



The Comstock Act in Wisconsin

The likeliest path to an abortion ban in Wisconsin runs through the long-dormant Comstock Act, which a new administration could invoke without ever seeking a vote from Congress.

The Wisconsin Supreme Court recently agreed to hear two challenges to a 175-year old law that could be interpreted to outlaw abortions. This decision comes as national reporters and policymakers raise the alarm about what could prove to be the most consequential threat to reproductive rights in Wisconsin – and around the country – since the fall of *Roe* — the long-overlooked Comstock Act of 1873.

Even if anti-abortion politicians win control of the Senate and White House in 2024, it is unlikely they could pass federal abortion restrictions through Congress thanks to the filibuster. However, an influential conservative coalition has developed a plan to institute a nationwide abortion ban without Congress — through executive action. **Their secret weapon is the Comstock Act, which, despite its relative obscurity, could well provide an anti-choice President the means to strip reproductive protections from Americans in Wisconsin – and every other state across the country – with the stroke of a pen.**

The Comstock issue is both novel and complex. In part, that's because some anti-abortion advocates have sought to keep their Comstock plans out of the public eye.¹ Adding to the confusion, lawyers on different sides of the abortion issue have advanced different interpretations of the Comstock Act.

This report outlines how the Comstock Act could be used by an anti-choice president and the impact that could have in Wisconsin. As federal law, the Comstock Act would outlaw abortion in Wisconsin, despite efforts from Wisconsin residents and lawmakers to prevent the passage of anti-choice state legislation. If an anti-choice president is elected, the potential impact on Wisconsin from Day One could be catastrophic:

- Based on pre-*Dobbs* numbers, [9,944](#) women would be denied a medication abortion during the four year term of an anti-choice president if the Comstock Act is enforced.
- Some advocates, like the former Trump lawyer Jay Sekulow, are pushing to extend Comstock even further to include equipment used in surgical abortions, which would completely ban abortion, affecting an additional **15,876** women during a four year term.
- In total, over [26,300](#) women could see their reproductive freedoms further ripped away over the course of four years.

¹ Lisa Lerer and Elizabeth Dias, “Trump Allies Plan New Sweeping Abortion Restrictions,” *The N.Y. Times*, <https://www.nytimes.com/2024/02/17/us/politics/trump-allies-abortion-restrictions.html> (February 17, 2024) (“Mr. Mitchell, who represented Mr. Trump in arguments before the Supreme Court over whether the former president could appear on the ballot in Colorado, indicated that anti-abortion strategists had purposefully been quiet about their more advanced plans, given the political liability the issue has become for Republicans”); Amy Littlefield, “The Poison Pill in the Mifepristone Lawsuit That Could Trigger a National Abortion Ban,” *The Nation*, <https://www.thenation.com/article/society/comstock-act-jonathan-mitchell/> (April 26, 2023) (“I knew about Comstock before *Dobbs*, but I wanted to say nothing about it,” Mitchell told me. “I really was hoping nobody would say anything about the Comstock laws until *Dobbs* came out.” After all, if people understood that a nationwide abortion ban was lurking on the books, it would blow up any plausible claim that the justices were handing abortion back to the states”).

- The vast majority (93%) of women who seek abortion care do so during their first trimester of pregnancy. In Wisconsin, [24,400](#) who seek abortions before the end of their first trimester would be denied abortions during the four years of an anti-choice presidential administration. Had the former, anti-choice administration not appointed Supreme Court Justices who overturned *Roe v. Wade*, presidents would be constitutionally barred from banning those abortions. But now, they could ban them nationwide on Day One.
- Women of color would be disproportionately impacted – including the [12,660](#) of women who seek abortion care in Wisconsin and identify as Black or Hispanic.
- There would be major economic implications to an abortion ban: Women who are denied an abortion see their overdue debts climb, on average, by [78%](#) or \$1,750 a year, which would cost Wisconsin women \$11.5 million per year or \$46 million over four years.
- Additionally, banning abortion in Wisconsin could result in **288**² additional Wisconsin women being unemployed and **1,251**³ additional women living in poverty.

I. Background

Until recently, the Comstock Act primarily interested historians. Enacted in its initial form at the behest of notorious “anti-vice” crusader Anthony Comstock in 1873, the law made it a federal crime to convey a broad range of “obscene” or “lewd” material, like pornography, through the U.S. mail system.⁴ Over the first half of the twentieth century, courts and executive branch officials concluded that the Comstock Act’s most sweeping and vague provisions violated the First Amendment and were therefore unenforceable.⁵

At issue today, however, are two of the more specific criminal provisions of the statute,⁶ which remain on the books and explicitly reference abortion:

1. One provision, at 18 U.S.C. § 1461, declares “[e]very article or thing designed, adapted, or intended for producing abortion,” as well as “[e]very article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion,” to be “nonmailable matter.” The provision states that using the postal system to mail or receive such “nonmailable” items can result in prison sentences of up to 10 years.

² *Women denied abortions experience a 37.8% increase in unemployment. Wisconsin's unemployment rate is [2.9%](#). Of the 26,300 women who seek abortion care during a 4 year presidential term, we can assume 763 are already unemployed (2.9% of 26,300). A 37.8% increase in unemployment would be an additional 288 unemployed women.*

³ *Women denied abortions experience a 35.5% increase falling below the federal poverty line. In 2023, [13.4%](#) of Wisconsin women over 18 years of age lived below the poverty line, including approximately 3,524 of the 26,300 women who seek abortion care in Wisconsin over the course of a presidential term. A 35.5% increase is approximately 1,251 additional women who would fall below the federal poverty line.*

⁴ See “Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortion,” Off. of Legal Counsel, U.S. Dep’t of Justice 3–4 (Dec. 23, 2022), available at <https://www.justice.gov/olc/opinion/file/1560596/download> (hereafter “OLC Opinion”).

⁵ *Ibid.*

⁶ The text of the Comstock Act has undergone several revisions, which lie beyond the scope of this brief. Notably, in 1971 Congress removed explicit references to contraception from the statute. See Pub. L. No. 91-662, 84 Stat. 1973 (1971). Similar efforts by former Reps. Patricia Schroeder and Barney Frank to remove references to abortion from 1996-2001 never passed Congress. See H.R. 3057 (104th Congress); H.R. 2272 (105th Congress); H.R. 2808 (106th Congress); H.R. 1346 (107th Congress).

2. A second provision, at 18 U.S.C. § 1462, imposes similar criminal liability on anyone who “knowingly uses” delivery companies, common carriers or even the Internet to transport “any drug, medicine, article, or thing designed, adapted, or intended for producing abortion.”

Anti-abortion advocates believe these two provisions will, at minimum, allow a new administration to effectively terminate access to medication abortion, the most common method of abortion, nationwide — if not go further.

As described in the next section, the current Department of Justice (“DOJ”) has put forward its own legal interpretation of these provisions, and signaled that it will not enforce the Comstock Act. But a new administration would be free to chart a different path.

II. 2022 Office of Legal Counsel opinion

For the moment, the Biden DOJ has largely neutered the Comstock Act.

In December 2022, the Department’s Office of Legal Counsel (“OLC”) issued a memorandum outlining a “narrower” interpretation of Comstock than what “a literal reading [of the statute] might suggest.”⁷ According to the OLC, relevant case law from the first half of the 20th century indicates that the Comstock Act’s abortion prohibitions only properly apply to “unlawful” abortions, even though that word does not appear in the statute.⁸ The memo concludes that, due to the difficulties of ascertaining whether a sender or recipient has an unlawful intent, the federal government will not consider the interstate transport of medication abortion to constitute a Comstock violation.⁹

While the details of the OLC’s legal argument are somewhat technical, the memo’s practical impact is clear: under the current administration, the Comstock Act will remain a dead letter. With a few caveats, addressed below, this has effectively thwarted the anti-abortion movement’s Comstock campaign for now. Under our constitutional system, nobody but the DOJ gets to decide when to bring federal charges. This well-established principle, colloquially known as prosecutorial discretion, undergirds every decision the Department makes: from mundane choices about prioritizing prosecutorial targets to consequential policy shifts — most famously, recent administrations’ decision to not enforce federal laws criminalizing marijuana use.

However, OLC memos do not bind courts or future administrations. They offer only an interpretation of the law, and direct executive branch officials to act accordingly. A subsequent administration is free to revoke the 2022 memo and reverse course — as, indeed, the conservative administration-in-waiting hopes to do.

III. The Comstock revival plan

Led by the likes of Stephen Miller, Jonathan Mitchell, and the Heritage Foundation, influential segments of the conservative movement are planning to revive the Comstock Act should the presidency flip in 2024.

In the flagship conservative policy agenda for a forthcoming administration, “Project 2025,” Gene Hamilton, the vice president of America First Legal and a former senior official in the Trump DOJ, urges a new administration to withdraw the Biden legal interpretation, and instead enforce the Comstock Act’s “criminal

⁷ OLC Opinion at 5.

⁸ *Id.* at 1–2. What constitutes an “unlawful” abortion in the context of new state-level restrictions remains somewhat unclear under the OLC’s interpretation. *See id.* at n.5.

⁹ *Id.* at 1–2.

prohibitions,” against “providers and distributors of abortion pills.”¹⁰ Hamilton and his allies, such as the Alliance Defending Freedom, dispute the OLC’s characterization of early twentieth-century caselaw.¹¹ Instead, they offer a different narrative: *Roe v. Wade* rendered the Comstock Act’s abortion provisions unconstitutional; but now that the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* has overturned *Roe*, the statute is once again fair game.

If upheld in court, enforcing the law in this manner would effectively ban one of Wisconsin’s most common methods of abortion — medication abortion — overnight. No pharmacy or drug manufacturer could continue distributing medication abortion without using the U.S. postal service, delivery companies, common carriers, or the Internet. Those who persisted could face prison sentences of up to ten years if convicted. Notably, under the conservative theory of the statute, nothing would prevent the DOJ from expanding its list of targets to include individual patients — as former Reagan Attorney General Edwin Meese III has argued is possible.¹²

Further, medication abortion may only prove the tip of the Comstock iceberg. Because the law also encompasses “any ... article or thing designed, adapted, or intended for producing abortion,” some hope to extend the Comstock argument to medical equipment used in surgical abortions¹³ — an attempt to shutter every abortion provider across the state and the country.

It is important to understand that if the conservative interpretation prevails, **the Comstock Act, as federal law, would supersede all state level protections.** And because the Comstock Act already exists within the U.S. Code, a new administration could act without ever seeking a vote from Congress. All anti-choice advocates need to put their plan into action is a President willing to go along with it.

The coalition pushing this Comstock agenda includes prominent and influential conservative actors, such as:

- **Wisconsin member of U.S. Congress, Rep. Scott Fitzgerald,** urged the Supreme Court to use the Comstock Act to ban medication abortion in Wisconsin and nationwide.¹⁴

¹⁰ Gene Hamilton, “Chapter 17: Department of Justice,” *Mandate for Leadership: The Conservative Promise*, Project 2025 562 (2023), https://thf-media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf.

¹¹ Brief for the Respondents, Alliance for Hippocratic Medicine et al., *FDA v. Alliance for Hippocratic Medicine et al., Danco Laboratories, LLC v. Alliance for Hippocratic Medicine et al.*, Nos. 23-235, 23-236 56–58 (U.S. 2024), available at https://www.supremecourt.gov/DocketPDF/23/23-235/301142/20240222125412317_23-235%20%2023-236%20Brie%20for%20the%20Respondents.pdf.

¹² See Brief for Former U.S. Attorney General Edwin Meese III, *Alliance for Hippocratic Medicine et al., FDA v. Alliance for Hippocratic Medicine et al., Danco Laboratories, LLC v. Alliance for Hippocratic Medicine et al.*, Nos. 23-235, 23-236 (U.S. 2024), available at https://www.supremecourt.gov/DocketPDF/23/23-235/301928/20240229153221243_23-235%20-236%20bsac%20Meese.pdf.

¹³ Elaine Godfrey, “A Plan to Outlaw Abortion Everywhere,” *The Atlantic* (Dec. 6, 2023), <https://www.theatlantic.com/magazine/archive/2024/01/anti-abortion-movement-trump-reelection-roe-dobbs/676132/> (“The hopes of some activists go further. Their ultimate aim in reviving the Comstock Act is to use it to shut down every abortion facility ‘in all 50 states,’ Mark Lee Dickson, a Texas pastor and anti-abortion advocate, told me. Taken literally, Comstock could be applied to prevent the transport of all supplies related to medical and surgical abortions, making it illegal to ship necessary tools and medications to hospitals and clinics, with no exceptions for other medical uses, such as miscarriage care.”).

¹⁴ See Brief for 145 Members of Congress, *FDA v. Alliance for Hippocratic Medicine et al., Danco Laboratories, LLC v. Alliance for Hippocratic Medicine et al.*, Nos. 23-235, 23-236 (U.S. 2024), available at https://www.supremecourt.gov/DocketPDF/23/23-235/301819/20240229110746147_23-235%20Amicus%20Brief%20of%20145%20Members%20of%20Congress%20in%20Support%20of%20Respondents%20and%20Affirmance.pdf.

- **Project 2025**, the conservative movement’s planning hub for a new administration. Led by two former Trump administration officials, the project boasts that its 2016 iteration saw “more than two-thirds” of its proposals adopted within the Trump administration’s first year.¹⁵
- **The Heritage Foundation**, a leading conservative think tank sponsoring Project 2025.
- **America First Legal**, the legal outfit **Stephen Miller** founded and runs. **Gene Hamilton**, the organization’s vice president, wrote the Project 2025 transition chapter that recommends reviving Comstock Act enforcement.¹⁶ And Miller has been touted as a potential pick for Attorney General in a second Trump presidency.¹⁷
- **Speaker Mike Johnson (R-La.)**, who signed a letter alongside dozens of other members of Congress in 2023 urging the DOJ to enforce the Comstock Act against providers and distributors of medication abortion.¹⁸ More recently, **145 members of Congress** signed an amicus brief at the Supreme Court arguing that the existence of the Comstock Act should invalidate the Food and Drug Administration’s approval of mifepristone (more on this case below).¹⁹
- **Jonathan Mitchell**, Donald Trump’s lawyer in the Colorado ballot access case and the legal mind behind Texas’s SB-8 strategy.²⁰ For years, Mitchell has been quietly orchestrating Comstock’s revival.²¹
- **The Alliance Defending Freedom**, an influential legal nonprofit that has led litigation efforts to revive the Comstock Act.²²
- **20 GOP state attorneys general**, who signed a letter to Walgreens and CVS asserting the major pharmacies were in violation of the Comstock Act.²³
- **More than 50 other conservative organizations** that have co-signed Project 2025’s transition blueprint, including groups described as “machine-in-waiting” for a second Trump term.²⁴

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¹⁵ “About Project 2025,” Project 2025, <https://www.project2025.org/about/about-project-2025/> (last visited March 5, 2024).

¹⁶ “Leadership,” America First Legal, <https://aflegal.org/about/#leadership> (last visited March 5, 2024); Gene Hamilton, “Chapter 17: Department of Justice,” *Mandate for Leadership: The Conservative Promise*, Project 2025 562 (2023), https://thf-media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf.

¹⁷ Mike Allen and Jim VandeHie, “Behind the Curtain — Exclusive: How Trump would build his loyalty-first Cabinet,” *Axios*, <https://www.axios.com/2023/12/07/trump-loyalty-cabinet-2025-carlson-miller-bannon> (Dec. 7, 2023).

¹⁸ Letter re: OLC memo (Jan. 25, 2023), available at

<https://www.lankford.senate.gov/wp-content/uploads/media/doc/dojletterabortionmail.pdf>.

¹⁹ See Brief *amici curiae* of 145 Members of Congress, Alliance for Hippocratic Medicine et al., FDA v. Alliance for Hippocratic Medicine et al., Danco Laboratories, LLC v. Alliance for Hippocratic Medicine et al., Nos. 23-235, 23-236 (U.S. 2024), available at

https://www.supremecourt.gov/DocketPDF/23/23-235/301819/20240229110746147_23-235%20Amicus%20Brief%20of%20145%20Members%20of%20Congress%20in%20Support%20of%20Respondents%20and%20Affirmance.pdf.

²⁰ Abbie VanSickle, “Who Were the Lawyers Arguing the Trump Ballot Case?” *The N.Y. Times*, <https://www.nytimes.com/2024/02/08/us/elections/jonathan-mitchell-trump-ballot-case.html> (Feb. 8, 2024); Jeannie Suk Gersen, “The Conservative Who Wants to Bring Down The Supreme Court,” *The New Yorker* (January 5, 2023), <https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court>.

²¹ Jonathan Mitchell, “The Writ-of-Erasure Fallacy,” 104 Va. L. Rev. 933 (2018), available at https://virginialawreview.org/wp-content/uploads/2020/12/Mitchell_Online.pdf; see also *supra* at n. 1.

²² See *supra* at n. 9.

²³ Nick Visser, “20 Republican Attorneys General Warn CVS, Walgreens Against Mailing Abortion Pill,” *The Huffington Post*, https://www.huffpost.com/entry/republican-attorneys-general-cvs-walgreens-abortion-pills_n_63db2ff5e4b01a4363923f7d (Feb. 1, 2023).

²⁴ “The Project 2025 Advisory Board,” *Mandate for Leadership: The Conservative Promise*, Project 2025 xi (2023), https://thf-media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf; see Jonathan Swan, “A radical plan for Trump’s second term,” *Axios*, <https://www.axios.com/2022/07/22/trump-2025-radical-plan-second-term> (July 22, 2022).

According to the Guttmacher Institute, medication abortion now accounts for a majority of all U.S. abortions (63 percent of facility-based abortions in 2023). In Wisconsin, medication abortion was used in over 2,480 cases (about half of all abortions performed) in 2021. Typically, medication abortion consists of a two-pill regimen, using the drugs mifepristone and misoprostol. The Food and Drug Administration has approved the use of medication abortion through the first 10 weeks of pregnancy, and decades of research has confirmed that the method is safe and effective.²⁵ Banning mifepristone would eliminate one of the most common methods of abortion for Wisconsinites.

IV. An uncertain future

As long as the OLC maintains its current stance on Comstock, the statute will remain a relatively minor player in the post-*Dobbs* reproductive landscape. Under this status quo arrangement, the Comstock Act may well complicate related abortion fights (as described below), but the prospect of a nationwide abortion ban will remain off the table: not even the Supreme Court can tell the DOJ which cases to prosecute.

Should a new administration revoke the 2022 memo and launch Comstock prosecutions, however, the anti-abortion movement's Comstock ambitions may well be realized. The issue would inevitably reach the Supreme Court, currently dominated by a 6-3 conservative majority. Given the issue's novelty, we do not yet have direct evidence about how the justices might rule on a Comstock challenge (though, as described below, that may soon change). But reproductive freedom advocates have reasons for concern.

A Comstock case, after all, would likely be decided by the same Supreme Court majority that overturned *Roe v. Wade*. Already, two Trump-appointed federal judges, Matthew Kacsmaryk²⁶ and James Ho,²⁷ have written approvingly of anti-abortion Comstock theories. Each is a rising star in the Federalist Society, an influential legal organization with close ties to the Republican appointees on the Court.²⁸ Finally, reproductive freedom proponents need to be clear-eyed about the baseline legal plausibility of the Comstock threat. Shorn from its historical context, the literal text of the statute can read like a national abortion ban already enshrined into federal law (as the OLC memo effectively concedes).²⁹

In March, we received an indication about how some of the justices – specifically Justices Alito and Thomas – may rule on a future Comstock case. On March 26, the Supreme Court heard oral arguments on a challenge to the Federal Drug Administration's approval of mifepristone, one of the two drugs used in a typical medication abortion regimen.³⁰ Even though the Supreme Court technically only agreed to review a set of legal questions that did not implicate the Comstock Act directly, the anti-abortion litigants urged the Court to

²⁵ Rachel K. Jones et al., “Medication Abortion Now Accounts for More Than Half of All US Abortions,” The Guttmacher Institute, <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> (updated Dec. 1, 2022).

²⁶ Mark Joseph Stern, “The Lawless Ruling Against the Abortion Pill Has Already Prompted a Constitutional Crisis,” *Slate*, <https://slate.com/news-and-politics/2023/04/matthew-kacsmaryk-mifepristone-medication-abortion-supreme-court.html> (April 7, 2023).

²⁷ *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 267 (5th Cir. 2023) (James C. Ho, concurring in part and dissenting in part) (“I write separately to add that the 2021 revisions violate the Comstock Act, 18 U.S.C. §§ 1461–62, and are ‘not in accordance with law’ for that reason as well.”).

²⁸ See generally, Emma Green, “How the Federalist Society Won,” *The New Yorker*, <https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won> (July 24, 2022); David Montgomery, “Conquerors of the Courts,” *The Washington Post Magazine*, <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/> (Jan. 2, 2019).

²⁹ OLC opinion at 5 (“Over the course of the last century, the Judiciary, Congress, and USPS have all settled upon an understanding of the reach of section 1461 and the related provisions of the Comstock Act that is narrower than a literal reading might suggest”).

³⁰ Amy Howe, “Court schedules abortion pill case for March argument session,” *SCOTUSblog*, <https://www.scotusblog.com/2024/01/court-schedules-abortion-pill-case-for-march-argument-session/> (Jan. 29, 2024).

nonetheless address the Act directly,³¹ through at least ten amicus briefs that referenced the Act.³² As noted above, one of those briefs was signed by 145 Republican lawmakers, **including Wisconsin member of Congress, Rep. Scott Fitzgerald**. As a result, Justices Alito and Thomas raised the Comstock Act in their questioning, providing the Comstock theory with its first positive reception from at least two members of the Supreme Court.

V. Conclusion:

Since before *Roe v. Wade*, American abortion politics has revolved around a core premise: no matter how many harrowing restrictions manifest in red states, blue states will be free to guarantee reproductive rights for their residents. The anti-abortion movement's Comstock agenda threatens to render that assumption obsolete. If ultimately upheld by the Supreme Court, their plan would enable a new administration to ban methods of abortion nationwide with the stroke of a pen.

ABOUT GOVERNING FOR IMPACT

Governing for Impact (GFI) was founded in 2019 to advance progressive policy through executive action, including regulation. As a team of experts on administrative law and federal policy implementation, we look for innovative ways the Executive Branch can use new and existing legal authority to advance the interests of working Americans. Through rigorous legal analysis, advocacy at the agency level, and key partnerships with nonprofits and activist groups, our team aims to rebalance the existing power asymmetry between industry actors and public-minded progressive groups.

³¹ Brief for the Respondents, Alliance for Hippocratic Medicine et al., *FDA v. Alliance for Hippocratic Medicine et al.*, *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine et al.*, Nos. 23-235, 23-236 56–58 (U.S. 2024), available at https://www.supremecourt.gov/DocketPDF/23/23-235/301142/20240222125412317_23-235%20%2023-236%20Brief%20for%20the%20Respondents.pdf.

³² See “Food and Drug Administration v. Alliance for Hippocratic Medicine,” *SCOTUSblog*, <https://www.scotusblog.com/case-files/cases/food-and-drug-administration-v-alliance-for-hippocratic-medicine-2/> (last visited March 5, 2024).