court faced with an equal protection challenge to the law's enforcement in the present day must undertake a context-specific and fact-intensive inquiry into whether the law's reenactment at T_2 purged the law of its discriminatory taint from T_1. The Essay has already discussed the discriminatory purposes that motivated Comstock's enactment at T_1 (i.e., 1873). The issue now is the import, for equal protection analysis, of Comstock's developments at T_2.

The law of how to purge discriminatory taint remains underdeveloped, but at a minimum requires some engagement with the tainted provision, reenactment of the tainted provision, or both. The few Supreme Court cases that have addressed the enduring effect of discriminatory taint provide limited guidance, but, as I argue below, suggest that the Act remains tainted. Consider first the Court's 1985 decision in *Hunter v. Underwood*.[127] There, the Court heard an equal protection challenge to an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to promoting white supremacy.[128] The article disenfranchised anyone convicted of any crime on a long list including several minor offenses.[129] In an opinion authored by Justice Rehnquist, a unanimous Court agreed that the article had been adopted with discriminatory intent.[130] The article was never repealed, but in the succeeding 80 years, some of the "more blatantly discriminatory selections" had been struck down by courts, and the State argued that what remained was facially constitutional.[131] The Court, however, rejected that argument because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted.[132] "Without deciding whether [the article] would be valid *if enacted today* without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such," the Court concluded, "it violates equal protection under *Arlington Heights*."[133] *Hunter* thus left unresolved the question of how a subsequent legislature, by amending or reenacting a law at T_2, could purge a law of its taint. Still, the Court's reasoning in *Hunter* is instructive insofar as it confirms that a law's discriminatory taint persists even after some of its more invidious provisions have been pruned and left inoperative in succeeding years—in *Hunter*, by intervening court decisions.

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127. Hunter v. Underwood, 471 U.S. 222 (1985).

128. *Id.* at 228–30.

129. *Id.* at 226–27.

130. *Id.* at 229.

131. *Id.* at 232–33.

132. *Id.* at 233.

133. *Hunter*, 471 U.S. at 233 (emphasis added).

Notably, the Roberts Court has had occasion to address discriminatory taint in several contexts, with some Justices writing separately to emphasize that purging taint requires more than cursory reenactment. In its 2020 decision in *Ramos v. Louisiana*, the Court grappled with the racist origins of Louisiana's nonunanimous jury verdict system, ultimately concluding that such a system was inconsistent with the Sixth Amendment's right to a jury trial.[134] Although the Court's holding focused on Sixth Amendment requirements, the plurality explained that in "assess[ing] the functional benefits" of a law, courts cannot "ignore the very functions those rules were"—in origin—"adopted to serve."[135] Those discriminatory functions also led the plurality to reject the dissenting opinion's suggestion that recodification of the jury rules cleaned it of its racist intent.[136]

Justice Sotomayor wrote separately to articulate the import of discriminatory taint on a law's constitutionality. "Although Ramos does not bring an equal protection challenge, the history is worthy of this Court's attention," she wrote, "not simply because that legacy existed in the first place . . . but also because the States' legislatures never truly grappled with the laws' sordid history in reenacting them."[137] Justice Sotomayor proceeded to offer a view about what it takes to purge discriminatory intent: "Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint."[138] But Justice Sotomayor concluded, "[t]hat cannot be said of the laws at issue here. While the dissent points to the 'legitimate' reasons for Louisiana's reenactment, Louisiana's perhaps only effort to contend with the law's discriminatory purpose and effects came recently, when the law was repealed altogether."[139]

Later that term, Justice Alito wrote separately to endorse a reading of *Ramos* as embracing a robust discriminatory taint doctrine. In *Espinoza v. Montana Department of Revenue*, the Supreme Court declined to allow a tradition of state laws borne of anti-Catholic animus to inform its history-based free exercise analysis.[140] In a concurring opinion, Justice Alito objected that discriminatory taint should have featured more centrally in the Court's analysis because *Ramos* stands for the proposition that where laws

134. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

135. *Id.* at 1401 n.44

136. *Id.*

137. *Id.* at 1410 (Sotomayor, J., concurring).

138. *Id.*

139. *Id.*

140. Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464 (2020); *see also* Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of The Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 720 (2022) (arguing that "the idea featured in *Ramos*—that a history of racism is worth considering even when resolving legal claims that don't directly assert race-based discrimination—can be deployed in challenges to other laws with racist origins still on the books").

possess a discriminatory "original motivation," that taint continue to have "bearing on the laws' constitutionality," even where "such laws can be adopted for non-discriminatory reasons" and legislatures "readopted their rules under different circumstances in later years."[141] Indeed, "[u]nder *Ramos*," Alito wrote, "it emphatically *does not matter* whether [the State] readopted the [] provision for benign reasons. The provision's 'uncomfortable past' must still be 'examined,' " and it must be "clear that the animus was scrubbed."[142]

On these accounts of how to purge discriminatory intent, the Comstock Act's discriminatory intent persists to this day. As relevant here, Comstock was reenacted and amended on several occasions in the twentieth century. In 1945, Congress enacted Title 18 of the U.S. Code into positive law and codified Comstock in Sections 1461 and 1462 verbatim. Congress subsequently amended the Comstock Act four times in 1955, 1958, 1971, and 1994. The question, then, is whether these developments severed the continuity between the Comstock Act as it was originally enacted and the Comstock Act as it exists today so as to render the law's discriminatory taint immaterial to its contemporary enforcement. They did not.

First, the current Comstock Act is tainted because succeeding legislative actions neither grappled with the law's problematic history nor reenacted its abortion provision. None of Comstock's legislative developments implemented substantive changes to (or even addressed) the law's abortion provision, with most changes incorporating minor changes in phraseology to surrounding language. The 1955, 1958, and 1994 amendments, for instance, were largely cosmetic. The 1955 amendments substituted, in the first paragraph, "indecent, filthy or vile article, matter, thing, device or substance," for "or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character."[143] It also eliminated the fifth paragraph which read as follows: "Every letter, packet, or package, or other mail matter containing any filthy, file, or indecent thing, device or substance."[144] The 1958 amendments provided in the eighth paragraph for continuing offenses by use of the mails instead of by deposits for mailing and for punishment for subsequent offenses.[145] And the 1994 amendments edited the sentence beginning "Whoever knowingly uses," striking out "not more than $5,000" and inserting "under this title" following "shall

141. *Espinoza*, 591 U.S. at 497 (Alito, J., concurring).

142. *Id.* at 505–06 (quoting *Ramos*, 140 S. Ct. at 1401, n.44) (emphasis added). In dissent, Justice Sotomayor argued that any religious animus that motivated the enactment of the state constitutional provision at issue had been purged through reenactment. *Id.* at 541 n.2 (Sotomayor, J., dissenting).

143. *See* Act of June 28, 1955, § 1.

144. *Id.* § 2.

145. Pub. L. No. 85-796.

be fined" in one instance and struck out "not more than $10,000" and inserted "under this title" following "shall be fined" in another instance.[146]

The 1971 amendments were most substantive, but still did not touch the abortion provision. Congress repealed Comstock's contraceptive language in 1971.[147] But as Siegel and Ziegler observe, the 1971 amendment "passed with scant attention, and without any mention of abortion."[148] The amendment received virtually no press coverage and—like the original Comstock Act in 1873—was passed in the House and Senate with no recorded opposition or debate.[149] Siegel and Ziegler attribute this in part to statements of support submitted during committee hearings by the Departments of Health, Education, and Welfare (HEW), Commerce, State, Labor, and Treasury, as well as the Post Office.[150] HEW stated 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 suggested that "existing statutory prohibitions . . . merit[] reappraisal, in light of court decisions and present attitudes."[151] Congress's repeal of Comstock's contraceptive provisions as presumably inconsistent with "present attitudes" does not, without more, cleanse the neighboring abortion provisions—which were left untouched—of the discriminatory intent with which the provisions had been adopted. As the Court's holding

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146. Pub. L. No. 103-322.

147. *See* Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. 1973 (1971). The 1971 amendments implemented the following revisions to the Act:

> Pub.L. 91-662 , § 3(1), in second par. struck out "preventing conception or" preceding "producing abortion".
>
> Pub.L. 91-662 , § 3(1), in third par. struck out "preventing conception or" following "apply it for".
>
> Pub.L. 91-662 , § 3(2), (3), in fourth par. substituted "means abortion may be produced" for "means conception may be prevented or abortion produced".
>
> Pub.L. 91-662 , § 3(1), in fifth par. struck out "preventing conception or" following "applied for".
>
> Pub.L. 91-662 , § 6(3), in eighth par. added "or section 3001(e) of title 39" following "this section". Section 5(b) of Pub.L. 91-662 inserted reference to section 4001(d) of Title 39, The Postal Service, which reflected provisions of Title 39 prior to the effective date of Title 39, Postal Service, as enacted by the Postal Reorganization Act. Said section 4001(d) was repealed by section 6(2) of Pub.L. 91-662 , effective on the date that the Board of Governors of the Postal Service establish as the effective date for section 3001 of Title 39, Postal Service.

Id.

148. *Comstockery*, *supra* note 22, at 69 n.446; *see also* Brunnstrom, *supra* note 22, at 11 ("Although it might seem natural to link contraception with abortion, especially as they appear side by side in the statute, no reference was made to the abortion provision of the statute, or even abortion more generally, in the House or the report to accompany H.R. 4605.").

149. *Comstockery*, *supra* note 22, at 69 n.446.

150. *Id.*

151. H.R. REP. NO. 91-1105, at 3 (1970).

in *Hunter* instructs, a law's discriminatory taint persists even after some of its more invidious provisions have been pruned and left inoperative in succeeding years.[152] And given that Congress did not address the abortion provisions at all, a court has no way of knowing whether the provisions were reenacted "without any impermissible motivation."[153] Moreover, although the 1971 amendment enacted substantive changes to the Comstock Act, it is difficult to characterize as a reenactment of Comstock's surviving provisions. That is because the amendments were a byproduct of Congress's enactment of the Contraception Mail Prohibition Removal Act, which amended the Tariff Act of 1930 and all of the U.S. Code "to remove the prohibitions against importing, transporting, and mailing in the United States mails articles for preventing conception."[154] The Comstock Act, then, was just one of many laws whose contraception provisions were amended by that law in 1971.

In sum, Congress's reenactments have neither specifically referenced the 1873 abortion provision nor engaged with the risks of perpetuating its plausibly discriminatory past if enforced today. And whatever else might be said about other provisions of the original law, the abortion provision has been carried forward facially unchanged. Where the original law's inception was steeped in invidious discrimination against women, specific engagement demands more of the contemporary decisionmaker. As Professor W. Kerrel Murray has argued, "the necessary engagement at least requires appreciating the persistent impact of the past."[155] But no such legislative engagement has taken place.

Still, it is true that a number of courts of appeals have adopted discriminatory-taint tests that require seemingly minimal engagement with taint by lawmakers at T_2. The Fourth Circuit, for instance, has held that a future reenacting legislature "has *no duty* to purge its predecessor's allegedly discriminatory intent" and that the discriminatory origins of a law are relevant only insofar as they constitute part of the *Arlington Heights* "historical background" factor.[156] And even then, the court considers discriminatory intent at T_1 to be "of limited probative force" with respect to a lawmaker's intent at T_2.[157] Similarly, the Eleventh Circuit has held that "[t]he question is whether the re-enactment was done through a deliberative process and without discriminatory intent, not whether the legislature

152. *See* Hunter v. Underwood, 471 U.S. 222, 226–27, 232–33 (1985).

153. *Id.* at 233.

154. Contraception Mail Prohibition Removal Act, Pub. L. No. 91-662, 84 Stat. 1973 (1970).

155. W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1253 (2022).

156. United States v. Sanchez-Garcia, 98 F.4th 90, 99 (4th Cir. 2024) (emphasis added) (internal quotation marks and citation omitted).

157. *Id.* at 99–100; *see also* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 305 (4th Cir. 2020).

intended the re-enactment to eliminate the earlier provision's discriminatory intent."[158] These courts shift the reference point of analysis from T_1 to T_2, primarily considering whether reenactment at T_2 was itself motivated by discriminatory animus.[159]

Do these de minimis approaches to discriminatory-taint analysis pose a problem for this Essay's constitutional challenge? After all, I do not suggest that Congress's twentieth-century amendments were enacted with discriminatory intent. In the end, I think they make no difference. As I have argued, the Comstock Act's twentieth-century amendments did not reenact its abortion provisions. Its only substantive amendment—the removal of contraceptive provisions in 1971—was a byproduct of Congress's enactment of the Contraception Mail Prohibition Removal Act during which abortion was never at issue. The first problem with a purge response, then, is that no subsequent Congress has reenacted Comstock's abortion provision through a deliberative process that engages with its discriminatory origins.

But there is a second reason why today's advocates of the sweeping antiabortion reading of Comstock cannot benefit from these amendments: To the extent that Congress's amendments in the later twentieth century readopted the law's abortion provisions, they did *not* ratify the antiabortion view of Comstock that advocates seek to revive today. Instead, at best, Congress ratified the narrowing construction of the Comstock Act applied by federal circuit courts in the early 1900s, which limited the law's abortion provisions to *unlawful* abortions.

The Comstock Act was enforced for forty years after its enactment in 1873, but its application was dramatically restricted by a series of court decisions in the early twentieth century. Of note, the Second Circuit indicated in its 1930 *Young Rubber* decision that the Act applied only to a sender who intended to mail or ship items for "illegal contraception or abortion or for indecent or immoral purposes."[160] The court later explained that any other interpretation of the Act's sweeping language would have the unreasonable consequence of criminalizing *any* item that *could* be used for contraception or abortion (i.e, the exact interpretation antiabortion advocates seek to revive today).[161] Other courts followed in tow and federal

158. Thompson v. Sec'y of State for the State of Alabama, 65 F.4th 1288, 1298 (11th Cir. 2023); *see also* Hayden v. Paterson, 594 F.3d 150, 162, 167 (2d Cir. 2010) (considering whether a subsequent amendment was "inconsequential" and "substantively change[d]" the law).

159. For a more robust theory of discriminatory taint, *see* Murray, *supra* note 155, at 1236.

160. Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103, 108 (2d Cir. 1930).

161. United States v. One Package, 86 F.2d 737, 739–40 (2d Cir. 1936); *see also* United States v. Nicholas, 97 F.2d 510, 512 (2d Cir. 1938) ("We have twice decided that contraceptive articles may have lawful uses and that statutes prohibiting them should be read as forbidding them only when unlawfully employed.").

enforcement of the Act consequently ceased in 1936.[162] In sum, courts limited Comstock's abortion provisions to *unlawful* abortions because "[w]ithout this interpretation, the Act's ban would cover every abortion—including those to save the life of the pregnant person—that was legal at the time of the Act's passage."[163]

By the time Congress amended the Comstock Act's provisions, that limiting interpretation of the law's contraception and abortion provisions had prevailed. As the Office of Legal Counsel (OLC) has concluded, "Congress's repeated actions, taken 'against this background understanding in the legal and regulatory system,' ratified the Judiciary's settled narrowing construction."[164] That Congress had the narrow construction in mind is corroborated by the Historical and Revision Note included in the 1945 report of the House Committee on the Revision of the Laws when Congress enacted title 18 of the U.S. Code.[165] The Note expressly "invited" the "attention of Congress" to the circuit court decisions cited above and quoted at length from the Second Circuit's decision in *Young Rubber*, incorporating its conclusion that the relevant provisions of the statute should be construed to require "an intent on the part of the sender that the article mailed or shipped by common carrier be used for *illegal* contraception or abortion . . . ."[166] None of Congress's subsequent actions repudiated this construction. So, OLC explained, "Congress's several actions 'perpetuating the wording' of the Comstock Act's abortion provisions against the backdrop of a well-established, settled judicial construction that was brought to Congress's attention establishes Congress's acceptance of that narrowing construction"—a construction that "does not prohibit the mailing of an item that is designed, adapted, or intended for producing abortion in the absence of an intent by the sender that the item will be used unlawfully."[167]

Although OLC's analysis was focused on interpretation of the Comstock Act's text, its account of the law's twentieth-century legislative history also has constitutional significance. Recall that in the prototypical case of discriminatory taint, the court must consider whether a law's subsequent reenactment at T_2 purged the law of its discriminatory taint at T_1

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162. *See* Greer Donley, *Contraceptive Equity: Curing the Sex Discrimination in the ACA's Mandate*, 71 ALA. L. REV. 499, 509–10 (2019); *see, e.g.*, Davis v. United States, 62 F.2d 473, 474–75 (6th Cir. 1933) (adopting the Second Circuit's unlawfulness requirement).

163. Cohen et al., *supra* note 7, at 343.

164. Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C., slip op. at 11 (Dec. 23, 2022), https://www.justice.gov/olc/opinion/file/1560596/dl [https://perma.cc/YRC4-H3EH] (quoting Texas Dep't of Housing & Cmty. Affs. v. Inclusive Cmtys. Project, 576 U.S. 519, 536 (2015)).

165. *See* H.R. REP. NO. 79-152, at A96-97 (1945).

166. *See* 18 U.S.C. § 1461 note (Historical and Revision Notes) (emphasis added) (internal quotation marks omitted).

167. Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, *supra* note 164, 46 Op. O.L.C., slip op. at 14–15.

such that enforcement of the law today is permissible. Comstock's legislative and judicial history teaches us, however, that at T_2, Congress ratified a narrower construction of Comstock than the law as enacted at T_1. Yet it is the broader construction of the law allegedly lacking an intent requirement—embodied at T_1—that antiabortion advocates seek to enforce today. Thus, Comstock's subsequent legislative history cannot be understood as purging the taint attached to the antiabortion construction of the law. If that is correct, it simply does not matter whether future legislatures have an affirmative duty to purge its predecessor's allegedly discriminatory intent as a matter of equal protection doctrine because 1971 is not the relevant reference point for the Essay's equal protection challenge—1873 is. The Comstock Act's subsequent amendments therefore do not render its contemporary enforcement as an abortion ban constitutional.

Finally, I acknowledge that questions of discriminatory taint are unsettled. But at a minimum, it should be clear that contemporary efforts to revive the Comstock Act as a federal abortion ban raise serious constitutional "doubts."[168] And these constitutional doubts matter whether one is ready to fully accept the constitutional argument or not because "[w]hen a serious doubt is raised about the constitutionality of an Act of Congress, it is a cardinal principle that [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[169] In other words, this Essay's equal protection argument supports, in the alternative, a narrow textual construction of the law based on constitutional avoidance.

As a threshold matter, "constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."[170] Of course, advocates of the abortion-restrictive reading of the statute insist that the statute's text is not susceptible to more than one construction. For example, as Fifth Circuit Judge James Ho—widely considered a leading Supreme Court candidate under the second Trump Administration[171]—wrote about the abortion pills challenge, "the unambiguous meaning of the Act" prohibits the distribution of abortion pills because " 'using the mails for the mailing' of a 'drug . . . for producing abortion' is precisely what the Comstock Act

168. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550 (2000) (describing constitutional avoidance as "narrow construction of a statute in order to avoid a constitutional doubt").

169. Jennings v. Rodriguez, 583 U.S. 281, 296 (2018) (internal quotation marks and citation omitted).

170. Nielsen v. Preap, 139 S. Ct. 954, 972 (2019) (internal quotation marks and citation omitted).

171. *See* Haley Chi-Sing, *Experts Predict Trump Will Tap His Own Appellate Judges for Supreme Court in the Event of a Retirement*, FOX NEWS (Nov. 10, 2024, 4:00 AM), https://www.foxnews.com/politics/trump-expected-fall-back-his-own-appellate-appointees-case-supreme-court-retirement-experts-say [https://perma.cc/UYL6-YJKG].

prohibits."[172] Yet, understanding the plain meaning of the statute's text turns out not to be so, well, plain. In surveying the history of the Comstock Act's enactment and evolving enforcement, Siegel and Ziegler find that the meaning of the Act's abortion provision has been underdetermined from its inception. They explain, for example, that the word "abortion" was synonymous with "miscarriage" in 1873.[173] Siegel and Ziegler also cite contemporaneous legal dictionaries providing that abortion was not a crime whenever any miscarriage occurred but rather when miscarriage was "procured or produced with a malicious design or for an unlawful purpose."[174] They thus conclude that "Comstock revivalists who insist the statute's meaning is plain and absolute are calling for enforcement of the statute in ways it never has been understood or enforced."[175]

In light of these textual ambiguities, a colorable argument can be made that the canon of constitutional avoidance applies and operates as a means of choosing between the broad and narrow constructions of the Act's abortion provision. Courts that disfavor the invalidation route may invoke constitutional avoidance and adopt the narrow construction because there are serious constitutional concerns raised by the broad construction of Comstock that antiabortion advocates today favor.

Whichever route a court ultimately takes, Comstock's contemporary advocates face a double bind. Either the original 1873 understanding of the law, which supposedly plainly enacts a federal abortion ban, controls—and the law's discriminatory taint renders its enforcement unconstitutional. *Or*, the law was purged of its taint in the twentieth century when Congress ratified the limiting construction of the law adopted by courts in the 1930s—and as a textual matter, the Act does not enact a general abortion ban. Antiabortion advocates cannot have it both ways. In the end, only reenactment of the law today through ordinary politics in a way that seriously grapples with the law's discriminatory history can cure its infirmities.

CONCLUSION: COMSTOCK AND DEMOCRATIC CONSTITUTIONALISM

Having laid out the doctrinal case for the Comstock Act's invalidation on equal protection grounds, I close with three observations about the Act's invalidation as a form of democratic constitutionalism.

First, the resurrection of Comstock by antiabortion movement actors today is a blatant end run around the ordinary channels of democratic lawmaking. Unable to pass a national abortion ban in the foreseeable future, these actors have resorted to necromancy to advance their political agenda.

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172. All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 268 (5th Cir.) (Ho, J., concurring in part), *rev'd and remanded sub nom.* FDA v. All. for Hippocratic Med., 602 U.S. 367, (2024).

173. *Comstockery*, *supra* note 22, at 24–25.

174. *Id.* at 24 (quotation marks omitted).

175. *Id.* at 4.

And, as a normative matter, it is hard to imagine what democratic force the Act could have today. At the time of enactment, women lacked the basic right to vote.[176] Its enactment in 1873 was itself procedurally irregular, devoid of congressional deliberation, findings, or reasoned debate, and marred by discriminatory taint. To make matters worse, the Act was enforced to silence and prosecute its critics. Since its enactment, the Act has been dormant for nearly a century. And although the Act was amended several times in the twentieth century, none of these amendments endorsed, or even addressed, the Act as a federal abortion ban. That is because the sweeping interpretation of the law defended by antiabortion advocates today has long been laid to rest.

In my view, one of the virtues of the constitutional argument espoused by this Essay is that it forces Comstock's contemporary advocates to grapple with the law's democratic deficit. That is because the equal protection argument requires these advocates to defend the law on the very grounds on which it was enacted in 1873—and to explain why, given its discriminatory motives, such a law should have any force on governance today. It also forces courts confronted with such a challenge to do the very same. To uphold the law against the equal protection challenge, a court must articulate why this zombie law is either devoid of—or has been purged of—discriminatory taint that dates back to 1873 and is constitutionally enforceable today.

Second, and relatedly, the Comstock Act's undemocratic bent also poses a challenge for today's opponents of judicial review and constitutionalism. Proponents of these views believe that the entrenchment of rights through judicially enforced constitutionalism is inconsistent with the requirements of democratic self-government.[177] The answer, then, is to disempower courts and direct contestation and definition of constitutional rights to legislative bodies and democratic lawmaking.[178] That is, of course, what a majority of the Supreme Court purportedly accomplished in *Dobbs* with respect to abortion rights.[179] But as antiabortion advocates soon learned, the democratic process was not an immediately efficacious avenue

176. *Id.* at 83 ("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.").

177. *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE. L.J. 1346 (2006) (arguing that judicial review does not protect rights more effectively than legislatures and that judicial review is "democratically illegitimate").

178. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1704 (2021) (noting that progressives should push for "disempowering reforms"); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 769 (2022) (arguing that liberal constitutionalism should turn to democratic politics); *see also* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1394 (2009) (exploring how the right to abortion can be established through political rather than adjudicative means).

179. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022) (noting that the Mississippi legislature made factual findings to support the Gestational Age Act).

to implement a national abortion ban. So they turned to undemocratic means. In response, Democratic lawmakers have signaled their intention to introduce legislation that would repeal the Comstock Act, but federal abortion legislation of any kind seems far off.[180]

My point here is not to argue categorically that anti-constitutionalists should support judicial invalidation of the Comstock Act. After all, they may well stick to their guns and oppose judicial invalidation under any circumstance—even of zombie laws[181] like the Comstock Act enacted against a backdrop of subordination. But I would suggest that they should at least consider whether judicial intervention is justified under these non-ideal conditions given the uniquely undemocratic nature of the law.[182] At the very least, the case against judicial review is at its lowest ebb in such a case.[183] It is, as Siegel and Ziegler observe, "a textbook example of the kind of law that *Carolene Products* . . . identified as constitutionally suspect."[184] The Comstock Act may provide a cautionary tale of how political actors can, in the absence of judicial review, pursue patently undemocratic strategies under the guise of democratic struggle.

My closing observation relates to the argument's jurisgenerative value—that is, the argument's potential for creating new legal meaning.[185] With an eye toward the future, this Essay's constitutional argument has

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180. *See* Tina Smith, *Opinion: I Hope to Repeal an Arcane Law that Could Be Misused to Ban Abortion Nationwide*, N.Y. TIMES (Apr. 2, 2024), https://www.nytimes.com/2024/04/02/opinion/comstock-act-abortion-repeal.html [https://perma.cc/Y28N-P8DA]; Joseph Choi, *Democrat Bush Calls to Repeal 'Zombie Statute' Raised in Abortion Pill Case*, HILL (Mar. 26, 2024, 2:47 PM), https://thehill.com/homenews/house/4557257-democrat-bush-calls-repeal-zombie-statute-raised-abortion-pill-case/ [https://perma.cc/4J7E-MDAJ].

181. *Cf.* Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 99 (2022) (arguing that enforcement of dead crimes undermines the rule of law).

182. This is, of course, not a novel argument but rather a context-specific application of Ely's case for judicial review as representation reinforcement. Ely famously read Footnote Four of *Carolene Products* to focus on "whether the opportunity to participate . . . in the political processes . . . has been unduly constricted." JOHN HART ELY, DEMOCRACY AND DISTRUST 77 (1980). *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (staking out a role for "more searching judicial inquiry" in cases where "prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ").

183. Jeremy Waldron notes, for example, that his argument against judicial review applies only assuming "a society has democratic and legislative institutions in good shape so far as political equality is concerned" and "that the members of the society we are considering are by and large committed to the idea of individual and minority rights." Waldron, *supra* note 177, at 1401; *see generally* Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1907 (2021) (arguing that "mobilization around courts can be democracy-promoting").

184. *Comstockery*, *supra* note 22, at 83–84.

185. Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1982) (defining "jurisgenesis" as "the creation of legal meaning").

the advantage of building jurisprudential ties between abortion rights and the guarantee of equal protection. Advocates of a constitutional abortion right have long lamented that equal protection doctrine was the road not taken to guaranteeing abortion as a constitutional right.[186] Thirty years ago, Professor Siegel articulated an equal protection argument for abortion rights based on historical efforts to criminalize abortion that were motivated by a desire to subjugate women.[187] Thirty years later, the Supreme Court ignored that history when it rejected the equal protection theory of abortion rights in *Dobbs*.[188] But as this Essay has suggested, the Comstock Act was one of those historical efforts. Recent attempts to revive the Comstock Act therefore present an opportunity for abortion rights advocates to use existing equal protection doctrine—doctrine that the Court in *Dobbs* reiterated—to safeguard abortion rights and force courts to finally grapple with this discriminatory history head on.

186. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 375 (1985); Jack M. Balkin, Roe v. Wade: *An Engine of Controversy*, *in* WHAT ROE V. WADE SHOULD HAVE SAID 36–37 (Jack M. Balkin ed., 2005); Kenneth L. Karst, *Foreword, Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 26 (1977); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

187. Siegel, *Reasoning from the Body*, *supra* note 64, at 347–80.

188. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022).