

TO: Members of Congress
RE: Memo to Repeal the Comstock Act
FROM: Healthcare Across Borders, Take Back the Court Action Fund, UltraViolet Action
DATE: Tuesday, May 14, 2024

INTRODUCTION

In June 2022, the U.S. Supreme Court [overturned](#) *Roe v. Wade*. Since that time, total abortion bans have gone into effect in 14 states, six-week bans in three states, and more limited bans in numerous others. These bans have created concurrent public health crises, with rising rates of death and illness due to pregnancy-related causes, individuals denied emergency care and left to bleed out in parking lots, and countless people forced to carry unintended or untenable pregnancies.

This situation was, unfortunately, foreseeable. For decades, many invested unwarranted faith in the longevity of *Roe*, even as the extremist right fought a ferocious and unmatched decades-long campaign to take over courts, state legislatures, and governors' offices across the country, while still trying to pass a national abortion ban. With no strategy to protect abortion outside of dependence on *Roe*, millions of people were left vulnerable.

There is no time for further complacency. The right continues to agitate for a complete national abortion ban. And it may soon be able to achieve its goal without a single vote in Congress. As Jonathan Mitchell, [the architect](#) of Texas's "bounty hunter" law and one of Donald Trump's personal lawyers stated [bluntly](#): "We don't need a federal ban when we have Comstock on the books." He was referring to the [Comstock Act](#), a Victorian-era "anti-obscenity" law that originally prohibited the mailing of materials used for abortion, as well as anything deemed "indecent" or "immoral."

Current Justice Department policy, based on nearly a century of precedent, correctly interprets the abortion provisions in Comstock in a way that does not impede the use of mailing services for lawful abortion care. Given that Comstock is still on the books, however, a future anti-abortion presidential administration could use it to effectively put an end to abortion and miscarriage management nationwide because if abortion providers cannot use the mail or express services to obtain pills, equipment, and supplies, clinics and abortion provision would become practically impossible.

And because the right is as determined to eliminate other critical medical and public health interventions—such as contraception, HIV prevention, clean needle exchange, and gender-affirming care—as it is abortion care, we anticipate that in the hands of a right-wing

administration, the language about “indecent” or “immoral” activity in Comstock could be interpreted to try to ban these and other forms of care.

This memo provides a brief overview of the Comstock Act, underscores what is at stake now, and urges Congress to move immediately to repeal this zombie law that threatens not just reproductive rights, but the entire fabric of public health in the United States.

WHAT IS THE COMSTOCK ACT?

Turning back the clock on our rights is not a euphemism or metaphor. The right is literally taking us back to the 1800s, as seen most recently in the Arizona Supreme Court’s [revival](#) of an 1864 abortion ban—a law recently repealed by the state legislature that nonetheless leaves the ban in place for several months—and attempts to maintain an even [older ban](#) in Wisconsin.

The Comstock Act is a broadly written 1873 “anti-obscenity” law that, in its current form, makes it illegal to use the United States Postal Service (USPS) ([or nationwide carriers](#) such as UPS and FedEx) to [transport or deliver](#) any “article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use.” Because of the dangers of too broadly interpreting the law, courts in the early 1900s read the abortion provision to apply only to unlawful abortions and the federal government hasn’t enforced the abortion provisions of Comstock since the early 1930s.

In its original form, Comstock also prohibited shipping and delivery of contraception. In 1971, Congress [repealed the provision applying to birth control](#) leaving the rest intact. Comstock’s application to abortion was effectively made even more irrelevant two years later in the Supreme Court’s 1973 decision in *Roe v. Wade*. But it remained on the books waiting to be exhumed by a right-wing movement dedicated to stripping people of their most fundamental rights. And in playing a long game, the right has arrived at its destination.

WHAT’S AT STAKE

The right-wing plan to deploy Comstock is not a vague or guarded scheme, but rather an explicit strategy for which conservatives are openly advocating. Jonathan Mitchell is hardly the only one who has pointed to Comstock. As legal scholars David S. Cohen, Greer Donley, and Rachel Rebouché [write](#), the right’s intentions are spelled out “in [litigation](#), [local ordinances](#), threatening letters by [state legislators](#) and [attorneys general](#), [media statements](#) and [plans for a Republican administration in 2025](#).” Indeed, in the March 26, 2024 oral arguments for [FDA v. Alliance for Hippocratic Medicine](#), Supreme Court Justices Samuel Alito and Clarence Thomas made clear exactly how conservative extremists could use the law to effectively ban abortion nationwide should Republicans regain the White House.

Using Comstock to ban abortion would be catastrophic for basic rights and public health, but this is far from the end goal. Based on past experience, we believe that notwithstanding

precedent, evidence, or costs to public health, a right-wing administration will feel empowered to go beyond banning abortion, potentially using the “indecent” or “immoral” language of the Comstock Act to prohibit distribution of the many other proven health interventions that are routinely attacked by political and religious extremists.

For at least 30 years, for example, in addition to the constant agitation for abortion bans, we have watched state legislatures dominated by right-wing majorities wield their power to enforce laws and policies [banning age-appropriate and accurate sex education](#), banning [clean needle exchange](#) and HIV prevention technologies, [denying care to transgender individuals](#), [redefining contraceptives](#) as abortifacients against all evidence, and promoting misinformation and propaganda about sex and sexuality.

Conservative extremists under a second Trump administration could use Comstock to attack access to contraception, as well as hormone treatment for gender-affirming care, HIV and AIDS prevention, and drugs for other STIs and STI-related illnesses. They may well use Comstock to limit access to Narcan and other forms of addiction treatment since the right considers addiction a personal moral failing and not a medical condition also of concern to public health. The right could also use Comstock to prevent dissemination of vaccines that prevent sexually transmitted infections like HPV, which is responsible for more than 95 percent of all cervical cancers.

Still, even if the plan was “only” to ban abortion care, Comstock is dangerous enough.

THE URGENCY OF ACTING NOW

It’s time to go on offense and shape the future we want to see. The Comstock Act is lying in wait for the next right-wing administration to distort and weaponize it. And it does not matter whether this happens in 2025 or in 2029—our politics are so fragile that it is no longer safe to leave this law on the books, irrespective of the outcome of one election or another.

The only way to prevent this is to take action to repeal Comstock. Congress must start that process now. Momentum for repeal is growing. Legal scholars Cohen, Donnelly, and Rebouché have written several pieces calling for repeal. The *Washington Post* editorial board [wrote](#) in favor of repeal, stating that: “Democrats should lead that effort while they still control the Senate and the White House.” Senator Tina Smith (D-MN) [wrote](#) a strong editorial supporting repeal. And Congresswomen Becca Balint (D-VT) and Cori Bush (D-MO) both have called for repeal. Senator Elizabeth Warren has also [issued warnings](#) about how a second Trump Administration would move to impose a federal abortion ban by reviving the Comstock Act.

Congress must act decisively to create the dynamic necessary to repeal this legislation. While we understand the current composition of Congress is not conducive to immediate repeal, introducing legislation now will force a critical public debate on Comstock, educate people about the dire consequences for basic human rights, public health, and medicine in the United States should Comstock be deployed by politicians on the right, and give voters the information they

need on this vital issue. Elected officials are responsible for informing their constituents about and leading on critical issues; forcing a public debate on Comstock now is a critical way of fulfilling that duty. Every candidate for office should be pressed on whether they support using Comstock to ban abortion, as well as whether they support Comstock's repeal. These efforts must go forward until this anachronistic law is eliminated.

Comstock is a reflection of deeply embedded patriarchal values and a world in which men control virtually everything. And though 151 years have passed, it is the misogynist quest to take back that power and control that animates much of our politics today. This makes the danger of resurrecting Comstock even greater—and the cost of not beginning the process of repeal even higher.

Repealing Comstock is the only sensible step for any lawmaker who cares about reproductive freedom, fundamental rights, and public health.