

Is there any value to the Comstock Act? Why isn't it totally removed?

The Comstock Act is an outdated and problematic law from the 1800s that is constitutionally defective in a number of respects. However, it has remained on the books as a “ghost law” largely because the Executive branch treated the law as unenforceable. It was further relegated to relic status after the Supreme Court decided *Griswold v. Connecticut* (establishing a right to contraception) and *Roe v. Wade* (establishing the right to abortion), which solidified that the law could not be enforced – because abortion and contraception were constitutionally protected, it couldn't be unlawful to send information, medication, or devices related to them through the mail. However, Congress never took action to repeal the Comstock law's abortion provisions.

Now, less than a year after *Roe* has been overturned, anti-abortion politicians and activists have focused renewed attention on the Comstock laws – even though the laws have never been understood to reach mailing materials for otherwise-lawful abortion care. It is difficult to predict whether these efforts will be successful. In the past, courts concluded that the Comstock laws did not apply to otherwise-lawful abortion care, and the Department of Justice recently issued an opinion reaching the same conclusion. However, we are in a new era where anti-abortion judges are willing to consider blatantly frivolous arguments to block access to reproductive health care. We are exploring the most effective ways to respond to this threat, whether it be litigation, a campaign to repeal the Comstock Act, or some combination of these tactics.



Will it be necessary to have state constitutional amendments to protect the right to have an abortion?

In a post-*Roe* world, the right to abortion is being fought out state by state. State constitutional amendments are one of the best ways to secure the right to abortion, providing people with the opportunity to bypass gerrymandered legislatures and use

the tool of direct democracy to ensure access to abortion in their state. We helped to make this happen in Michigan last November, when the people overwhelmingly passed a ballot measure enshrining the right to reproductive freedom into the state constitution. We are currently exploring the potential for similar efforts in other states where we believe the electorate supports abortion rights and there is a real need to regain or protect access. (These efforts are advancing the fastest in Ohio.)

This is an important strategy to ensure access wherever we can in the short term, but ultimately, we need a nationwide solution to restore access to abortion for every person in every state. This is why at the same time we are strategizing ways to build enough power to pass federal legislation that will codify a federal right to abortion and birth control, starting with leveraging the public's outrage around overturning *Roe* (as well as the lawsuit in Texas seeking to undermine medication abortion care).

What initiatives are being taken at the Federal level to codify Roe so that states cannot limit healthcare access for women?

As mentioned above, the ACLU's National Political Advocacy Department is aiming to pass federal legislation that will restore access to abortion and protect access to birth control in every state across the country. Our strategy includes: 1) building a layered and sustained constituent outreach plan that will educate the public around the harms of abortion bans and energize our millions of members and activists across the U.S. around abortion; 2) introducing federal legislation to codify the right to abortion and birth control nationwide, and pushing elected officials to go on the record about it; and 3) encouraging candidates who support abortion access to run on this issue so that when they win we have the political power needed to secure passage. We are in the process of selecting target states for this campaign, so we can invest deeply in places where a pressure campaign will have the biggest impacts.

Thank you for your questions!

For more information on the ACLU **Reproductive Freedom Project's** latest work, [click here](#).

And for more information on the ACLU's new **Abortion Criminal Defense Initiative**, which establishes a network of experienced criminal defense attorneys to defend those facing prosecution related to abortion care, [click here](#).

Note: Our work in this area is quickly developing. The answers above are accurate as of March 20, 2023. For the latest news and information, visit our site at the links above.