

THE LAWS IN YOUR STATE, THE DAY AFTER

Roe v. Wade, the Supreme Court decision establishing a woman's right to abortion, remains under constant attack. In the 2004 version of this report, the Center for Reproductive Rights outlined the legal framework anti-choice forces were constructing to overturn abortion rights. Since that time, the anti-choice movement has added important new strategies. Now we can see more clearly how *Roe* would be toppled, and what anti-choice forces are doing to ensure that, if it is, abortion rights will be wiped out in several parts of the country. This study provides a detailed analysis of those strategies and their potential impact.

WHAT IF ROE

FALLS?

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WHAT IF *ROE* FELL?

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FEEL?

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I FEAR FOR THE FUTURE.
I FEAR FOR THE LIBERTY AND EQUALITY
OF THE MILLIONS OF WOMEN
WHO HAVE LIVED AND COME OF AGE
IN THE 16 YEARS SINCE *ROE* WAS DECIDED.
I FEAR FOR THE INTEGRITY
OF, AND PUBLIC ESTEEM FOR, THIS COURT.

— Supreme Court Justice **Harry A. Blackmun**

WEBSTER V. REPRODUCTIVE HEALTH SERVICES, JULY 3, 1989

We first released *What If Roe Fell?* in 2004, when many believed that the reversal of *Roe v. Wade*, the 1973 Supreme Court decision that recognized a woman's right to an abortion, was not possible, let alone likely. The experience of the last three years should have converted the last of the nonbelievers. The Supreme Court is now decidedly more conservative and less sympathetic to *Roe*, and just this year permitted a federal ban on a safe abortion procedure. In the states, there is likely to be increasingly frantic competition to put laws on the books that ban abortion at all stages of pregnancy, including laws that directly challenge *Roe*. In 2006, South Dakota passed one such law; only the vigorous mobilization of activists who secured repeal of the law by referendum headed off a constitutional showdown.

This updated *What If Roe Fell?* report offers the most recent and complete analysis of the plans underway to reverse *Roe* and undermine abortion rights in many states. Its purpose is to provide advocates, lawmakers, and reporters the most up-to-date information on the current activities and the threat levels in each state. It reveals the overt and covert techniques that opponents of reproductive rights are using, both to overturn *Roe* and then to create an alternate legal reality for women immediately thereafter. It equips defenders of a woman's right to choose with the legislative tools needed to fortify abortion rights in a state or stave off an intensifying opposition.

For decades, anti-choice activists have subjected *Roe* to a shrewdly organized, well-funded attack to limit access to legal abortion. The list of measures deployed to limit women's access to abortion is extensive. It includes—but isn't limited to—funding bans, mandatory delay laws, restrictions on teenagers' access, and state-imposed biased and misleading counseling requirements. And yet, over the past three years, opponents of legal abortion have pushed another, two-track strategy: bans-in-waiting, spring-loaded to criminalize abortion the instant *Roe* is overturned, and immediate bans that criminalize abortion as soon as they're signed into law.

Gonzales v. Carhart marked a decisive step away from *Roe*, effectively demonstrating that the new Court was willing to jettison women's health in favor of questionable ideology, even if doing so meant rejecting the advice of reputable women's medical experts, such as The American College of Obstetricians and Gynecologists.

Recent events have emboldened anti-choice forces. The most sweeping, and most threatening, of these events is the replacement of two Supreme Court justices, including Justice Sandra Day O'Connor, who had become the pivotal vote that allowed *Roe* to survive, weakened, but intact. Justice O'Connor's retirement, and the appointment of her more conservative successor Justice Samuel A. Alito, unleashed what appears to be a full frontal assault on *Roe*. Within the year following Justice O'Connor's departure, anti-choice legislators in nearly a dozen states rushed to introduce outright abortion bans, fully aware that doing so would violate federal law. Indeed, as the example of South Dakota shows, that was the point.

On April 18, 2007, this newly composed Supreme Court handed down its decision in *Gonzales v. Carhart*, for the first time upholding a ban on a safe abortion procedure without including an exception to protect the health of the woman. This marked a decisive step away from *Roe*, effectively demonstrating that the new Court was willing to jettison women's health in favor of questionable ideology, even if doing so meant rejecting the advice of reputable women's medical experts, such as The American College of Obstetricians and Gynecologists. Equally troubling was the Court's adoption of anti-choice rhetoric, including antiquated views of women's roles and decision-making ability. Justice Anthony Kennedy was the author of the majority opinion. For many pro-choice supporters who have viewed Justice Kennedy as certain to defend *Roe*, his *Carhart II* (For information on *Carhart I*, see Appendix "Overview of Supreme Court Decisions on Abortion and the Right to Privacy," on page 96) opinion caused deep consternation. In contrast, anti-choice activists view *Carhart II* as an invitation to redouble their attacks on *Roe*, seeing the current Court as possibly open to a direct challenge.

Justice Ruth Bader Ginsburg, the Supreme Court's remaining female justice, called the decision "alarming." In her vigorous and pointed dissent, she made clear that the Court was not following its established law: "...The Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of 'the rule of law' and 'the principles of *stare decisis*.'"

Fifteen years earlier, the Court's first female justice, Justice Sandra Day O'Connor, also identified the centrality of upholding *Roe* to the Court's institutional legitimacy and to women's ability to live free and equal lives. Writing for the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992, she explained: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed. An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society."

The United States, whose Constitution is one of the world's first human rights documents, is regressing on its commitment to women's dignity, equality, and self-determination. The retreat from *Roe* places the United States against the global trend in which reproductive rights are increasingly being recognized as human rights. Even countries that banned abortion entirely are coming around. Just last year, the Colombian Constitutional Court held

Americans can no longer rely on *Roe* to provide all women the right to abortion, now that the states are increasingly free to restrict what's left of the right and to lay the legal foundation for a post-*Roe* America.

unconstitutional the country's abortion ban: "Reproductive rights," the Colombian court said, "...emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting...reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice." Instead of being in the vanguard of freedom, the United States is going to the back of the line.

Americans can no longer rely on *Roe* to provide all women the right to abortion, now that the states are increasingly free to restrict what's left of the right and to lay the legal foundation for a post-*Roe* America. In the escalating fight to save the right to choose, pro-choice advocates will face many hurdles. Possibly the greatest is the public's disbelief. Many Americans don't believe *Roe* will be overturned, simply because they can't imagine abortion becoming a criminal act once again. And why should they? Almost the entire population of women of reproductive age has grown up with a legal right to abortion. One in three women in America will exercise that right, and a majority of Americans support it.

Over the last three decades, the pro-choice movement has sounded the alarm unremittingly. For some, this may have morphed into white noise. But those who wish to defend reproductive freedom in this country must act decisively. We must work against harmful laws, such as those that seek to eliminate legal abortion, and push for good ones, such as Freedom of Choice Acts and state constitutional amendments guaranteeing the right to legal abortion. We must be vigilant and organized, and we must be smart and proactive. For the majority of Americans who support the right guaranteed by *Roe*, the time to act is now.

— **Nancy Northup**

PRESIDENT, CENTER FOR REPRODUCTIVE RIGHTS

THE LEGAL LANDSCAPE

LAYING THE GROUNDWORK
FOR A NO-*ROE*
NATION

Legislators in seventeen states have seen the introduction of an unprecedented number of abortion bans, thirty-eight in total, over the last three years.

This updated report is the most current investigation of the efforts being waged by anti-choice forces to make abortion illegal in the United States. As we detail in this report, twenty-one states are likely to ban abortion almost as soon as *Roe v. Wade* is reversed. In only twenty states would abortion rights be safe. The remaining nine states would be battlegrounds. Where a woman lives and her income will largely determine whether she can legally obtain an abortion.

This report was initially released in 2004. Since then, with the retirement of Justice Sandra Day O'Connor and the appointment of her replacement Justice Samuel A. Alito, the Supreme Court has grown more conservative. Justice O'Connor was the decisive vote in holding the line against attacks on abortion rights. At the moment, just four of the nine justices appear to consistently hold that the U.S. Constitution protects key elements of the right to abortion, including the right of women to obtain abortions prior to viability and even later in pregnancy to protect their health.¹ The new alignment of the Court may push Justice Anthony Kennedy into the decisive role in any test of *Roe*, a worrisome turn for pro-choice forces. His decision this year to uphold a federal ban on a safe abortion procedure in *Gonzales v. Carhart*² shows he is receptive to restrictions on abortion. This does not bode well for *Roe*.

Seeing the Supreme Court apparently swinging in their favor, emboldened anti-choice forces have stepped up efforts to introduce legislation to force the Court to reexamine *Roe*. In fact, legislators in seventeen states have seen the introduction of an unprecedented number of abortion bans, thirty-eight in total, over the last three years. This push to overturn *Roe* resulted in the largest number of bills introduced to ban abortion in all stages of pregnancy since the early 1990s, when anti-choice advocates decided to test the waters after the *Webster v. Reproductive Health Services* decision.³

CALCULATING STATE VULNERABILITY TO CRIMINALIZE ABORTION IF *ROE* IS REVERSED

Understanding a state's abortion policy if *Roe* is reversed requires careful legal analysis of state laws, constitutions, and court decisions, as well as legislative and political considerations.

Based on our analysis, the following factors determine a state's level of risk to the right to choose within one year of *Roe* being overturned:

- (1) Existence of pre-*Roe* ban on the books that has never been blocked by the courts or ban-in-waiting;
- (2) Existence of abortion bans that are on the books, but have been blocked by courts;

- (3) Vulnerability to enact new ban based on political composition of state's legislature;
- (4) Existence of explicit protection for abortion rights in state's constitution that should survive the demise of *Roe*; and
- (5) Existence of statutes on the books that strongly protect a woman's right to abortion.

These overlapping factors establish that in thirty states, women are at risk of losing their right to abortion if *Roe* is overturned. In twenty-one of these states, women are at the highest risk. These states are extremely vulnerable to the revival of old abortion bans or the enactment of new ones; and none of them have legal protections for abortion. In

the remaining nine states, as well as the Commonwealth of Puerto Rico and the District of Columbia, protection for abortion rights would be uncertain. In some of these states, it is unclear whether the legislature would enact a ban after a *Roe* reversal, but their composition or past activity warrant concern. In others, there is some indication that the right to abortion could be protected under the state's constitution, but the right is by no means secure.

In only twenty states, we conclude, a woman's right to abortion appears secure because of established strong state constitutional or statutory protections or a friendly legislative environment.

IMMEDIATE BANS INTRODUCED BY STATE AND YEAR

2 in 2004

- Michigan
- South Dakota

4 in 2005

- Georgia
- Ohio
- South Dakota
- West Virginia

10 in 2006

- Alabama (2)
- Georgia
- Indiana
- Kentucky
- Louisiana
- Missouri
- South Dakota (enacted, repealed by referendum)
- Tennessee
- West Virginia

11 in 2007

- Alabama (2)
- Colorado
- Georgia
- Mississippi (3)
- Missouri
- North Dakota
- Ohio
- South Dakota

A New Legal Landscape Emerges: A Three-Pronged Attack

In the 2004 report, we outlined the legal framework anti-choice forces were constructing to overturn abortion rights. In the last three years, they have added important new strategies. Now we can see more clearly how *Roe* would be toppled, and what anti-choice forces are doing to ensure that, if it is, abortion rights will be wiped out in several parts of the country. The current anti-choice plan of attack consists of three types of abortion bans: immediate bans, bans that don't go into effect until *Roe* is overturned (henceforth known as “bans-in-waiting”), and pre-*Roe* bans.

HERE'S HOW THEY WORK

Immediate Ban: This is legislation that intentionally violates the basic tenets of *Roe v. Wade* with the goal of triggering a direct challenge to the decision. Anti-choice forces introduce this legislation fully cognizant that it is unconstitutional. The expectation is that by the time a case reaches the Supreme Court, a justice who supports *Roe* will retire and be replaced by a justice willing to rule against over thirty years of precedent and overturn *Roe*.

In 1991, two states, Louisiana and Utah, and the Territory of Guam enacted abortion ban laws; those bans have been declared unconstitutional — but the statutes still remain on the books.⁴ More recently, South Dakota enacted an immediate ban in 2006, but it was repealed by referendum.

Ban-in-Waiting: This is an increasingly popular way to pass an abortion ban. Bans-in-waiting are not immediate but, rather, spring into effect the instant or soon after *Roe* is overturned. These bans would not require any legal action to go into effect if *Roe* were reversed. While they do not get the attention of outright bans, bans-in-waiting are just as dangerous; indeed, in many ways they are more insidious (See box, Why Bans that Don't Go into Effect until *Roe* is Overturned are So Dangerous, on page 11). Louisiana, Mississippi, North Dakota, and South Dakota have all passed bans-in-waiting.

Pre-*Roe* Bans: These bans were enacted before *Roe* was decided, but became unenforceable once the Supreme Court made the landmark decision. Should *Roe* be overturned, these laws may be revived in one of two ways. In some states, a ban has never been declared unconstitutional or blocked by the courts, and therefore once *Roe* is overturned, state officials could take immediate steps to enforce the law by prosecuting abortion

WHAT IS YOUR STATE'S RISK LEVEL?

21 States at High Risk

Alabama, Arkansas, Colorado, Delaware, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

9 States at Middle Risk

Arizona, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, New Hampshire, and Pennsylvania.

20 States Likely Protected

Alaska, California, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Washington, West Virginia, and Wyoming.

Now we can see more clearly how *Roe* would be toppled, and what anti-choice forces are doing to ensure that, if it is, abortion rights will be wiped out in several parts of the country.

providers. In states where a court has enjoined or limited their pre-*Roe* ban, officials could file court actions immediately asking courts to lift the injunctions preventing enforcement of the law, so that the ban could go back into effect. Enforcement of the ban could begin within weeks or even days of a decision overturning *Roe*.⁵ Alabama, Delaware, Massachusetts, and Wisconsin have pre-*Roe* bans on the books that have not been blocked by the courts. Arizona, Arkansas, Colorado, Michigan, New Mexico, Oklahoma, Rhode Island, Utah, Vermont, West Virginia, and Puerto Rico have pre-*Roe* bans on the books that have been blocked by the courts.

The main argument against revival of pre-*Roe* bans is that the laws have been repealed by implication by laws regulating abortion enacted after *Roe*. (See box, Implied Repeal, on page 12.)

South Dakota: The Laboratory for Extreme Anti-Choice Legislation

In 2004, South Dakota introduced the first abortion ban to be considered by state legislatures in over a decade, setting in motion an anti-choice state legislative campaign bent on criminalizing abortion across the country, state by state.⁶ Governor Mike Rounds vetoed the ban not because it was unconstitutional, but because the measure, according to him, would have invalidated all of South Dakota's anti-choice laws while the legal challenge to the ban was addressed in court.⁷ Not to be discouraged, in 2005 the South Dakota Legislature passed a ban-in-waiting.⁸

Later that same year, the South Dakota Legislature convened a task force to “study the practice of abortion since its legalization.”⁹ It is clear now that the purpose of the Task Force to Study Abortion, as it was named, was to justify a total ban on abortion. Of course, this intent was not explicit, but to assure the desired outcome, the anti-choice legislators took a crucial initial step. They stacked the supposedly unbiased, supposedly scientific study group with leaders from the anti-abortion establishment, including the executive

BANS-IN-WAITING INTRODUCED BY STATE AND YEAR

0 in 2004

- No bans-in-waiting proposed

2 in 2005

- South Dakota (introduced two, one was enacted)

3 in 2006

- Kentucky
- Louisiana (enacted)
- Missouri

6 in 2007

- Mississippi (enacted)
- North Dakota (enacted)
- Oklahoma
- Texas (2)
- Utah

WHY BANS THAT DON'T GO INTO EFFECT UNTIL *ROE* IS OVERTURNED ARE SO DANGEROUS

Bans-in-waiting cannot be immediately challenged in court. These bans don't go into effect until *Roe* is overturned and cannot be challenged until then. It's as basic as this: when lawsuits are filed, they typically ask the court to block a law from taking effect. Because bans-in-waiting take effect at an indeterminate date, they cannot be challenged until that time. They, instead, lay in wait on the statute books establishing a foundation to ban abortion within days of a *Roe* reversal.

Bans-in-waiting are difficult to defeat in state legislatures. Because these bans don't

take effect immediately, they are perceived as less urgent and don't inspire the same public dialogue or outrage often needed to demand their defeat. Not one of the bans-in-waiting passed in the last three years has earned the same national media coverage as South Dakota's immediate ban did in 2006. In fact, the North Dakota ban-in-waiting passed in 2007 received no press coverage. And yet, each of them guarantees abortion will be outlawed in a state once *Roe* is overturned.

Bans-in-waiting provide anti-choice lawmakers political cover. Anti-choice lawmakers whose true intention is to outlaw abortion pass

bans-in-waiting so that no additional work will have to take place to outlaw abortion in their state if *Roe* is ever overturned. Legislators attempt to act as though they are passing a less extreme measure than a ban that is immediately challengeable. In doing so, legislators often attempt to shirk responsibility for enacting legislation that will outlaw abortion, claiming less accountability because the law will potentially not go into effect while they are in office. These bans are not less severe, however, and are a way for lawmakers to strip away the rights of women.

Copycat legislation surfaced all across the country. Immediate bans were proposed in twelve other states in 2006 and 2007 in response to the South Dakota law.

STATES WITH PRE-ROE BANS ON THE BOOKS THAT HAVE NEVER BEEN BLOCKED BY THE COURTS

- Alabama
- Delaware
- Massachusetts
- Wisconsin

director of Right to Life of South Dakota,¹⁰ a board member of the National Right to Life committee,¹¹ the director of the Respect Life office of the South Dakota Catholic Diocese¹² as well as the husband of the campaign manager of Vote Yes for Life,¹³ the organization leading the statewide campaign to ban all abortions. The result was a seventy-two-page report claiming to document why abortion was harmful not only to the “unborn,” but also to women and society.¹⁴ Legislators based the *Report of the South Dakota Task Force to Study Abortion* on inaccurate and discredited science. Equally disturbing, the report did this in the name of protecting women. As the language of the task force report made clear, women, in the opinion of the authors, are primarily and intrinsically maternal, best suited to be wives and mothers. Abortion has, in this view, both oppressed women and subverted their ‘nature’.¹⁵

In 2006, encouraged by the previous year’s efforts, and armed with the “findings” from the *Task Force Report*, the legislature passed an immediate ban on abortion, in total disregard of *Roe*. The bill read, “[t]he Legislature finds, based upon the conclusions of the South Dakota Task Force to Study Abortion, and in recognition of the technological advances and medical experience and body of knowledge about abortions produced and made available since the 1973 decision of *Roe v. Wade*, that to fully protect the rights, interests, and health of the pregnant mother, the rights, interest, and life of her unborn child, and the

IMPLIED REPEAL

When a law is expressly repealed, the legislature passes a new law that explicitly states that the old law is repealed.ⁱ Under the doctrine of implied repeal, if a new statute is enacted that conflicts with an older statute, the older statute is said to have been “repealed by implication” and can no longer be enforced. For example, when the Tennessee Legislature passed a law in 1988 requiring parental consent for minors seeking abortion and passed another law in 1989 requiring parental notice, the Tennessee Supreme Court ruled that the 1989 law repealed the earlier statute by implication.ⁱⁱ

In order to argue successfully that an abortion ban has been repealed by implication, and is therefore no longer enforceable, it is usually necessary to show that the state has subsequently enacted laws regulating abortion that cannot be reconciled with the ban. For example, after *Roe* was decided, the Louisiana Legislature passed several statutes

regulating abortion and setting forth the circumstances under which abortions would be permitted, without explicitly repealing its pre-*Roe* ban. A federal district court reviewing the laws found that an irreconcilable conflict existed between the statutes stating when abortion would be legal and the pre-*Roe* ban making abortion illegal. Therefore the ban was repealed by implication.ⁱⁱⁱ

However, this determination is often not so clear-cut. For example, many states have enacted restrictions on the abortions that are permitted in the state—such as a requirement that women wait twenty-four hours after receiving certain state-scripted and biased information before obtaining an abortion (“mandatory-delay/biased-counseling” laws)—rather than passing a statute affirmatively setting forth the conditions under which abortions are permitted. In this situation, a court could decide that these later-enacted statutes were not irreconcilable with an earlier ban statute by interpreting the mandatory-delay/biased-counseling law as a

regulation on the few abortions that might be allowed under the ban statute. For example, if the ban allowed abortions to save the woman’s life, the court could interpret the mandatory-delay law as regulating those few abortions performed to save the woman’s life, not as an indication that additional abortions were allowed. Under this reasoning, an abortion ban would not be viewed as irreconcilable, and therefore might be considered enforceable. A different court could reason that the enactment of the restrictions indicated that abortion was permitted (since there would be nothing to restrict if it wasn’t) and therefore find implied repeal of the ban. To complicate things further, although most states recognize the doctrine of implied repeal, courts in many states are reluctant to find implied repeal. Thus, while repeal by implication may be the best legal argument available against immediate enforcement of a pre-*Roe* ban, pro-choice advocates should consider other strategies as well.

mother's fundamental natural intrinsic right to a relationship with her child, abortions in South Dakota should be prohibited.”¹⁶

The bill only contained a life exception and omitted all others, including those for when a woman's health is at stake, or even when her pregnancy is the result of rape or incest. Rounds described the legislation as “a direct frontal challenge to *Roe v. Wade*.”¹⁷

South Dakota residents were able to reconsider the law before it took effect because it is one of only twenty-five states with a referendum process allowing citizens a direct vote on particular laws (See box, Direct Democracy, on page 14). Pro-choice forces successfully rallied South Dakota voters to reject the law, using the state's referendum process, and the law was repealed during the 2006 midterm elections.

Despite this defeat, the state's anti-choice energy and tactics inspired other states. Copycat legislation surfaced all across the country. Immediate bans were proposed in twelve other states in 2006 and 2007 in response to the South Dakota law. Many of them mirrored South Dakota's legislation, and relied on the findings of the South Dakota *Task Force Report*. Some bills even borrowed the language of the report, despite its anti-scientific and anti-woman underpinnings. The intention was clearly to prompt a court challenge that would permit the Supreme Court to revisit its *Roe* decision and overturn it.

In 2007, several South Dakota legislators publicly stated that they no longer wanted to play abortion politics.¹⁸ Nonetheless, another ban was quickly introduced.¹⁹ This one was also to take effect immediately, though this time legislators inserted a rape and incest exception. The bill passed the South Dakota House but it did not make it out of committee in the Senate before the legislature adjourned for the year.

Paternalism and Banning Abortion

The South Dakota abortion ban was based in large part on the false assertion that abortion should be outlawed because it hurts women.²⁰ This is a relatively new argument that shifts away from the traditional anti-choice approach, which has focused predominantly on the need to protect “the unborn.” Premised on an outdated and stereotypical belief that the prop-

STATES WITH PRE-*ROE* BANS ON THE BOOKS THAT HAVE BEEN BLOCKED BY THE COURTS:

- Arizona
- Arkansas
- Colorado
- Michigan
- New Mexico
- Oklahoma
- Rhode Island
- Utah
- Vermont
- West Virginia

“BANS-IN-WAITING” VS. “TRIGGER LAWS”

The difference between the bans-in-waiting identified in this report and the “trigger laws” referred to in our original 2004 report is that one is simply a policy and the other is an actual abortion ban. The 2004 report refers to six states with “trigger laws,” Arkansas, Illinois, Kentucky, Louisiana, Missouri, and Montana. All of these states have either constitutional or statutory provisions claiming that if the U.S. Constitution is amended or the abortion decisions of the Supreme Court are reversed or modified then the former policy of

the state to ban abortion would be reinstated.” However, all of these states have repealed or enjoined their pre-*Roe* bans or have enacted constitutional provisions that are in conflict with the bans. Therefore, except in Louisiana where a ban-in-waiting was enacted in 2006, there would be nothing to reinstate if *Roe* were overturned.

In contrast, bans-in-waiting, enacted in Louisiana, Mississippi, North Dakota, and South Dakota, contain two parts. First, language lays out how abortion will be banned

in the state, including what penalties will be faced by anyone who performs an abortion. Second, the language outlines when the ban will go into effect, such as “on the date that the states are recognized by the United States Supreme Court to have the authority to regulate or prohibit abortion at all stages of pregnancy.” Accordingly, these provisions put actual bans on the books that will go into effect within days of a *Roe* reversal.

Among the more egregious findings in the report is the uncorroborated claim that abortion causes women to suffer mental and physical side effects.

er role for women in society is that of a child bearer and mother, this new approach argues that abortion should be outlawed to protect and preserve these so-called immutable characteristics of womanhood. This anti-woman rhetoric was made official in the 2005 *Task Force Report*. Despite its apparently scientific language²¹, the entire process, as we saw, was biased against an objective consideration of evidence. In fact, even the anti-choice chair of the task force voted against the proceeding because she believed the process lacked transparency and was extremely one-sided.²² Nonetheless, the *Task Force Report* is being relied on by anti-choice advocates around the country to support their efforts to criminalize abortions.

Among the more egregious findings in the report is the uncorroborated claim that abortion causes women to suffer mental and physical side effects. Side effects occur, the report argues, because women are going against their predetermined role in society—that of mother and caregiver—when having an abortion.²³ Accordingly, the task force believes that when women choose to end their pregnancies, they are taking part in a practice that goes against their very nature, which causes them to suffer either “significant psychological trauma or distress” or debilitating physical side effects.²⁴ Yet the task force ignored credible medical evidence in reaching this conclusion, including a statement by the American Psychological Society that abortion has “no lasting or significant health risks.”²⁵

The *Task Force Report* uses the same arguments about women’s predestined role in society to back up the proposition that women are incapable of making decisions about abortion, and therefore, are incapable of truly choosing whether to end their pregnan-

DIRECT DEMOCRACY

The Referendum

When South Dakota passed a law that banned abortion in the state, opponents of the ban gathered over 38,000 signatures to put the measure on the ballot for a statewide popular vote.^v The law was challenged by a process called a referendum. Referenda allow citizens to vote on specific laws passed by the legislature. By using the referendum process, the citizens of South Dakota were given an opportunity to decide whether abortion should remain legal in their state and, by a margin of eleven percentage points, they rejected the ban.^{vi} Had the South Dakota voters not used a referendum to challenge the ban, it would have become law. At that stage, the only way to defeat the measure would have been through a court battle.

While a referendum is a critical tool that allows citizens to directly participate in the democratic process, only twenty-five states have this mechanism of review.^{vii} In fact, ten of the twenty-one states identified by this report as being most at risk of banning abortion do not allow for laws to be repealed by referendum. In addition, in those states that don’t have referenda and whose legislatures pass a ban that goes into effect when *Roe* is overturned, there is no remedy except in the courts.^{viii}

Ballot Initiatives

Another method that allows citizens to engage in the democratic process is the ballot initiative. Unlike referenda, which allow voters to challenge laws enacted by the legislature, ballot initiatives allow proposals that qualify to go directly to the ballot for popular vote. Twenty-four states allow initiatives.^{ix} Activists have used ballot initiatives to both undermine and protect access to abortion. Anti-choice forces

continue to use ballot initiatives to put the question of whether abortion should remain legal to the public for a vote.^x On the other hand, citizens in Washington and Nevada used the initiative process to guarantee that a woman’s right to an abortion is protected.^{xi} Using the initiative method allows voters, not the legislature, to enact the laws of their state. Ballot initiatives may be an effective way for pro-choice advocates to ensure that the right to abortion is protected in their state and also serve as a tool to push back against anti-choice legislators.

Focusing on the medically uncorroborated assertion that abortion hurts women, anti-choice legislatures and activists will continue to argue that abortion should be criminalized, and will use this same rhetoric to justify cruel tactics, such as forcing a woman to view an ultrasound image or listen to a fetal heartbeat.

cies. The report concluded that “[i]t is so far outside the normal conduct of a mother to implicate herself in the killing of her own child.”²⁶ According to the task force, either the abortion provider must deceive the mother into thinking the unborn child does not yet exist, and thereby induce her consent without her being informed, or the abortion provider must encourage her to defy her very nature as a mother to protect her child. Either way, this method of waiver denigrates a woman’s right to reach a decision for herself. Thus, in one fell swoop, a legislative body concluded that women are incapable of providing informed consent for an abortion, and only choose to terminate their pregnancies when they are coerced. In so doing, the report also “discounts women’s agency in abortion,” and insists that “women lack the judgment and independence necessary to make responsible decisions.”²⁷

The anti-woman rhetoric set forth by the *Task Force Report* is being used nationally to rationalize why abortions should be banned. In fact, of the seventeen bills introduced in 2007, six contained language that concluded that abortion should be outlawed to protect women.²⁸ Legislatures are also seizing on the notion that women do not have the capacity to be informed decision makers when deciding whether to have an abortion to justify the need for additional so-called informed-consent legislation, including requiring physicians to talk to women about the unsubstantiated physical and psychological effects associated with the termination of a pregnancy.²⁹ While this legislation is passed under the guise that it seeks to help women make informed decisions about their pregnancies, its true intent is to prevent women from having abortions. This anti-choice rhetoric has also infiltrated the judicial system. In the recent Supreme Court decision that upheld a restriction on abortion even though it did not contain an exception for women’s health, the Court reasoned, “[w]hile we find no reliable data to measure the phenomenon, it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”³⁰

This shift in messaging attempts to undo years of legal and social advancements secured by women.³¹ It not only seeks to undermine women’s ability to obtain safe and legal abortions, but portrays them as victims incapable of making important decisions about their reproductive health. Focusing on the medically uncorroborated assertion that abortion hurts women, anti-choice legislatures and activists will continue to argue that abortion should be criminalized, and will use this same rhetoric to justify cruel tactics, such as forcing a woman to view an ultrasound image or listen to a fetal heartbeat. Failure to fight back against these stereotypical notions of motherhood and women’s proper role will undermine not only reproductive freedom, but the advancement women have made toward achieving social, economic, and political equality.

See Endnotes on next page.

ENDNOTES

THE LEGAL LANDSCAPE

- 1 *Gonzales v. Carhart*, U.S., 127 S. Ct. 1610 (2007).
 - 2 *Id.*
 - 3 *Webster*, 492 U.S. 490 (1989).
 - 4 *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992); *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992), *aff'd*, 102 F.3d 1112 (10th Cir. 1996); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992).
 - 5 Anti-choice officials in some states and territories may try to immediately enforce pre-Roe bans without going through proper judicial channels; in such cases, pro-choice advocates should immediately go to court to block the prosecutions on the basis that the court injunctions are still in effect.
 - 6 H.R. 1191, 2004 Leg., 79th Sess. (S.D. 2004).
 - 7 *South Dakota's Governor Says He Favors Abortion Ban Bill*, THE NEW YORK TIMES, Feb. 25, 2006, at A9.
 - 8 H.R. 1249, 2005 Leg., 80th Sess. (S.D. 2005).
 - 9 *Report of the South Dakota Task Force to Study Abortion* (December 2005), available at <http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf> (hereafter *Task Force Report*).
 - 10 Monica Davey, *Vote Due on South Dakota Bill Banning Nearly All Abortions*, NEW YORK TIMES, Feb. 22, 2006.
 - 11 National Right to Life News, NRLC Board Honors Geline Williams, Jay Duenwald, and Grassroots Volunteers, Volume 33: Issue 7 (July 2006), available at <http://nrlc.org/news/2006/NRL07/Resolutions.html>.
 - 12 Respect Life, Catholic Diocese of Sioux Falls website, <http://diocese-of-sioux-falls.org/respectlife/nfp.html> (last visited October 23, 2007).
 - 13 Myra Batchelder, *Who Is Leslee Unruh?*, *Planned Parenthood News*, May 10, 2006, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/teen-pregnancy-sex-education/leslee-unruh-6248.htm>.
 - 14 *Task Force Report*.
 - 15 *Id.*
 - 16 H.R. 1215, 2006 Leg., 81st Sess. (S.D. 2006).
 - 17 See <http://www.msnbc.msn.com/id/11542260/>.
 - 18 *Abortion Ban: Why Derailed?* ARGUS LEADER (Sioux Falls, S.D.), Feb. 26, 2007.
 - 19 H.R. 1293, 2007 Leg., 82nd Sess. (S.D. 2007).
 - 20 H.R. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006) ("to fully protect the rights, interests, and health of the pregnant mother . . . and the mother's fundamental natural intrinsic right to a relationship with her child, abortions in South Dakota should be prohibited.").
 - 21 *Task Force Report*.
 - 22 *South Dakota Task Force Approves Final Report on Abortion-Related Issues: Some Members Disappointed With Outcome*, KAISER DAILY WOMEN'S HEALTH POLICY REPORT, Dec. 15, 2005, available at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=34333. See also Lauren Bans, *Anatomy of a Bad Law*, THE NATION, Mar. 30, 2006, <http://www.thenation.com/doc/20060417/bans>.
 - 23 *Task Force Report* at 41–47.
 - 24 *Id.* at 41–48 ("It is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without the risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and health capability of a woman whose natural instincts are to protect and nurture her child.").
 - 25 Reva B. Siegel and Sarah Blustein, *Mommy Dearest*, THE AMERICAN PROSPECT, Sept. 17, 2006, available at <http://www.prospect.org/cs/articles?articleId=12011>.
 - 26 *Task Force Report* at 56.
 - 27 Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, U. ILL. L. REV. 991, 1032, (2007).
 - 28 H.R. 329, 2007 Leg., Reg. Sess. (Ala. 2007); H.R. 1, 149th Gen. Assem., Reg. Sess. (Ga. 2007); S. 2795, 2007 Leg., Reg. Sess. (Miss. 2007); H.R. 1241, 2007 Leg., Reg. Sess. (Miss. 2007) H.R. 1293, 2007 Leg., 82nd Sess. (S.D. 2007); H.R. 175, 80th Leg., Reg. Sess. (Tex. 2007).
 - 29 Four bills introduced during the 2007 legislative session in New Hampshire, North Dakota, Texas, and Wyoming would have required providers to warn women seeking an abortion of an increased risk of breast cancer.
 - 30 *Gonzales v. Carhart*, U.S., 127 S. Ct. 1610 (2007).
 - 31 "There was a time, not so long ago, when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. . . . Those views. . . . are no longer consistent with our understanding of the family, the individual, or the Constitution. . . . Women, it is now acknowledged, have the talent, capacity, and right to participate equally in the economic and social life of the Nation. . . . Their ability to realize their full potential . . . is intimately connected to their ability to control their reproductive lives." 127 S. Ct. 1619 at 1641 (Ginsburg, dissenting) (internal citations omitted).
- amended . . . then the former policy of this State to prohibit abortions shall be enforced."
- ## DIRECT DEMOCRACY
- v H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006).
 - vi *South Dakota Ban Rejected*, USA TODAY, Nov. 11, 2006.
 - vii Alaska, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming.
 - viii Neither Louisiana nor Mississippi allows for laws to be challenged by referendum. Yet both states have led the charge to outlaw abortion and recently enacted bans with delayed effective dates. The citizens of each state were thereby left helpless to challenge these laws.
 - ix Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming.
 - x See, e.g., *In re Initiative Petition* No. 349, 838 P.2d 1 (Okla. 1992) (invalidating the initiative on the grounds that it sought a vote on a measure that would, if approved, be unconstitutional
 - xi Wash. rev. code ann. §§ 9.02.100, 9.02.110, 9.02.140, 9.02.160.
- ## IMPLIED REPEAL
- i For example, this occurred in Florida when the legislature explicitly repealed a parental-consent requirement that had been ruled unconstitutional by the Florida Supreme Court. See *In re T.W.*, 551 So. 2d 1186 (1989).
 - ii *Planned Parenthood of Nashville v. McWhorter*, 817 S.W.2d 13, 16 (1991); see also *McCorvey v. Hill*, No. 03-10711 (5th Cir. Sept. 14, 2004) (Texas's pre-Roe statute repealed by implication).
 - iii *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990).
- ## BANS-IN-WAITING VS. TRIGGER LAWS
- iv Arkansas – constitutional provision stating that it is the policy of Arkansas to protect life of every unborn child from conception until birth, to extent permitted by the federal Constitution.; Illinois – statutory provision on the books stating that it is the policy of the state "that the unborn child is a human being from time of conception" . . . and that it is a longstanding policy "to protect the life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because decisions of the United States Supreme Court . . . and therefore, if those decisions are reversed or modified . . . then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."; Kentucky – "if U.S. Constitution is amended or relevant judicial decisions are reversed or modified . . . policy . . . to protect the lives of all human beings regardless of their degree of biological development shall be fully restored."; Louisiana – if "those decisions of the United States Supreme Court are ever reversed or modified or the Constitution is

HOW WILL A *ROE* REVERSAL AFFECT WOMEN IN THE STATES?

A **Supreme Court decision** to overturn *Roe v. Wade* most likely would not by itself make abortion illegal in the United States.³² Rather, such a decision would remove federal constitutional protection for the right to choose and give each state the authority to set its own abortion policy, including banning abortion outright. The only states in which the right to choose would be protected from changes in the political winds are states whose state constitutions provide strong protection independent of the U.S. Constitution or states with strong statutory protection. Given the variations in law and political climates in the fifty states, the overturning of *Roe* would result in a patchwork of rights in which women seeking abortions would be strongly protected in some states and completely denied the right in others, with different levels of protection in between. This means a woman's ability to access safe abortion services will vary according to where she lives.

If *Roe* is overturned, there is a strong possibility that a clandestine, illegal underground will again emerge to meet the need for abortions, a need that virtually no one believes will disappear. For women resorting to unsafe illegal abortions the dangers are abundant.

History demonstrates that banning abortion does not end its occurrence.³³ Once abortion is no longer protected by law, many women will turn to illegal and often dangerous means to terminate their pregnancies. Moreover, banning abortion will lead to a dramatic increase in the number of women seeking abortion later in pregnancy, which heightens the risks associated with the procedure. The time it takes to get an abortion is considerably longer when it also involves raising additional funds and organizing an out-of-state trip. If *Roe* is overturned, there is a strong possibility that a clandestine, illegal underground will again emerge to meet the need for abortions, a need that virtually no one believes will disappear. For women resorting to unsafe illegal abortions, the dangers are abundant.

The banning of abortion will have the most devastating impact on poor and low-income women — who often struggle just to secure the resources to pay for an abortion and will likely have difficulty affording travel to a state where abortion remains legal.³⁴ The difficulties of travel for poor women are highlighted by the Hurricane Katrina disaster in Louisiana. In that life-threatening emergency, many poor families in Louisiana did not have the money or transportation to leave the state without significant government assistance.³⁵ If poor women were unable to travel out of state in order to escape the horrifying conditions caused by Hurricane Katrina, it is highly unlikely that they will be able to travel to another state to obtain an abortion. This disparity will force low-income women to carry unwanted pregnancies to term or resort to illegal means, often in unsafe conditions, to end them.³⁶

Yet, it is the states with the poorest populations that are most aggressively trying to make abortion illegal. In fact, of the ten poorest states,³⁷ the Center found that seven are highly likely to ban abortion within a year of a *Roe* reversal, and two of these states (Mississippi and Louisiana) have recently enacted laws to ban abortion within days of *Roe* being overturned.³⁸ Notably, these states are also comprised of large populations of color, creating a reality where poor women of color will have the most difficulty obtaining an abortion in a post-*Roe* world.

Some women who are unable to find other means to end an unwanted pregnancy will resort to a self-induced abortion.³⁹ Currently, six states have statutes criminalizing self-induced abortion.⁴⁰ Some of these laws have been selectively used to prosecute women who have resorted to ending their pregnancies by self-induction.⁴¹ With the fall of *Roe*, there will likely be a push to enact more laws that prosecute women who self-induce.⁴² This will create a greater divide between women with resources and those without. Wealthy and middle-class women will be able to avoid prosecution by traveling to states where abortion is legal, while poor women will face criminal prosecution, and possibly go to prison, for attempting to terminate their pregnancies on their own.

The right to health, including reproductive health care, and the right to decide freely and responsibly the number and spacing of one's children, are well established under human rights law. Abortion is an essential part of reproductive care, and access to abortion is critical for women in order to participate equally in society with autonomy and dignity as their human right. Even if *Roe* is overturned, we must do what we can to avoid and minimize the grave injustice and denial of human rights that will occur as some states move to ban abortion.

THE SOLUTIONS

WHAT CAN YOU DO TO

PROTECT
YOUR RIGHT TO AN ABORTION?

Pro-choice lawmakers at both the federal and state levels should consider introducing legislation that protects a woman's ability to make her own reproductive health decisions, including abortion.

To begin, pro-choice advocates must educate themselves about the status of abortion rights in each state. They must then confront and counter the legislative challenges of the anti-choice forces state by state. By understanding the anti-choice strategies detailed in this report, pro-choice advocates can lay their own legislative groundwork to protect the right to choose in the event that *Roe* is overturned.

As indicated in the state-by-state legal analysis that follows, the pro-choice strategy in a state depends on the legal, legislative, and political reality. Whatever the local reality, there are a number of broad legislative strategies that advocates should immediately consider to protect access to abortion. In some states, only defensive strategies are realistic; in others, advocates should consider a proactive strategy to protect the right to choose. The following are ways to protect reproductive rights.

Enact federal and state legislation protecting the right to choose abortion.

Pro-choice lawmakers at both the federal and state levels should consider introducing and/or supporting legislation that protects a woman's ability to make her own reproductive health decisions, including abortion. A Freedom of Choice Act (FOCA) not only prevents further erosion of a woman's right to choose, but also guarantees reproductive freedom when *Roe* is overturned.

At the federal level, a FOCA has already been introduced. If enacted, that FOCA would supersede existing state restrictions on abortion, and prohibit state legislatures from enacting measures that deny or interfere with a woman's ability to continue or end a pregnancy, thus avoiding the unjust disparities that would result from individual legislatures determining the availability of abortion in their state.

Similar to the federal FOCA, a state FOCA protects a woman's right to choose in the state where the legislation passed. Several states with pro-choice legislatures have already enacted, FOCA's. Those states include California, Connecticut, Hawaii, Maine, Maryland, Nevada, and Washington.

State lawmakers and advocates should weigh a series of factors in assessing whether this strategy is appropriate for their state.

For instance:

- Does the state constitution already provide protection for the right to choose abortion?
- If not, how likely is pro-choice legislation to be enacted in the state?
- Will a compromise have to be reached to achieve success? Is the price of such a compromise too steep?
- What is the possibility of a legislative backlash, leaving the state with a legal framework worse than it already has? For example, would a pro-choice preemptive approach provoke abortion ban legislation or an anti-choice ballot initiative process?
- Is the governor likely to veto or sign a FOCA?

The energy of anti-choice legislators will only increase as they sense that *Roe* is in danger. Their efforts will become more focused if the composition of the Supreme Court changes again and as controversial litigation, including any possible challenge against immediate abortion bans, makes its way to the Court.

After considering these factors, lawmakers and advocates may wish to introduce a Freedom of Choice Act. To help with this task, we have provided model bill language in the Appendix to this report. This is only a model—advocates will need to draft a bill that fits the specific situation and political/legislative climate of their particular state. Legal experts from the Center for Reproductive Rights are available for consultation on how best to tailor the model bill into a workable program for a given state.

If pro-choice advocates decide against introducing a preemptive bill, they may consider other strategies that will not provide as much protection for reproductive rights but will, nonetheless, send a strong message and promote the right to choose. For example, advocates could introduce a legislative resolution to protect choice as was done in Vermont.⁴³

Repeal pre-*Roe* laws banning abortion.

In states in which pre-*Roe* bans remain on the books, especially those where the law has not been declared unconstitutional, advocates should consider attempting to have the ban explicitly repealed. Here, too, advocates will have to assess the possibility of a legislative backlash.

Monitor constitutional developments.

In states in which abortion rights may be protected under the state constitution, advocates should work to ensure that their highest state court judges—whether elected or appointed—are supportive of privacy and abortion rights. It is also wise to monitor privacy cases—even those that are not explicitly related to abortion rights—that could provide an early warning that protections for reproductive rights are at risk of being undermined. Finally, advocates should oppose any efforts to amend the state constitution if the proposed amendment would undermine the right to privacy generally or, more specifically, the right to choose abortion.

Prepare now to block passage of new bans.

The energy of anti-choice legislators will only increase as they sense that *Roe* is in danger. Their efforts will become more focused if the composition of the Supreme Court changes again and as controversial litigation, including any possible challenge against immediate abortion bans, makes its way to the Court. Therefore, advocates should immediately begin to formulate their strategy to prevent abortion bans from being enacted. They should build strong coalitions and gather data to demonstrate how truly harmful an abortion ban will be for women in the state. While in many cases it will not be possible ultimately to block passage of these bans, advocates may be successful in reducing the severity of the language of the ban by, for example, attaching amendments with broad exceptions.

ENDNOTES

NO-ROE REALITY

- 32 This report presumes that a decision to overrule *Roe* will leave regulation of abortion to the discretion of the states (and Congress, possibly), rather than command a prohibition on abortion by finding that the fetus or embryo is a “person” under the Fourteenth Amendment and therefore entitled to protection from the state.
- 33 Heather D. Boonstra et al., *Abortion in Women’s Lives 13*, GUTTMACHER INSTITUTE (May 2006), citing C. Tietz and S. Lewit, *Abortion*, SCIENTIFIC AMERICAN 220(1): 21–27 (1969).
- 34 Tabulations made using state-specific abortion-provider numbers from the GUTTMACHER INSTITUTE for the states expected to outlaw abortion or where the status of abortion rights would be unclear if *Roe* were overturned, available at <http://www.guttmacher.org/statecenter/ind ex.html> (accessed July 18, 2007)
- 35 Fussell, Elizabeth. *Leaving New Orleans: Social Stratification, Networks, and Hurricane Evacuation*. June 11, 2006, available at <http://understandingkatrina. ssrc.org/Fussell/>.
- 36 *Id.* at 13.
- 37 Ten poorest states in order: Mississippi, Louisiana, District of Columbia, New Mexico, West Virginia, Texas, Arkansas, Alabama, Kentucky, and Oklahoma. U.S. Census Bureau, *United States and States: Percent of People Below Poverty Level in Past 12 Months: 2005, R1701*, AMERICAN COMMUNITY SURVEY (2005), available at http://factfinder.census.gov/servlet/GRT1a?_lang=en&-format=US-30&-CONTEXT=grt.)
- 38 In Mississippi, a state with both the highest poverty rate and largest African-American population in the country (U.S. Census Bureau, *United States and States: Percent of People Below Poverty Level in Past 12 Months: 2005, R1701*, and *Percent of the Total Population Who Are Black or African American Alone: 2005, R0202*, AMERICAN COMMUNITY SURVEY (2005)). If *Roe* is overturned, the nearest out-of-state abortion provider from Jackson would be located in New Orleans, La., Mobile, Ala., or Tuscaloosa, Ala., each approximately 180 miles away. However, because the state of Louisiana has a ban on the books abortion will immediately be outlawed in Louisiana if *Roe* is reversed. Additionally, Alabama has a pre-*Roe* ban on the books that has not been enjoined and will likely go until effect within days of a *Roe* reversal. (ALA. CODE § 13a-13-7.) Women in Jackson, Miss., will, therefore, be forced to travel 210 miles to Memphis, Tenn., to secure a legal termination.
- 39 Boonstra et al. at 13, citing S. Polgar and E.S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, FAMILY PLANNING PERSPECTIVES 8(3): 125–127 (1976). (“One in ten [low-income women living in New York City in the 1960s] said they had attempted to terminate a pregnancy illegally, almost always with a self-induced abortion.”)
- 40 See 11 DEL. CODE ANN. tit. 11 § 652 (2007) (self-induced abortion categorized as a Class A misdemeanor); IDAHO CODE ANN. § 18-606(2) (2006) (\$5,000, fine and/or 1–5-year prison sentence for women who knowingly terminate their pregnancies); NEV. REV. STAT. § 200.220 (2006) (felony punishment for a woman who self-induces after twenty-four weeks, carrying a prison sentence of 1–10 years and a maximum \$10,000 fine); N.Y. [Penal] Law §§ 125.50-55 (2004) (self-induced abortion categorized as a Class B misdemeanor if not performed by or under the advice of a licensed physician, rising to a Class A misdemeanor after twenty-four weeks LMP); 63 OKLA. STAT. ANN. § 1-733 (2004) (criminalizing self-induced abortions except under the supervision of a physician; S.C. CODE ANN. § 44-41-80(b) (1976) (self-induced abortion is a misdemeanor punishable by a prison sentence up to two years and/or a fine of \$1,000).
- 41 Brian R. Ballou and Raja Mishra, *Alleged Bid to Abort Leads to Baby’s Death*, THE BOSTON GLOBE, Jan. 25, 2007; Ann Friedman, *Mail-Order Abortions: Pfizer’s Little Secret*, MOTHER JONES, Nov./Dec. 2006.
- 42 John Leland, *Abortion Might Outgrow Its Need for Roe v. Wade*, THE NEW YORK TIMES, Oct. 2, 2005.
- 43 Vt. Acts & Resolves H.R. 4, S.R. 8 (2003).

**ABORTION
BAN BILLS
BY YEAR AND STATE**

ABORTION BAN BILLS

By Year and State

	2004		2005	
STATE	MICHIGAN	SOUTH DAKOTA	GEORGIA	OHIO
BILL NUMBER	HB 6366	HB 1191	H 93	H 228
PENALTIES	<ul style="list-style-type: none"> • Life imprisonment; • Or fine up to \$50,000; • Or both. 	<ul style="list-style-type: none"> • Class 5 felony: 5 years in state penitentiary and possible \$10,000 fine. 	<ul style="list-style-type: none"> • For first offense, 2nd-degree felony: 3–10-year prison term and fine up to \$20,000; • For second offense, 1st-degree felony: 2–8-year prison term and fine up to \$15,000. 	<ul style="list-style-type: none"> • For first offense, 1st-degree felony: 3–10-year prison term and fine up to \$20,000; • For second offense, 2nd-degree felony: 2–8-year prison term and fine up to \$15,000.
EXCEPTIONS	<ul style="list-style-type: none"> • “Necessary to preserve the life of the pregnant woman”; • “Serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman”; • “An action taken by a physician that results in the accidental or unintentional injury or death of the unborn child”; • “A mother upon whom an abortion is performed or attempted”; • “Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions.” 	<ul style="list-style-type: none"> • “Necessary to preserve the life of the pregnant woman”; • “Serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “The pregnant mother upon whom an abortion is performed or attempted”; • “Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions.” 	<ul style="list-style-type: none"> • None. 	<ul style="list-style-type: none"> • “Medical treatment to prevent the death of the pregnant woman [that]... without intent to do so, causes the termination of the pregnant woman’s pregnancy.”
EFFECTIVE DATE	90 days after legislative adjournment.	First day of July in year of passage.	Immediately upon becoming law.	October 29, 2005, or the earliest date permitted by law, whichever is later.

Since 2004, emboldened anti-choice forces have quickly constructed a new plan to ensure that abortion is banned in all stages of pregnancy in as many states as possible if *Roe* is overturned. In the last three years, seventeen states have introduced thirty-eight abortion bans, both immediate bans and bans-in-waiting.

The following chart provides a year-by-year look at all of those bans, including details of how doctors would be penalized, the

limited circumstances under which the bans would not apply, and when they would go into effect.

Five bans have been enacted thus far, including South Dakota's immediate ban (**H 1215**) in 2006, which was repealed by referendum. Bans-in-waiting were passed in South Dakota (**H 1249**) in 2005; Louisiana (**S 33**) in 2006; and Mississippi (**S 2391**) and North Dakota (**H 1466**) in 2007.

BILL PASSED				2006
SOUTH DAKOTA	SOUTH DAKOTA	SOUTH DAKOTA	WEST VIRGINIA	ALABAMA
H 1249	S 198	S 203	HB 2941	H 791
<ul style="list-style-type: none"> • Class 6 felony: 2 years in state penitentiary; • Or a \$4,000 fine; • Or both. 	<ul style="list-style-type: none"> • Class 5 felony: 5 years in state penitentiary and possible \$10,000 fine. 	<ul style="list-style-type: none"> • Class 1 felony: 50 years in state penitentiary and possible \$50,000 fine. 	<ul style="list-style-type: none"> • Minimum 2-year prison term for each offense. 	<ul style="list-style-type: none"> • Class A felony: life imprisonment; • Or 10–99-year prison term and possible fine up to \$60,000.
<ul style="list-style-type: none"> • “Necessary to preserve the life of the pregnant female.” 	<ul style="list-style-type: none"> • Necessary to preserve the life of the pregnant woman”; • “Serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “The pregnant mother upon whom an abortion is performed or attempted”; • “Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions.” 	<ul style="list-style-type: none"> • “Necessary to preserve the pregnant female’s life.” 	<ul style="list-style-type: none"> • “In cases in which the life of the mother is in imminent danger.” 	<ul style="list-style-type: none"> • “To prevent the death of a pregnant mother”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions.”
On the date that Supreme Court recognizes authority of states to prohibit abortion at all stages of pregnancy.	First day of July in year of passage.	On the date the states are given the exclusive authority to regulate abortion.	90 days after passage.	Immediately upon becoming law.

ABORTION BAN BILLS

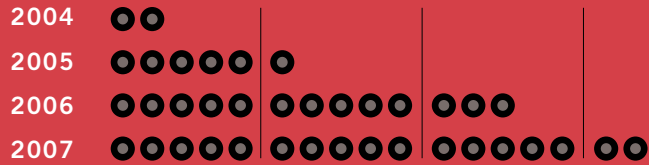
By Year and State

2006

CONTINUED

STATE	ALABAMA	GEORGIA	INDIANA	KENTUCKY
BILL NUMBER	S 503	H 93	HB 1096	H 489
PENALTIES	<ul style="list-style-type: none"> • Class B felony: prison term 2–20 years and possible fine up to \$30,000. 	<ul style="list-style-type: none"> • Felony: punishable by death; • By life imprisonment; • Or by imprisonment for more than 12 months. 	<ul style="list-style-type: none"> • Class C felony: potential 2–8-year prison term and possible fine up to \$10,000. 	<ul style="list-style-type: none"> • Class C felony: potential 5–10-year prison term.
EXCEPTIONS	<ul style="list-style-type: none"> • “In extreme case of medical emergency where the life of the mother is threatened by the pregnancy.” 	<ul style="list-style-type: none"> • None. 	<ul style="list-style-type: none"> • “Necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman . . . [AND] • The abortion is performed by a physician [AND] • The woman upon whom the abortion is performed has submitted written consent to her physician, unless exigent circumstances preclude the filing of a written consent.” 	<ul style="list-style-type: none"> • “To prevent the death of a pregnant mother”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “Contraception . . . administered prior to the time when a pregnancy could be determined through conventional medical testing and the . . . measure is . . . sold, used, prescribed or administered in accordance with manufacturer instructions”; • “The pregnant mother upon whom an abortion is performed or attempted.”
EFFECTIVE DATE	1st day of 3rd month following passage.	Immediately upon becoming law.	July 1, 2006.	90 days after adjournment.

NUMBER OF BAN BILLS INTRODUCED EACH YEAR



		BILL PASSED		
KENTUCKY	LOUISIANA	LOUISIANA	MISSOURI	MISSOURI
H 750	H 132	S 33	H 1786	H 2001
<ul style="list-style-type: none"> • Class C felony: potential 5–10-year prison term. 	<ul style="list-style-type: none"> • Potential hard labor prison term for 1–10 years and \$10,000–\$100,000 fine. 	<ul style="list-style-type: none"> • Potential hard labor prison term for 1–10 years and \$10,000–\$100,000 fine. 	<ul style="list-style-type: none"> • Class B felony: potential 5–15-year prison term. 	<ul style="list-style-type: none"> • Class A felony: life imprisonment or prison term of 10–30 years.
<ul style="list-style-type: none"> • “To prevent the death of a pregnant mother”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions”; • “The pregnant mother upon whom an abortion is performed or attempted.” 	<ul style="list-style-type: none"> • “For the express purpose of saving the mother”; • “Shall not apply to the female who has the abortion”; • “Result of rape... in which all of the following requirements are met prior to the pregnancy termination: (a) the rape victim obtains a physical examination and/or treatment from a physician other than the physician who is to terminate the pregnancy within 5 days of the rape... victim reports the rape to law enforcement within 7 days of the rape... abortion is performed within 13 weeks of conception.”; • “Result of incest, provided the crime is reported to law-enforcement officials and the abortion is performed within 13 weeks of conception.” 	<ul style="list-style-type: none"> • “Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions”; • “To prevent the death or substantial risk of death due to physical condition”; • “To prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman”; • “Medical treatment provided to the mother by a licensed physician”; • “The pregnant mother upon whom an abortion is performed.” 	<ul style="list-style-type: none"> • Medical emergency (“to avert her death or for which a delay will create a serious risk of death”). 	<ul style="list-style-type: none"> • “To prevent the death of a pregnant mother”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “The pregnant mother upon whom an abortion is performed or attempted.”
On the date the Ky. General Assembly declares that Supreme Court has recognized that states have authority to prohibit abortion at all stages of pregnancy.	Effective on August 15 of the calendar year in which the regular session is held.	Immediately after any Supreme Court decision reverses <i>Roe</i> in whole or in part; or the U.S. Constitution is amended to restore Louisiana’s authority to prohibit abortion.	On the effective date of the Supreme Court decision reversing <i>Roe</i> ; or negating constitutional basis for abortion on demand; or enactment of a federal law prohibiting abortion on demand.	90 days after legislative session adjournment.

ABORTION BAN BILLS

By Year and State

	2006 CONTINUED			2007
STATE	SOUTH DAKOTA	TENNESSEE	WEST VIRGINIA	ALABAMA
BILL NUMBER	H 1215	S 334	H 4553	S 59
PENALTIES	<ul style="list-style-type: none"> • Class 5 felony: 5 years in state penitentiary and possible \$10,000 fine. 	<ul style="list-style-type: none"> • 3–15-year prison term; jury may also impose up to \$10,000 fine. 	<ul style="list-style-type: none"> • Felony: 3–10-year prison term; • If woman dies as a result of abortion, murder: maximum sentence of life imprisonment in state penitentiary. 	<ul style="list-style-type: none"> • Class B felony: 2–20-year prison term and possible fine of up to \$30,000.
EXCEPTIONS	<ul style="list-style-type: none"> • To prevent the death of a pregnant mother”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions”; • “The pregnant mother upon whom an abortion is performed or attempted.” 	<ul style="list-style-type: none"> • “Necessary to save the woman's life.” 	<ul style="list-style-type: none"> • “In good faith, with the intention of saving the life of such woman.” 	<ul style="list-style-type: none"> • “Extreme case of medical emergency where the life of the mother is threatened by the pregnancy.”
EFFECTIVE DATE	Subject to the provisions of the U.S. Constitution and vetoes and referenda, this act would take effect on the first day of July after its passage.	Immediately upon becoming law.	90 days after passage by the legislature.	First day of 3rd month after becoming law.

ALABAMA	COLORADO	GEORGIA	MISSOURI
H 329	S 143	H 1	H 990
<ul style="list-style-type: none"> • Class A felony: life imprisonment; • Or 10–99-year prison term and possible fine up to \$60,000. 	<ul style="list-style-type: none"> • Class 3 felony: 4–12-year prison term and/or a fine between \$3,000 and \$750,000. 	<ul style="list-style-type: none"> • Felony: crime punishable by death; • By life imprisonment; • Or by imprisonment for more than 12 months. 	<ul style="list-style-type: none"> • Class B felony: 5–15-year prison term.
<ul style="list-style-type: none"> • “Necessary to avert the death of the mother”; • “Serious risk of a substantial and irreversible impairment of a major bodily function of the mother should the pregnancy be continued”; • Rape or Aggravated Incest with the following conditions: “before viability in physician’s good faith medical judgment, physician or his agent must obtain a copy of the written record of report from law enforcement and maintain in the woman’s medical records; if not reported already, advise the woman that report must be made and report immediately; report must include name, address, birth date of woman, date(s) of rape/incest, location rape/incest, name and address or description of perpetrator, blood sample from woman and remains of child for DNA testing; contact law enforcement and transfer custody of samples within 24 hours; provide counseling services in area of residence and area of procedure; document all actions”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “Contraception . . . administered prior to the time when a pregnancy could be determined through conventional medical testing and the . . . measure is . . . sold, used, prescribed or administered in accordance with manufacturer instructions”; • “The pregnant mother upon whom an abortion is performed or attempted”; • “Nothing prohibits any person from assisting a pregnant mother in obtaining an abortion in any other state where such a procedure is legal.” 	<ul style="list-style-type: none"> • “To prevent the death of a pregnant mother”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “Contraception . . . administered prior to the time when a pregnancy could be determined through conventional medical testing and the . . . measure is . . . sold, used, prescribed or administered in accordance with manufacturer instructions”; • “The pregnant mother upon whom an abortion is performed or attempted.” 	<ul style="list-style-type: none"> • None. 	<ul style="list-style-type: none"> • “To save the life of the mother” (physician must certify in writing).
First day of 3rd month after becoming law.	July 1, 2007.	Immediately upon becoming law.	90 days after legislative adjournment.

ABORTION BAN BILLS

By Year and State

2007 CONTINUED		BILL PASSED	
STATE	MISSISSIPPI	MISSISSIPPI	MISSISSIPPI
BILL NUMBER	H 670	H 1241	S 2391
PENALTIES	<ul style="list-style-type: none"> • Misdemeanor: 1-year prison term or \$5,000 fine or both. 	<ul style="list-style-type: none"> • Felony: 1–10-year prison term or \$10,000 fine or both. 	<ul style="list-style-type: none"> • 1–10-year prison term.
EXCEPTIONS	<ul style="list-style-type: none"> • Life-threatening condition in pregnant woman that would be worsened by continuing the pregnancy; • “Except the pregnant woman.” 	<ul style="list-style-type: none"> • “Necessary to save the life of the pregnant woman; or if there exists the presence of a life-threatening medical condition in the mother that would be worsened by continuing the pregnancy”; • “Medical treatment [outside of abortion services] provided the mother by a licensed physician”; • “Contraception . . . administered prior to the time when a pregnancy could be determined through conventional medical testing and the . . . measure is . . . sold, used, prescribed or administered in accordance with manufacturer instructions”; • “Pregnancy is the result of a reported rape or incest.” 	<ul style="list-style-type: none"> • “Except in the case where necessary for the preservation of the mother’s life”; • “Or where the pregnancy was caused by rape . . . if a formal charge of rape has been filed with an appropriate law enforcement official”; • Except the pregnant woman.”
EFFECTIVE DATE	July 1, 2007.	July 1, 2007.	Effective 10 days after Miss. Attorney General publishes that the Supreme Court has overruled <i>Roe</i> .

BILL PASSED				
	NORTH DAKOTA	NORTH DAKOTA	OHIO	OKLAHOMA
	H 1466	H 1489	H 284	H 1014
	<ul style="list-style-type: none"> Class C felony: 5-year prison term maximum, \$5000 fine, or both. 	<ul style="list-style-type: none"> Class AA felony (for intentionally destroying or terminating): maximum sentence of life imprisonment without parole. Class C felony (for aiding, abetting, facilitating, soliciting, or inciting): maximum penalty of 5-year prison term or \$5,000 fine or both. 	<ul style="list-style-type: none"> For a first offense, 2nd-degree felony: 2–8-year prison term and a possible fine of up to \$15,000. For a second offense or if the offender has previously been convicted of violating another abortion restriction, a 1st-degree felony: 3–10-year prison term and possible fine up to \$20,000. 	<ul style="list-style-type: none"> 2–5-year prison term in state penitentiary.
	<ul style="list-style-type: none"> “To prevent the pregnant female’s death.” 	<ul style="list-style-type: none"> “Medical treatment provided to the mother by a licensed physician which may result in accidental or unintentional injury or death of the pre-born child.” 	<ul style="list-style-type: none"> “Does not apply to a person who provides medical treatment to a pregnant woman to prevent the death of the pregnant woman and who, as a proximate result of that medical treatment but without intent to do so, causes the termination of the pregnant woman’s pregnancy.” 	<ul style="list-style-type: none"> None.
	Date the N.D. Attorney General certifies to Secretary of State and Legislative Council that as a result of Supreme Court decisions, it is reasonably probable that this act would be held constitutional.	August 1, 2007, after filing with the N.D. Secretary of State.	Effective the 91st day after the act is filed with the Secretary of State.	“Upon cessation” of <i>Roe v. Wade</i> , upon certification by Okla. Attorney General.

ABORTION BAN BILLS

By Year and State

2007

CONTINUED

STATE	SOUTH DAKOTA	TEXAS	TEXAS
BILL NUMBER	H 1293	H 175	S 186
PENALTIES	<ul style="list-style-type: none"> • Class 4 felony: 10-year prison term and possible \$20,000 fine. 	<ul style="list-style-type: none"> • With woman's consent, 3rd-degree felony: 2–10-year prison term and/or fine up to \$10,000; • Without woman's consent, 2nd-degree felony: 2–20-year prison term and/or fine up to \$10,000. 	<ul style="list-style-type: none"> • With woman's consent, 3rd-degree felony: 2–10-year prison term and possible fine up to \$10,000; • Without woman's consent, 2nd-degree felony: 2–10-year prison term and possible fine up to \$10,000.
EXCEPTIONS	<ul style="list-style-type: none"> • "Necessary to avert the death of the mother"; • "Serious risk of a substantial and irreversible impairment of a major bodily function of the mother should the pregnancy be continued"; • Rape or Aggravated Incest with the following conditions: "before viability in physician's good faith medical judgment, physician or his agent must obtain a copy of the written record of report from law enforcement and maintain in the woman's medical records; if not reported already, advise the woman that report must be made and report immediately; report must include name, address, birth date of woman, date(s) of rape/incest, location rape/incest, name and address or description of perpetrator, blood sample from woman and remains of child for DNA testing; contact law enforcement and transfer custody of samples within 24 hours; provide counseling services in area of residence and area of procedure; document all actions"; • "Medical treatment [outside of abortion services] provided the mother by a licensed physician"; • "Contraception... administered prior to the time when a pregnancy could be determined through conventional medical testing and the... measure is... sold, used, prescribed or administered in accordance with manufacturer instructions"; • "The pregnant mother upon whom an abortion is performed or attempted"; • "Nothing prohibits any person from assisting a pregnant mother in obtaining an abortion in any other state where such a procedure is legal." 	<ul style="list-style-type: none"> • "For purpose of preventing death of the mother." 	<ul style="list-style-type: none"> • "For purpose of preventing death of the mother."
EFFECTIVE DATE	July 1, 2007.	60th day after determination that the U.S. Constitution no longer prohibits states from banning abortion is published in Texas Register.	60th day after determination that the U.S. Constitution no longer prohibits states from banning abortion is published in Texas Register.

<p>UTAH</p>	
<p>H 235</p>	
<ul style="list-style-type: none"> • Prison term not to exceed 5-years. 	
<ul style="list-style-type: none"> • “Medical condition exists that would cause woman’s death”; • “Serious risk of substantial and irreversible impairment of major bodily function of woman”; • “Pregnancy is a result of incest, rape or rape of child which is reported to authorities before abortion is performed.” 	
<p>If <i>Roe</i> is overturned.</p>	

STATE-BY-STATE ANALYSIS

35	Alabama	54	Maine	73	Pennsylvania
36	Alaska	55	Maryland	74	Rhode Island
37	Arizona	56	Massachusetts	75	South Carolina
38	Arkansas	57	Michigan	76	South Dakota
39	California	58	Minnesota	77	Tennessee
40	Colorado	59	Mississippi	78	Texas
41	Connecticut	60	Missouri	79	Utah
42	Delaware	61	Montana	80	Vermont
43	District of Columbia	62	Nebraska	81	Virginia
44	Florida	63	Nevada	82	Washington
45	Georgia	64	New Hampshire	83	West Virginia
46	Hawaii	65	New Jersey	84	Wisconsin
47	Idaho	66	New Mexico	85	Wyoming
48	Illinois	67	New York	86	Commonwealth of Puerto Rico
49	Indiana	68	North Carolina	87	Territory of Guam
50	Iowa	69	North Dakota		
51	Kansas	70	Ohio		
52	Kentucky	71	Oklahoma		
53	Louisiana	72	Oregon		

ALABAMA

Risk level ● High
● Medium
● Low

RISK: HIGH

ALABAMA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life and health) on the books; never blocked by a court

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory public policy language protects life of "unborn"

● Existence and Status of Abortion Ban:

Alabama has a pre-*Roe* abortion ban, with exceptions that protect a woman's "life or health,"¹ that has not been repealed or enjoined by a court. The ban reads:

Any person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than \$100.00 nor more than \$1000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.²

Because of the law's conflict with *Roe*, it has not been enforced since the *Roe* decision; however, it is still on the books.

It is possible that if *Roe* is overruled, state officials in Alabama could seek to enforce the ban. In this case, an argument could be made for the implied repeal of the ban, based on the fact that statutes regulating abortion have been enacted in Alabama since the ban. Furthermore, a decision by the Alabama Court of Criminal Appeals has recognized that the ban has been unenforceable after *Roe*, and suggests that it has been repealed by implication.³ However, this argument may fail, because Alabama courts in the past have been extremely reluctant to find repeal by implication.⁴ Furthermore, the Alabama Supreme Court has issued several opinions indicating that it is hostile to abortion rights.⁵

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

The legislature has declared its intent to protect every "unborn" human life.⁶

● Conclusion:

Abortion is likely to be banned in Alabama in the event that *Roe* is overturned, either through enforcement of the existing criminal ban or through passage of new legislation. Laws passed by the Alabama Legislature since *Roe* have contained statements that signal the legislature's hostility to abortion, thus indicating the likelihood that the Legislature would be willing to enact a complete prohibition on abortion if the opportunity arose. If the existing criminal ban is enforced, abortions will only be allowed to protect a woman's "life or health" (although an argument can be made to interpret these exceptions broadly).

RISK: LOW

ALASKA AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

State constitutional right to privacy protects abortion rights

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

None

- **Existence and Status of Abortion Ban:**

No abortion ban

- **State Constitutional Protection of Abortion Rights:**

The Alaska Supreme Court has interpreted the privacy provision found in the state's constitution to protect a woman's right to make reproductive decisions, including abortion, as a fundamental right.⁷ Thus, Alaska law provides greater protection to abortion rights than is currently afforded under the U.S. Constitution.⁸

Consequently, even though the Alaska Legislature might pass some type of abortion ban if *Roe* is overruled, the ban will likely be found unconstitutional under this privacy provision. The right to abortion should continue to be fully protected in Alaska.

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

None.

- **Conclusion:**

There is no abortion ban currently on the books in Alaska. The state's constitution should protect the right to abortion in the event that the legislature tries to enact an abortion ban.

RISK: MEDIUM

ARIZONA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) on the books; court has blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

Protection for abortion recognized under privileges and immunities clause

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Arizona has a pre-*Roe* abortion ban, with an exception to protect a woman's life, in its statutes. It states:

*A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.*⁹

This ban has been declared unconstitutional since *Roe*.¹⁰ In the event that *Roe* is overturned, the ban would not be immediately enforceable because of the court rulings finding it unconstitutional. However, state officials might attempt to have the court rulings set aside. If an attempt were made to enforce the enjoined statute, an argument could be made for implied repeal, but the Arizona courts do not favor the implied-repeal doctrine.¹¹

● State Constitutional Protection of Abortion Rights:

The Arizona Constitution contains an explicit right to privacy.¹² This provision has, in some contexts, been interpreted as providing more privacy protection than the U.S. Constitution.¹³ However, the Arizona Supreme Court has not yet addressed the issue of whether this right to privacy encompasses the right of reproductive choice and, if so, whether that right is more protected under the Arizona Constitution than under the U.S. Constitution.¹⁴ However, unless the Arizona Supreme Court recognizes the state right to privacy provision as applying to the right of reproductive choice, the provision will provide little, if any, protection should *Roe* be overturned.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

Although the Arizona abortion ban, with an exception for the woman's life, is currently unenforceable, state officials may seek to set aside the court rulings in order to enforce the ban if *Roe* is overturned; or the Arizona Legislature may enact a new ban. If a new ban is enacted, the Arizona courts may find that such a ban is unconstitutional under the Arizona Constitution.

ARKANSAS

Risk level ● High
● Medium
● Low

RISK: HIGH

ARKANSAS AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's conduct) on the books; court has blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Arkansas Constitution protects rights of "unborn;" statutory language indicates intent to regulate abortion consistent with U.S. Supreme Court decisions

● Existence and Status of Abortion Ban:

Arkansas has a pre-*Roe* abortion ban in its statutes. It states:

It shall be unlawful for anyone to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce such abortion by any other means.¹⁵

This ban has been enjoined as unconstitutional by a federal court.¹⁶

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

The Arkansas Constitution contains language that would support efforts to revive the old ban or enforce a new one. It states, "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."¹⁷ One argument that could be asserted in opposition to the revival of the ban is that of implied repeal, which has been recognized by courts in Arkansas.¹⁸

● Conclusion:

Arkansas has an abortion ban, with a limited exception, on the books. In the event that *Roe* is overturned, the ban could not be immediately enforced because the statute has been enjoined by the federal court. However, state officials could seek to have the injunction lifted in order to revive the law or the legislature may enact a new ban. Laws passed by the Arkansas Legislature since *Roe* have contained statements that signal the legislature's hostility to abortion,¹⁹ thus indicating the likelihood that the legislature would be willing to enact a complete prohibition on abortion if the opportunity arose.

RISK: LOW

CALIFORNIA AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

State constitutional right to privacy protects abortion rights

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

Freedom of choice on the books

- **OTHER FACTORS**

None

- **Existence and Status of Abortion Ban:**

No abortion ban.

- **State Constitutional Protection of Abortion Rights:**

California has strong state constitutional protection for the right to choose abortion. Indeed, California recognized the existence of the right of procreative choice under the state constitution four years before the U.S. Supreme Court issued the *Roe*²⁰ decision. The state constitution states:

*All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.*²¹

This provision has been interpreted as protecting the right to choose abortion.²²

- **Statutory Protection of Abortion Rights:**

California has strong statutory protection for abortion rights under the freedom of choice act adopted in 2002. The law provides:

*The legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that: (a) Every individual has the fundamental right to choose or refuse birth control. (b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article. (c) The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.*²³

- **Other Factors:**

None.

- **Conclusion:**

Given the state's constitutional and statutory protection for abortion, it is unlikely that California would enact a new ban on abortion if *Roe* were overruled. If *Roe* is overturned, the right to abortion should be fully protected in California.

RISK: HIGH

COLORADO AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre- ban (with exception for "justified medical termination") on the books; court has partially blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Colorado has a pre-criminal abortion ban in its statutes. It states:

Any person who intentionally ends or causes to be ended the pregnancy of a woman by any means other than justified medical termination or birth commits criminal abortion.²⁴

Some parts of the statute have been held unconstitutional,²⁵ while other provisions remain in effect.²⁶ The portions that are still in effect permit only "justified medical termination,"²⁷ but that term is broadly defined to permit abortions upon the woman's request.²⁸ Therefore, even though part of the statute is still in effect, it does not presently restrict abortion access in Colorado.

Because of the earlier court decision finding parts of the statute unconstitutional, abortion would not immediately be restricted if *Roe* is overturned. It is possible, however, that if *Roe* is overruled, state officials would seek to undo this earlier court decision so that the more restrictive provisions from the pre-*Roe* statute would be revived.

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

Currently abortion is accessible in Colorado, despite the existence of a partially enjoined abortion ban (with exceptions for "justified medical termination") on the books. If *Roe* is overturned, abortion may be restricted if state officials successfully set aside the earlier court ruling enjoining parts of the law, or if new restrictions are enacted through the legislature or by ballot initiative. Colorado has a history of anti-choice forces spearheading ballot initiatives aimed at restricting abortion by popular vote. If *Roe* is overruled, anti-abortion activists would no doubt once again seek to ban abortions either by statute or by means of a ballot measure. The success of such efforts is uncertain.

CONNECTICUT

Risk level ● High
● Medium
● Low

RISK: LOW

CONNECTICUT AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

Freedom of choice act on the books

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

A lower court decision in Connecticut recognizes strong protection under the state constitution for a woman's right to choose abortion, but that decision has not been affirmed by the Connecticut Supreme Court and would provide little, if any, protection should *Roe* be overturned.²⁹

● Statutory Protection of Abortion Rights:

Connecticut enacted a freedom of choice act in 1990 that explicitly protects a woman's right to choose abortion.³⁰ It states:

*The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.*³¹

● Other Factors:

None.

● Conclusion:

Given the state's statutory protection for abortion, it is unlikely that Connecticut would enact a new ban on abortion if *Roe* were overruled. Should *Roe* be overturned, the right to abortion will likely be fully protected in Connecticut.

DELAWARE

Risk level ● High
● Medium
● Low

RISK: HIGH

DELAWARE AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for “therapeutic” abortion) on the books; never blocked by a court; state attorney general recognized ban is unenforceable

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Delaware has a pre-*Roe* abortion ban in its statutes. It states:

*A person is guilty of abortion when the person commits upon a pregnant female an abortion which causes the miscarriage of the female, unless the abortion is a therapeutic abortion.*³²

“Therapeutic abortion” is defined as, among other things, abortion in the case of rape or unlawful sexual intercourse (with certification from the attorney general), incest, life endangerment, substantial risk of permanent injury to the woman’s physical or mental health, or substantial risk of physical deformity or mental retardation of the child.³³ The statute does not appear to have been enjoined by any court.³⁴ Instead, the statute has been viewed by state officials as unenforceable to the extent its provisions conflict with *Roe*.³⁵ If *Roe* is overturned, state officials may try to enforce the existing criminal abortion statute. If such an attempt is made, an argument could be made for its implied repeal, although it is unclear whether such an argument would be successful.³⁶

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

The current abortion ban is unenforceable; but if *Roe* is overturned, only “therapeutic abortions” will be allowed. Moreover, it is unlikely that the legislature would enact a more restrictive abortion ban. Nonetheless, in order to ensure that the women of Delaware are protected in the event of a *Roe* reversal, the legislature must repeal the state’s pre-*Roe* ban.

DISTRICT OF COLUMBIA

Risk level ● High
● Medium
● Low

RISK: MEDIUM

D.C. AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

D.C. is subject to plenary power of U.S. Congress; therefore abortion could be banned in D.C. by Act of Congress

● Existence and Status of Abortion Ban:

No abortion ban. The D.C. City Council recently repealed its pre-*Roe* ban.³⁷

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

As D.C. is subject to the plenary power of U.S. Congress, it is possible that abortion could be banned by an Act of Congress.

● Conclusion:

There is no ban currently on the books. It is unlikely that the District of Columbia itself would enact a restrictive ban on abortion if *Roe* is overturned. Nevertheless, the District remains subject to plenary congressional power,³⁸ and it is possible that the U.S. Congress would prohibit or severely restrict abortion in the absence of *Roe*.³⁹

FLORIDA

Risk level ● High
● Medium
● Low

RISK: LOW

FLORIDA AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

State constitutional right to privacy protects abortion rights

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

None

- **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.⁴⁰

- **State Constitutional Protection of Abortion Rights:**

The Florida Constitution contains an explicit guarantee of privacy, which states:

*Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.*⁴¹

The Florida Supreme Court has construed this provision as giving strong protection to a woman's right to choose abortion.⁴²

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

None.

- **Conclusion:**

There is no abortion ban currently in Florida and the state constitution protects the right to choose. Although a new ban may be enacted if *Roe* is overturned, it would be unconstitutional under the Florida Constitution.

GEORGIA

Risk level ● High
● Medium
● Low

RISK: MEDIUM

GEORGIA AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

Although there is no abortion ban currently in its statutes, anti-choice forces in Georgia have previously attempted to outlaw abortion in the state by legislation and most recently through ballot initiative.⁴³ If *Roe* is overruled, anti-abortion activists would no doubt once again seek to ban abortions either by statute or ballot measure. The success of such efforts is uncertain.

RISK: LOW

HAWAII AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

Freedom of choice act on the books

- **OTHER FACTORS**

None

- **Existence and Status of Abortion Ban:**

No abortion ban.

- **State Constitutional Protection of Abortion Rights:**

Hawaii's Constitution contains a right to privacy provision. It states:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.⁴⁴

This provision might protect reproductive rights if legislative efforts were made to ban abortion.⁴⁵

- **Statutory Protection of Abortion Rights:**

Hawaii has strong statutory protection for abortion rights under the freedom of choice act adopted in 2006. The law provides:

The State shall not deny or interfere with a female's right to choose or obtain an abortion of a nonviable fetus or an abortion that is necessary to protect the life or health of the female.⁴⁶

- **Other Factors:**

None.

- **Conclusion:**

Given the state's statutory protection for abortion, it is unlikely that Hawaii would enact a ban on abortion if *Roe* were overruled. Should *Roe* be overturned, the right to abortion will likely be fully protected in Hawaii.

RISK: MEDIUM

IDAHO AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

Statutory public policy language favors childbirth over abortion

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban. Prior to that repeal, law-makers removed another law from the books that would have revived that ban had *Roe* been overturned.⁴⁷

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

The legislature has declared that:

*The Supreme Court of the United States having held in the case of 'Planned Parenthood v. Casey' that the states have a 'profound interest' in preserving the life of preborn children, Idaho hereby expresses the fundamental importance of that 'profound interest' and it is hereby declared to be the public policy of this state that all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion.*⁴⁸

● **Conclusion:**

No abortion ban currently exists, but the legislature may try to enact one if *Roe* is overturned. As illustrated above, laws passed by the Idaho Legislature since *Roe* have contained statements that indicate its hostility to abortion, and the legislature has not been hesitant to pass restrictive abortion legislation.⁴⁹ It is possible that the legislature would be willing to enact a complete prohibition on abortion if the opportunity arose.

RISK: MEDIUM

ILLINOIS AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

Statutory public policy language expresses the desire to prohibit abortion if *Roe* is overturned

● **Existence and Status of Abortion Ban:**

No abortion ban.⁵⁰ The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

If a ban were enacted, it might be found unconstitutional under the Illinois Constitution, as reflected by a lower court decision recognizing constitutional protection for abortion.⁵¹

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

Illinois has a statutory provision on the books stating:

*The General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.*⁵²

● **Conclusion:**

Illinois does not have an abortion ban on the books and it is unlikely, especially in light of Illinois's repeal of its criminal abortion ban, that the state's anti-choice policy statement would actually trigger a ban on abortion. Moreover, if a new ban were enacted, it might be struck down under the Illinois Constitution.

INDIANA

Risk level ● High
● Medium
● Low

RISK: MEDIUM

INDIANA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory public policy language favors childbirth over abortion

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

The Indiana Supreme Court has held that the Indiana Constitution's protection of abortion on privacy grounds is substantially similar to the protections under the U.S. Constitution articulated by the U.S. Supreme Court in *Planned Parenthood v. Casey*.⁵³ Under the *Brizzi* decision, it appears that Indiana would retain the *Price/Casey* standard, under which a ban would be struck down, if *Roe* were overturned.⁵⁴ However, *Brizzi* does not directly address the issue of whether the Indiana Constitution includes a right to abortion.⁵⁵ Thus, it is unclear whether the court would extend protection to the right to obtain abortion under the state constitution if *Roe* and/or *Casey* were overturned.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

The legislature has declared in a policy statement that “[c]hildbirth is preferred, encouraged, and supported over abortion.”⁵⁶

● Conclusion:

There is no abortion ban on the books, but the legislature may try to enact one if *Roe* is overturned. If a new ban were enacted, it might be struck down under the Indiana Constitution.

RISK: MEDIUM

IOWA AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

There is no abortion ban on the books and it is unlikely that a new ban would be enacted because the Iowa Legislature has historically taken a moderate stance on passing restrictive abortion legislation.

KANSAS

Risk level ● High
● Medium
● Low

RISK: MEDIUM

KANSAS AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

There is no ban on the books but the legislature may try to enact one. This is in part because Kansas has one of the few U.S. providers of post-viability abortions,⁵⁷ who has been a target of anti-choice zealots for many years. Thus, it is likely that the anti-choice movement would make Kansas a focus of its political efforts to restrict abortion.

KENTUCKY

Risk level ● High
● Medium
● Low

RISK: HIGH

KENTUCKY AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory public policy language expresses the desire to prohibit abortion if *Roe* is overturned

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

While the Kentucky Supreme Court has recognized a stronger right to privacy under the state constitution than exists under the U.S. Constitution,⁵⁸ it is unclear whether this right would be extended to protect the right to obtain an abortion.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

Kentucky has a statutory provision on the books stating that if the Supreme Court overrules *Roe*, the “policy” of the state to prohibit abortions “shall be fully restored.”⁵⁹

● Conclusion:

There is no abortion ban currently on the books and the anti-choice policy statement should not be enforceable as a ban on abortion. If the legislature enacted a ban, it is unclear whether or not it would be upheld because state constitutional protection is uncertain. Nonetheless, as illustrated above, laws passed by the Kentucky Legislature since *Roe* have contained statements that indicate the legislature’s hostility to abortion, and the legislature has not been hesitant to pass restrictive abortion laws.⁶⁰ It is thus likely that the legislature would be willing to enact a complete prohibition on abortion if the opportunity arose.

LOUISIANA

Risk level ● High
● Medium
● Low

RISK: HIGH

LOUISIANA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Ban-in-waiting on the books; abortion will be banned if *Roe* is overturned

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory public policy language favors childbirth over abortion

● Existence and Status of Abortion Ban:

In 2006, Louisiana enacted a ban on abortion that will become effective if the U.S. Supreme Court reverses *Roe* in whole or in part, or if the U.S. Constitution is amended to allow states to ban abortion. The ban would prohibit any abortion except if necessary “to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.”⁶¹

● State Constitutional Protection of Abortion Rights:

Although the Louisiana Constitution contains explicit protections for privacy, similar to provisions that have provided increased protection for abortion rights in other states, it is unclear whether that provision would be interpreted to encompass abortion.⁶²

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

Louisiana had a pre-*Roe* abortion ban on the books that was declared repealed by implication in 1990.⁶³ In 1991, at the next opportunity after this court ruling, however, the legislature enacted a new abortion ban with limited exceptions.⁶⁴ This ban has been enjoined by the federal courts.⁶⁵

● Conclusion:

Louisiana’s current abortion ban will go into effect immediately if *Roe* is overturned, and abortion will be outlawed in the state except in narrow circumstances when necessary to protect a woman’s life. The Louisiana legislature has been at the forefront of enacting anti-choice legislation and unfortunately, no preventive steps appear to be realistic in Louisiana. Louisiana is thus among a small number of states in which abortion may immediately become illegal if *Roe* is overturned.

RISK: LOW

MAINE AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

Freedom of choice act on the books

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

Maine has enacted a freedom of choice act, declaring the state's policy of support for abortion rights.⁶⁶ It states:

It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability except as provided in section 1597-A.⁶⁷

● **Other Factors:**

None.

● **Conclusion:**

Given Maine's statutory protection for abortion it is unlikely that Maine would enact a new ban on abortion if *Roe* were overruled. If *Roe* is overturned, the right to abortion should be fully protected in Maine.

RISK: LOW

MARYLAND AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

Freedom of choice act on the books

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

The legislature has enacted a freedom of choice act, which states:

Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:

(1) Before the fetus is viable; or

(2) At any time during the woman's pregnancy, if:

(i) The termination procedure is necessary to protect the life or health of the woman; or

(ii) The fetus is affected by genetic defect or serious deformity or abnormality.⁶⁸

● **Other Factors:**

None.

● **Conclusion:**

Given Maryland's statutory protection for abortion and the fact that the state provides other statutory protections for abortion access,⁶⁹ it is unlikely that Maryland would enact a new ban on abortion if *Roe* were overruled. If *Roe* is overturned, the right to abortion should be fully protected in Maryland.

MASSACHUSETTS

Risk level ● High
● Medium
● Low

RISK: LOW

MASSACHUSETTS AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (requiring “unlawful” activity) on the books; never blocked by a court; newer abortion law also on the books

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

State constitutional right to due process protects abortion rights

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Massachusetts has a pre-*Roe* abortion ban in its statutes. It states:

*Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any instrument or other means whatever, or with like intent, aids or assists therein, shall...be punished....*⁷⁰

This law has not been repealed by the legislature nor enjoined by a court, but is currently not enforceable due to *Roe*.

In addition, Massachusetts has another abortion statute on the books that was enacted shortly after the *Roe* decision. This second law generally permits abortions prior to twenty-four weeks,⁷¹ and thereafter if “necessary to save the life of the mother, or if a continuation of her pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health.”⁷² This is the law that is currently enforced in Massachusetts, and generally protects access to abortion.⁷³

If *Roe* is overturned, it is possible that state officials in Massachusetts could seek to enforce the pre-*Roe* ban, but any person performing an abortion in compliance with the second statutory scheme seemingly would not be “unlawfully” procuring a miscarriage. In addition, an argument could be made that the pre-*Roe* ban was repealed by implication by the passage of the second statutory scheme. However, Massachusetts courts in the past have been reluctant to find repeal by implication.⁷⁴

● State Constitutional Protection of Abortion Rights:

It also appears that enforcement of the pre-*Roe* ban (or enforcement of a new ban, if enacted by the legislature) would likely be enjoined pursuant to the Massachusetts Constitution, which protects the right to choose abortion more strongly than the U.S. Constitution.⁷⁵

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

Despite the existence of an abortion ban on the books, state constitutional protections should ensure that abortion will remain available in Massachusetts if *Roe* is overturned. In order to ensure that the women of Massachusetts are protected in the event of a *Roe* reversal, however, the legislature must repeal the state’s pre-*Roe* ban.

RISK: HIGH

MICHIGAN AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) on the books; court has interpreted so as not to conflict with *Roe*

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

Constitutional protection for public funding for abortion specifically rejected by court

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Michigan has a pre-*Roe* abortion ban, with an exception to protect a woman's life, in its statutes. It states:

*Any person who shall willfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.*⁷⁶

The Michigan Supreme Court has construed the ban to include other exceptions required by federal constitutional law.⁷⁷ Therefore, the law is currently enforceable only to the extent it does not conflict with *Roe*.

If *Roe* were overturned, state officials might seek to enforce the ban immediately, thus ignoring the judicially mandated exceptions on the basis that *Roe* was no longer good law. Despite the existence of other statutes allowing abortions to be performed in some circumstances, an argument that these statutes repealed the ban by implication has already been specifically rejected by the Michigan Court of Appeals.⁷⁸

● State Constitutional Protection of Abortion Rights:

The Michigan Supreme Court has rejected the argument that the state's Equal Protection Clause requires public funding for low-income women seeking medical abortions, but the court has not reached the issue of whether the constitution protects "a separate right to abortion" under other provisions.⁷⁹

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

There is a pre-*Roe* ban on the books that may become enforceable if *Roe* is overruled. Additionally, Michigan's Legislature has been and continues to be extremely anti-choice,⁸⁰ making the state highly vulnerable to enactment of a new ban.

MINNESOTA

Risk level ● High
● Medium
● Low

RISK: LOW

MINNESOTA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

State constitutional right to privacy protects abortion rights

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory public policy language favors childbirth over abortion

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.⁸¹

● State Constitutional Protection of Abortion Rights:

The Minnesota Supreme Court has construed the state constitution to protect the right to abortion more strongly than the U.S. Constitution under *Roe*.⁸²

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

Minnesota law specifically favors childbirth over abortions.⁸³

● Conclusion:

There is no abortion ban currently on the books. The right to choose abortion in Minnesota is likely to be protected if *Roe* is overturned. Moreover, if the Minnesota Legislature does enact an abortion ban, it would most likely be struck down by the Minnesota courts under the state constitution, which protects the right to abortion more strongly than the U.S. Constitution under *Roe*.

MISSISSIPPI

Risk level ● High
● Medium
● Low

RISK: HIGH

MISSISSIPPI AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

Ban-in-waiting on the books; abortion will be banned if *Roe* is overturned

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

None

- **Existence and Status of Abortion Ban:**

In 2007, Mississippi enacted an abortion ban that will go into effect once the attorney general of Mississippi determines that *Roe* has been overruled and concludes “his determination of that fact in the administrative bulletin published by the Secretary of State.” Upon both of these occurrences the ban will go into effect ten days later. The ban states:

*No abortion shall be performed or induced in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape. ... rape shall be an exception to the prohibition for an abortion only if a formal charge of rape has been filed with an appropriate law enforcement official.*⁸⁴

- **State Constitutional Protection of Abortion Rights:**

None established.

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

None.

- **Conclusion:**

Mississippi's abortion ban will go into effect shortly after a *Roe* reversal, and abortion will be totally outlawed in the state except in cases of rape and incest or to prevent a woman's death. Unfortunately, no preventive steps to protect a woman's right to an abortion appear to be realistic in Mississippi. Mississippi is thus among a small number of states in which abortion may become illegal almost immediately if *Roe* is overruled.

MISSOURI

Risk level ● High
● Medium
● Low

RISK: HIGH

MISSOURI AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory language indicates intent to regulate abortion as permitted by federal law and to protect life of “unborn”

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

It should be noted that Missouri has indicated its intention to regulate abortion to the fullest extent possible if *Roe* is overturned. By statute, the state has declared:

It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.⁸⁵

● Conclusion:

Given the Missouri Legislature’s strong opposition to abortion rights,⁸⁶ if *Roe* is overruled, Missouri will likely ban abortion as soon as the legislature has the opportunity to act.

RISK: LOW

MONTANA AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

State constitutional right to privacy protects abortion rights

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

Statutory public policy language protects life of the “unborn;” indicates intent to regulate abortion as permitted by law

- **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

- **State Constitutional Protection of Abortion Rights:**

If the legislature were to enact a new ban, such a ban should be struck down under the Montana Constitution’s explicit right to privacy, which provides:

*The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.*⁸⁷

The Montana Supreme Court has recognized strong protection for the right to choose abortion under this provision of the state constitution.⁸⁸

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

The legislature has a stated policy to extend protection to every human life including the “unborn” (although this statement appears to be limited to protect “viable” unborn life)⁸⁹ and to “restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation.”⁹⁰

- **Conclusion:**

Currently there is no abortion ban on the books in Montana. If the Montana Legislature were to enact such a ban it should be struck down by the Montana courts under the state constitution, which protects the right to abortion more strongly than the U.S. Constitution.

NEBRASKA

Risk level ● High
● Medium
● Low

RISK: HIGH

NEBRASKA AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

Statutory declaration deplores the destruction of life resulting from the *Roe* decision

- **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* abortion ban.

- **State Constitutional Protection of Abortion Rights:**

None established.

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

The legislature has declared that “the members of the legislature expressly deplore the destruction of unborn human lives which has and will occur in Nebraska as a consequence of [*Roe v. Wade*],”⁹¹ and that because of “the legislative intrusion of the United States Supreme Court by virtue of [*Roe*],” the state is currently “prevented from providing adequate legal remedies to protect the life, health and welfare of pregnant women and unborn human life.”⁹²

- **Conclusion:**

Nebraska presently does not have an abortion ban on the books; however, given the state's anti-choice policy statement and the legislature's long record of restricting abortion,⁹³ it is likely that one will be enacted if *Roe* is overturned.

RISK: LOW

NEVADA AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

Freedom of choice act on the books

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban.⁹⁴ The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

Nevada has codified *Roe* through passage of a ballot initiative in 1990. The law provides that abortion is legal in Nevada if performed by a doctor within twenty-four weeks of the commencement of the pregnancy (assuming other criteria are met).⁹⁵

● **Other Factors:**

None.

● **Conclusion:**

There is no abortion ban on the books, and the right to abortion will be protected by statute unless the statutory protection is repealed by initiative. The legislature itself is unlikely to enact a new ban. Therefore, absent an initiative, the state will continue to guarantee abortion rights even if *Roe* is overruled.

NEW HAMPSHIRE

Risk level ● High
● Medium
● Low

RISK: MEDIUM

NEW HAMPSHIRE AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

There is no abortion ban on the books and the legislature has taken a moderate stance on abortion in the past. Therefore, it is uncertain whether the legislature would attempt to enact a ban upon a *Roe* reversal.

NEW JERSEY

Risk level ● High
● Medium
● Low

RISK: LOW

NEW JERSEY AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

State constitutional right to equal protection protects abortion rights

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

None

- **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed the pre-*Roe* ban.

- **State Constitutional Protection of Abortion Rights:**

The New Jersey Supreme Court has decided two cases involving abortion under the state Constitution's equal protection provision clause, striking down both a parental-notification requirement and a ban on public funding for medically necessary abortions.⁹⁶ In both cases, the Court recognized that the right to privacy protected under the state constitution encompasses a fundamental right to abortion. Consequently, the right to abortion will likely remain secure in New Jersey even if *Roe* is overruled.

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

None.

- **Conclusion:**

No ban currently exists and abortion should continue to be protected if *Roe* is overturned. Moreover, if the New Jersey Legislature enacts an abortion ban, it would likely be struck down by the courts under the state constitution, which protects the right to abortion more strongly than the U.S. Constitution under *Roe*.

NEW MEXICO

Risk level ● High
● Medium
● Low

RISK: LOW

NEW MEXICO AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with various exceptions) on the books; court has partially blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

State constitution's equal rights amendment protects abortion rights

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

New Mexico has a pre-*Roe* abortion ban, with some exceptions, in its statutes. The ban permits abortions, or “justified medical terminations,” only if performed in an accredited hospital with written certification by a hospital board, in order to protect the woman’s life or health, or in the case of rape (if reported), incest, or fetal anomaly.⁹⁷ A state court has declared the statute largely unenforceable.⁹⁸

In the event that *Roe* is overturned, the statute would not be immediately enforceable due to the court ruling finding provisions of the statute unconstitutional. State officials could attempt to revive this statute by having the previous court ruling set aside. Arguments that the pre-*Roe* ban was impliedly repealed by later-enacted statutes regulating abortion could be made, but their success is uncertain at best, because implied repeal is disfavored by New Mexico courts.⁹⁹

● State Constitutional Protection of Abortion Rights:

The New Mexico Constitution contains an Equal Rights Amendment¹⁰⁰ that has been construed by the New Mexico Supreme Court as providing stronger protection for abortion rights than exists under the U.S. Constitution under *Roe*.¹⁰¹ Thus, even if *Roe* is struck down, it is unlikely that any effort to revive New Mexico’s pre-*Roe* ban, or to enact a new one, will ultimately be successful.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

New Mexico has an abortion ban on the books, with various exceptions, that is currently unenforceable. If the New Mexico Legislature were to enact an abortion ban it would likely be struck down by the New Mexico courts under the state constitution, which protects the right to abortion more strongly than the U.S. Constitution.

NEW YORK

Risk level ● High
● Medium
● Low

RISK: LOW

NEW YORK AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. Indeed, New York reformed its pre-*Roe* abortion statutes before the *Roe* decision was issued.

● **State Constitutional Protection of Abortion Rights:**

None established.¹⁰²

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

There is no ban on the books in New York. The New York Legislature has rejected efforts to restrict abortion during the past twenty years, and New York remains one of a handful of states that provide Medicaid funding for medically necessary abortions, even absent a court ruling. Consequently, the right to abortion will likely remain secure in New York even if *Roe* is overruled. Nonetheless, the New York Legislature can ensure that women continue to have access to safe legal abortions by implementing statutory protections to codify *Roe*.

NORTH CAROLINA

Risk level ● High
● Medium
● Low

RISK: HIGH

NORTH CAROLINA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Although North Carolina has a pre-*Roe* abortion ban on the books,¹⁰³ it has been repealed by a later-enacted statute that permits abortion “when the procedure is performed by a licensed physician in a certified hospital during the first twenty weeks of the pregnancy.”¹⁰⁴ Currently this section requiring hospitalization cannot be enforced. However, if *Roe* is overturned, this provision may be enforceable again.

● State Constitutional Protection of Abortion Rights:

None established.¹⁰⁵

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

While the North Carolina Legislature has taken a moderate stance toward enacting abortion legislation, it has also passed several provisions aimed at restricting abortion,¹⁰⁶ and it is therefore unclear whether abortion will be banned in North Carolina if *Roe* is overturned.

NORTH DAKOTA

Risk level ● High
● Medium
● Low

RISK: HIGH

NORTH DAKOTA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Ban-in-waiting on the books; abortion will be banned if *Roe* is overturned

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory public policy language protects every “unborn” human life

● Existence and Status of Abortion Ban:

In 2007, North Dakota enacted an abortion ban that will go into effect “on the date the legislative council approves by motion the recommendation of the attorney general to the legislative council that it is reasonably probable that [the ban] would be upheld as constitutional.”¹⁰⁷ The ban states that:

*It is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion.*¹⁰⁸

Those prosecuted for being in violation of the ban will be able to assert the following affirmative defenses:

-
- That the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female.*
 - That the abortion was to terminate a pregnancy that resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest, as those offenses are defined in chapter 12.1-20.*
 - That the individual was acting within the scope of that individual's regulated profession and under the direction of or at the direction of a physician.*¹⁰⁹

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

The legislature has declared its intent to protect every “unborn” human life.¹¹⁰

● Conclusion:

North Dakota's abortion ban will likely go into effect quickly if *Roe* is overturned. According to the ban, a physician who performs an abortion will be held in violation of the statute unless he or she affirmatively proves that the abortion was necessary in the doctor's professional judgment and was intended to prevent the death of the pregnant woman; or that the abortion was to terminate a pregnancy that was the result of “sexual imposition,” “sexual abuse,” or incest. Unfortunately, no preventive steps appear to be realistic in North Dakota. North Dakota is thus among a small number of states in which abortion may become illegal immediately if *Roe* is overruled.

RISK: HIGH

OHIO AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

Constitutional protection specifically rejected by court

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

The Ohio Court of Appeals has explicitly ruled that the Ohio Constitution does not afford greater protection to abortion rights than the U.S. Constitution, and the court suggested in its opinion that less protection might be afforded if current federal standards changed.¹¹¹

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

Although Ohio currently does not have an abortion ban, it is highly vulnerable to enactment of a new ban if *Roe* is overruled because the state has a long record of regulating abortion.¹¹²

RISK: HIGH

OKLAHOMA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) on the books; court has blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Oklahoma has a pre-*Roe* abortion ban, with an exception to protect a woman's life, in its statutes. It states:

Every person who administers to any woman or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.¹¹³

This ban has been found unconstitutional since *Roe* and is therefore unenforceable.¹¹⁴ Nonetheless, as recently as 1997 and 1999, the Oklahoma legislature amended the statute to change the penalty for performing an illegal abortion.¹¹⁵ The statutes remain unenforceable after these amendments. If *Roe* is overturned, however, state officials could argue that the recent amendments to the penalty section revived the ban and a prosecutor could, in principle, enforce the amended statute immediately after *Roe* is overruled. Even if the pre-*Roe* ban, as amended, is viewed as subject to the earlier findings of unconstitutionality, a state prosecutor or other state official could seek to lift the injunction if *Roe* is overruled.

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

Although Oklahoma's abortion ban is currently unenforceable, if *Roe* is overturned, the ban may be revived, putting women in Oklahoma at high risk. Moreover, in 1992, anti-choice activists gathered enough signatures in the state to place an abortion ban initiative on the ballot. It was ultimately blocked by the Oklahoma Supreme Court.¹¹⁶ If *Roe* is overruled, anti-abortion activists would no doubt once again seek to ban abortions either by statute or by means of a ballot measure. The success of such efforts is uncertain. Finally, in recent years the Oklahoma Legislature has become increasingly anti-choice and has passed several laws regulating abortion,¹¹⁷ heightening the probability of the enactment of a ban should *Roe* be overturned.

OREGON

Risk level ● High
● Medium
● Low

RISK: LOW

OREGON AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

While Oregon courts have provided some protections for the right to choose abortion, they have not found an independent basis for the right to choose abortion in the Oregon Constitution.¹¹⁸

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

The right to choose will likely to be protected in Oregon. The legislature has not enacted any laws restricting abortion. In addition, in 1990, Oregon voters rejected a ballot measure that would have banned most abortions by a 2-1 margin.¹¹⁹ Thus, there is little likelihood that Oregon would ban abortion if *Roe* were overruled.

PENNSYLVANIA

Risk level ● High
● Medium
● Low

RISK: MEDIUM

PENNSYLVANIA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

Constitutional protection for public funding for abortion specifically rejected by court

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

Statutory public policy language protects life of “unborn”

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

The Pennsylvania Supreme Court has held that the state constitution, including the state’s Equal Rights Amendment, does not require public funding for medically necessary abortions for indigent women, which suggests that no protection beyond what is required by the federal Constitution will be extended should the legislature seek to ban abortion.¹²⁰

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

The Pennsylvania Legislature has enacted anti-choice public policy language protecting the rights of the “unborn” and favoring childbirth over abortion. It states:

*The common and statutory law in Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.*¹²¹

● Conclusion:

Although there is no abortion ban currently on the books, it is likely that the legislature, which has been historically anti-choice and has enacted numerous laws regulating abortion,¹²² will attempt to enact an abortion ban if *Roe* is overturned.

RHODE ISLAND

Risk level ● High
● Medium
● Low

RISK: HIGH

RHODE ISLAND AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) on the books; court has blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

State constitution specifies that it does not protect abortion rights

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Rhode Island has a pre-*Roe* abortion ban, with an exception to protect the woman's life, in its statutes. It states:

*Every person who, with the intent to procure the miscarriage of any pregnant woman or woman supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatsoever or shall aid, assist or counsel any person so intending to procure a miscarriage shall if the woman die in consequence thereof, shall be imprisoned not exceeding twenty (20) years nor less than five (5) years, and if she does not die in consequence thereof, shall be imprisoned not exceeding seven (7) years nor less than one (1) year; provided that the woman whose miscarriage shall have been caused or attempted shall not be liable to the penalties prescribed by this section.*¹²³

The ban has been declared unconstitutional by the courts.¹²⁴

In the event that *Roe* is overturned, the ban would not be immediately enforceable, due to the court ruling finding it unconstitutional. However, state officials might attempt to have the court ruling set aside. If they do, the success of an argument that subsequent Rhode Island legislation has repealed the pre-*Roe* ban by implication is uncertain.¹²⁵

● State Constitutional Protection of Abortion Rights:

No protection for the right to choose has been established under the Rhode Island Constitution. Nor is such protection likely, given a provision in the constitution that states:

*Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.*¹²⁶

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

Although the Rhode Island abortion ban, with an exception for the woman's life, is currently unenforceable, state officials may seek to set aside the court rulings in order to enforce the ban if *Roe* is overturned. Alternatively, the Rhode Island Legislature, which has been historically anti-choice and has enacted numerous laws regulating abortion,¹²⁷ may attempt to enact a new ban.

SOUTH CAROLINA

Risk level ● High
● Medium
● Low

RISK: HIGH

SOUTH CAROLINA AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

Given the South Carolina Legislature's strong opposition to abortion rights,¹²⁸ if *Roe* is overruled, South Carolina will likely ban abortion as soon as the legislature has the opportunity to act.

SOUTH DAKOTA

Risk level ● High
● Medium
● Low

RISK: HIGH

SOUTH DAKOTA AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

Ban-in-waiting on the books; abortion will be banned if *Roe* is overturned

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

South Dakota enacted a law—repealed by referendum—that would have prohibited abortion under all circumstances except to save a woman's life

- **Existence and Status of Abortion Ban:**

In 2005, South Dakota enacted a ban that will become effective “on the date that the states are given the exclusive authority to regulate abortion.” It bans all abortions except those necessary to preserve a woman's life.¹²⁹

- **State Constitutional Protection of Abortion Rights:**

None established.

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

In 2006, South Dakota enacted a law that would have prohibited abortion under all circumstances except to save a woman's life.¹³⁰ The measure, however, was repealed by referendum.

- **Conclusion:**

The South Dakota abortion ban will go into effect immediately if *Roe* is overturned, and abortion will be totally outlawed in the state except to prevent a woman's death. Unfortunately, no preventive steps appear to be realistic in South Dakota. South Dakota is thus among a small number of states in which abortion may immediately become illegal if *Roe* is overruled.

TENNESSEE

Risk level ● High
● Medium
● Low

RISK: LOW

TENNESSEE AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

State constitutional right to privacy protects abortion rights

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

The Tennessee Supreme Court has interpreted the Tennessee Constitution as providing independent protection for a woman's right to make reproductive decisions.¹³¹

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

There is no abortion ban currently on the books in Tennessee, and the state constitution will likely protect the right to abortion in the event that the legislature tries to enact such a ban.

RISK: HIGH

TEXAS AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) repealed by implication

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

Constitutional protection for public funding for abortion specifically rejected by court

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

In 2004, Texas's pre-*Roe* abortion ban was held to have been repealed by implication by the numerous subsequent statutes enacted by the legislature regulating abortion.¹³² This pre-*Roe* ban was the law that was challenged in *Roe v. Wade* and held unconstitutional by the U.S. Supreme Court.

● State Constitutional Protection of Abortion Rights:

The Texas Supreme Court has held that the state constitution does not require funding for medically necessary abortions for Medicaid-eligible women, which suggests that no protection beyond what is required by the federal Constitution will be extended should the legislature seek to ban abortion.¹³³

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

The United States Court of Appeals for the Fifth Circuit held in 2004 that Texas's pre-*Roe* abortion ban had been repealed by implication. However, given the state's history of regulating abortion heavily,¹³⁴ it is likely that Texas would enact a new statute banning abortion.

RISK: HIGH

UTAH AT-A-GLANCE

- **EXISTENCE AND STATUS OF ABORTION BAN**

Pre-*Roe* ban (with limited exceptions) on the books; amended in 1991; court has blocked enforcement

- **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

- **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

- **OTHER FACTORS**

Statutory public policy language protects life of “unborn”

- **Existence and Status of Abortion Ban:**

Utah’s pre-*Roe* abortion ban was amended and reenacted in 1991.¹³⁵ It contains several exceptions.¹³⁶ Because the statute has been enjoined by a federal court,¹³⁷ the ban would not be immediately enforceable in the event that *Roe* is overturned. However, state officials could seek to have the federal court’s injunction lifted in order to revive the law.

- **State Constitutional Protection of Abortion Rights:**

None established.

- **Statutory Protection of Abortion Rights:**

None.

- **Other Factors:**

Utah law specifically provides that if the 1991 amended version of the abortion ban “is ever held to be unconstitutional” by the U.S. Supreme Court, the previous version of the law “is reenacted and immediately effective.”¹³⁸ The U.S. Supreme Court declined to hear the appeal of the federal court ruling finding the 1991 law unconstitutional, and it is unlikely that the Court would have occasion to assess this law in the future; therefore, this provision is unlikely to have any impact.

It should be noted that Utah has several statutory provisions on the books protecting the “unborn.”¹³⁹ Additionally, arguments for the implied repeal of the 1991 statute based on more recently enacted abortion regulations may not be successful.¹⁴⁰

- **Conclusion:**

Although Utah’s abortion ban is currently unenforceable, abortion is likely to be banned in Utah either because of efforts by state officials to set aside the court ruling enjoining operation of the ban, or because the legislature will enact a new ban. It is very likely that Utah will enact a new abortion ban at the earliest opportunity, given the state’s history of restricting abortion.¹⁴¹

RISK: LOW

VERMONT AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) on the books; court has blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

Lower court decision has recognized state constitutional protection for abortion rights

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Vermont still has its pre-*Roe* abortion ban, with an exception to protect a woman's life, in its statutes. It provides:

A person who willfully administers, advises or causes to be administered anything to a woman pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, if the woman dies in consequence thereof, shall be imprisoned not more than twenty years nor less than five years. If the woman does not die in consequence thereof, such person shall be imprisoned not more than ten years nor less than three years. However, the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section.¹⁴²

The ban was held invalid by the Vermont Supreme Court under state law principles before *Roe* was decided.¹⁴³

In the event that *Roe* is overturned, the ban would not be immediately enforceable, due to the court ruling finding it unconstitutional. Although state officials might try to have the ruling set aside, such action is unlikely to be successful as the court's decision did not rely on *Roe*.

● State Constitutional Protection of Abortion Rights:

A state trial court has found that the Vermont Constitution protects the right to choose abortion more strongly than the U.S. Constitution does.¹⁴⁴

● Statutory Protection of Abortion Rights:

The Vermont Legislature has enacted strong pro-choice resolutions, including: "[t]his legislative body reaffirms the right of every Vermont woman to privacy, autonomy, and safety in making personal decisions regarding reproduction and family planning."¹⁴⁵

● Other Factors:

None.

● Conclusion:

Although there is an abortion ban on the books, the right to choose is likely to be protected in Vermont if *Roe* is overturned. Nevertheless, in order to ensure that the women of Vermont are protected in the event of a *Roe* reversal, the legislature must repeal the state's pre-*Roe* ban.

VIRGINIA

Risk level ● High
● Medium
● Low

RISK: HIGH

VIRGINIA AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.¹⁴⁶

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

Although Virginia currently does not have an abortion ban on the books, given the state's legislative record of hostility to abortion,¹⁴⁷ Virginia is highly vulnerable to enactment of a new ban.

WASHINGTON

Risk level ● High
● Medium
● Low

RISK: LOW

WASHINGTON AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

No ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

Freedom of choice act on the books

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

No abortion ban. The legislature repealed its pre-*Roe* ban.

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

The state has adopted, by a 1991 ballot initiative, a freedom of choice act that protects the right to abortion in Washington.¹⁴⁸ The statute provides, in part:

The sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the state of Washington that:

- (1) Every individual has the fundamental right to choose or refuse birth control;
- (2) Every woman has the fundamental right to choose or refuse to have an abortion, except as specifically limited...
- (3) Except as specifically permitted...the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion; and
- (4) The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.¹⁴⁹

● Other Factors:

None.

● Conclusion:

Given the state's statutory protection for abortion and the fact that Washington provides other statutory protections for abortion access, it is unlikely that Washington would enact a new ban on abortions if *Roe* were overruled. Thus if *Roe* is overruled, the right to abortion should be fully protected in Washington.

WEST VIRGINIA

Risk level ● High
● Medium
● Low

RISK: LOW

WEST VIRGINIA AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) on the books; court has blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

State constitutional right to due process protects abortion rights

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

West Virginia has a pre-*Roe* abortion ban, with an exception to protect the life of the woman, in its statutes. It states:

Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.¹⁵⁰

This ban has been declared unconstitutional since *Roe*.¹⁵¹ In the event that *Roe* is overturned, the ban would not be immediately enforceable because of the court rulings finding it unconstitutional. However, state officials might attempt to have the court rulings set aside.

● State Constitutional Protection of Abortion Rights:

Any ban on abortion is likely to be held unconstitutional under the West Virginia Constitution, which would likely provide broader protection for the basic right to choose abortion than the U.S. Constitution.¹⁵²

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

Although the abortion ban that is on the books is currently unenforceable, if *Roe* is overturned, state officials may seek to set aside the court rulings, or the legislature may try to enact a new ban. Such efforts, however, would probably not withstand a challenge under the West Virginia Constitution.

RISK: HIGH

WISCONSIN AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban (with exception for woman's life) on the books; court has partially blocked enforcement of part of ban

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

None

● Existence and Status of Abortion Ban:

Wisconsin has a pre-*Roe* abortion ban, with an exception to protect a woman's life, in its statutes.¹⁵³ Prior to the *Roe* decision, the statute was declared unconstitutional by a federal court as applied to pregnancies prior to "quickening," which the court defined as occurring at approximately sixteen weeks of pregnancy.¹⁵⁴ The decision left no protection for abortions after "quickening" and prior to viability; only the *Roe* decision currently protects the right to choose abortion after "quickening" and prior to viability in Wisconsin.

If *Roe* is overruled, state officials could immediately attempt to enforce Wisconsin's ban as applied to abortions after "quickening," since *Roe* and its successor cases would no longer provide protection. State officials could also seek to overturn the court ruling in order to revive the pre-*Roe* ban in its entirety. If such an effort were successful, then abortions prior to "quickening" would also be prohibited in Wisconsin.

While arguments that the pre-*Roe* ban was impliedly repealed by later enacted statutes regulating abortion could be made, their success is uncertain at best, because, Wisconsin courts have been reluctant to recognize this doctrine.¹⁵⁵

● State Constitutional Protection of Abortion Rights:

None established.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

None.

● Conclusion:

The current abortion ban is unenforceable; but if *Roe* is overturned, it is likely that some, or all, pre-viability abortions will be prohibited. It is also possible, given the legislature's hostility towards abortion¹⁵⁶ that it would enact a more restrictive abortion ban. Nonetheless, in order to ensure that the women of Wisconsin are protected in the event of a *Roe* reversal, the legislature must repeal the state's pre-*Roe* ban.

WYOMING

Risk level ● High
● Medium
● Low

RISK: LOW

WYOMING AT-A-GLANCE

● **EXISTENCE AND STATUS OF ABORTION BAN**

No ban

● **STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS**

None

● **STATUTORY PROTECTION OF ABORTION RIGHTS**

None

● **OTHER FACTORS**

None

● **Existence and Status of Abortion Ban:**

No abortion ban. The legislature repealed its pre-*Roe* ban.

● **State Constitutional Protection of Abortion Rights:**

None established.

● **Statutory Protection of Abortion Rights:**

None.

● **Other Factors:**

None.

● **Conclusion:**

There is no abortion ban on the books in Wyoming, and it is unlikely that one would be enacted if *Roe* were overturned. In 1994, a ballot initiative to ban abortion in almost all circumstances was unsuccessful. This rejection of an abortion ban by Wyoming voters makes enactment of an abortion ban unlikely.

COMMONWEALTH OF PUERTO RICO

Risk level ● High
● Medium
● Low

RISK: MEDIUM

PUERTO RICO AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

Pre-*Roe* ban repealed and reenacted (with exception for woman's life and health); court has interpreted law broadly

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

None

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

U.S. Congress could exercise plenary power and ban abortion

● Existence and Status of Abortion Ban:

Puerto Rico had a pre-*Roe* abortion ban, a portion of which was held unconstitutional and enjoined not long after *Roe*.¹⁵⁷ The law was subsequently repealed and reenacted. It now provides that performing an abortion is illegal “except by therapeutic prescription made by a physician duly authorized to practice medicine in Puerto Rico with a view to preserve the health or life of the mother.”¹⁵⁸ Puerto Rico courts have interpreted this statute to allow first-trimester abortions where advised by a physician to preserve the woman's mental or physical health.¹⁵⁹

If *Roe* is overturned, Commonwealth officials could seek to set aside this court ruling.

● State Constitutional Protection of Abortion Rights:

Any efforts to ban abortion may fail in Puerto Rico. The Constitution of Puerto Rico contains an explicit right to privacy, which the Puerto Rico Supreme Court has held in other contexts provides more protection than the U.S. Constitution.¹⁶⁰ However, the court has not addressed the issue of whether this right to privacy encompasses the right to choose abortion and, if so, whether that right is more protected than under the U.S. Constitution. Therefore, if *Roe* is overturned, advocates could argue that the Puerto Rico Constitution's privacy clause protects the right to abortion, but the success of this argument in Puerto Rico, which has been quite hostile to abortion rights, is far from certain.

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

The legislature could enact a more restrictive abortion ban. Alternatively, because Puerto Rico is a U.S. territory, the U.S. Congress could exercise plenary power and ban abortion in Puerto Rico.¹⁶¹

● Conclusion:

Puerto Rico has an abortion ban on the books that has been interpreted to permit most abortions upon a determination of medical need. Commonwealth officials could seek to set aside these rulings, or a new more sweeping ban could be enacted by the legislature or by the U.S. Congress.

TERRITORY OF GUAM

Risk level ● High
● Medium
● Low

RISK: HIGH

GUAM AT-A-GLANCE

● EXISTENCE AND STATUS OF ABORTION BAN

1990 ban (with limited exceptions) on the books; court has blocked enforcement

● STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS

No constitution

● STATUTORY PROTECTION OF ABORTION RIGHTS

None

● OTHER FACTORS

U.S. Congress could exercise plenary power and ban abortion

● Existence and Status of Abortion Ban:

In 1990, the legislature repealed an old abortion ban and passed a new ban with narrow exceptions, which states:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action.¹⁶²

This law was declared unconstitutional and enjoined.¹⁶³

Guam officials may seek to set aside this court ruling if *Roe* is overturned.

● State Constitutional Protection of Abortion Rights:

Guam does not have an independent constitution.¹⁶⁴

● Statutory Protection of Abortion Rights:

None.

● Other Factors:

As Guam is a U.S. territory, the U.S. Congress could exercise plenary power and ban abortion in Guam.¹⁶⁵

● Conclusion:

Although the Guam abortion ban is currently unenforceable, if *Roe* is overturned, Guam officials could attempt to lift the court's injunction and enforce the ban. Alternatively, a new ban is likely to be enacted by the Guam Legislature or could be enacted by the U.S. Congress.

ENDNOTES

STATE-BY-STATE ANALYSIS

ALABAMA

- 1 ALA. CODE § 13A-13-7. There is not much case law available interpreting the “life or health” exceptions under state law. At the very least, if a provider were prosecuted under the ban, it would be his or her burden to demonstrate that the abortion fell into one of these exceptions. *See Lingle v. State*, 283 So. 2d 660, 661 (Ala. Crim. App. 1973) (it is the burden of the defense, not the prosecution, to demonstrate that an abortion falls within the exceptions).
- 2 ALA. CODE § 13A-13-7.
- 3 *Allison v. City of Birmingham*, 580 So. 2d 1377, n.8 (Ala. Crim. App. 1991) (explaining that the legislature’s failure to repeal the ban does not indicate approval of the ban, and noting that the legislature has enacted laws subsequent to the ban indicating the legal status of abortion).
- 4 *See Cook v. Lloyd Noland Found., Inc.*, 825 So. 2d 83, 88 (Ala. 2001) (implied repeal will be found only when “it is obvious that the Legislature intended to repeal the first statute”) (citations omitted); *Ex Parte S.C.W.*, 826 So. 2d 844, 850 (Ala. 2001) (courts do not favor repealing a statute or part of statute by implication); *Kirby v. Mobile County Comm’n*, 564 So. 2d 447, 450 (Ala. Civ. App. 1990) (statutes will be construed so as not to find implied repeal, even if inconsistent).
- 5 *See, e.g., Ex parte Anonymous*, No. 1030172, 2003 WL 22520408 (Ala. Nov. 7, 2003) (denying minor’s request for a waiver of parental consent for abortion).
- 6 ALA. CODE § 26-22-1 (a) (stating “[t]he public policy of the state of Alabama is to protect life, born and unborn.”); *id.* § 26-22-5 (“[N]othing in this chapter shall be construed to recognize a right to abortion or to make legal an abortion that is otherwise unlawful.”).

ALASKA

- 7 *Valley Hosp. Ass’n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 971 (Alaska 1997) (court held that “[u]nder Alaska’s constitution, there is a protected right to an abortion” and struck down restrictions on provision of abortions at a quasi-public hospital). The U.S. Supreme Court has held differently in interpreting the U.S. Constitution’s protections. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (holding that a state ban on performing abortions in public facilities did not unconstitutionally burden a woman’s right to an abortion).
- 8 948 P.2d at 968 (privacy provision “provides more protection of individual privacy rights than the United States Constitution”); *see also State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001) (striking down state regulation limiting Medicaid payment for abortions). Federal case law on this issue has interpreted the U.S. Constitution more narrowly. *See Harris v. McRae*, 448 U.S. 297 (1980) (holding that the Hyde Amendment, which severely restricts federal Medicaid funds from being used to reimburse abortion costs, does not violate a woman’s right to choose abortion).

ARIZONA

- 9 ARIZ. REV. STAT. ANN. § 13-3603. *See also id.* § 13-3604 (criminalizing obtaining an abortion, with exception for woman’s life); *see also* § 13-3605 (criminalizing abortion advertising).
- 10 *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.*, 505 P.2d 580, *modified on reh’g*, 505 P.2d 590 (Ariz. Ct. App. 1973), *review denied*, No. 11160-PR (Ariz. Mar. 20, 1973) (striking down statute pursuant to *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973)). *See also State v. New Times, Inc.*, 511 P.2d 196 (Ariz. Ct. App. 1973) (reversing conviction for advertising abortion services due to unconstitutionality of state abortion statutes); *State v. Wahlrab*, 509 P.2d 245 (Ariz. Ct. App. 1973) (same).

- 11 *See, e.g., State v. Tarango*, 914 P.2d 1300 (Ariz. 1996) (law does not favor implied repeal, and instead court is more likely to adopt an interpretation that harmonizes the conflicting statutes); *Achen-Gardner, Inc. v. Superior Court*, 839 P.2d 1093 (Ariz. 1992) (unless statute’s language or effect clearly requires conclusion that legislature intended new statute to impliedly repeal or supercede previous statute, courts will not presume such intent); *Pijanowski v. Yuma County*, 43 P.3d 208, 211 (Ariz. App. Div. 1 2002) (“modification-by-implication is disfavored by courts when construing statutes, and we will not find such an intent unless the interplay between the statutes under consideration compels us to find the Legislature must have intended the later statute to impliedly repeal the earlier one.”).
- 12 No person shall be disturbed in his private affairs, or his home invaded, without authority of law.
- 13 *See, e.g., Rasmussen by Mitchell v. Fleming*, 741 P.2d 674 (Ariz. 1987) (recognizing right to refuse medical care under state privacy protection, and noting that the Supreme Court has not yet recognized such a right under the U.S. Constitution); *State v. Bolt*, 689 P.2d 519 (Ariz. 1984) (en banc) (holding that warrantless entry and inspection short of search violated state right to privacy even though it did not appear to violate the Fourth Amendment of the U.S. Constitution).
- 14 Although both of those issues could have been addressed by the Arizona Supreme Court in *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002) (challenging failure to fund medically necessary abortions based on Arizona constitutional provisions), the court did not do so. Instead, the court reasoned that the right to choose is a fundamental right under the U.S. Constitution and therefore strict scrutiny applied to its analysis of the discriminatory funding scheme under the privileges and immunities provision of the state constitution. 56 P.3d at 32–35.

ARKANSAS

- 15 ARK. CODE ANN. § 5-61-102 (containing an exception if the woman causes the “death of her own unborn child in utero”).
- 16 *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980) (statute permanently enjoined as applied to physicians pursuant to *Roe*).
- 17 ARK. CONST. amend. LXVII, § 2; existing statutory language also indicates that the legislature intends “to regulate abortions in a manner consistent with the decisions of the Supreme Court of the United States.” ARK. CODE ANN. § 20-16-701.
- 18 *See, e.g., Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980) (finding later-enacted abortion statute impliedly repealed earlier abortion statute).
- 19 Existing statutory language also indicates that the legislature intends “to regulate abortions in a manner consistent with the decisions of the Supreme Court of the United States.” ARK. CODE ANN. § 20-16-701.

CALIFORNIA

- 20 *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969) (“[t]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court’s and this court’s repeated acknowledgement of a ‘right of privacy’ or ‘liberty’ in matters related to marriage, family and sex.”). This case was decided before the California constitutional privacy protections were added to the state constitution.
- 21 CAL. CONST. art. I, § 1.
- 22 *See Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (striking down limits on Medicaid coverage for abortions, finding that all women possess a fundamental constitutional right to choose abortion under the California constitutional privacy provision); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (invalidating parental-consent requirement).
- 23 CAL. HEALTH & SAFETY CODE § 123462. *See also id.* § 123466, (“[t]he state may not deny or interfere with a woman’s right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman.”) Note that this reproductive privacy act repealed §§ 124600–124615 and § 124630 of the Welfare and Institutions Code (known as the “Therapeutic Abortions Act”) which contained various abortion restrictions, some of which had already been struck down by California courts.

COLORADO

- 24 COLO. REV. STAT. ANN. § 18-6-102. *See also id.* § 18-6-101 (defining “justified medical termination” as the “intentional ending of the pregnancy of a woman at the request of said woman” and including requirements such as parental consent, spousal consent, hospital authorization, and allowing abortions only in the cases of rape or incest or if the continuation of the pregnancy is likely to result in the woman’s death or serious permanent impairment of her physical or mental health, or result in the birth of a child with a physical deformity or retardation; note that much of this definition has been held unenforceable, *see infra*).
- 25 *People v. Norton*, 507 P.2d 862 (Colo. 1973) (striking down portions of Colorado abortion law that conflict with *Roe*, including provisions under “justified medical termination” requiring that abortions be performed in a licensed hospital, that abortions be certified by members of a special hospital board, and that abortions be allowed only in the cases of rape or incest or if the continuation of the pregnancy is likely to result in the woman’s death or serious permanent impairment of her physical or mental health, or result in the birth of a child with a physical deformity or retardation). The spousal-consent provision is currently unenforceable under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (spousal-notification requirement is unconstitutional) and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (striking down spousal-consent requirement). If *Roe* were reversed, the U.S. Supreme Court case law based on *Roe* (such as *Casey* and *Danforth*) would also likely be overturned, making requirements such as the hospitalization provision potentially enforceable.
- 26 *People v. Franklin*, 683 P.2d 775 (Colo. 1984) (upholding the constitutionality of the portion of Colorado abortion ban remaining after the *Norton* decision, which defines a “justified medical termination” as one performed “by a licensed physician using accepted medical procedures”).
- 27 *Id.*
- 28 *Id.*; *Norton*, 507 P.2d at 863–64 (striking down restrictions under definition of “justified medical termination,” thereby leaving the definition broad enough to essentially allow abortion upon a woman’s request).

CONNECTICUT

- 29 *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986) (holding that Medicaid regulation restricting abortion funding for poor women to those necessary to save the life of the woman violates due process and equal protection clauses of Connecticut Constitution).
- 30 CONN. GEN. STAT. ANN. § 19a-602(a).
- 31 *Id.*

DELAWARE

- 32 DEL. CODE ANN. tit. 11, § 651. The statute also bans “self abortion” (with an exception for “therapeutic abortion”) and bans “issuing abortifacient articles.” *Id.* at §§ 652–653.
- 33 DEL. CODE ANN. tit. 24, § 1790.
- 34 *See Delaware Women’s Health Org. v. Wier*, 441 F. Supp. 497, 499 n.9 (D. Del. 1977) (challenge to criminal abortion law dismissed because plaintiffs were not exposed to a genuine threat of enforcement).
- 35 The Attorney General issued an opinion in 1973 recognizing that the statute is unenforceable. Del. Op. Att’y Gen. No. 73-030 (Apr. 12, 1973); Statement of Policy, Attorney General of Delaware (Mar. 24, 1977).
- 36 The doctrine of implied repeal has met with mixed results in Delaware courts. A Delaware court has specifically ruled that a later-enacted statute regarding a minor’s access to abortion repealed the earlier parental-consent requirement. *In re Diane*, 318 A.2d 629 (Del. Ch. 1974) (statute providing that a pregnant female over age twelve can give her consent to an abortion repealed by implication a previously enacted statute requiring consent of parents or guardian before pregnant females under eighteen could seek abortion). The implied repeal argument has been successful in other contexts as well. *See Wilson v. State*, 500 A.2d 605 (Del. Super. Ct. 1985) (stating that repeal can be implied where continued existence of both statutes would lead to absurd, unjust, or mischievous results); *Fraternal Order of Police v. McLaughlin*, 428 A.2d 1158 (Del. 1981) (same). However, Delaware courts have also rejected claims of implied repeal. *See, e.g., Bd. of Assessment Review v. Silverbrook Cemetery Co.*, 378 A.2d 619 (Del. 1977) (stating that repeal by implication is not favored, and denying claim for implied repeal).

DISTRICT OF COLUMBIA

- 37 D.C. Law 15-1543(a).
- 38 U.S. CONST. art. I, § 8, cl. 17.
- 39 *See generally, Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) (upholding the validity of a congressional enactment prohibiting the District of Columbia from reducing the penalties for use or possession of marijuana); *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004) (upholding validity of congressional prohibition against commuter tax on nonresidents working in the District of Columbia).

FLORIDA

- 40 Note that there is an old statute still on the books banning abortion advertising that is not enforced. FLA. STAT. ANN. § 797.02.
- 41 FLA. CONST. art. I, § 23. This provision was added to the constitution through the ballot in 1980.
- 42 *N. Fla. Women’s Health and Counseling Servs., Inc. v. Florida*, 866 So. 2d 612 (Fla. 2003) (striking down parental-notice law under Florida constitutional privacy provision); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (the amendment “embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution”). However, the Florida state constitution was subsequently amended to permit legislation requiring notification of a parent or guardian prior to performing an abortion on a minor. FLA. CONST. art. X, § 22. The legislature then enacted the Florida Parental Notice of Abortion Act, requiring a physician to notify the parent or legal guardian of a minor at least forty-eight hours before terminating the minor’s pregnancy. FLA. STAT. § 390.01114.

GEORGIA

- 43 In 2007, several members of the Georgia House of Representatives introduced a resolution seeking to amend the state constitution to give unborn children the “right to life.” This “Personhood Amendment,” which would need to be approved by a majority of Georgia voters in order to be enacted, did not move during the 2007 legislative session, but has been carried over into the 2008 session.

HAWAII

- 44 HAW. CONST. art. I, § 6.
- 45 *See, e.g., State v. Cuntapay*, 85 P.3d 634, 642 (Haw. 2004) (noting that “[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai’i Constitution, we are free to give broader protection than that given by the federal constitution.”); *Baehr v. Lewin*, 852 P.2d 44, 55 (Haw. 1993) (finding “there is no doubt that, at a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution,” and finding that marriage restriction is deserving of strict scrutiny test under state constitution’s equal protection clause).
- 46 HAW. REV. STAT. § 453-16 (2006).

IDAHO

- 47 The law required both (1) the overruling of *Roe* and its companion case, *Doe v. Bolton*, and (2) the issuing of a proclamation by the governor announcing that such an event had occurred. Once these conditions were met, certain sections of the code Ann. would be repealed and other sections (i.e., the abortion ban) would be enforceable again.
- 48 IDAHO CODE §18-601.
- 49 For example, the Idaho Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called “partial-birth abortion” ban, IDAHO CODE ANN. § 18-613; a mandatory-delay/biased-counseling law, § 18-609; a parental-consent law, §§ 18-602, 18-609A, 18-609F, 18-609G; a law that restricts low-income women’s access to abortion, § 56-209c, IDAHO ADMIN. CODE r. 16.03.09.511 to 16.03.09.514; and targeted regulations against abortion providers, IDAHO CODE ANN. § 18-608(2).

ENDNOTES

CONTINUED

STATE-BY-STATE ANALYSIS

ILLINOIS

- 50 Illinois has a ban on abortions performed for purposes of sex selection of the fetus, *see* 720 ILL. COMP. STAT. ANN. 510/6(8) and 510/6(2), that has been enjoined pursuant to consent decree, insofar as it relates to pre-viability procedures under *Herbst v. O'Malley*, 84 C 5602, ND IL (1993). Illinois law also contains a provision permitting a husband to seek a court order to prevent his wife's abortion. *See* 735 ILL. COMP. STAT. ANN. 5/11-107.1. This latter provision is unenforceable under *Planned Parenthood v. Casey*, 505 U.S. 833, 895-98 (1992) (spousal-notification requirement is unconstitutional) and *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976) (striking down spousal-consent requirement, noting "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."). Of course, if *Roe* is overturned, this provision may be enforceable, since U.S. Supreme Court case law based on *Roe* (such as *Casey* and *Danforth*) would also likely be overturned, making requirements such as these enforceable.
- 51 *See Doe v. Wright*, No. 91 CH 1958 (Ill. Ct. Dec. 2, 1994) (state trial court ruling recognizing strong protection for the right to abortion under the Illinois Constitution).
- 52 720 ILL. COMP. STAT. ANN. 510/1.

INDIANA

- 53 *A Clinic for Women v. Brizzi*, 837 N.E.2d 973 (Ind. 2005). In *Brizzi*, the Indiana Supreme Court assumes that the applicable state constitutional standard is set out in *Price v. State*, 622 N.E.2d 954 (Ind. 1993), a freedom of expression case in which the court held that a "government regulation would be unconstitutional if it imposed a 'material burden' on a 'fundamental right' that constituted a 'core constitutional value.'" *Brizzi*, 837 N.E.2d at 983 (internal citations omitted). The court then found that the "material burden" standard of *Price* and "undue burden" standard of *Casey* were "virtually indistinguishable." *Id.* at 983-84.
- 54 *See Brizzi*, 837 N.E.2d at 983-84.

- 55 *Id.* at 983. ("In order to set to one side the question of whether the Indiana Constitution embodies a core constitutional value of privacy that includes a right to abortion, we assume the applicability of the *Price* 'material burden' standard where the petitioners bring an as applied constitutional challenge to a statute.")
- 56 *See* IND. CODE § 16-34-1-1 ("Childbirth is preferred, encouraged, and supported over abortion.").

KANSAS

- 57 Post-viability abortions may be performed in Kansas when the physician performing the abortion, and a second physician, unaffiliated with that physician, both determine that the abortion is "necessary to preserve the life of the pregnant woman" or that "continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman." KAN. STAT. ANN. § 65-6703.

KENTUCKY

- 58 *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993) (holding that sodomy statute violates privacy and equal protection guarantees of Kentucky Constitution).
- 59 KY. REV. STAT. ANN. § 311.710(5) ("If, however, the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.")
- 60 For example, the Kentucky Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called "partial-birth abortion" ban, KY. REV. STAT. § 311.765; a mandatory-delay/biased-counseling law, § 311.725; a parental-consent law, § 311.732; a law that restricts low-income women's access to abortion, § 311.715; and targeted regulations against abortion providers, § 216B.0435.

LOUISIANA

- 61 LA. REV. STAT. ANN. § 1299.30 (2006).
- 62 *See State v. Thompson*, 891 So. 2d 1223 (La. 2005) ("the parameters of the state constitutional right to privacy in the sexual area have not been determined..."). *But see, e.g., State v. Houton*, ___ So.2d ___, 2007 WL 1765011 (La. App. 2. Cir. 2007) ("It is undisputed that the guarantees of the right to privacy contained in the Louisiana Constitution afford more protection of individual liberty than the Fourth Amendment.").
- 63 *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990) (because criminal abortion statute and abortion regulations were in conflict, earlier criminal abortion statute was repealed by implication).
- 64 *See* LA. REV. STAT. ANN. § 14-87 (banning abortion except (1) to preserve the life or health of the fetus or to remove "a dead unborn child"; (2) to save the life of the woman; (3) in the case of rape if various requirements are met, including reporting the rape and obtaining the abortion within thirteen weeks of conception; (4) in the case of incest if the incest is reported and abortion is obtained within thirteen weeks of conception). Note that bans on abortion advertising and on distribution of abortifacients remain on the books, *see* LA. REV. STAT. ANN. §§ 14-87.4, 14-88, but are not enforceable since the decision in *Weeks*, 733 F. Supp. 1036 at 1039-1040.
- 65 *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) (finding statute criminalizing most abortions unconstitutional).

MAINE

- 66 ME. REV. STAT. ANN. tit. 22, § 1598.
- 67 *Id.* Section 1597-A regulates a minor's ability to obtain an abortion in Maine.

MARYLAND

- 68 MD. CODE ANN., HEALTH-GEN. § 20-209(b).
- 69 For example, Maryland provides Medicaid funding for abortions in some circumstances under which federal funding is unavailable; and has a clinic protection law. *See* MD. REGS. CODE. tit. 10, §§ 09.02.04(G), 09.34.04(B)(2); MD. CODE ANN., CRIM. LAW § 10-204.

MASSACHUSETTS

- 70 MASS. GEN. LAWS ch. 272, § 19. It also prohibits abortion advertising, and sale of abortion instruments. *Id.* at §§ 20, 21.
- 71 MASS. GEN. LAWS ch. 112, § 12L (permitting abortions before twenty-four weeks if performed by a physician and if the physician judges the abortion "necessary under all attendant circumstances"); § 12N (penalty for violation of section 122).
- 72 *Id.* § 12M.
- 73 Note that some restrictions in the post-*Roe* law are currently unenforceable, such as a requirement that all abortions after thirteen weeks be performed in a hospital. MASS. GEN. LAWS ch. 112, § 12Q; *see Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (striking down the requirement that all abortions after the end of the first trimester be performed in a hospital). If *Roe* were reversed, the other Supreme Court case law based on *Roe* (such as the *Akron* case) would also likely be overturned, making requirements such as the hospitalization provision potentially enforceable.
- 74 *See, e.g., Commonwealth v. Katsirubis*, 696 N.E.2d 147 (Mass. App. Ct. 1998) (cases disfavor invoking doctrine of implied repeal in absence of express statutory directive).
- 75 *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981) (state's asserted interests supporting restrictions on public funding for abortions did not outweigh burden imposed on women seeking medically necessary abortions); *Planned Parenthood League of Mass. v. Attorney General*, 677 N.E.2d 101 (Mass. 1997) (state's asserted interests in parental-consent or judicial-bypass requirement for minors seeking abortions supported a one-parent, but not a two-parent, consent requirement). The court relied on various sections of the Massachusetts Constitution that provide due process protections. *Moe*, 417 N.E.2d at 397-99; *Planned Parenthood League of Mass.*, 677 N.E. at 103-04, 107-08.

MICHIGAN

- 76 MICH. COMP. LAWS ANN. § 750.14. Other sections of the statute ban the sale and advertising of abortion drugs and medicine (§ 750.15), advertising of abortions (§ 750.34), and publication or sale of recipes or prescriptions for producing abortions (§ 750.40).
- 77 *People v. Bricker*, 208 N.W.2d 172 (Mich. 1973) (statute interpreted to allow physicians to perform abortions within their medical judgment until viability, after which abortion is prohibited except to preserve the woman's life or health).
- 78 *People v. Higuera*, 625 N.W.2d 444 (Mich. Ct. App. 2001) (rejecting argument that pre-*Roe* ban, as limited by the court in *People v. Bricker*, was repealed by implication by subsequent abortion legislation in Michigan).
- 79 *Doe v. Dept. of Soc. Servs.*, 487 N.W.2d 166, 174 (Mich. 1992).
- 80 For example, the Michigan Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called "partial-birth abortion" ban, MICH. COMP. LAWS §§ 333.1081 to 333.1085; a mandatory-delay/biased-counseling law, §§ 333.17014, 333.17015; a parental-consent law, §§ 722.901-722.908; a law that restricts low-income women's access to abortion, § 400.109a; and targeted regulations against abortion providers, MICH. ADMIN. CODE r. 325.3802.

MINNESOTA

- 81 Note that there are some provisions remaining on the books that are not enforced. *See* MINN. STAT. §§ 617.20 and 617.25 (prohibiting sale or manufacture of instrument or drug to produce miscarriage); § 617.28 (prohibiting abortion advertising; however, this section was struck down by a court in *Meadowbrook Women's Clinic v. State*, 557 F. Supp. 1172 (D.C. Minn. 1983)).
- 82 *Women of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (striking down law limiting public funds for abortions except in cases of life, rape, or incest as violation of women's right to privacy under Minnesota Constitution). The court relied on three provisions in the Minnesota Constitution as the source of the right to privacy: the "rights and privileges" provision (art. I, § 2), the due process provision (art. I, § 7), and the prohibition against unreasonable search and seizure (art. I, § 10).
- 83 *See* MINN. STAT. § 256B.011.

MISSISSIPPI

- 84 S.B. 2391, 2007 Leg., Reg. Sess. (Miss. 2007).

MISSOURI

- 85 Mo. REV. STAT. § 188.010; *see also id.* § 1.205 (finding that life begins at conception and providing "[e]ffective January 1, 1998, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state").
- 86 For example, the Missouri Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called "partial-birth abortion" ban, Mo. REV. STAT. § 565.300; a mandatory-delay/biased-counseling law, § 188.039; a parental-consent law, §§ 188.028, 188.250; a law that restricts low-income women's access to abortion, § 188.205; and targeted regulations against abortion providers, §§ 188.080, 188.025, 197.200; Mo. CODE REGS. ANN. tit. 19, § 30-30.050, Mo. CODE REGS. ANN. Tit. 19, § 30-30.070).

MONTANA

- 87 MONT. CONST. art. II, § 10.
- 88 *Armstrong v. State*, 989 P.2d 364 (Mont. 1999) (abortion regulation impacted women's right to choose and her right to obtain an abortion and was thus an unconstitutional violation of her right to privacy).
- 89 MONT. CODE ANN. § 50-20-102 ("The Legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life. It is the policy of the state to preserve and protect the lives of all human beings and to provide protection for the viable human life. The protection afforded to a person by Montana's constitutional right of privacy is not absolute, but may be infringed upon by a compelling state interest."); *see also* § 41-1-103 (rights of unborn children).
- 90 MONT. CODE ANN. § 50-20-103.

NEBRASKA

- 91 NEB. REV. STAT. § 28-325(2).
- 92 NEB. REV. STAT. § 28-325(1), (4).
- 93 For example, the Nebraska Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a mandatory-delay/biased-counseling requirement, NEB. REV. STAT. §28-327; a so-called "partial-birth abortion" law, § 28-328; a physician-only law, § 28-335; and a parental-involvement law, §§71-6901-6909.

NEVADA

- 94 However, Nevada still has an unenforced ban on abortion advertising on the books, NEV. REV. STAT. ANN. § 202.200.
- 95 NEV. REV. STAT. ANN. § 442.250 ("No abortion may be performed in this state unless the abortion is performed: (a) By a physician licensed to practice in this state or by a physician in the employ of the government of the United States who: (1) Exercises his best clinical judgment in the light of all attendant circumstances including the accepted professional standards of medical practice in determining whether to perform an abortion; and (2) Performs the abortion in a manner consistent with accepted medical practices and procedures in the community. (b) Within 24 weeks after the commencement of the pregnancy. (c) After the 24th week of pregnancy only if the physician has reasonable cause to believe that an abortion currently is necessary to preserve the life or health of the pregnant woman.").

NEW JERSEY

- 96 *Planned Parenthood of Cent. N. J. v. Farmer*, 762 A.2d 620 (N.J. 2000) (striking down parental-notification law because the act violated the minor's right to privacy and equal protection of the law, as protected by the state constitution); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (under the state constitution Medicaid funding for medically necessary abortions are necessary. Holding based on a recognized right to privacy under the inalienable rights clause that encompasses abortion, that provides the basis for strict scrutiny under the equal protection clause).

NEW MEXICO

- 97 N.M. STAT. ANN. § 30-5-1 (defining "justified medical termination"), § 30-5-3 (criminal abortion).
- 98 *State v. Strance*, 506 P.2d 1217 (N.M. Ct. App. 1973) (statute unconstitutional to the extent it is incompatible with *Roe v. Wade* and *Doe v. Bolton*). After this decision, abortion has been prohibited in New Mexico only if the woman did not give her consent or the abortion was not performed by a physician. N.M. Op. Att'y Gen. No. 90-19 (1990).
- 99 *See, e.g., Hall v. Regents of Univ. of N.M.*, 740 P.2d 1151, 1152 (N.M. 1987) (recognizing "that repeal by implication is disfavored" but stating, "[n]evertheless, when two statutes are inconsistent, the latter enactment repeals the former by implication to the extent of the inconsistency" and declaring part of earlier statute repealed).
- 100 N.M. CONST. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.").
- 101 *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) (holding that gender-based classifications, including restrictions on abortions, are subject to strict scrutiny under the Equal Rights Amendment and holding that the state must fund medically necessary abortions for Medicaid-eligible women).

NEW YORK

- 102 In rejecting a challenge to New York's public health law's failure to fund abortions on an equal footing with prenatal services, the state's highest court declined to hold that the New York Constitution provided broader protection for the right to choose abortion than the U.S. Constitution. *Hope v. Perales*, 634 N.E. 2d 183, 186 (N.Y. 1994). The court did not reach the issue, noting that "it is undisputed by defendants that the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right . . ." (citations omitted).

ENDNOTES

CONTINUED

STATE-BY-STATE ANALYSIS

NORTH CAROLINA

- 103 N.C. GEN. STAT. § 14-44 (“If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be punished as a Class I felon.”).
- 104 N.C. GEN. STAT. § 14-45-1.
- 105 *Rosie J. v. N.C. Dept. of Human Res.*, 419 S.E.2d 535 (N.C. 1977) (rejecting argument that state constitution required equal funding for abortion and prenatal care in Medicaid program, without addressing whether the state constitution provided independent protection for the right to abortion itself).
- 106 For example, the North Carolina Legislature has enacted numerous laws regulating abortion, including a parental-consent law, N.C. GEN. STAT. §§ 90-21.7 to 90-21.10; a law that restricts low-income women’s access to abortion, 1995 N.C. Sess. Laws 1525, 1661; and targeted regulations against abortion providers, N.C. GEN. STAT. § 14-45.1(a), 10A N.C. ADMIN. CODE 14E.0101(1), 10A N.C. ADMIN. CODE 14E.0307, N.C. GEN. STAT. § 14-45.1(b).

NORTH DAKOTA

- 107 H.B. 1466, 2007 Leg., Reg. Sess. (North Dakota 2007).
- 108 *Id.*
- 109 *Id.*
- 110 “The purpose of this chapter is to protect unborn human life and maternal health within present constitutional limits. It reaffirms the tradition of the state of North Dakota to protect every human life whether unborn or aged, healthy or sick.” *Id.* § 14-02.1-01.

OHIO

- 111 *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993) (upholding Ohio’s informed-consent law requiring physician to provide a woman with certain state-sponsored materials twenty-four hours prior to performing an abortion).

- 112 For example, the Ohio Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a physician-only law, OHIO REV. CODE ANN § 2919.11, § 4731.41; a parental-involvement law, § 2919.121; an “abortion manslaughter” law, § 2919.13; an “abortion trafficking” law, § 2919.14; a “partial-birth feticide” law, § 2919.151; a post-viability ban, § 2919.17, and a mandatory-delay/biased-counseling requirement, § 2317.56.

OKLAHOMA

- 113 OKLA. STAT. ANN. tit. 21, § 714.
- 114 *Jobe v. State*, 509 P.2d 481 (Okla. Crim. App. 1973) (finding abortion ban in § 861 unconstitutional pursuant to *Roe*); *Henrie v. Derryberry*, 358 F. Supp. 719 (N.D. Okla. 1973) (finding § 861 and § 862 unconstitutional pursuant to *Roe*). The *Derryberry* court declined to rule on the constitutionality of a separate statute regulating abortions after quickening because “the State law [was] uncertain and susceptible of a construction that would avoid or modify the federal constitutional issue,” but did point out several constitutional defects. *Derryberry*, 358 F. Supp. at 726.
- 115 *Id.* § 861.
- 116 *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992) (invalidating the initiative on the grounds that it sought a vote on a measure that would, if approved, be unconstitutional).
- 117 For example, the Oklahoma Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called “partial-birth abortion” ban, OKLA. STAT. tit. 21, § 684; a mandatory-delay/biased-counseling law, OKLA. STAT. tit. 63, §§ 1-738.1 to 1-738.5; a parental-consent law, OKLA. STAT. tit. 63, §§ 1-740 to 1-740.5; a law that restricts low-income women’s access to abortion, OKLA. ADMIN. CODE § 317:30-5-6(a); and targeted regulations against abortion providers, OKLA. STAT. tit. 63, § 1-731.

OREGON

- 118 *See Planned Parenthood Ass’n v. Dep’t of Human Res.*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff’d on other grounds*, 687 P.2d 785 (Or. 1984) (striking down administrative rule denying funding for medically necessary abortions). The court relied on the federally constitutional rights recognized in *Roe* and a provision of the Oregon Constitution which states, “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” OR. CONST. art. I, § 20. Notably, however, the Oregon Supreme Court declined to affirm the court’s ruling in this case on constitutional grounds, relying instead on statutory arguments. *Planned Parenthood Ass’n v. Dep’t of Human Res.*, 687 P.2d 785 (Or. 1984).
- 119 *See* “Amends Oregon Constitution to Prohibit Abortion With Three Exceptions,” submitted by initiative petition, November 6, 1990 *available at* <http://bluebook.state.or.us/state/elections/elections21.htm>.

PENNSYLVANIA

- 120 *Fischer v. Dept. of Pub. Welfare*, 502 A.2d 114 (Pa. 1985) (challenge to restrictions on public funding of abortion under state equal protection clause, equal rights amendment, and other provisions denied).
- 121 18 PA. CONS. STAT. § 3202(c) (“... the common and statutory law in Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.”).
- 122 For example, the Pennsylvania Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a parental-consent law, 18 PA. CONS. STAT. § 3206; a mandatory-delay/biased-counseling law, §§ 3205, 3208; a physician-only law, § 3204; restrictions on use of public hospitals for abortions, § 3215; and a spousal-notice requirement, § 3209.

RHODE ISLAND

- 123 R.I. GEN. LAWS §§ 11-3-1–11-3-5.
- 124 *Doe v. Israel*, 358 F. Supp. 1193 (D.R.I. 1973) (statute unconstitutional under *Roe*). There is also a law on the books in Rhode Island that prohibits the “administration to any woman pregnant with a quick child of any medication, drug, or substance or the use of any instrument or device of other means, with intent to destroy the child, unless it is necessary to preserve the life of the mother; in the event of the death of the child; shall be deemed manslaughter.” R.I. GEN. LAWS § 11-23-5. The term “quick child” has been interpreted to apply only to fetuses at twenty-three weeks or later. *Rodas v. Michaelson*, 527 F.2d 582 (1st Cir. 1975).
- 125 *See Berthiaume v. Sch. Comm.*, 397 A.2d 889, 893 (R.I. 1979) (“Only when the two statutory provisions are irreconcilably repugnant will a repeal be implied and the last-enacted statute be preferred.”).
- 126 R.I. CONST. art. I, § 2.
- 127 For example, the Rhode Island Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called “partial-birth abortion” ban, R.I. GEN. LAWS ANN. §§ 23-4.12-1 to 4.12.6; parental-consent law, § 23-4.7-6; a mandatory-delay/biased-counseling law, §§ 23-4.7-2 to 4.7-5; a spousal-notice requirement, §§ 23-4.8-1 to 4.8-5; a physician-only requirement, R.I. CODE R. 14 000 009; and targeted regulations on abortion providers, R.I. CODE R. 14 000 009.

SOUTH CAROLINA

- 128 For example, the South Carolina Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called “partial-birth abortion” ban, S.C. CODE ANN. § 44-41-85; a spousal-consent provision, § 44-41-20(c); a parental-involvement law, § 44-41-30-37; a physician-only law, § 44-41-20; a mandatory-delay/biased-counseling law, § 44-41-330; and clinic-licensing requirements, § 44-41-75.

SOUTH DAKOTA

- 129 S.D. CODIFIED LAWS § 22-17-5.1 (2005).
- 130 S.D. CODIFIED LAWS § 22-17-7 to 12 (2006) (*repealed*).

TENNESSEE

- 131 *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (striking down mandatory-delay/biased-counseling law and second-trimester hospitalization requirement as violating the state constitutional right to privacy inherent in the state constitution's concept of ordered liberty). The constitutional provisions relied on include article I, section 1 ("That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and inalienable right to alter, reform, or abolish the government in such manner as they may think proper") and article I, section 2 ("That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.").

TEXAS

- 132 *McCorvey v. Hill*, No. 03-10711 385 F.3d 846, 849 (5th Cir. 2004). In this action, Norma McCorvey, the original Jane Roe in *Roe v. Wade*, who is now opposed to abortion, sought to reopen the *Roe* case and have the abortion ban declared unconstitutional. The federal district court rejected her request without reaching the merits on the grounds that too much time has passed since the original judgment was entered. On appeal, the United States Court of Appeals for the Fifth Circuit held that the case was moot because the pre-*Roe* ban had been repealed by implication. *Id.*
- 133 *Bell v. Low-Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002) (rejecting challenge to state restrictions on Medicaid funding for abortions on basis of state constitutional right to privacy, equal protection, and equal rights amendment, without deciding whether the right to privacy protects abortion).

- 134 For example, the Texas Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a mandatory-delay/biased-counseling law, TEX. HEALTH & SAFETY CODE ANN. §§ 171.011 to 171.016; a parental-consent law, TEX. FAM. CODE ANN. §§ 33.001 to 33.006; laws that restrict low-income women's access to abortion, 1 TEX. ADMIN. CODE § 354.1167, TEX. HEALTH & SAFETY CODE ANN. § 32.005; and targeted regulations against abortion providers, TEX. HEALTH & SAFETY CODE ANN. §§ 245.002 to 245.004.

UTAH

- 135 UTAH CODE ANN. § 76-7-302 (abortions prior to twenty weeks gestational age can only be performed to save a woman's life, in cases of rape or incest if reported to law enforcement, to avert grave damage to the woman's medical health, or to prevent the "birth of a child" with "grave defects"; abortions after twenty weeks gestational age can only be performed to save the woman's life, to avert grave damage to the woman's medical health, or to prevent the "birth of a child" with "grave defects.").
- 136 *Id.*
- 137 *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992) (provision regulating abortions prior to twenty weeks unconstitutional); *rev'd in part Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (provision regulating abortion after twenty weeks unconstitutional).
- 138 UTAH CODE ANN. § 76-7-317.2.
- 139 *Id.* § 76-7-301.1 (state has a compelling interest in the protection of the lives of unborn children; unborn children have inherent and inalienable rights); § 78-11-23 (state's policy is to encourage the right to life).
- 140 *See, e.g., Salt Lake City v. Towne House Athletic Club*, 424 P.2d 442, 444 (Utah 1967) (setting out stringent standard for finding implied repeal).
- 141 For example, the Utah Legislature has enacted numerous laws regulating abortion, including a so-called "partial-birth abortion" ban, UTAH CODE ANN. § 76-7-326; a mandatory-delay/biased-counseling law, §§ 76-7-305, 76-7-305.5; a parental-consent law, §§ 76-7-304, 76-7-304.5; laws that restrict low-income women's access to abortion, §§ 76-7-331, 26-18-4; and targeted regulations against abortion providers, §§ 26-21-2(1), 76-7-302(1), UTAH ADMIN. CODE r. 432-600-14, 432-600-9.

VERMONT

- 142 VT. STAT. ANN. tit. 13, § 101; *see also* § 104 (ban on abortion advertising).
- 143 *Beecham v. Leahy*, 287 A.2d 836 (Vt. 1972) (striking down abortion statute as applied to physicians, finding "[b]y this decision, we hold that the legislature, having affirmed the right of a woman to abort, cannot simultaneously, by denying medical aid in all but cases where it is necessary to preserve her life, prohibit its safe exercise. This is more than regulation, and an anomaly fatal to the application of this statute to medical practitioners.").
- 144 *Doe v. Celani*, No. S81-84Cn at 5 (Vt. Super. Ct. May 23, 1986) (holding that ban on Medicaid funding violated state constitution).
- 145 2003 Vt. Acts & Resolves H.R. 4 S.R. 8 (2003).

VIRGINIA

- 146 Note that in 1975, the legislature enacted a post-*Roe* abortion statute, which provides, "[e]xcept as provided in other sections of this article, if any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be guilty of a Class 4 felony." VA. CODE ANN. § 18.2-71 (emphasis added). Although this statute initially appears to be an abortion ban, it does not operate as one, as other sections of the article specifically allow abortion, and this provision specifically excludes those sections. Thus, this provision primarily operates as a physician-only law. *See id.*; § 18.2-72 ("[n]otwithstanding any of the provisions of § 18.2-71, it shall be lawful for any physician licensed by the Board of Medicine to practice medicine and surgery, to terminate or attempt to terminate a human pregnancy or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman during the first trimester of pregnancy"); § 18.2-73 ("[n]otwithstanding any of the provisions of § 18.2-71 and in addition to the provisions of § 18.2-72, it shall be lawful for any physician licensed by the Board of Medicine to practice medicine and surgery, to terminate or attempt to terminate

- a human pregnancy or aid or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman during the second trimester of pregnancy and prior to the third trimester of pregnancy provided such procedure is performed in a hospital licensed by the State Department of Health or under the control of the State Board of Mental Health, Mental Retardation and Substance Abuse Services"); § 18.2-74 (regulating post-second-trimester abortions); § 18.2-74-1 (exception for woman's life).
- 147 For example, the Virginia Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called "partial-birth abortion" ban, VA. CODE ANN. § 18.2-71.1; a mandatory-delay/biased-counseling law, § 18.2-76; a parental-consent law, § 16.1-241(V); a law that restricts low-income women's access to abortion, §§ 32.1-92.1, 32.1-92.2; and targeted regulations against abortion providers, § 18.2-73.

WASHINGTON

- 148 WASH. REV. CODE ANN. §§ 9.02.100, 902.110, 902.140, 902.160.
- 149 *Id.* at § 9.02.100. Washington law also states that "[t]he state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health," § 9.02.110; and provides defenses to prosecution, § 9.02.130; restrictions on abortion regulation, § 9.02.140; and rights to state benefits, § 9.02.160.

WEST VIRGINIA

- 150 W.VA. CODE ANN. § 61-2-8.
- 151 *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644-45 (4th Cir. 1975) ("[t]he West Virginia criminal abortion statute is unconstitutional beyond question" and "irreconcilable with *Roe v. Wade*").
- 152 *Women's Health Ctr. of W.Va., Inc. v. Panepinto*, 446 S.E.2d 658 (W.Va. 1993) (finding statute limiting state funds for abortion unconstitutional).

ENDNOTES

CONTINUED

STATE-BY-STATE ANALYSIS

WISCONSIN

- 153 Wis. STAT. ANN. § 940.04 (providing “[a]ny person, other than the mother, who intentionally destroys the life of an unborn child” is guilty of a Class H felony and “[a]ny person, other than the mother, who...intentionally destroys the life of an unborn quick child” is guilty of a Class E felony; the statute contains an exception for a “therapeutic abortion,” which is an abortion that is necessary to save the life of the mother and is performed by a physician).
- 154 *Babbitz v. McCann*, 310 F. Supp. 293 (D. Wis. 1970). The *Babbitz* court noted that “quickening” is the point in pregnancy when it is possible to detect fetal movement, usually around sixteen to eighteen weeks. The court also stated, “...a woman’s right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity... When measured against the claimed ‘rights’ of an embryo of four months or less, we hold that the mother’s right transcends that of such an embryo.” *Babbitz*, 310 F. Supp. at 299, 301.
- 155 See *State v. Black*, 526 N.W.2d 132, 134–35 (Wis. 1994) (“Implied repeal of statute by later enactments is not favored in statutory construction. Rather, when two provisions are similar, . . . we must make every attempt to give effect to both by construing them together so as to be consistent with one another. . .”) (citations omitted).
- 156 For example, the Wisconsin Legislature has enacted numerous laws regulating abortion (not all of which are currently in effect), including a so-called “partial-birth abortion” ban, Wis. STAT. § 895.038; a mandatory-delay/biased-counseling law, § 253.10; a parental-consent law, § 48.375(4); a law that restricts low-income women’s access to abortion, § 20.927; and targeted regulations against abortion providers, Wis. ADMIN. CODE MED. § 11.04(1)(g), Wis. ADMIN. CODE MED. § 11.05.

COMMONWEALTH OF PUERTO RICO

- 157 *Montalvo v. Colon*, 377 F. Supp. 1332, 1343–44 (D.P.R. 1974) (holding that *Roe v. Wade* is binding upon Puerto Rico; upholding provisions of Puerto Rico law requiring abortions to be performed by a physician for therapeutic purposes upon finding that a physician’s medical judgment regarding health “may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient”; and striking down provisions of the law making it illegal to procure or submit to an abortion except when necessary to preserve the mother’s life on account that those provisions “sweep too broadly and take too little account of the right of the pregnant woman, particularly in her first two trimesters, to seek an abortion to vindicate her privacy or preserve her health, under circumstances where her interests outweigh the interest of the state in preserving the life of the unborn child.”) (citations omitted).
- 158 P.R. LAWS ANN. Tit. 33, § 4010 (“Every person who permits, indicates, advises, induces or practices an abortion; any person who provides, supplies, administers, prescribes or causes a pregnant woman to take any medicine, drug or substance, or uses or employs any instrument or other means with the intent to procure the miscarriage of such woman, and any person who aids in the commission of any such acts, except by therapeutic prescription made by a physician duly authorized to practice medicine in Puerto Rico with a view to preserve the health or life of the mother, shall be punished by imprisonment for a fixed term of three (3) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of five (5) years; if there should be extenuating circumstances, it may be reduced to a minimum of two (2) years.”). Puerto Rico law also criminalizes “abortion committed by the woman or consented to by her” with life and health exceptions, § 4011, and prohibits abortion advertising, § 4012.
- 159 *People v. Duarte Mendoza*, 109 D.P.R. 596 (1980) (reversing conviction for performing an abortion and stating that the “term ‘health’ contained in our statute implies physical as well as mental health.”).
- 160 *Figueroa Ferrer v. Commonwealth*, 107 D.P.R. 250 (1978); see also *Estado Libre Asociado de Puerto Rico v. Hermandad de Empleados*, 104 D.P.R. 436 (1975), *People v. Santiago Feliciano*, 139 D.P.R. 361 (1995); *People v. Falu Martinez*, 116 D.P.R. 828 (1986).
- 161 All U.S. territories that have not been admitted as states are subject to congressional authority, and Congress may legislate for such territories directly. “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” U.S. CONST. art. IV, § 3, cl. 2. Therefore, if *Roe* were overturned, Congress could theoretically enact an abortion ban in Puerto Rico. See *Ngiraingas v. Sanchez*, 495 U.S. 182, 204 (1990) (“[Congress] has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments”); *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431 (3d Cir. 1966) (holding that Puerto Rico is a territory within the meaning of art. IV, § 3).
- 162 All U.S. territories that have not been admitted as states are subject to congressional authority, and Congress may legislate for such territories directly. “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” US Const. Art. IV, § 3, cl. 2. Therefore, if *Roe* were overturned, Congress could theoretically enact an abortion ban in Guam. See *Ngiraingas v. Sanchez*, 495 US 182, 204 (1990) (“[Congress] has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments”); and holding that Congress may legislate for Guam).

TERRITORY OF GUAM

- 162 Guam Pub. L. No. 20-134 (1990) (repealing and reenacting 9 GUAM CODE § 31.21). Under this law, abortion was banned except in cases of ectopic pregnancy, or where two independent physicians determined that there was a substantial risk that the mother’s life would be endangered or her health would be gravely impaired by continuing the pregnancy. Guam Pub. L. No. 20-134 (repealing and reenacting § 31.20). The law also banned abortion solicitation. Guam Pub. L. No. 20-134 (1990) (repealing and reenacting §§ 31.22).
- 163 *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 776 F Supp 1422 (D. Guam 1990) (declaring law “void” and “moot”); aff’d, 962 F2d 1366 (9th Cir 1992).
- 164 The Organic Act of Guam, enacted by the U.S. Congress and containing sections such as a Bill of Rights, directs that provisions of the U.S. Constitution are operative in Guam. 48 USC §§ 1421–1428(e).

APPENDIX

OVERVIEW:
OF SUPREME COURT DECISIONS ON
ABORTION AND THE RIGHT TO PRIVACY

MODEL LEGISLATION:
FREEDOM OF CHOICE ACT

STATE ABORTION BANS

Overview of Supreme Court Decisions on Abortion and the Right to Privacy

The Decision in *Roe v. Wade*

1 *Roe v. Wade*, 410 U.S. 113 (1973).

2 “Viability” is the point in pregnancy at which the fetus is able to survive indefinitely outside the woman’s body.

On January 22, 1973, the United States Supreme Court struck down a Texas law criminalizing abortion and held that a woman has a constitutional right to choose whether to terminate her pregnancy.¹ *Roe v. Wade* placed women’s reproductive choice alongside other fundamental constitutional rights, such as freedom of speech and freedom of religion, by conferring upon it the highest degree of constitutional protection, known as “strict scrutiny.” When a law or policy is subjected to “strict scrutiny,” the state must establish that the law or policy is narrowly tailored to serve a convincing state interest, the most difficult test to meet.

In *Roe*, the Supreme Court established a framework for evaluating restrictions on abortion, finding a need to balance a woman’s right to privacy with the state’s interest in protecting potential life. The Court required the state to justify any interference with a woman’s decision to have an abortion by showing that it had a “compelling interest” in doing so and that restrictions on abortions performed before fetal viability were limited to those that narrowly and precisely promoted real maternal health concerns.² After the point of viability, the state was free to ban abortion or take other steps to promote its interest in protecting fetal life. Even after that point, however, the state’s interest in the viable fetus had to yield to the woman’s right to have an abortion to protect her life or health.

Although a landmark ruling, the *Roe* decision was consistent with earlier Supreme Court cases recognizing a right of privacy that protects intimate and personal decisions from governmental interference, including those affecting child rearing, marriage, procreation, and the use of contraception. The decision was far from radical; it was the logical extension of the Court’s decisions on the right to privacy dating back to the turn of the century. In finding that the constitutional right to privacy encompasses a woman’s right to decide whether or not to continue a pregnancy, the Supreme Court continued a long line of decisions that rejected government interference in life’s most personal decisions.

The erosion of *Roe*'s protections began immediately. Well-funded abortion opponents pressed state and federal lawmakers to enact a wide range of restrictive abortion laws attempting to directly or indirectly reverse *Roe*'s protection of women's reproductive choices.

The 7-2 decision in *Roe* had an immediate and profound effect on the lives of American women. Before *Roe*, it is estimated that "between 200,000 and 1.2 million illegally induced abortions occur[red] annually in the United States."³ After *Roe*, abortions were no longer relegated to back alleys, and women instead had strong legal protection for obtaining abortions.

The Backlash

The erosion of *Roe*'s protections began immediately. Well-funded abortion opponents pressed state and federal lawmakers to enact a wide range of restrictive abortion laws attempting to directly or indirectly reverse *Roe*'s protection of women's reproductive choices. Many states adopted requirements that married women involve their husbands in their abortion choice, requirements that young women consult their parents in their abortion decisions, restrictions on abortion coverage in state Medicaid programs and state employee health plans, bans on the performance of abortions in public hospitals, requirements that women wait for a certain period of time, usually twenty-four hours, after receiving certain state-scripted and biased information before obtaining an abortion ("mandatory-delay/biase-counseling" laws), and bans on abortion procedures.

Supreme Court Decisions Post-*Roe*: Chipping Away at the Right to Choose

Lawsuits challenging the constitutionality of these restrictions provided the Supreme Court with numerous opportunities to dilute the fundamental right to choose abortion. And it wasn't long before the Court abandoned full protection for the right. Three years after *Roe*, in one case the justices reviewed a requirement that a married woman obtain her husband's consent for an abortion; a statute requiring minors seeking abortions to obtain the written consent of one parent; and a ban on the performance of abortions by saline amniocentesis. While the Court struck down the parental-and spousal-consent requirements and the ban on saline abortions in *Planned Parenthood v. Danforth*, the seven-Justice *Roe* majority was reduced to six in the decision.⁴ Four years later, the balance shifted when five Justices held in *Harris v. McRae*⁵ that the denial of Medicaid funding for medically necessary abortions did not "interfere" with women's rights to make reproductive decisions, and that the state could promote fetal life throughout pregnancy by discriminatory funding.

In addition to weakening *Roe*'s protection for low-income women, the Court acted to compromise young women's reproductive rights. In *Bellotti v. Baird*,⁶ a plurality of the Court outlined a general scheme that would meet constitutional muster for states imposing parental-consent requirements. As a consequence, over thirty states today require either parental notice or consent for a minor seeking an abortion.

While the Supreme Court permitted restrictions on abortion for low-income women and minors, a tenuous majority of the Court continued to invalidate restrictions on the rights of adult, non-indigent women, such as the twenty-four-hour waiting period, biased informed-consent, and second-trimester hospitalization requirements in *City of Akron v. Akron Center for Reproductive Health*.⁷ The majority of the Court also continued to adhere to the framework

3 Wilfred Cates, Jr., and Robert W. Rochat, *Illegal Abortions in the United States: 1972-74*, 08 FAM. PLAN. PERSP. 86, 92 (1976).

4 428 U.S. 52 (1976).

5 448 U.S. 297 (1980).

6 443 U.S. 622 (1979).

7 462 U.S. 416 (1983).

In the early 1990s, with the retirement of two justices, the overturning of *Roe* was again seriously threatened. Additionally, anti-choice state legislatures were continuing to pass restrictions on abortion that had already been declared unconstitutional.

of *Roe*, under which a woman's life and health must predominate even after fetal viability, in *Colautti v. Franklin*⁸ and *Thornburgh v. American College of Obstetricians and Gynecologists*.⁹

In 1988, President Ronald Reagan appointed a new Justice to the Court, leading many to believe that *Roe* would be overturned by a newly constituted majority. Yet, when *Webster v. Reproductive Health Services*¹⁰ was decided in 1989, a majority of Justices declined to overrule *Roe* explicitly, finding that the question of *Roe*'s validity was not properly before them. However, a number of the Justices did invite states to pass laws banning abortion to test the 1973 decision so that the Court would be able to directly address the issue. Soon thereafter, the Territory of Guam and two states, Louisiana and Utah, enacted bans criminalizing virtually all abortions. These statutes were blocked, although with great reluctance, by some federal judges.

After *Webster*, in *Ohio v. Akron Center for Reproductive Health*,¹¹ a six-Justice majority upheld a one-parent notification statute that also contained a provision for a burdensome and potentially lengthy judicial procedure in which a minor could obtain a judge's permission to bypass the parental-notification requirement ("judicial-bypass"). In *Hodgson v. Minnesota*,¹² the Court invalidated as "unreasonable" a statute that required minors to notify both parents, with no judicial-bypass option. But the justices permitted the two-parent notification requirement as long as a bypass was available.

In the early 1990s, with the retirement of two Justices, the overturning of *Roe* was again seriously threatened. Additionally, anti-choice state legislatures were continuing to pass restrictions on abortion that had already been declared unconstitutional. For example, Mississippi, North Dakota, and Pennsylvania reenacted mandatory-delay and biased-counseling requirements previously declared unconstitutional by the Court in *Akron* and *Thornburgh*; and Pennsylvania went beyond these other states by imposing a spousal-notice requirement (without a judicial bypass) for married women.

In 1992, when the Supreme Court granted review of a challenge to the Pennsylvania statutes in *Planned Parenthood v. Casey*,¹³ the parties once again asked the Court either to overrule *Roe* or reaffirm it. Despite the urging of the plaintiffs to retain "strict scrutiny" as the test for abortion regulations, the Court issued an opinion reaffirming *Roe*'s "core holding"—that states may not ban abortions or interfere with a woman's ultimate decision to terminate a pregnancy—but eliminating *Roe*'s original framework. In its place, the Court established an "undue burden" standard, which allowed states to regulate abortion prior to viability based on the state's interest in maternal health and potential life so long as those regulations did not impose an "undue burden." The Court explained, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹⁴ Under this new standard, the Court upheld Pennsylvania's mandatory-delay/biased-counseling law, but struck down the spousal-notice requirement because it imposed a substantial obstacle for a "large fraction" of married women who would not otherwise notify their husbands.

8 439 U.S. 379 (1979).

9 476 U.S. 747 (1986).

10 492 U.S. 490 (1989).

11 497 U.S. 502 (1990).

12 497 U.S. 417 (1990).

13 505 U.S. 833 (1992).

14 *Casey*, 505 U.S. at 877.

It is clear that in the years since *Roe* was decided, the scope of its protection for women’s right to choose abortion has been weakened.

In 2000, the Supreme Court struck down a Nebraska ban on so-called “partial-birth abortion” in a 5-4 vote. The decision in *Stenberg v. Carhart*¹⁵ held that the Nebraska ban violated the precedents of *Roe* and *Casey* in two ways. First, the Court held that the Nebraska ban was unconstitutional because it failed to include an exception to preserve the health of the woman. Second, the Court held that the ban was written so broadly that it banned the safest and most common procedures starting as early as twelve weeks of pregnancy, and thus, imposed an undue burden on a woman’s ability to choose an abortion.

In 2003, President George W. Bush signed into law the first-ever federal abortion ban, legislation nearly identical to the Nebraska ban. By 2007, the federal ban had made its way to the Supreme Court whose makeup had shifted once again. Justice Sandra Day O’Connor, who joined the majority in *Stenberg*, had departed, and Justices John Roberts and Samuel A. Alito joined. When the newly constituted Court reviewed the federal law, it reached a dramatically different result than it had in *Stenberg* just seven years earlier. In *Gonzales v. Carhart*,¹⁶ also decided by a 5-4 vote, the Court swept aside thirty years of precedent and upheld the law even though it did not include an exception to protect women’s health. For the first time, a majority of the Court allowed women’s health to be balanced against “moral” interests asserted by the government, and permitted lawmakers, not physicians, to determine the availability of certain abortion procedures absent unanimous medical opinion on the subject. In so doing, the majority also implied that women needed the government’s assistance in making decisions about abortion. The decision also changed the standard for challenging restrictions on abortion, making it much more difficult to completely invalidate laws containing unconstitutional provisions.

15 530 U.S. 914 (2000).

16 127 S. Ct. 1610 (2007).

Conclusion

It is clear that in the years since *Roe* was decided, the scope of its protection for women’s right to choose abortion has been weakened. Most significantly, the Court’s 1992 decision in *Casey* made two profound changes: it reduced the level of judicial scrutiny given to laws that restrict abortion and eliminated *Roe*’s trimester system, which outlined the changing balance between a woman’s right to choose abortion and the state’s interest in regulating the procedure as a pregnancy progresses. Yet the *Casey* decision reaffirmed the central holding of *Roe* that women have a constitutionally protected right to abortion, which is the basis for abortion rights today. However, as demonstrated by the close vote in *Carhart II*, the right to abortion is in jeopardy, especially if one or more new anti-choice Justices are appointed to the Court. Such an event could shift the current, precarious Court balance, making it more likely that *Roe* would be overturned.

Model Legislation: Freedom of Choice Act¹

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF _____

Section 1: SHORT TITLE

This Act may be cited as the “Freedom of Choice Act”

Section 2: FINDINGS AND POLICY

The legislature hereby finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions.

The legislature further finds that the decision to bear a child or to obtain an abortion prior to the viability of the fetus should be solely that of the pregnant woman in consultation with her physician.

The legislature further finds that a pregnant woman’s interest in protecting her life or health are paramount and may not be compromised as a result of any law or regulation governing abortion.

Section 3: RIGHT TO MAKE REPRODUCTIVE DECISIONS PROTECTED

Chapter ___ is amended [created] by adding a new section to read as follows:

- (A) Every woman has the fundamental right to choose to bear a child; or to choose to obtain an abortion [*or has a fundamental right to choose whether or not to terminate a pregnancy*].
- (B) The state shall not deny or interfere with a woman’s right to choose to bear a child or obtain an abortion [*or choose whether or not to terminate a pregnancy*]
 - (1) prior to viability of the fetus; or
 - (2) when the abortion is necessary to protect the life or health of the woman.
- (C) Any law or regulation restricting abortion shall not premise criminal or civil liability on unintentional conduct taken by a physician in his/her good faith medical judgment that the abortion was performed in conformance with the law or regulation.

¹ This model bill is intended to be used as an aid in drafting legislation. You may need to alter the language so the bill adheres to the existing laws and circumstances of your particular state.

Section 4: OTHER LAWS

Nothing in this Act prohibits the enforcement of generally applicable statutes governing licensing, regulation, or informed consent for medical procedures as to abortion procedures,

OR

Nothing in this Act prohibits the enforcement of *[list specific statutes, such as mandatory-delay/biased-counseling, parental-involvement laws, physician-only laws, etc]*.

Section 5: DEFINITIONS

As used in this chapter, the following words and phrases have the following meanings unless the context clearly indicates otherwise:

- (A) “Abortion” means any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth.
- (B) “State” means the State of _____ and every county, city, town, and municipal corporation and quasi-municipal corporation in the state.
- (C) “Viability” means the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable likelihood of the fetus’ sustained survival outside the uterus without the application of extraordinary medical measures.

Section 6: REPEAL

The following are repealed:

[If there are provisions in existing law that are inconsistent with this Act, this section should list and explicitly repeal them. Examples of such language include pre-Roe bans on abortion or statements of legislative policy expressing disagreement with the Roe decision.]

Section 7: EFFECTIVE DATE

This Act shall take effect [fill in appropriate information].

Additional optional provision, for states where advocates want to introduce broader Freedom of Choice Act legislation:

The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.

State Abortion Bans

ALABAMA

Section 13A-13-7.

Inducing or attempting to induce abortion, miscarriage or premature delivery of woman.

Any person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than \$100.00 nor more than \$1,000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.

Source: <http://alisdب.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-13-7.htm>

ARIZONA

13-3603.

Definition; punishment.

A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

Source: <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/13/03603.htm&Title=13&DocType=ARS>

13-3604.

Soliciting abortion; punishment; exception.

A woman who solicits from any person any medicine, drug or substance whatever, and takes it, or who submits to an operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless it is necessary to preserve her life, shall be punished by imprisonment in the state prison for not less than one nor more than five years.

Source: <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/13/03604.htm&Title=1&DocType=ARS>

13-3605.

Advertising to produce abortion or prevent conception; punishment.

A person who wilfully writes, composes or publishes a notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for prevention of conception, or who offers his services by a notice, advertisement or otherwise, to assist in the accomplishment of any such purposes, is guilty of a misdemeanor.

Source: <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/13/03605.htm&Title=13&DocType=ARS>

ARKANSAS

5-61-101.

Abortion only by licensed medical practitioner.

- (a) It shall be unlawful for any person to induce another person to have an abortion or to willfully terminate the pregnancy of a woman known to be pregnant with the intent to cause fetal death unless such person shall be licensed to practice medicine in the State of Arkansas.
- (b) Violation of this provision shall be a Class D felony.
- (c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

Source: https://web2.westlaw.com/find/default.wl?fn=_top&rs=WLW7.06&rp=%2ffind%2fdefault.wl&mt=Westlaw&vr=2.0&sv=Split&cite=ark+code+s.5-61-101

5-61-102.

Unlawful abortion.

- (a) It shall be unlawful for anyone to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce such abortion by any other means.
- (b) Any person offending against the provisions of this section shall be fined in any sum not to exceed one thousand dollars (\$1,000) and imprisoned in the penitentiary not less than one (1) nor more than five (5) years.
- (c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

Source: https://web2.westlaw.com/find/default.wl?fn=_top&rs=WLW7.06&rp=%2ffind%2fdefault.wl&mt=Westlaw&vr=2.0&sv=Split&cite=ark+code+s.5-61-102

COLORADO

18-6-101.

Definitions. Statute text.

As used in sections 18-6-101 to 18-6-104, unless the context otherwise requires:

- (1) “Justified medical termination” means the intentional ending of the pregnancy of a woman at the request of said woman or, if said woman is under the age of eighteen years,

then at the request of the woman and her then living parent or guardian, or, if the woman is married and living with her husband, at the request of said woman and her husband, by a licensed physician using accepted medical procedures in a licensed hospital upon written certification by all of the members of a special hospital board that:

- (a) Continuation of the pregnancy, in their opinion, is likely to result in: the death of the woman; or the serious permanent impairment of the physical health of the woman; or the serious permanent impairment of the mental health of the woman as confirmed in writing under the signature of a licensed doctor of medicine specializing in psychiatry; or the birth of a child with grave and permanent physical deformity or mental retardation; or
 - (b) Less than sixteen weeks of gestation have passed and that the pregnancy resulted from conduct defined as criminal in sections 18-3-402 and 18-3-403, or if the female person is unmarried and has not reached her sixteenth birthday at the time of such conduct regardless of the age of the male, or incest, as defined in sections 18-6-301 and 18-6-302, and that the district attorney of the judicial district in which the alleged sexual assault or incest has occurred has informed the committee in writing over his signature that there is probable cause to believe that the alleged violation did occur.
- (2) “Licensed hospital” means one licensed or certificated by the department of public health and environment.
 - (3) “Pregnancy” means the implantation of an embryo in the uterus.
 - (4) “Special hospital board” means a committee of three licensed physicians who are members of the staff of the hospital where the proposed termination would be performed if certified in accordance with subsection (1) of this section, and who meet regularly or on call for the purpose of determining the question of medical justification in each individual case, and which maintains a written record, signed by each member, of the proceedings and deliberations of the board.

18-6-102.

Criminal abortion. Statute text

- (1) Any person who intentionally ends or causes to be ended the pregnancy of a woman by any means other than justified medical termination or birth commits criminal abortion.
- (2) Criminal abortion is a class 4 felony, but if the woman dies as a result of the criminal abortion, it is a class 2 felony.

Source: <http://198.187.128.12/colorado/lpext.dll/Infobase4/2abee/2d928/2d958/2d95b?f=templates&fn=fs-main-doc.htm&q=18-6-101&x=Advanced&2.0#LPHit1>

DELAWARE

Title 11 § 651.

Abortion; class F felony.

A person is guilty of abortion when the person commits upon a pregnant female an abortion which causes the miscarriage of the female, unless the abortion is a therapeutic abortion.

Title 11 § 652.

Self-abortion; class A misdemeanor.

A female is guilty of self-abortion when she, being pregnant, commits or submits to an abortion upon herself which causes her abortion, unless the abortion is a therapeutic abortion.

Title 11 § 653.

Issuing abortifacient articles; class B misdemeanor.

A person is guilty of issuing abortifacient articles when the person manufactures, sells or delivers any instrument, article, medicine, drug or substance with intent that the same be used in committing an abortion upon a female in circumstances which would constitute a crime defined by this Criminal Code.

Title 11 § 654.

“Abortion” defined.

“Abortion” means an act committed upon or with respect to a female, whether by another person or by the female herself, whether directly upon her body or by the administering, taking or prescription of drugs or in any other manner, with intent to cause a miscarriage of such female.

Source: http://delcode.delaware.gov/title11/c005/sc02/index.shtml#P602_43777

Title 24 § 1790.

Limitation on termination of human pregnancy; annual report.

- (a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by this State may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if such procedure takes place in a hospital accredited by a nationally recognized medical or hospital accreditation authority, upon authorization by a hospital abortion review authority appointed by the hospital if 1 or more of the following conditions exist:
- (1) Continuation of the pregnancy is likely to result in the death of the mother;
 - (2) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;
 - (3) The pregnancy resulted from:
 - a. Incest, or
 - b. A rape or unlawful sexual intercourse in the first or second degree committed as a result of force or bodily harm or threat of force or bodily harm, and the Attorney General of this State has certified to the hospital abortion review authority in writing over the Attorney General’s signature that there is probable cause to believe that the alleged rape or unlawful sexual intercourse in the first or second degree did occur, except that during the first 48 hours after the alleged rape or unlawful sexual intercourse in the first or second degree no certification by the Attorney General shall be required;
 - (4) Continuation of the pregnancy would involve substantial risk of permanent injury to the physical or mental health of the mother.

- (b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless:
 - (1) Not more than 20 weeks of gestation have passed (except in the case of a termination pursuant to subsection (a)(1) of this section or where the fetus is dead); and
 - (2) Two physicians licensed by this State, 1 of whom may be the physician proposed to perform the abortion, certify to the abortion review authority of the hospital where the procedure is to be performed that they are of the opinion, formed in good faith, that 1 of the circumstances set forth in subsection (a) of this section exists (except that no such certification is necessary for the circumstances set forth in subsection (a)(3)b. of this section); where the personal physician of an expectant mother claims that she has a mental or emotional condition, a psychiatrist licensed by this State shall, in addition to the personal physician, certify to the abortion review authority of the hospital where such procedure is to be performed that the physician is of the opinion, formed in good faith, that 1 of the circumstances set forth in subsection (a) of this section exists (except that no such certification is necessary for the circumstances set forth in subsection (a)(3)b. of this section); and
 - (3) In the case of an unmarried female under the age of 18 or mentally ill or incompetent, there is filed with the hospital abortion review authority the written consent of the parents or guardians as are then residing in the same household with the consenting female, or, if such consenting female does not reside in the same household with either of her parents or guardians, then with the written consent of 1 of her parents or guardians.
- (c) The hospital abortion review authority of each hospital in which a procedure or procedures are performed pursuant to this section shall, on or before the 1st day of March in each year, file with the Department of Health and Social Services a written report of each such procedure performed pursuant to the authorization of such authority during the preceding calendar year setting forth grounds for each such authorization but not including the names of patients aborted.

Title 24 § 1791.

Refusal to perform or submit to medical procedures.

- (a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person, nor a basis for any disciplinary or other recriminatory action against the person.
- (b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution, and the refusal to permit such procedures shall not be grounds for civil liability to any person, nor a basis for any disciplinary or other recriminatory action against it by the State or any person.
- (c) The refusal of any person to submit to an abortion or to give consent shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled, nor shall submission to an abortion or the granting of consent be a condition precedent to the receipt of any public benefits.

Title 24 § 1792.

Assistance or participation in an unlawful termination of human pregnancy.

No person shall, unless the termination of a human pregnancy has been authorized pursuant to § 1790 of this title:

- (1) Sell or give, or cause to be sold or given, any drug, medicine, preparation, instrument or device for the purpose of causing, inducing or obtaining a termination of such pregnancy; or
- (2) Give advice, counsel or information for the purpose of causing, inducing or obtaining a termination of such pregnancy; or
- (3) Knowingly assist or cause by any means whatsoever the obtaining or performing of a termination of such pregnancy.

Title 24 § 1793.

Residency requirements; exceptions.

- (a) No person shall be authorized to perform a termination of a human pregnancy within the State upon a female who has not been a resident of this State for a period of at least 120 days next before the performance of an operative procedure for the termination of a human pregnancy.
- (b) This section shall not apply to such female who is gainfully employed in this State at the time of conception, or whose spouse is gainfully employed in this State at the time of conception or to such female who has been a patient, prior to conception, of a physician licensed by this State, or to such female who is attempting to secure the termination of her pregnancy for the condition specified in § 1790(a)(1) of this title.

Title 24 § 1794.

Consent prior to termination of human pregnancy.

- (a) No abortion may be performed unless the woman submitting to the abortion first gives her written consent to the abortion stating that she freely and voluntarily consents to the abortion and that she has received a full explanation of the abortion procedure and effects, including, but not limited to, the following:
 - (1) The abortion procedure to be utilized.
 - (2) The probable effects of the abortion procedure on the woman, including the effects on her child-bearing ability and effects on possible future pregnancies.
 - (3) The facts of fetal development as of the time the proposed abortion is to be performed.
 - (4) The risks attendant to the procedure.
 - (5) An explanation of the reasonable alternatives to abortion and of the reasonable alternative procedures or methods of abortion.
- (b) No abortion may be performed on a woman within 24 hours after giving written consent pursuant to subsection (a) of this section unless, in the opinion of her treating physician, an emergency situation presenting substantial danger to the life of the woman exists.

In the event a woman's treating physician determines an abortion is necessary because an emergency situation presenting substantial danger to the life of the woman existed and such woman is unable to give her consent to an abortion, an abortion may be performed on such woman.

Title 24 § 1795.

Live birth following abortion.

- (a) In the event an abortion or an attempted abortion results in the live birth of a child, the person performing or inducing such abortion or attempted abortion and all persons rendering medical care to the child after its birth must exercise that degree of medical skill, care and diligence which would be rendered to a child who is born alive as the result of a natural birth.
- (b) Nothing found in this section shall be deemed to preclude prosecution under any other applicable section of the Delaware Code for knowing or reckless conduct which is detrimental to the life or health of an infant born as a result of a procedure designed to terminate pregnancy. Anyone who knowingly violates this section shall be guilty of a class A misdemeanor.

Source: <http://delcode.delaware.gov/title24/c017/sc09/index.shtml>

LOUISIANA

Section 40:1299.30.

Abortion; prohibition.

- A. The provisions of this Act shall become effective immediately upon, and to the extent permitted, by the occurrence of any of the following circumstances:
 - (1) Any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby, restoring to the state of Louisiana the authority to prohibit abortion.
 - (2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit abortion.
- B. The provisions of this Act shall be effective relative to the appropriation of Medicaid funds, to the extent consistent with any executive order by the President of the United States, federal statute, appropriation rider, or federal regulation that sets forth the limited circumstances in which states must fund abortion to remain eligible to receive federal Medicaid funds pursuant to 42 U.S.C. 1396, et. seq.
- C. No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.
- D. Any violation of this Section shall be prosecuted pursuant to R.S. 14:87.
- E. Nothing in this Section may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing and if

the contraceptive measure is sold, used, prescribed, or administered in accordance with manufacturer instructions.

- F. It shall not be a violation of Subsection C of this Section for a licensed physician to perform a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child in a manner consistent with reasonable medical practice.
- G. Medical treatment provided to the mother by a licensed physician which results in the accidental or unintentional injury or death to the unborn child is not a violation of Subsection C of this Section.
- H. Nothing in this Section may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty.
- I. The following terms as used in this Section shall have the following meanings:
 - (1) “Pregnant” means the human female reproductive condition, of having a living unborn human being within her body throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth.
 - (2) “Unborn human being” means an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth.
 - (3) “Fertilization” means that point in time when a male human sperm penetrates the zona pellucida of a female human ovum.
- J. This Section shall be known, and may be cited, as the Human Life Protection Act.

Source: <http://www.legis.state.la.us/lss/lss.asp?doc=409414>

MASSACHUSETTS

Chapter 272: Section 19.

Procuring miscarriage.

Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any instrument or other means whatever, or, with like intent, aids or assists therein, shall, if she dies in consequence thereof, be punished by imprisonment in the state prison for not less than five nor more than twenty years; and, if she does not die in consequence thereof, by imprisonment in the state prison for not more than seven years and by a fine of not more than two thousand dollars.

Source: <http://www.mass.gov/legis/laws/mgl/272-19.htm>

Chapter 112: Section 12N.

Violation of section 12L or 12N; punishment.

Any person who violates the provisions of sections 12L or 12M shall be punished by impris-

onment for not less than one year nor more than five years. Conduct which violates the provisions of this act, which also violates any other criminal laws of the commonwealth, may be punished either under the provisions of sections 12K to 12U, inclusive, or under such other applicable criminal laws.

Source: <http://www.mass.gov/legis/laws/mgl/112-12n.htm>

Chapter 112: Section 12O.

Abortion performed pursuant to section 12M; protection of unborn child.

If an abortion is performed pursuant to section 12M, no abortion procedure which is designed to destroy the life of the unborn child or injure the unborn child in its mother's womb may be used unless, in the physician's best medical judgment, all other available procedures would create a greater risk of death or serious bodily harm to the mother either at the time of the abortion, or subsequently as the result of a future pregnancy, than the one being used.

Source: <http://www.mass.gov/legis/laws/mgl/112-12o.htm>

Chapter 112: Section 12P.

Abortion performed pursuant to section 12M; preservation of life and health of child.

If an abortion is performed pursuant to section 12M, the physician performing the abortion shall take all reasonable steps, both during and subsequent to the abortion, in keeping with good medical practice, consistent with the procedure being used, to preserve the life and health of the aborted child. Such steps shall include the presence of life-supporting equipment, as defined by the department of public health, in the room where the abortion is to be performed.

Source: <http://www.mass.gov/legis/laws/mgl/112-12p.htm>

Chapter 112: Section 12Q.

Restrictions on abortions performed under 12L or 12M; emergency excepted.

Except in an emergency requiring immediate action, no abortion may be performed under sections 12L or 12M unless the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section 12S; and if the abortion is during or after the thirteenth week of pregnancy, it is performed in a hospital duly authorized to provide facilities for general surgery.

Source: <http://www.mass.gov/legis/laws/mgl/112-12q.htm>

MICHIGAN

750.14

Miscarriage; administering with intent to procure; felony, penalty.

Administering drugs, etc., with intent to procure miscarriage—Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of

such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

Source: [http://www.legislature.mi.gov/\(S\(xjfuc13eehpp0z5543huu4rs\)\)/mileg.aspx?page=getObject&objectName=mcl-750-14](http://www.legislature.mi.gov/(S(xjfuc13eehpp0z5543huu4rs))/mileg.aspx?page=getObject&objectName=mcl-750-14)

MISSISSIPPI

Senate Bill 2391¹

- (1) The term “abortion” means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth or to remove a dead fetus.
- (2) No abortion shall be performed or induced in the State of Mississippi, except in the case where necessary for the preservation of the mother’s life or where the pregnancy was caused by rape.
- (3) For the purposes of this act, rape shall be an exception to the prohibition for an abortion only if a formal charge of rape has been filed with an appropriate law enforcement official.
- (4) Any person, except the pregnant woman, who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion in the State of Mississippi, except in the case where necessary for the preservation of the mother’s life or where the pregnancy was caused by rape, upon conviction, shall be punished by imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than ten (10) years.

¹ This abortion ban-in-waiting was enacted in 2007 and is now the law in Mississippi. As of June 2007, it has not yet been printed in the Mississippi code and so no citation to the code is available.

SECTION 4. At such time as the Attorney General of Mississippi determines that the United States Supreme Court has overruled the decision of *Roe v. Wade*, 410 U.S. 113 (1973), and that as a result, it is reasonably probable that Section 2 of this act would be upheld by the court as constitutional, the Attorney General shall publish his determination of that fact in the administrative bulletin published by the Secretary of State as provided in Section 25-43-2.101, Mississippi Code of 1972.

Source: http://billstatus.ls.state.ms.us/documents/2007/pdf/SB/2300_399/SB2391SG.pdf

NEW MEXICO

30-5-1.

Definitions.

- A. “Pregnancy” means the implantation of an embryo in the uterus;
- B. “Accredited hospital” means one licensed by the health and social services department [public health division of the department of health];
- C. “Justified medical termination” means the intentional ending of the pregnancy of a woman at the request of said woman or if said woman is under the age of eighteen years, then at the request of said woman and her then living parent or guardian, by a physician licensed by the state of New Mexico using acceptable medical procedures in an accredited hospital

upon written certification by the members of a special hospital board that:

- (1) the continuation of the pregnancy, in their opinion, is likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman; or
- (2) the child probably will have a grave physical or mental defect; or
- (3) the pregnancy resulted from rape, as defined in Sections 40A-0-2 through 40A-9-4 NMSA 1953. Under this paragraph, to justify a medical termination of the pregnancy, the woman must present to the special hospital board an affidavit that she has been raped and that the rape has been or will be reported to an appropriate law enforcement official;
- (4) the pregnancy resulted from incest;

D. "Special hospital board" means a committee of two licensed physicians or their appointed alternates who are members of the medical staff at the accredited hospital where the proposed justified medical termination would be performed, and who meet for the purpose of determining the question of medical justification in an individual case, and maintain a written record of the proceedings and deliberations of such board.

30-5-3.

Criminal abortion.

Criminal abortion consists of administering to any pregnant woman any medicine, drug or other substance, or using any method of means whereby an untimely termination of her pregnancy is produced, or attempted to be produced, with the intent to destroy the fetus, and the termination is not a justified medical termination.

Whoever commits criminal abortion is guilty of a fourth degree felony. Whoever commits criminal abortion which results in the death of the woman is guilty of a second degree felony.

Source: <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2>

NORTH CAROLINA

14-44.

Using drugs or instruments to destroy unborn child.

If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be punished as a Class H felon.

Source: http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-44.html

14-45.

Using drugs or instruments to produce miscarriage or injure pregnant woman.

If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman,

or shall use any instrument or application for any of the above purposes, he shall be punished as a Class I felon.

Source: http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-45.html

NORTH DAKOTA

House Bill 1466²

Section 1. A new section to chapter 12.1-31 of the North Dakota Century Code is created and enacted as follows:

Abortion - Affirmative defenses.

1. As used in this section:
 - a. “Abortion” means the use or prescription of any substance, device, instrument, medicine, or drug to intentionally terminate the pregnancy of an individual known to be pregnant. The term does not include an act made with the intent to increase the probability of a live birth; preserve the life or health of a child after live birth; or remove a dead, unborn child who died as a result of a spontaneous miscarriage, an accidental trauma, or a criminal assault upon the pregnant female or her unborn child.
 - b. “Physician” means an individual licensed to practice medicine under chapter 43-17.
 - c. “Professional judgment” means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.
2. It is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion.
3. The following are affirmative defenses under this section:
 - a. That the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female.
 - b. That the abortion was to terminate a pregnancy that resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest, as those offenses are defined in chapter 12.1-20.
 - c. That the individual was acting within the scope of that individual's regulated profession and under the direction of or at the direction of a physician.

² This abortion ban-in-waiting was enacted in 2007 and is now the law in North Dakota. As of June 2007, it has not yet been printed in the North Dakota code and so no citation to the code is available.

Section 2. Effective Date. This Act becomes effective on the date the legislative council approves by motion the recommendation of the attorney general to the legislative council that it is reasonably probable that this Act would be upheld as constitutional.

Source: <http://www.legis.nd.gov/assembly/60-2007/bill-text/HBEU0600.pdf>

OKLAHOMA

21861.

Procuring an abortion.

Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instru-

ment, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.

Source: <http://www.lsb.state.ok.us/OKStatutes/CompleteTitles/os21.rtf>

RHODE ISLAND

11-3-1.

Procuring, counseling or attempting miscarriage.

Every person who, with the intent to procure the miscarriage of any pregnant woman or woman supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatsoever or shall aid, assist or counsel any person so intending to procure a miscarriage, shall if the woman die in consequence thereof, shall be imprisoned not exceeding twenty (20) years nor less than five (5) years, and if she does not die in consequence thereof, shall be imprisoned not exceeding seven (7) years nor less than one (1) year; provided that the woman whose miscarriage shall have been caused or attempted shall not be liable to the penalties prescribed by this section.

11-3-4.

Construction and application of § 11-3-1.

It shall be conclusively presumed in any action concerning the construction, application or validity of § 11-3-1, that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution of the United States, and that miscarriage at any time after the instant of conception caused by the administration of any poison or other noxious thing or the use of any instrument or other means shall be a violation of said § 11-3-1, unless the same be necessary to preserve the life of a woman who is pregnant.

11-3-5.

Constitutionality.

If any part, clause or section of this act shall be declared invalid or unconstitutional by a court of competent jurisdiction, the validity of the remaining provisions, parts, or sections shall not be affected.

SOUTH DAKOTA

Section 22-17-5.1.

Procurement of abortion prohibited—Exception to preserve life of pregnant female—Felony.

Any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of

the pregnant female, is guilty of a Class 6 felony.

Section effective on the date states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy.

Source: <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=22-17-5.1&Type=Statute>

TEXAS

Title 9 Chapter 15 Article 1191.

Abortion. (Repealed by implication, see page 10.)

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Title 9 Chapter 15 Article 1192.

Furnishing the means.

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Title 9 Chapter 15 Article 1193.

Attempt at abortion.

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Title 9 Chapter 15 Article 1194.

Murder in producing abortion.

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Title 9 Chapter 15 Article 1196.

By medical advice.

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Source: *Roe v. Wade decision*

UTAH

76-7-302.

Circumstances under which abortion authorized.

- (1) An abortion may be performed in this state only by a physician licensed to practice medicine under Title 58, Chapter 67, Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act and, if performed 90 days or more after the commencement of the pregnancy as defined by competent medical practices, it shall be performed in a hospital.
- (2) An abortion may be performed in this state only under the following circumstances:
 - (a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;
 - (b) the pregnancy is the result of rape or rape of a child, as defined by Sections 76-5-402 and 76-5-402.1, that was reported to a law enforcement agency prior to the abortion;
 - (c) the pregnancy is the result of incest, as defined by Subsection 76-5-406 (10) or Section 76-7-102, and the incident was reported to a law enforcement agency prior to the abortion;
 - (d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or
 - (e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.
- (3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d), and (e).
- (4) The name of a victim reported pursuant to Subsection (2)(b) or (c) is confidential and may not be revealed by law enforcement or any other party except upon approval of the victim. This subsection does not effect or supersede parental notification requirements otherwise provided by law.

Source: http://le.utah.gov/~code/TITLE76/htm/76_09012.htm

VERMONT

Title 13 § 101.

Definition and punishment.

A person who wilfully administers, advises or causes to be administered anything to a woman pregnant, or supposed by such person to be pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, if the woman dies in consequence thereof, shall be imprisoned not more than twenty years nor less than five years. If the woman does not die in consequence thereof, such person shall be imprisoned not more than ten years nor less than three years. However, the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section.

Source: <http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=13&Chapter=003&Section=00101>

WEST VIRGINIA

§ 61-2-8.

Abortion; penalty.

Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than three nor more than ten years; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.

Source: <http://law.justia.com/westvirginia/codes/61/wvc61-2-8.html>

WISCONSIN

940.04.

Abortion.

- (1) Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.
- (2) Any person, other than the mother, who does either of the following is guilty of a Class E felony:
 - (a) Intentionally destroys the life of an unborn quick child; or
 - (b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.
- (3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than \$200 or imprisoned not more than 6 months or both.
- (4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another is guilty of a Class I felony.
- (5) This section does not apply to a therapeutic abortion which:
 - (a) Is performed by a physician; and
 - (b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and
 - (c) Unless an emergency prevents, is performed in a licensed maternity hospital.
- (6) In this section "unborn child" means a human being from the time of conception until it is born alive.

Source: http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=26018369&infobase=stats.nfo&j1=940.04&jump=940.04&softpage=Browse_Frame_Pg

State Freedom of Choice Acts

CALIFORNIA

Health and Safety Code § 123462.

The legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that:

- (a) Every individual has the fundamental right to choose or refuse birth control.
- (b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article.
- (c) The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.

Health and Safety Code § 123466.

The state may not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman.

Source: <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=hsc&group=123001-124000&file=123375-123418>

CONNECTICUT

Chapter 368y § 19a-602.

Termination of pregnancy prior to viability. Abortion after viability prohibited; exception.

- (a) The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.
- (b) No abortion may be performed upon a pregnant woman after viability of the fetus except when necessary to preserve the life or health of the pregnant woman.

Source: <http://search.cga.state.ct.us/surs/chap368y.htm#Sec19a-602.htm>

HAWAII

Section 453-16.

Intentional termination of pregnancy; penalties; refusal to perform.

- (a) No abortion shall be performed in this state unless:
 - (1) The abortion is performed by a licensed physician or surgeon, or by a licensed osteopathic physician and surgeon; and
 - (2) The abortion is performed in a hospital licensed by the department of health or operated by the federal government or an agency thereof, or in a clinic or physician's office.
- (b) Abortion shall mean an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section.

- (c) The State shall not deny or interfere with a female's right to choose or obtain an abortion of a nonviable fetus or an abortion that is necessary to protect the life or health of the female.
- (d) Any person who knowingly violates subsection (a) shall be fined not more than \$1,000 or imprisoned not more than five years, or both.
- (e) Nothing in this section shall require any hospital or any person to participate in an abortion nor shall any hospital or any person be liable for a refusal.

Source: http://www.capitol.hawaii.gov/hrscurrent/Vol10_Ch0436-0474/HRS0453/HRS_0453-0016.HTM

MAINE

Chapter 263-B § 1598.

Abortions.

1. Policy. It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability except as provided in section 1597-A. After viability an abortion may be performed only when it is necessary to preserve the life or health of the mother. It is also the public policy of the State that all abortions may be performed only by a physician. [1993, c. 61, § 2 (amd).]
2. Definitions. As used in this section, unless the context otherwise indicates, the following terms shall have the following meanings.
 - A. "Abortion" means the intentional interruption of a pregnancy by the application of external agents, whether chemical or physical or by the ingestion of chemical agents with an intention other than to produce a live birth or to remove a dead fetus. [1979, c. 405, § 2 (new).]
 - B. "Viability" means the state of fetal development when the life of the fetus may be continued indefinitely outside the womb by natural or artificial life-supportive systems. [1979, c. 405, § 2 (new).] [1979, c. 405, § 2 (new).]
3. Persons who may perform abortions; penalties.
 - A. Only a person licensed under Title 32, chapter 36 or chapter 48, to practice medicine in Maine as a medical or osteopathic physician, may perform an abortion on another person. [1979, c. 405, § 2 (new).]
 - B. Any person not so licensed who knowingly performs an abortion on another person or any person who knowingly assists a nonlicensed person to perform an abortion on another person is guilty of a Class C crime. [1979, c. 405, § 2 (new).] [1979, c. 405, § 2 (new).]
4. Abortions after viability; criminal liability. A person who performs an abortion after viability is guilty of a Class D crime if:
 - A. He knowingly disregarded the viability of the fetus; and [1979, c. 405, § 2 (new).]
 - B. He knew that the abortion was not necessary for the preservation of the life or health of the mother. [1979, c. 405, § 2 (new).] [1979, c. 405, § 2 (new).]

Source: <http://janus.state.me.us/legis/statutes/queryStatutesFullHit.htm?CiWebHitsFile=%2Flegis%2Fstatutes%2F22%2Ftitle22sec1598%2Ehtml&CiRestriction=%28%23Filename+%22title22sec1598%2E%2A%22+%29+%26+%28+TITLE+%29+&CiBeginHilite=%3Cb+class%3DHit%3E&CiEndHilite=%3C%2Fb%3E&CiUserParam3=/legis/statutes/search.asp&CiUserParam8=Title+22+Section+1598&CiUserParam9=Title+22+%2D+%A71598%2E+Abortions&CiHiliteType=Full>

MARYLAND

§ 20-209.

Intervention; regulations; liability.

- (a) **Definition.** In this section, “viable” means that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus’s sustained survival outside the womb.
- (b) **State intervention.** Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:
 - (1) Before the fetus is viable; or
 - (2) At any time during the woman’s pregnancy, if:
 - (i) The termination procedure is necessary to protect the life or health of the woman; or
 - (ii) The fetus is affected by genetic defect or serious deformity or abnormality.
- (c) **Regulations.** The Department may adopt regulations that:
 - (1) Are both necessary and the least intrusive method to protect the life or health of the woman; and
 - (2) Are not inconsistent with established medical practice.
- (d) **Liability.** The physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the physician’s best medical judgment in accordance with accepted standards of medical practice.

Source: <http://michie.lexisnexis.com/maryland/lpext.dll/mdcode/10f97/12b33/12b81/12b90?fn=document-frame.htm&f=templates&2.0#>

NEVADA

NRS 442.250

Conditions under which abortion permitted.

- 1. No abortion may be performed in this state unless the abortion is performed:
 - (a) By a physician licensed to practice in this state or by a physician in the employ of the government of the United States who:
 - (1) Exercises his best clinical judgment in the light of all attendant circumstances including the accepted professional standards of medical practice in determining whether to perform an abortion; and
 - (2) Performs the abortion in a manner consistent with accepted medical practices and procedures in the community.
 - (b) Within 24 weeks after the commencement of the pregnancy.
 - (c) After the 24th week of pregnancy only if the physician has reasonable cause to believe that an abortion currently is necessary to preserve the life or health of the pregnant woman.
- 2. All abortions performed after the 24th week of pregnancy or performed when, in the judgment of the attending physician, there is a reasonable likelihood of the sustained survival of the fetus outside of the womb by natural or artificial supportive systems must be performed in a hospital licensed under chapter 449 of NRS.

3. Before performing an abortion pursuant to subsection 2, the attending physician shall enter in the permanent records of the patient the facts on which he based his best clinical judgment that there is a substantial risk that continuance of the pregnancy would endanger the life of the patient or would gravely impair the physical or mental health of the patient.

Source: <http://www.leg.state.nv.us/NRS/NRS-442.html#NRS442Sec240>

VERMONT

House Resolution 4.

Whereas, on January 22, 1973, in a landmark decision, the U.S. Supreme Court issued its historic ruling in *Roe v. Wade* which affirmed that women, not politicians, should make this most personal decision when or whether to have children, and

Whereas, the constitutional right to abortion as embodied in *Roe v. Wade* recognizes women's right to exercise reproductive choice, saves women's lives, and strengthens families, and

Whereas, prior to the *Roe v. Wade* decision, thousands of American women died every year as a result of complications from unsafe and illegal abortions, and an untold number of women suffered grievous injuries, a situation that created a serious public health problem that has virtually been eliminated by providing access to safe and legal abortion, and

Whereas, it is a public health goal of the State of Vermont to protect and enhance the health of all Vermonters, including women of all ages, and to strengthen families by encouraging and promoting access to comprehensive planning services, and

Whereas, violence against providers and restrictions against abortion endangered the lives of women and men, and have continued to erode access to abortion, and

Whereas, safe, legal, and accessible abortion services are still under attack, especially for women who speak English as their second language or do not speak English at all, poor women, rural women, and women who are minors, and

Whereas, it is critical for the economic health of our country, and the personal health and happiness of American women, that the right of women and their families to make their own personal medical decisions about reproduction and gynecological issues be vigilantly preserved and protected, now therefore be it

Resolved by the House of Representatives:

That this legislative body reaffirms the right of every Vermont woman to privacy, autonomy, and safety in making personal decisions regarding reproduction and family planning, and be it further

Resolved: That the Clerk of the House be directed to send a copy of this resolution to each member of the Vermont Congressional Delegation.

Source: <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2004/resolutn/HR0004.HTM>

WASHINGTON

RCW 9.02.100.

Reproductive privacy — Public policy.

The sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions.

Accordingly, it is the public policy of the state of Washington that:

- (1) Every individual has the fundamental right to choose or refuse birth control;
- (2) Every woman has the fundamental right to choose or refuse to have an abortion, except as specifically limited by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902;
- (3) Except as specifically permitted by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902, the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion; and
- (4) The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.

Source: <http://apps.leg.wa.gov/RCW/default.aspx?cite=9.02.100>

RCW 9.02.110.

Right to have and provide.

The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health.

A physician may terminate and a health care provider may assist a physician in terminating a pregnancy as permitted by this section.

Source: <http://apps.leg.wa.gov/RCW/default.aspx?cite=9.02.110>

RCW 9.02.140.

State regulation.

Any regulation promulgated by the state relating to abortion shall be valid only if:

- (1) The regulation is medically necessary to protect the life or health of the woman terminating her pregnancy,
- (2) The regulation is consistent with established medical practice, and
- (3) Of the available alternatives, the regulation imposes the least restrictions on the woman's right to have an abortion as defined by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902

Source: <http://apps.leg.wa.gov/RCW/default.aspx?cite=9.02.140>

RCW 9.02.160.

State-provided benefits.

If the state provides, directly or by contract, maternity care benefits, services, or information to women through any program administered or funded in whole or in part by the state, the state shall also provide women otherwise eligible for any such program with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies.

Source: <http://apps.leg.wa.gov/RCW/default.aspx?cite=9.02.160>

WHAT IF *ROE* FELL?

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The Center for Reproductive Rights
is a nonprofit legal advocacy organization
dedicated to promoting and defending
women's reproductive rights worldwide

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