

# What If *Roe* Fell?

The State-by-State Consequences of Overturning *Roe v. Wade*

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## EXECUTIVE SUMMARY

There is perhaps no political issue more volatile in the United States than abortion, no Supreme Court ruling subject to such a well-organized and well-funded attack as *Roe v. Wade*. Since it was decided in 1973, *Roe* has been under constant attack. Since 1995 alone, state legislatures have enacted 380 measures restricting abortion, and in November 2003, Congress passed the first-ever federal ban on abortion procedures. Anti-choice forces are counting on new appointments to the Supreme Court in the next few years to totally overturn *Roe*.

What would happen if *Roe* were to fall? This study by the Center for Reproductive Rights provides a detailed state-by-state analysis of the impact of a reversal of *Roe*.

A Supreme Court decision overturning *Roe* would not by itself make abortion illegal in the United States. Instead, a reversal of *Roe* would remove federal constitutional protection for a woman's right to choose and give the states the power to set abortion policy. Of course, all 50 states run the risk of their state legislatures enacting new abortion bans if *Roe* is overruled. But this study of current state laws, state constitutions, and the composition of state legislatures identifies five different categories that determine different levels of risk to the right to choose in each state.

Those categories are: states with abortion bans on the books that have never been blocked by courts; states with abortion bans on the books that have been blocked by courts; states that are highly vulnerable to enactment of new bans by their legislatures; states with constitutional protections for abortion and states with strong statutory protection for the right to choose, including legislatures disinclined to enact a new ban.

Where it gets complicated is that most states fall into more than one category, and a state's level of risk is determined by that combination of factors. For example, one might conclude that Massachusetts is at high risk because it has an abortion ban on the books that has never been blocked by the court. But the state constitution of Massachusetts specifically protects the right to choose abortion even more strongly than the U.S. Constitution. So it follows that women in Massachusetts are at low risk for losing their right to choose.

That said, we have found that women in more than half the country would be vulnerable to efforts by anti-choice forces to ban abortion.

In 30 states, women are at risk of losing their right to choose abortion after a reversal of *Roe*; 21 of these states warrant the highest level of concern.

In only 20 states does women's right to choose abortion appear secure.



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## INTRODUCTION

### Why consider “If Roe Fell”?

There is perhaps no political issue more volatile in the United States than abortion, no Supreme Court ruling subject to such a well-organized and well-funded attack as *Roe v. Wade* (“*Roe*”).<sup>1</sup> Given the continued assault on *Roe*, and the success of anti-abortion advocates in whittling away *Roe*’s protections,<sup>2</sup> it is shocking how few of us understand the legal ramifications of a reversal of *Roe*. For example, many assume that if the Supreme Court reversed *Roe* and sent the issue back to the states,<sup>3</sup> individual states would have to pass *new* legislation to ban abortions. Moreover, some commentators, while conceding that bans on abortions starting as early as 12-14 weeks of pregnancy (before amniocentesis is performed) are likely, dismiss as remote and inconsequential the possibility that bans on first-trimester abortion will be enacted in more than a “handful” of states.<sup>4</sup>

The sober truth, though, is that *old* laws are on the books that could ban abortion right away in many states. In states where the old laws have never been blocked by a court, state officials could begin enforcing these laws immediately; in states where the old laws have been blocked but never repealed, state officials could move to vacate court orders preventing enforcement and then enforce the bans. And anyone who claims that states are unlikely to enact *new* laws banning abortion simply hasn’t been paying attention. State legislatures across the country from Arkansas to Kentucky to Illinois have been busy enacting laws establishing a state public policy of protecting the “unborn,” and, in six states, even promising that bans on abortion will be reinstated if *Roe* is overturned. Two states, Louisiana and Utah, went even further and in 1991 enacted new abortion bans, even while federal protection under *Roe* still existed. A ban on abortion came within inches of passing in 2004 in South Dakota and was vetoed by the anti-choice governor only because he was concerned that if the new law were challenged and blocked, the state might be left without *any* restrictions on abortion. And in Michigan also in 2004, anti-abortion activists succeeded in enacting legislation that would ban all abortions; that law will be subject to a legal challenge and should be blocked before it takes effect, assuming *Roe* stands. Imagine the rush to bring legislation to governors’ desks if *Roe* is gone.

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> See Appendix for an overview of United States Supreme Court decisions on abortion and the right to privacy.

<sup>3</sup> This is the manner of reversal promoted repeatedly by Chief Justice William Rehnquist, and Justices Antonin Scalia and Clarence Thomas. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) (expressing view that “[a]lthough a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.”).

<sup>4</sup> See Jeffrey Rosen, *Worst Choice*, *New Republic*, Feb. 24, 2003 (arguing that “pro-life legislators . . . would themselves think long and hard before pulling the trigger to overturn *Roe*” and that “even if a handful of state legislatures did pass restrictions on first-term abortions,” the political consequences would be beneficial for the pro-choice movement).

This report provides a state-by-state guide to the impact of a *Roe* reversal. For example, on the day after *Roe* is reversed:

- Imagine that your sister is living in Alabama and has an appointment to obtain a first trimester abortion. Would she be able to get it? No. State officials could begin immediately to enforce Alabama’s pre-*Roe* abortion ban that remains on the books and has never been enjoined by a court. Doctors prosecuted under the law risk jail. Pro-choice lawyers could argue that the law had been “repealed by implication,” meaning that newer abortion restrictions enacted after *Roe* have, in effect, repealed the pre-*Roe* total ban. However, the success of such an argument is far from certain under Alabama law.
- Imagine that you live in a state such as Mississippi, Michigan, or Rhode Island, where pre-*Roe* abortion bans have been blocked since shortly after the *Roe* decision. State officials rush to court to lift the injunctions and begin enforcing the laws. Will they succeed? Most likely, yes. Mississippi courts are unlikely to find that the statute was “repealed by implication”; the argument would be difficult to win in Michigan and Rhode Island as well. Doctors who perform abortions in violation of the pre-*Roe* ban—even in the first trimester—would be felons.
- Imagine that your daughter lives in Nebraska; it’s mid-January and the legislature is in session. She needs an abortion. She’d better hurry. Nebraska has no ban on the books, but the legislature has never met an abortion restriction it didn’t like. It has already enacted a statute “expressly deplor[ing] the destruction of the unborn human lives which has and will occur in Nebraska” as a result of *Roe*, and is poised to enact a new ban on abortion if *Roe* is overturned.

### **The United States Supreme Court: the vote count**

But all this begs the question: is *Roe* at risk? And if so, given how much of *Roe* has already been eviscerated, what of *Roe* remains to be jettisoned and how, if at all, is the Court likely to do that? The bottom line is that a slight change in the composition of the Court could tip the balance toward an anti-abortion majority and doom the core holding of *Roe*.

The nine Justices of the Supreme Court are clearly divided on this issue. The three most conservative members of the Court—Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas—are on record favoring a reversal of *Roe*.<sup>5</sup> The consequence of their view is that states would be allowed—but would not be

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<sup>5</sup> *Stenberg v. Carhart*, 530 U.S. at 980 (Thomas, J., dissenting) (“although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.”).

required—to ban abortions.<sup>6</sup> It is doubtful that the Court would overrule *Roe* by holding that a fetus, embryo, or zygote is a “person” within the meaning of the Fourteenth Amendment to the U.S. Constitution, thus establishing a right to life from the moment of conception and outlawing abortion nationwide.<sup>7</sup> However, in Court opinions, these Justices have expressed the view that states should be able to protect fetal life from the moment of conception, and that a state’s interest in protecting fetal life outweighs any “liberty” interest a woman might have in controlling whether or not to give birth.<sup>8</sup>

Five other Justices—Justices John Paul Stevens, Sandra Day O’Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—believe that the U.S. Constitution protects the right of women to obtain abortions prior to viability and even after viability to protect their lives or health.<sup>9</sup> These five Justices fully support one of the fundamental tenets of *Roe*, a principle repeatedly reaffirmed by the Court,<sup>10</sup> that restrictions on abortion may not compromise the woman’s health. Most recently, in 2000 in *Stenberg v. Carhart*, these five Justices formed the majority to hold that a statute banning methods of abortion that lacks an exception to protect the health of the woman is unconstitutional absent evidence that a health exception would “never [be] necessary to preserve the health of women.”<sup>11</sup> According to these five Justices, the government may not prohibit physicians from providing, and their patients from obtaining, the safest abortions possible.<sup>12</sup>

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<sup>6</sup> *Stenberg v. Carhart*, 530 U.S. at 980 (Thomas, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting, joined by Justices White, Scalia and Thomas) (arguing that *Roe* should be overruled and stating “[w]e would adopt the approach of the plurality in *Webster*”); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (arguing that state’s interest in protecting potential human life is compelling as of the moment of conception) (Rehnquist, C.J.); *Id.* at 55556 (Blackmun, J., concurring in part, and dissenting in part) (noting that under plurality’s view “every hindrance to a woman’s ability to obtain an abortion must be ‘permissible.’”).

<sup>7</sup> As Justice Stevens noted in his opinion concurring and dissenting in *Casey*, 505 U.S. at 913, “no Member of the Court has ever questioned th[e] fundamental proposition” that “an abortion is not ‘the termination of life entitled to Fourteenth Amendment protection.’”

<sup>8</sup> *Webster*, 492 U.S. at 519; *Casey*, 505 U.S. at 594. As former Justice Blackmun, the author of the Court’s opinion in *Roe*, lamented:

The [anti-*Roe* Justices’] balance matches a lead weight (the State’s allegedly compelling interest in fetal life as of the moment of conception) against a feather (a “liberty interest” of the pregnant woman that the plurality barely mentions, much less describes.) The plurality’s balance – no balance at all – places nothing, or virtually nothing, beyond the reach of the democratic process.

*Webster*, 492 U.S. at 556 n.11 (Blackmun, J., dissenting).

<sup>9</sup> While all of these Justices support *Roe*’s core holding, they disagree about the degree of protection offered by the U.S. Constitution. For example, Justice Stevens criticized the Court’s abandonment of the *Roe* standard in the Court’s 1992 decision in *Planned Parenthood v. Casey*, and argued that the Court should have applied the principles established in cases from *Roe* through *Akron* to strike down Pennsylvania’s requirement that physicians provide women with state-created biased materials designed to convince them not to obtain an abortion, as well as the 24-hour mandated delay period. 505 U.S. at 920-21. He also argued that these requirements were unconstitutional under the *Casey* “undue burden” standard because of the severity of burden they imposed and because the provisions did not serve legitimate state interests. *Id.* On the other hand, Justice O’Connor was the architect of the undue burden standard announced in the *Casey* decision in an opinion in which Justices Souter and Kennedy joined. See Appendix, Overview of Supreme Court Decision on Abortion and the Right to Privacy.

<sup>10</sup> See, e.g., *Casey*, 530 U.S. at 879; *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 770, 768-69 (1986) (women’s health must remain the physician’s “paramount consideration.”).

<sup>11</sup> *Carhart*, 530 U.S. at 937-38; see also *Planned Parenthood v. Owens*, 287 F.3d 910, 919 (10th Cir. 2002) (discussing *Carhart* analysis). As the Court explained, “this Court has made clear that a State may promote but not endanger a woman’s health when it regulates the methods of abortion.” *Id.* at 931 (citations omitted). Rejecting the argument that the health exception applies only to situations where the pregnancy itself creates a threat to health, the Court emphasized that the “State cannot subject women’s health to significant risks” in that context or “where state regulations force women to

This leaves one Justice, Justice Anthony Kennedy, whose support for *Roe* is mixed. Shortly after his appointment to the Court, Justice Kennedy joined Justice Rehnquist and then-Justice White in 1989 in urging reconsideration of *Roe* in *Webster v. Reproductive Health Services*.<sup>13</sup> These Justices, including Justice Kennedy, indicated that were the question properly before them, they would overrule *Roe* by holding that the state had a compelling interest in fetal life from the moment of conception. However, just three years later, Justice Kennedy joined the Court’s 1992 decision in *Casey* that reaffirmed the central principles of *Roe*, even while lowering the level of constitutional protection for abortion and allowing states to enact many onerous regulations. Then in 2000, Justice Kennedy dissented from the Court’s opinion in *Carhart*, raising eyebrows and concern among pro-choice advocates that his support for the right to choose was eroding once again. The concerns were twofold.

First, in his dissent Justice Kennedy backed further away from *Roe*, dissenting from the majority’s reaffirmation of the principle—central to abortion jurisprudence from *Roe* through *Casey*—that restrictions on abortion must include provisions that protect women’s health.<sup>14</sup> Instead, Justice Kennedy saw Nebraska’s prohibition of a method<sup>15</sup> of abortion as a valid exercise of “Nebraska’s *right to declare* that critical moral differences exist” between the banned procedure and another procedure.<sup>16</sup> Justice Kennedy’s willingness to allow states to ban methods of abortion that the American College of Obstetricians and Gynecologists (ACOG), the organization that represents 95% of all obstetricians and gynecologists in the country, believes would reduce risks of uterine perforation, cervical lacerations, infections, and thus infertility—as well as his apparent belief that these risks are “insignificant”<sup>17</sup>—has spurred many to count Justice Kennedy as a vote against *Roe*. Indeed, under Justice Kennedy’s reasoning, a state would be able to legislate the way in which physicians perform abortions based on the state’s moral view of the particular procedure, even if the legislation subjected the woman to additional risks to her health. Under this theory, there is nothing to prevent the state from banning

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use riskier methods of abortion.” *Id.* (noting that “[o]ur cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks.”).

<sup>12</sup> *Id.* The Court was clear that “[b]y no means must a State grant physicians ‘unfettered discretion’ in their selection of abortion methods,” but instead held there must be “substantial medical authority support[ing] the proposition that banning a particular procedure could endanger women’s lives.” *Id.* at 938.

<sup>13</sup> 492 U.S. 490, 498 (1989).

<sup>14</sup> *Id.* at 964.

<sup>15</sup> Although the Court held that the Nebraska statute was so broadly written that it banned the safest and most common method of abortion used in the second trimester, Justice Kennedy interpreted the statute more narrowly to ban only the D&X method of abortion. Compare *Carhart*, 530 U.S. at 938-39 (construing statute to ban D&Es, the most common second trimester method) with *id.* at 972-79 (Kennedy, J., dissenting) (“law applies only to the D&X”).

<sup>16</sup> *Carhart*, 530 U.S. at 964 (emphasis added). Apparently relying on *Casey*’s recognition that states could require women to be told that the state disapproved of the woman’s choice, even presumably that the state itself condemned the woman’s choice, Justice Kennedy argued that banning some abortions – including those that are the safest – was simply Nebraska’s method of “instruct[ing] all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be respected.” In this way, he reasoned, the ban served the state’s interest in insuring that the woman’s choice to have an abortion was “more informed.” *Id.* Of course Nebraska’s statute, even if interpreted to apply only to one method of abortion, went far beyond a *declaration* of Nebraska’s moral judgment concerning one procedure; such a declaration may indeed have been constitutional under *Casey*. Instead, the statute imposed a *ban* on that procedure and would have forced women to *undergo* riskier methods of abortion.

<sup>17</sup> *Carhart*, 530 U.S. at 967 (Kennedy, J., dissenting) (distinguishing *Casey*’s requirement that regulation must impose a “significant” threat before it was seen as undue burden from case at hand).

any new and potentially safer method of abortion by declaring its moral repugnance. Even if Justice Kennedy supports some basic right to choose abortion,<sup>18</sup> there is little left of the right if states can force women to endure risks to their health that their physicians would never countenance.

Second, many saw Justice Kennedy's *Carhart* dissent as uncharacteristically hostile. For example, he used the term "abortionist"—which is used exclusively in a derogatory manner by anti-abortion advocates—to refer to physicians who provide abortions.<sup>19</sup> He also seemed to ignore ACOG's position that the ban would increase risks to women of serious complications.<sup>20</sup>

Thus, the Court is closely divided. Moreover, the Court is well overdue for change. It has been ten years since Justice Breyer, the most junior member of the Court, was appointed in 1994, the longest period without a new appointment since the early 1800s.<sup>21</sup> If one or two new Justices sharing the ideology of Justices Scalia, Thomas, and Rehnquist were appointed, the Court would likely overrule *Roe*, causing the first wholesale elimination of a constitutional right in U.S. history. As former Justice Blackmun noted, "[t]o overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history."<sup>22</sup>

## Conclusion

Anti-choice forces are counting on a changing Supreme Court and have been working tirelessly to pass anti-choice legislation in hopes that such legislation will be challenged in court, eventually forcing the Court to reexamine, and overturn, *Roe*. Given their near misses in the past in the *Webster*, *Casey*, and *Carhart* decisions, these anti-choice forces are especially determined to be successful this time at overturning *Roe*. Therefore, it is imperative that pro-choice forces prepare now, before changes in the Court occur, to educate themselves about the status of *Roe* in each state and to lay the legislative groundwork necessary to protect the right to choose abortion in the event that *Roe* is overruled. We hope this report will serve to educate the public and will give activists the tools they need to protect *Roe* on both national and state levels.

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<sup>18</sup> In his recent opinion in *Lawrence v. Texas*, striking down Texas's anti-sodomy statute, Justice Kennedy appeared to signal his continued support for the basic notion that women have a liberty interest protected by the Due Process Clause that protects their right to obtain an abortion. *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>19</sup> *Carhart*, 530 U.S. at 958 (Kennedy, J., dissenting).

<sup>20</sup> Compare *id.* at 967 (Kennedy, J., dissenting) with *id.* at 935-36.

<sup>21</sup> ALMANAC OF THE FEDERAL JUDICIARY, Vol. 2 (Christine Housen, ed. 2004)

<sup>22</sup> *Webster*, 492 U.S. at 598 (Blackmun, J., concurring in part and dissenting in part).



## A PATCHWORK OF RIGHTS: UNDERSTANDING THE IMPACT OF A REVERSAL OF *ROE*

A Supreme Court decision overturning *Roe* most likely would not by itself make abortion illegal in the United States.<sup>23</sup> 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 abortions outright. The only states in which the right to choose would be protected from changes in the political winds are those whose state constitutions provide strong protection independent of the U.S. Constitution—currently a mere ten states. Given the variations in law and political climates in the 50 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. Legislatures, law enforcement officials, and state courts would all have a role in shaping the scope of these rights. It is also possible that Congress could act to ban abortions if *Roe* is overturned. Such a ban, if upheld, would preempt state regulation of abortion, nullifying any protections granted under state statutes or constitutions.

Understanding the patchwork that would be left if *Roe* is reversed requires careful legal analysis of each state's laws, constitutions, and court decisions, as well as legislative and political considerations. The following state-by-state review analyzes the likely short-term impact on legal abortion in each state should the Supreme Court overrule *Roe*. In other words, we examine what would be the likely effect of a reversal within one year of the decision. In some states, the impact could be immediate; in other states, change would take longer.

Five categories emerged from our review that determine the level of risk to the right to choose in each state. Most states fall into more than one of these categories: (1) those with abortion bans on the books that have never been blocked by the courts; (2) those with abortion bans that are on the books but have been blocked by courts; (3) those that are most vulnerable to the enactment of new bans; (4) those with state constitutional protection that is independent of the U.S. Constitution and should survive the demise of *Roe*; and (5) those with strong statutory protection for the right to choose abortions or legislatures that will be hesitant to ban abortions.

These overlapping factors establish that women in 21 states are at the highest risk of losing their right to choose abortion. This is because of these states' vulnerability to enactment of new bans or the revival of old ones, coupled with a lack of state

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<sup>23</sup> See *supra* Introduction, "The United States Supreme Court: the vote count" at 2-3. 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.

constitutional protections. These states are: 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. The Territory of Guam is also at high risk.

In only 20 states, women’s right to choose abortion appears secure because of established strong state constitutional or statutory protections or a friendly legislative environment. These states are: 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.

In the remaining 9 states, the Commonwealth of Puerto Rico and the District of Columbia, protection is uncertain. In some of these states, legislative factors are uncertain but warrant concern. In others, there is some indication that the right to choose abortion could be protected under the state constitution, but the right is by no means secure. These states are: Arizona, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, New Hampshire, and Pennsylvania.

What follows is a breakdown of the states as they fall into the five categories. Keep in mind that there will be overlap among the categories.

#### **Four states with bans on the books that have never been blocked by the courts**

In Alabama, Delaware, and Massachusetts, laws banning abortion that were enacted before the decision in *Roe v. Wade* remain on the books and have never been declared unconstitutional or blocked by a court. In addition, a pre-*Roe* ban in Wisconsin has been declared unconstitutional only as applied to abortions performed prior to “quickening,”<sup>24</sup> thus leaving intact a ban on some pre-viability abortions. After *Roe* was decided, these laws became unenforceable, but no court has officially issued an order blocking their enforcement. Although the Delaware attorney general has issued an opinion stating that the Delaware law was unconstitutional and could not be enforced, the opinion is not binding and does not carry the same force as a judicial opinion. In these four states, therefore, state officials could take immediate steps to enforce the bans if *Roe* is overruled—for example, by prosecuting abortion providers. In each state, the position of the attorney general may be the decisive factor in determining whether immediate enforcement will begin; or these decisions may be left to the discretion of local law enforcement agencies.

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”). In order to prevent arrests and prosecutions of abortion providers, providers would themselves have to file a lawsuit to make this argument affirmatively and to ask the court to prevent enforcement of the pre-*Roe* abortion ban. The argument could also be made

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<sup>24</sup> *Babbitz v. McCann*, 310 F. Supp.293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970), *supplemental opinion*, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated and remanded*, 402 U.S. 903 (1971). The court noted that “quickening” is the point in pregnancy when it is possible to detect fetal movement, usually at around 16 to 18 weeks. *Id.* at 299.



after the fact, as a defense during a criminal prosecution of a provider brought under the ban statute.

## IMPLIED REPEAL

When a law is *expressly* repealed, the legislature passes a new law that explicitly states that the old law is repealed.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

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 24 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 have resisted applying the doctrine. 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.

<sup>25</sup> 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).

<sup>26</sup> *Planned Parenthood of Nashville v. McWherter*, 817 S.W.2d 13, 16 (1991); *see also McCorvey v. Hill*, No. 03-10711 (5<sup>th</sup> Cir. Sept. 14, 2004) (Texas’s pre-*Roe* statute repealed by implication)

<sup>27</sup> *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990).

### **Thirteen states with bans on the books that *have* been blocked by courts**

In 11 states and the Commonwealth of Puerto Rico, pre-Roe abortion bans are on the books that have been enjoined, declared unconstitutional, or limited so as to meet the requirements of *Roe* by state or federal courts.<sup>28</sup> Two additional states, Louisiana and Utah, and the Territory of Guam enacted abortion bans even after *Roe*; those bans have been declared unconstitutional.<sup>29</sup> The laws in Louisiana, Utah, and Guam were enacted in the wake of the Supreme Court's 1989 ruling in *Webster v. Reproductive Health Services*,<sup>30</sup> a decision that was widely viewed as heralding the demise of *Roe* and that inspired these legislative efforts to test the continuing vitality of *Roe* by banning abortion.

In all of these states and territories, if *Roe* is overturned, officials could file court actions immediately asking courts to set aside the court orders preventing enforcement of the laws, so that the bans could go back into effect. While in most cases, there will be some delay before the court renders a decision, if the previous judgment is set aside by the court, enforcement of the ban could begin within weeks or even days of a decision overturning *Roe*.<sup>31</sup> (Of course, anti-choice officials in some states and territories might try to enforce the bans immediately without going through proper judicial channels; in such cases, advocates should immediately go to court to block the prosecutions on the basis that the court judgments are still in effect).

### **Eighteen states that are most vulnerable to the enactment of new bans**

Because most state legislatures meet for at least some part of every year, and can be called in to special session at other times, all 50 legislatures would be able to consider a legislative response to a decision overturning *Roe* within days, weeks, or months of the ruling. If *Roe* is overturned, some type of ban on abortion will likely be introduced in every state, just as measures to protect abortion rights will be introduced where needed. Proposals to ban abortion will take on many forms. At their most extreme, these bans

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<sup>28</sup> In addition to Puerto Rico, the states in this category are Arizona, Arkansas, Colorado, Michigan, Mississippi, New Mexico, North Carolina, Oklahoma (with subsequent reenactment, post-decision), Rhode Island, Vermont, and West Virginia. In addition, as noted above, the pre-*Roe* ban in Wisconsin was partially blocked by the Court, as to abortions prior to "quickening."

<sup>29</sup> *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).

<sup>30</sup> 492 U.S. 490 (1989).

<sup>31</sup> One argument that can be raised in opposition to the motion to set aside the judgment is that of implied repeal, discussed above: that is, the court should not set aside the previous judgment and allow enforcement of the ban because statutes enacted subsequent to the ban have repealed it by implication. The success of this argument will depend on the particular state's laws and the particular factual situation. Another argument against lifting an old injunction or overturning a previous declaratory judgment is that such a motion is untimely because *Roe* has been the law of the land for decades. This argument may not prevail, given that a motion to set aside a judgment based on a change in the law under Rule 60(b) of the Federal Rules of Civil Procedure is premature if made before the law has changed. It is nonetheless possible that some courts will accept the argument that it is too late to set aside the judgment. See *McCorvey v. Hill*, 2003 WL 21448388 (N.D. Tex. June 19, 2003) (rejecting a recent motion to reopen the judgment in *Roe* as untimely), *aff'd on other grounds*, No. 03-10711 (5th Cir. Sept. 14, 2004). A final potential argument against setting aside the judgment and immediate enforcement of the ban is that it is unfair, or violates due process guarantees, to prosecute providers under a law that has been unenforceable for years, without giving them adequate time to become aware of the change in law and change their practices accordingly. The success of this argument will likely depend on the particular state's case law on due process and the particular factual situation.

will prohibit all abortions, perhaps with limited exceptions for cases in which a woman's life is at stake. Other measures may permit abortions only for certain specified reasons, such as rape, incest, and lethal fetal anomalies. Another approach may be to permit abortions only during the first trimester.

One way to gauge the probable legislative response in a particular state is to look at what restrictions on abortion are already in place and when those restrictions were enacted. A state that has restricted abortions to the extent currently permitted under the U.S. Constitution is likely to pass a broad ban on abortions. This includes states with laws preventing physicians from performing the safest abortion procedures, forcing adult women to wait 24 hours after being subjected to a state-mandated lecture before obtaining an abortion, requiring minors to obtain the consent of their parents before obtaining an abortion, subjecting abortion providers to onerous, unnecessary regulations designed to force them out of business, and prohibiting Medicaid payment for abortions for poor women. Of course, states like Louisiana and Utah, and the Territory of Guam, which had passed bans on pre-viability abortion even while *Roe* was in place, are likely to pass similar bans again if *Roe* is overturned. Moreover, the 13 states with official positions against abortion, including the six states with "trigger laws"—laws that indicate that the state will ban abortions if allowed under the U.S. Constitution—are more likely to enact bans. (See box, "Trigger Laws"). More moderate states with few restrictions may take no action or enact more limited restrictions.

Based on past legislative activity as well as the current composition of their legislatures,<sup>32</sup> 18 states are particularly vulnerable to enactment of a *new* statute banning abortion.<sup>33</sup> These states are comprised of 10 of the states with bans on the books and/or official positions against abortion and 8 additional states whose legislatures have proven particularly hostile to abortion.<sup>34</sup> The Territory of Guam is also likely to enact a ban. Where the state's constitution protects the right to choose, as it does in 4 of these states—Alaska, Florida, Minnesota, and Montana,<sup>35</sup>—bans on abortion should be struck down and the right should continue to be protected. In the remaining states and in Guam, bans are unlikely to be struck down and women will lose the right to choose abortion.

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<sup>32</sup> Only the states that appear most at risk of new enactments are included in this category. Some state legislatures, such as those in Pennsylvania and Oklahoma, have histories of hostility to abortion but do not appear to be the most at risk based on political factors.

<sup>33</sup> Alabama, Alaska, Florida, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, and Virginia. As noted above, Alabama, Louisiana, Michigan, Mississippi, and Utah already have bans on the books, all of which—except for Alabama's ban—have been blocked by courts. Because these states are also likely to enact new bans, any doubts about whether the old bans could be enforced are likely to become moot.

<sup>34</sup> These additional states are Alaska, Florida, Minnesota, Ohio, South Carolina, South Dakota, Texas, and Virginia.

<sup>35</sup> It is unclear whether Kentucky's Constitution will provide protection for the right to choose.

## **Ten states with strong state constitutional protection for the right to choose abortion**

Without federal constitutional protections, it will fall to the state courts to decide whether they will offer any independent protection for women’s right to choose abortion under state constitutions. State constitutions can provide broader protections for individual rights than the U.S. Constitution and in some cases they already have. In 10 states, any attempts to ban abortion would fail because their highest courts have interpreted their constitutions to provide explicit protection to abortion rights, often affording greater protection than what has been recognized under the U.S. Constitution.<sup>36</sup> In 9 additional states, lower courts have recognized state constitutional protection for the right to choose abortion, or courts have recognized the right of privacy in other contexts, suggesting that protection might be extended to abortion rights.<sup>37</sup> State constitutional protection could be used both to block attempts to enforce pre-*Roe* abortion bans and to invalidate newly enacted legislation.

## **Six states with strong statutory protection for the right to choose abortion, and seven additional states whose legislatures appear unlikely to ban abortion**

Six states have statutes on the books that strongly protect abortion rights.<sup>38</sup> In these states, abortion rights should be protected if *Roe* is overturned (unless the legislature amends or repeals this legislation). In addition, state legislatures in 7 additional states appear unlikely to ban abortions in the near future.<sup>39</sup>

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<sup>36</sup> These states are Alaska, California, Florida, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Tennessee, and West Virginia.

<sup>37</sup> These states are Arizona, Connecticut, Georgia, Hawaii, Illinois, Indiana, Kentucky, Oregon, and Vermont. This also applies to the Commonwealth of Puerto Rico.

<sup>38</sup> These states are California, Connecticut, Maine, Maryland, Nevada, and Washington. In addition, Vermont’s Legislature enacted a strong pro-choice resolution.

<sup>39</sup> These states are Hawaii, Iowa, New Hampshire, New York, Oregon, Vermont, and Wyoming. Four of these states—Iowa, New Hampshire, New York, and Wyoming—have no established state constitutional protection for the right to choose abortion. The state constitutions in Hawaii, Oregon, and Vermont may provide protection.

## TRIGGER LAWS

Beginning shortly after the decision in *Roe*, some states adopted statutes or constitutional amendments that call for abortion bans, or assert that abortion will be banned if the U.S. Supreme Court eliminates federal constitutional protection for the right to choose abortion. Six states<sup>40</sup> have such laws, often called “trigger laws” because they suggest that an abortion ban will immediately and automatically be triggered if *Roe* is overturned. Trigger laws, however, would not have this effect by themselves. For example, Illinois has a trigger law stating that if *Roe* is overturned or modified, the “policy” of Illinois to prohibit abortions will be “reinstated.”<sup>41</sup> Illinois has also repealed its pre-*Roe* abortion ban, however, so that even if the Supreme Court overturns *Roe*, there is no ban in place to reinstate. Several other states have enacted statutes providing that it is the policy of the state to prohibit abortions, or to protect fetuses, but these laws do not contain actual bans.<sup>42</sup> Moreover, in all but three of these states (Arkansas, Louisiana, and Utah), pre-*Roe* bans have been repealed, leaving nothing for the policy statements to “trigger.” In the three states with bans on the books, courts have declared the laws unconstitutional, thus preventing them from being instantly revived if *Roe* is overturned, in spite of the policy statements. Such laws are, however, a strong indication of future action by the legislature.

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<sup>40</sup> These states are Arkansas, Illinois, Kentucky, Louisiana, Missouri, and Montana.

<sup>41</sup> 720 ILL. COMP. STAT. ANN. 510/1.

<sup>42</sup> Arkansas, Illinois, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, and Utah.



## WHAT CAN BE DONE NOW TO PROTECT ABORTION RIGHTS?

As indicated in the state-by-state legal analysis that follows, the strategy in a particular state to protect reproductive rights depends on the legal and legislative/political reality in that state. There are a number of legislative strategies that advocates should consider now to protect access to abortion. In some states, only defensive strategies are realistic; in others, advocates should consider an affirmative strategy to protect the right to choose abortion.

### **Enact legislation protecting the right to choose abortion.**

Even with *Roe* in place, several states have enacted legislation to protect the right to choose abortion from further erosion at the federal level. In assessing whether this strategy is appropriate for a given state, advocates should consider certain factors. For example, advocates should ask: Does the state's constitution already provide protection for the right to choose abortion? What is the likelihood of passage of a reproductive privacy act in the upcoming session? 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 something worse than it already has? For example, is abortion ban legislation or an anti-choice ballot initiative process likely to be introduced in response?

If the analysis of these factors indicates that it is a good time to pursue affirmative legislation, advocates may wish to introduce a Reproductive Privacy Act. To help with this task, we have provided model language in the Appendix to this report to serve as a guide in crafting legislation. 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. We are available for consultation about how to adapt these samples into a workable scheme for any given state.

If advocates decide against introducing an affirmative bill, they may want to consider other strategies that may not provide as much protection for reproductive rights, but will send a strong message and promote the right to choose abortion. For example, advocates may introduce a legislative resolution to protect choice as was done in the State of Vermont.<sup>43</sup>

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<sup>43</sup> Vt. Acts & Resolves H.R. 4, S.R. 8 (2003).

### **Repeal pre-Roe laws banning abortion.**

In states where 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 those states where 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 not dealing with abortion rights to ensure that protections for reproductive rights are not 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.**

Many states will not wait until *Roe* is overturned to consider enacting new bans. As history teaches, anti-choice legislators will be busy introducing and pushing for bans on abortion if they sense that *Roe* is in danger. Their efforts will become more frenzied if the composition of the U.S. Supreme Court changes and as controversial litigation makes its way up to the Court. Therefore, advocates should begin now to formulate their strategy to prevent these bans from being enacted, building strong coalitions and gathering data to demonstrate how truly harmful an abortion ban would be for women and girls 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 ban language by, for example, attaching amendments with broad exceptions.



## **STATE-BY-STATE ANALYSIS**





# ALABAMA

## ALABAMA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|---|--|---|---|
| Pre- <i>Roe</i> ban (with exception for woman's life and health) on the books; never blocked by a court | None established                                   | None                                    | Statutory public policy language protects life of unborn; highly vulnerable to enactment of new ban |



**Existence and Status of Abortion Ban:** Alabama has a pre-*Roe* abortion ban, with exceptions that protect a woman’s “life or health,”<sup>44</sup> 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.<sup>45</sup>

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

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** 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

<sup>44</sup> 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).

<sup>45</sup> ALA. CODE § 13A-13-7.

recognized that the ban has been unenforceable after *Roe*, and suggests that it has been repealed by implication.<sup>46</sup>

However, this argument may fail, because the Alabama Supreme Court has issued several opinions indicating that it is hostile to abortion rights,<sup>47</sup> which makes it possible that the Court would be unwilling to recognize an implied repeal of the ban. Furthermore, Alabama courts in the past have been extremely reluctant to find repeal by implication.<sup>48</sup>

Even if a court found that the pre-*Roe* ban had been repealed by implication, it is likely that the Alabama Legislature would enact some type of abortion ban again. Laws passed by the Alabama Legislature since *Roe* have contained statements that indicate the legislature's hostility to abortions,<sup>49</sup> thus indicating the likelihood that the legislature would be willing to enact a complete prohibition on abortion if the opportunity arose.

**Conclusion:** Abortion is likely to be severely restricted in Alabama in the event that *Roe* is overturned, either through enforcement of the existing criminal ban or through passage of new legislation. 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 this broadly).

Unfortunately, no preventive steps appear to be realistic in Alabama. Efforts to repeal the pre-*Roe* ban would almost certainly fail. Alabama is thus among a small number of states in which abortion may become illegal immediately if *Roe* is overruled.

**Legislative Session in Alabama: Feb. 1 – May 16, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>46</sup> *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).

<sup>47</sup> 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).

<sup>48</sup> 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).

<sup>49</sup> 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

## ALASKA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS             | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|--------------------------------------|--|---|---|
| No ban                               | State constitutional right to privacy protects abortion rights | None                                    | Highly vulnerable to enactment of new ban |



**Existence and Status of Abortion Ban:** No abortion ban.

**State Constitutional Protection of Abortion Rights:** The Alaska Constitution contains an explicit right to privacy which states:

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.<sup>50</sup>

The Alaska Supreme Court has interpreted this explicit guarantee of privacy as protecting a woman’s right to make reproductive decisions, including abortion, as a fundamental right.<sup>51</sup> Thus, Alaska law provides greater protection to abortion rights than is currently afforded under the U.S. Constitution.<sup>52</sup>

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. Therefore, the right to abortion should continue to be fully protected in Alaska.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Alaska's anti-choice legislature makes it highly vulnerable to enactment of a new ban.

<sup>50</sup> ALASKA CONST. art. I, § 22.

<sup>51</sup> *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).

<sup>52</sup> 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 *Williams v. Zbaraz*, 448 U.S. 358 (1980).

**Conclusion:** There is no ban on abortions 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.

**Legislative Session in Alaska: Jan. 10 – May 9, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## ARIZONA

### ARIZONA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS  | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|---|---|---|---------------|
| Pre-Roe ban (with exception for woman’s life) on the books; court has blocked enforcement | State constitutional right to privacy has not been extended to protect abortion rights, but protection for abortion recognized under privileges and immunities clause | None                                    |               |

RISK FACTORS HIGH MEDIUM LOW

**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.<sup>53</sup>

This ban has been declared unconstitutional since *Roe*.<sup>54</sup>

<sup>53</sup> ARIZ. REV. STAT. ANN. § 13-3603. See also *id.* § 13-3604 (criminalizing obtaining an abortion, with exception for woman’s life), § 13-3605 (criminalizing abortion advertising).

<sup>54</sup> *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) (finding statute unconstitutional); *State v. Wahlrab*, 509 P.2d 245 (Ariz. Ct. App. 1973) (reversing conviction due to unconstitutionality of statute).

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

**State Constitutional Protection of Abortion Rights:** The Arizona Constitution contains an explicit right to privacy, which states:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.<sup>55</sup>

This provision has, in some contexts, been interpreted as providing more privacy protection than the U.S. Constitution.<sup>56</sup> 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.<sup>57</sup> Consequently, if *Roe* is overruled, it is possible that the right to abortion will be fully protected under the Arizona Constitution.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** An argument against revival of the old ban based on implied repeal may not be successful, because Arizona courts do not favor the implied-repeal doctrine.<sup>58</sup>

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<sup>55</sup> ARIZ. CONST. art. II, § 8

<sup>56</sup> 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).

<sup>57</sup> 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. Moreover, two of the three justices who joined in finding the failure to fund medically necessary abortions unconstitutional under the state constitution have left the Arizona Supreme Court, leaving the court's view of the protections accorded by Arizona's right to privacy even more uncertain.

<sup>58</sup> 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.").

**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.

**Legislative Session in Arizona: Jan. 10 – April 23, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## ARKANSAS

### ARKANSAS AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS  |
|--|--|---|--|
| Pre- <i>Roe</i> ban (with exception for woman’s conduct) on the books; court has blocked enforcement | None established                                   | None                                    | 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.<sup>59</sup>

<sup>59</sup> ARK. CODE ANN. § 5-61-102 (containing an exception if the woman causes the “death of her own unborn child in utero.”).



This ban has been enjoined as unconstitutional by a federal court.<sup>60</sup>

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.

**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.<sup>61</sup> It provides, “[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.”<sup>62</sup>

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.<sup>63</sup>

**Conclusion:** Arkansas has an abortion ban, with a limited exception, on the books. Although the abortion ban is currently unenforceable, if *Roe* is reversed, state officials may seek to set aside the court rulings in order to revive the ban, or the legislature may enact a new ban.

**Legislative Session in Arkansas: Jan. 10 – March 10, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>60</sup> *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980) (statute permanently enjoined as applied to physicians due to lack of notice). Note that this decision struck down other restrictions on abortion that are no longer on the books.

<sup>61</sup> 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.

<sup>62</sup> ARK. CONST. amend. 68, § 2.

<sup>63</sup> See, e.g., *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980) (finding later-enacted abortion statute impliedly repealed earlier abortion statute).



# CALIFORNIA

## CALIFORNIA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS             | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | State constitutional right to privacy protects abortion rights | Reproductive privacy act on the books   | Unlikely to enact new ban |



**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 constitutional right of procreative choice under the state constitution four years before the U.S. Supreme Court issued the *Roe* decision.<sup>64</sup> The state constitution provides:

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.<sup>65</sup>

This provision has been interpreted as protecting the right to choose abortion.<sup>66</sup>

**Statutory Protection of Abortion Rights:** California has strong statutory protection for abortion rights under the Reproductive Privacy 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

<sup>64</sup> *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.

<sup>65</sup> Cal. Const. art. I, § 1.

<sup>66</sup> 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 under the California constitutional privacy provision, and finding that California constitutional privacy protections are “at least as broad” as federal protections outlined in *Roe*); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (invalidating parental consent requirement).

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.<sup>67</sup>

**Other Factors:** None.

**Conclusion:** If *Roe* is overruled, the right to abortion should be fully protected in California.

**Legislative Session in California: Dec. 6, 2004 – Sept. 9, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## COLORADO

### COLORADO AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--|--|---|---------------|
| Pre-Roe ban (with exception for "justified medical termination") on the books; court has partially blocked enforcement | None established                                   | None                                    |               |

|                     |             |               |            |
|---------------------|-------------|---------------|------------|
| <b>RISK FACTORS</b> | <b>HIGH</b> | <b>MEDIUM</b> | <b>LOW</b> |
|---------------------|-------------|---------------|------------|

**Existence and Status of Abortion Ban:** Colorado has a pre-*Roe* 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

<sup>67</sup> 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 abortions restrictions, some of which had already been struck down by California courts.

birth commits criminal abortion.<sup>68</sup>

Some parts of the statute have been held unconstitutional,<sup>69</sup> while other provisions remain in effect.<sup>70</sup> The portions that are still in effect permit “justified medical termination,”<sup>71</sup> which is broadly defined to permit abortions upon the woman’s request.<sup>72</sup> 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:** Colorado courts are reluctant to find repeal by implication;<sup>73</sup> therefore, such an argument may not successfully block revival of the ban.

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<sup>68</sup> COLO. REV. STAT. ANN. § 18-6-102 (emphasis added). *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 requirements, 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*); § 18-6-103 (“pretended criminal abortion”); § 18-6-105 (regulating distribution of abortifacients); § 25-1-665 to 25-1-667 (prohibiting sale and advertising of abortifacients except by prescription).

<sup>69</sup> *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 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); *see also Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975) (striking down parental consent provision). The spousal consent provision is currently 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 (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.

<sup>70</sup> *People v. Franklin*, 683 P.2d 775, 778 (Colo. 1984) (upholding constitutionality of portions of abortion ban remaining after *Norton* decision, including language concerning “justified medical termination”).

<sup>71</sup> *Id.*

<sup>72</sup> *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).

<sup>73</sup> *See Property Tax Adm’r v. Prod. Geophysical Servs.*, 860 P.2d 514, 518 (Colo. 1993)(en banc) (“an intent to repeal by implication to be effective must appear clearly, manifestly, and with cogent force.”); *Casados v. People*, 204 P.2d 557, 559 (Colo. 1947) (“[r]epeals by implication are not favored. . . . The courts will not hold to a repeal if they can find reasonable grounds to hold to the contrary.”).

**Conclusion:** Currently abortion is accessible in Colorado, despite the existence of an 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.

**Legislative Session in Colorado: Jan. 12 – May 11, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## CONNECTICUT

### CONNECTICUT AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                                      | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|---|---|---------------------------|
| No ban                               | Lower court decision has recognized state constitutional protection for abortion rights | Reproductive privacy act on the books   | Unlikely to enact new ban |

RISK FACTORS HIGH MEDIUM LOW

**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.<sup>74</sup>

**Statutory Protection of Abortion Rights:** Connecticut enacted a reproductive privacy act in 1990 that explicitly protects a woman’s right to choose abortion.<sup>75</sup> It states:

<sup>74</sup> *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986) (Medicaid regulation restricting abortion funding for poor women violates due process and equal protection clauses of Connecticut Constitution). The Connecticut Constitution’s provisions regarding civil due process state, “[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” CONN. CONST. art. I, § 10. The equal protection provisions state, “[a]ll men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community” and “[n]o person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.” *Id.* at §§ 1, 20.

<sup>75</sup> Conn. Gen. Stat. Ann. § 19a-602(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.<sup>76</sup>

**Other Factors:** None.

**Conclusion:** If *Roe* is overturned, the right to abortion should continue to be protected in Connecticut.

**Legislative Session in Connecticut: Jan. 5 – June 8, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## DELAWARE

### DELAWARE AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--|--|---|---------------|
| Pre-Roe ban (with exception for "therapeutic" abortion) on the books; never blocked by a court; state attorney general recognized ban is unenforceable | None established                                   | None                                    |               |

RISK FACTORS    HIGH    MEDIUM    LOW

**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

<sup>76</sup> *Id.*

female an abortion which causes the miscarriage of the female, unless the abortion is a therapeutic abortion.<sup>77</sup>

The ban includes an exception for “therapeutic abortion” 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.<sup>78</sup> The statute does not appear to have been enjoined by any court.<sup>79</sup> Instead, the statute has been viewed by state officials as unenforceable to the extent its provisions conflict with *Roe*.<sup>80</sup>

It is possible, therefore, that if *Roe* is overruled, state authorities in Delaware could seek to immediately enforce this statute. This seems quite likely, considering that the attorney general recently attempted to enforce the old mandatory delay/biased counseling law.<sup>81</sup>

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** If an attempt was made to enforce the existing statute, an argument could be made for its implied repeal, although it is unclear whether such an argument would be successful.<sup>82</sup> It is also possible, though not likely, that the legislature could enact a broader abortion ban (without the “therapeutic abortion” exception) if *Roe* is overturned.

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<sup>77</sup> 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.

<sup>78</sup> DEL. CODE ANN. tit. 24, § 1790.

<sup>79</sup> 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).

<sup>80</sup> The attorney general has issued an opinion recognizing that the statute was unenforceable. Del. Op. Att’y Gen. No. 73-030 (Apr. 12, 1973); Statement of Policy, Attorney General of Delaware (Mar. 24, 1977).

<sup>81</sup> Similarly to this situation, the attorney general had previously issued an opinion finding the mandatory delay/biased counseling law unenforceable. Del. Op. Att’y Gen. No. 83-1023 (July 27, 1983) (finding DEL. CODE ANN. tit. 24, § 1794 unenforceable). Despite this opinion, the attorney general attempted to enforce the law; however, this effort was blocked by the court. See *Planned Parenthood v. Brady*, No. 03-153-SLR, 2003 WL21383721 (D. Del. June 9, 2003) (finding law unconstitutional and permanently enjoining it).

<sup>82</sup> The doctrine of implied repeal has fared 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, 631 (Del. Ch. 1974) (statute providing that a pregnant female over age 12 can give her consent to an abortion repealed by implication a previously enacted statute requiring consent of parents or guardian before pregnant females under 18 could seek abortion). The implied repeal argument has been successful in other contexts as well. See *Wilson v. State*, 500 A.2d 605, 609 (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, 1160 (Del. 1981) (same). However, Delaware courts have also refused to recognize implied repeal. See, e.g., *Bd. of Assessment Review v. Silverbrook Cemetery Co.*, 378 A.2d 619, 622 (Del. 1977) (stating that repeal by implication is not favored, and denying claim for implied repeal).

**Conclusion:** If *Roe* is overturned, state officials may try to enforce the existing criminal abortion statute. If the existing criminal ban is enforced, only “therapeutic abortions” will be allowed. It is unlikely that the legislature would enact a more restrictive abortion ban.

**Legislative Session in Delaware: Jan. 11 – June 30, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

## DISTRICT OF COLUMBIA

### DISTRICT OF COLUMBIA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--------------------------------------|--|---|---|
| No ban                               | None established                                   | None                                    | D.C. is subject to plenary power of Congress; therefore abortion could be banned in D.C. by act of Congress |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** No abortion ban. The legislature recently repealed its pre-*Roe* ban. [D.C. Law 15-15473(a).]

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** It is unlikely that the District of Columbia itself would enact a more restrictive ban on abortion if *Roe* is overturned. Nevertheless, the District remains subject to plenary Congressional power,<sup>83</sup> and it is possible that Congress would act to prohibit or severely restrict abortion in the absence of *Roe*.<sup>84</sup>

<sup>83</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>84</sup> 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 in non-residents working in the District of Columbia).



**Conclusion:** There is no ban currently on the books. However, Congress could act immediately to prohibit abortions in the District of Columbia.

**Legislative Session in Washington D.C.: Jan. 2 – end of year, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## FLORIDA

### FLORIDA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS             | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--------------------------------------|--|---|---|
| No ban                               | State constitutional right to privacy protects abortion rights | None                                    | Constitutional amendment concerning right to privacy will be on November 2004 ballot; highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** No abortion ban. The legislature repealed its pre-*Roe* ban.<sup>85</sup>

**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.<sup>86</sup>

The Florida Supreme Court has construed this provision as giving strong protection to a woman's right to choose abortion.<sup>87</sup>

<sup>85</sup> Note that there is an old statute still on the books banning abortion advertising that is not enforced. FLA. STAT. ANN. § 797.02.

<sup>86</sup> FLA. CONST. art. I, § 23. This provision was added to the constitution through the ballot in 1980.

<sup>87</sup> *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

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Despite the current reproductive privacy protections, the Florida governor is anti-choice and there are anti-choice majorities in both houses of the legislature. In addition, those opposed to abortion are seeking to overturn some of the protections recognized by the Florida Supreme Court under the privacy provision through an amendment to the state constitution.<sup>88</sup> Therefore, the current protections may be eviscerated, through new legislation banning abortion<sup>89</sup> or through a constitutional amendment.

**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 current Florida Constitution. However, anti-choice activists may attempt to remove protections through a constitutional amendment.

**Legislative Session in Florida: March 8 – May 6, 2005**

*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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“embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution”).

<sup>88</sup> At press time, the Legislature had passed a proposed constitutional amendment that was geared at imposing parental involvement requirements for minors’ abortions. This proposed constitutional amendment will be on the November 2004 ballot. If successfully enacted, and if *Roe* is overruled, anti-choice forces may be emboldened to try to ban abortion through a similar ballot initiative process.

<sup>89</sup> New legislation would likely be challenged immediately and should be struck down under the privacy provision of the state constitution (unless the constitution has been significantly amended).



# GEORGIA

## GEORGIA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS   | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--------------------------------------|--|---|---------------|
| No ban                               | State constitutional right to privacy has not yet been extended to protect abortion rights, but has been broadly interpreted in other contexts | None                                    |               |



**Existence and Status of Abortion Ban:** No abortion ban. Georgia does have a statute that seems to restrict abortion. That statute provides:

*Except as otherwise provided in Code Section 16-12-141, a person commits the offense of criminal abortion when he administers any medicine, drugs, or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.<sup>90</sup>*

However, Section 16-12-141 provides a broad exception for a doctor who provides an abortion “based upon his or her best clinical judgment that an abortion is necessary.”<sup>91</sup> This language has been broadly interpreted.<sup>92</sup>

**State Constitutional Protection of Abortion Rights:** The Georgia Constitution contains a due process clause, which states:

No person shall be deprived of life, liberty, or property except by due process of law.<sup>93</sup>

<sup>90</sup> GA. CODE ANN. § 16-12-140 (emphasis added).

<sup>91</sup> *Id.* § 16-12-141.

<sup>92</sup> This language was upheld by the U.S. Supreme Court, which interpreted it as allowing doctors to consider a wide array of factors including “physical, emotional, psychological, familial, and the woman’s age” in determining whether an abortion is necessary. *Doe v. Bolton*, 410 U.S. 179, 192 (1973), *motion to set aside judgment denied, Cano v. Bolton*, No. 1:70-c-13676-JOF (N.D. Ga. Mar. 26, 2004). An exception for the conduct of the pregnant woman was recognized in *Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998).

<sup>93</sup> GA. CONST. art. I, §1, ¶ 1.

The Georgia Supreme Court has interpreted this provision in a manner that may render any abortion prohibition invalid.<sup>94</sup> Therefore, if *Roe* is overturned and the legislature decides to enact an abortion ban, such a ban may be enjoined by the courts.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** None.

**Conclusion:** There is no abortion ban currently on the books in Georgia, and if one is enacted, it may be struck down by the courts.

**Legislative Session in Georgia: Jan. 10 – late March, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## HAWAII

### HAWAII AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS   | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | State constitutional right to privacy has not yet been extended to protect abortion rights | None                                    | Unlikely to enact new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** No abortion ban. Hawaii does have a statute requiring that all abortions be performed in a hospital;<sup>95</sup> however, this provision has long been viewed in Hawaii as unenforceable.<sup>96</sup> Given Hawaii’s strongly pro-choice record

<sup>94</sup> See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (holding that the sodomy statute violates the right of privacy as guaranteed by the Georgia Constitution’s due process clause).

<sup>95</sup> HAW. REV. STAT. § 453-16(a).

<sup>96</sup> Haw. Op. Att’y Gen. No. 74-17 (hospital requirement unenforceable during first trimester); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 438-39 (1983) (striking down requirement that all abortions after the first trimester be performed in a hospital).

(including providing full Medicaid funding for abortions),<sup>97</sup> it is unlikely that efforts would be made to revive this hospitalization requirement.

**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. The legislature shall take affirmative steps to implement this right.<sup>98</sup>

This provision might protect reproductive rights if legislative efforts were made to ban abortion.<sup>99</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** It is also unlikely that any legislative effort to enact an abortion ban would be successful if *Roe* is overturned.

**Conclusion:** There is no abortion ban on the books, and it is unlikely that one would be enacted if *Roe* is overturned. Any ban that was enacted might be struck down under the Hawaii Constitution.

**Legislative Session in Hawaii: Jan. 19 – early May, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>97</sup> HAW. ADMIN. RULES § 17-1727-49(C)(7).

<sup>98</sup> HAW. CONST. art. I, § 6.

<sup>99</sup> See, e.g., *State v. Cuntapay*, 85 P.3d 634, 642 (Haw. 2004) (affirming that petitioner had reasonable expectation of privacy on independent state constitutional grounds, finding 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).



# IDAHO

## IDAHO AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS  |
|--------------------------------------|--|---|--|
| No ban                               | None established                                   | None                                    | Statutory public policy language favors childbirth over abortion |



**Existence and Status of Abortion Ban:** No abortion ban.<sup>100</sup> The legislature repealed its pre-*Roe* ban.<sup>101</sup> The legislature also repealed Idaho’s “trigger law,” which had posed a real risk of reviving the pre-*Roe* statute prior to its repeal.<sup>102</sup>

**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.<sup>103</sup>

<sup>100</sup> There is a physician-only provision on the books that is written like an abortion ban. It states: “Every person not licensed or certified to provide health care in Idaho who, except as permitted by this chapter, provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent thereby to cause or perform an abortion shall be guilty of a felony . . .” IDAHO CODE § 18-605.

<sup>101</sup> Idaho law carefully regulates who can provide abortions or advertise for them. See IDAHO CODE §§ 18-603 – 18-608. The attorney general has found certain portions of §18-608 unenforceable. See Idaho Op. Att’y Gen. No. 93-1 (Feb, 10, 1993) and No. 98-1 (Jan. 26, 1998) (requirement that second-trimester abortion be performed in hospital unenforceable and ban on third-trimester abortions may be unconstitutional since no health exception).

<sup>102</sup> The trigger 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 would be repealed and other sections (i.e., the abortion ban) would be enforceable again.

<sup>103</sup> See Idaho Code §18-601.

**Conclusion:** No abortion ban currently exists, but the legislature may try to enact one if *Roe* is overturned.

**Legislative Session in Idaho: Jan. 10 – late March, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



**ILLINOIS**

**ILLINOIS AT A GLANCE**

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                                      | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS  |
|--------------------------------------|---|---|--|
| No ban                               | Lower court decision has recognized state constitutional protection for abortion rights | None                                    | Statutory public policy language states that Illinois' policy to prohibit abortion shall be reinstated if <i>Roe</i> is overturned |



**Existence and Status of Abortion Ban:** No abortion ban.<sup>104</sup> 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.<sup>105</sup>

**Statutory Protection of Abortion Rights:** None.

<sup>104</sup> There are two abortion provisions currently on the books that appear “ban-like”: (1) 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). Illinois provides a husband with the ability to go to court to obtain “injunctive relief” 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 the hospitalization provision enforceable.

<sup>105</sup> See *Doe v. Wright*, No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994) (state trial court ruling recognizing strong protection for the right to abortion under the Illinois Constitution).

**Other Factors:** Illinois has a statutory provision on the books stating that if the Supreme Court overrules *Roe*, the “policy” of Illinois to prohibit abortions “shall be reinstated.”<sup>106</sup> The provision also bestows rights on the “unborn.”<sup>107</sup> It is unlikely, especially in light of Illinois’s repeal of its criminal abortion ban, that this provision would actually trigger a ban on abortion.<sup>108</sup>

**Conclusion:** Illinois does not have an abortion ban on the books and the trigger law is unlikely to be found immediately operative. If a new ban were enacted, it might be struck down under the Illinois Constitution.

**Legislative Session in Illinois: Jan. 12 – end of year, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>106</sup> 720 ILL. COMP. STAT. ANN. 510/1 (“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.”).

<sup>107</sup> *Id.*

<sup>108</sup> See EFFECTS ON ILLINOIS IF *ROE V. WADE* IS MODIFIED OR OVERRULED, Ill. Gen. Assembly Legislative Research Unit (Feb. 9, 1989) (statutory language indicates legislative intent but lacks operative provisions and penalties so it cannot stand as abortion ban on its own, and cannot, on its own, revive the repealed law or dictate to current Legislature how to act).





# INDIANA

## INDIANA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS  | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS  |
|--------------------------------------|---|---|--|
| No ban                               | State constitutional right to privacy has not been extended to protect abortion; protection for abortion rights recognized under privileges and immunities clause | None                                    | Statutory public policy language favors childbirth over abortion |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** No abortion ban. The legislature repealed its pre-*Roe* ban.

**State Constitutional Protection of Abortion Rights:** It is currently unclear whether the Indiana Constitution’s right to privacy affords greater protection to abortion rights than the U.S. Constitution. The Indiana Supreme Court, in a sharply divided opinion, has required a limited expansion of public funding for abortions under the state constitution’s equal privileges and immunities clause,<sup>109</sup> but it did not address what, if any, privacy protection would be extended to abortion.<sup>110</sup> A case now pending before the Indiana Court of Appeals, challenging the state’s mandatory delay/biased counseling requirement, may resolve whether the state constitution’s right to privacy will be more protective of abortion rights than the U.S. Constitution.<sup>111</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** The legislature has declared that it is the state’s policy to prefer childbirth over abortion.<sup>112</sup>

<sup>109</sup> IND. CONST. art. I, § 23 (“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”).

<sup>110</sup> *Humphreys v. Clinic for Women*, 796 N.E.2d 247 (Ind. 2003).

<sup>111</sup> *A Clinic for Women v. Brizzi*, No. 49A05-305-CV-00259 (Ind. Ct. App) (argued Nov. 20, 2003).

<sup>112</sup> See IND. CODE § 16-34-1-1 (“Childbirth is preferred, encouraged, and supported over abortion.”).

**Conclusion:** There is no abortion ban on the books, but the legislature may try to enact one if *Roe* is overturned. The constitutionality under the Indiana Constitution of any newly enacted ban is unclear.

**Legislative Session in Indiana: Jan. 10 (may change) – April 29, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



**IOWA**

**IOWA AT A GLANCE**

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | None                                    | Unlikely to enact new ban |



**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:** The legislature has taken a moderate stance on abortion restrictions in the past. Although the current composition of the legislature is primarily anti-choice, it is likely that the state’s current pro-choice governor would veto a broad abortion ban. Therefore, it is unlikely that an abortion ban would be enacted if *Roe* is overturned.

**Conclusion:** There is no abortion ban on the books and it is unlikely that a new ban would be enacted.

**Legislative Session in Iowa: Jan. 10 – late April, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## KANSAS

### KANSAS AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--------------------------------------|--|---|---------------|
| No ban                               | None established                                   | None                                    |               |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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:** Although the current governor of Kansas is pro-choice, there is nevertheless a fair chance that Kansas will enact an abortion ban or severe restriction on abortion if *Roe* is overturned. This is in part because one of the few U.S. providers of post-viability abortions<sup>113</sup> practices in Kansas and 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.

**Conclusion:** There is no ban on the books but the legislature may try to enact one.

**Legislative Session in Kansas: Jan. 10th – late April, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>113</sup> Post-viability abortions are performed in Kansas pursuant to exceptions under state law allowing post-viability abortions only where two unaffiliated physicians have determined that the abortion is “necessary to preserve the life of the pregnant woman” or where “a 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

## KENTUCKY AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS   | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--------------------------------------|--|---|---|
| No ban                               | State constitutional right to privacy has not yet been extended to protect abortion rights, but has been broadly interpreted in other contexts | None                                    | Statutory language states that policy to ban abortions shall be reinstated if <i>Roe</i> is overturned; highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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,<sup>114</sup> 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.”<sup>115</sup> However, in light of Kentucky’s repeal of its criminal abortion ban, this provision would likely be ineffective in actually triggering a prohibition on abortion.

In any case, it is likely that, given its present anti-choice majorities, the legislature will enact a new ban if *Roe* is overturned.

**Conclusion:** There is no abortion ban currently and the trigger law should not be enforceable. The legislature is likely to enact a ban and if a ban were enacted, state constitutional protection is uncertain.

### Legislative Session in Kentucky: Jan. 4 – March 29, 2005

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>114</sup> *Commonwealth v. Wasson*, 842 S.W.2d 487, 491 (Ky. 1993) (holding that sodomy statute violates privacy and equal protection guarantees of Kentucky Constitution).

<sup>115</sup> 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.”).



## LOUISIANA

### LOUISIANA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|---|--|---|---|
| Pre- <i>Roe</i> ban held repealed by implication; new ban (with limited exceptions) on the books; court has blocked enforcement | None established                                   | None                                    | Statutory language protects life of unborn; promises enforcement of abortion ban if <i>Roe</i> is overturned; highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** Louisiana had a pre-*Roe* abortion ban in its statutes; however, in 1990 this statute was found to be repealed by implication (that is, a court found that because abortion regulations had been enacted subsequent to the ban, abortion was no longer prohibited in Louisiana, and struck down the ban).<sup>116</sup> In 1991, at the next opportunity after this court ruling, however, the legislature enacted a new abortion ban (with limited exceptions);<sup>117</sup> this ban has been enjoined by the federal courts.<sup>118</sup>

In the event that *Roe* is overturned, this second statute 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 in order to enforce the statute. In bringing such a suit, the officials would likely rely on a third statute, a so-called trigger law currently on the books in Louisiana, which states:

It is the intention of the legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The legislature does 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

<sup>116</sup> *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). This case is referred to herein as the “*Weeks* decision.”

<sup>117</sup> 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 13 weeks of conception; (4) in the case of incest if the incest is reported and abortion is obtained within 13 weeks of conception). Note that a ban on abortion advertising and on distribution of abortifacients remains on the books, see LA. REV. STAT. ANN. §§ 14:87.4, 14:88, but are not enforceable since the *Weeks* decision.

<sup>118</sup> *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), cert. denied, 507 U.S. 972 (1993) (finding statute criminalizing most abortions unconstitutional).

this State. Further, the legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decision 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 shall be enforced.<sup>119</sup>

Anti-choice advocates and state officials would likely argue that this statement of legislative intent is enough to trigger an abortion ban if *Roe* is overturned, since the earlier bans were not actually repealed. They may also attempt to enforce a ban on abortion without going to court to set aside the court's ruling or taking any additional legislative action. Advocates must be prepared to challenge any such attempt so that the courts, not state officials, can determine the exact scope of this statement.

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** In response to an attempt to enforce Louisiana's 1991 statute banning abortion, pro-choice lawyers could argue that the ban was repealed by implication because of passage of later abortion regulations. This argument would be supported by the reasoning of the 1990 decision holding that the pre-*Roe* ban had been repealed by implication and the existence of a Louisiana statute that specifically provides for implied repeals.<sup>120</sup> However, it is unclear whether such an argument would be successful.

In any event, regardless of what happens with the earlier ban, it is likely that the Louisiana Legislature, which is very anti-choice, would act to prohibit abortion if *Roe* were overturned, in keeping with the statement of legislative intent in the state's "trigger law." If a new ban were enacted, it is unlikely that it would be struck down by the courts under the Louisiana Constitution. Thus, Louisiana is very likely to succeed in prohibiting abortion if *Roe* is overruled.

**Conclusion:** Although the current abortion ban (with limited exceptions) is unenforceable, if *Roe* is overturned, abortion is likely to be banned in Louisiana, either through enforcement of the 1991 law (with limited exceptions) or through passage of a new ban.

**Legislative Session in Louisiana: April 25 – June 23, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>119</sup> LA. REV. STAT. ANN. § 40:1299.35.0.

<sup>120</sup> See LA. REV. STAT. ANN. § 24:176(A).



# MAINE

## MAINE AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | Reproductive privacy act on the books   | Unlikely to enact new ban |



**Existence and Status of Abortion Ban:** No abortion ban. The legislature repealed Maine’s pre-*Roe* ban.

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** Maine has enacted a reproductive privacy act, declaring the state’s policy of support for abortion rights.<sup>121</sup> 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.<sup>122</sup>

**Other Factors:** Maine voters have rejected a ban on so-called “partial-birth abortion” at the polls, and both the legislature and governor are considered pro-choice. It is therefore unlikely that Maine will move to prohibit abortion if *Roe* is overruled.

**Conclusion:** Currently there is no abortion ban on the books in Maine, and it is unlikely that one will be enacted if *Roe* is overturned.

**Legislative Session in Maine: Dec. 1, 2004 – June 15, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>121</sup> ME. REV. STAT. ANN. tit. 22, § 1598.

<sup>122</sup> *Id.* Section 1597-A regulates a minor’s ability to obtain an abortion in Maine.



# MARYLAND

## MARYLAND AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | Reproductive privacy act on the books   | Unlikely to enact new ban |



**Existence and Status of Abortion Ban:** No abortion ban. The legislature repealed the pre-*Roe* ban.

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** The legislature has enacted a reproductive privacy 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.<sup>123</sup>

**Other Factors:** Given the state’s statutory protection for abortions and the fact that Maryland provides other statutory protections for abortion access,<sup>124</sup> it is unlikely that Maryland would enact a new ban on abortions if *Roe* were overruled.

**Conclusion:** No ban currently exists and it is unlikely that one would be enacted.

**Legislative Session in Maryland: Jan. 12 – April 11, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>123</sup> Md. Code Ann., Health-Gen. § 20-209(b).

<sup>124</sup> 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. § 10-204.





## MASSACHUSETTS

### MASSACHUSETTS AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                 | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--|--|---|---------------|
| Pre- <i>Roe</i> ban (requiring "unlawful" activity) on the books; never blocked by a court; newer abortion law also on the books | State constitutional right to due process protects abortion rights | None                                    |               |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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 . . .<sup>125</sup>

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 24 weeks,<sup>126</sup> 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.”<sup>127</sup> This is the law that is currently enforced in Massachusetts, and generally protects access to abortion.<sup>128</sup>

If *Roe* is overturned, it is possible that state officials in Massachusetts could seek to enforce the pre-*Roe* ban. However, it can be argued that any person performing an

<sup>125</sup> MASS. GEN. LAWS ch. 272, § 19 (emphasis added). It also prohibits abortion advertising, and sale of abortion instruments. *Id.* at §§ 20, 21.

<sup>126</sup> MASS. GEN. LAWS ch. 112, § 12L (permitting abortions before 24 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).

<sup>127</sup> *Id.* § 12M.

<sup>128</sup> Note that some restrictions in the post-*Roe* law are currently unenforceable, such as a requirement that all abortions after 13 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 U.S. Supreme Court case law based on *Roe* (such as the *Akron* case) would also likely be overturned, making requirements such as the hospitalization provision enforceable.

abortion in compliance with the second statutory scheme seemingly would not be “unlawfully” procuring a miscarriage in violation of the ban.

**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 by a court pursuant to the Massachusetts Constitution, since the Massachusetts Constitution protects the right to choose abortion more strongly than the U.S. Constitution.<sup>129</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** An argument could be made that the pre-*Roe* ban was repealed by implication by the passage of the secondary statutory scheme. However, Massachusetts courts in the past have been reluctant to find repeal by implication, so this argument may not succeed.<sup>130</sup>

**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.

**Legislative Session in Massachusetts: Jan. 5 – end of year, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>129</sup> *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 including articles 1, 10 and 12 of the Declaration of Rights, and Part II (c)(1) of the constitution—essentially the constitution’s due process provisions.

<sup>130</sup> 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); *Registrar of Motor Vehicles v. Bd. of Appeal*, 416 N.E.2d 1373, 1376 (Mass. 1981) (“where two or more statutes relate to the same subject matter, they should be construed together so as to constitute an harmonious whole consistent with the legislative purpose.”).



## MICHIGAN

### MICHIGAN AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS       | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|---|--|---|---|
| Pre- <i>Roe</i> ban (with exception for woman's life) on the books; court has blocked enforcement to the extent the statute conflicts with <i>Roe</i> | Constitutional protection specifically rejected by court | None                                    | Highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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.<sup>131</sup>

The Michigan Supreme Court has required that the ban include other exceptions required by federal constitutional law.<sup>132</sup> 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. Such immediate enforcement would likely arise by means of a prosecution by an anti-choice prosecutor. Alternatively, state officials could seek to set aside the previous court ruling. It is therefore likely that Michigan's pre-*Roe* abortion ban will be enforceable within a short time after *Roe* is overruled.

**State Constitutional Protection of Abortion Rights:** The Michigan Supreme Court has rejected the argument that the State Constitution provides broader protection for abortion than the U.S. Constitution.<sup>133</sup>

<sup>131</sup> 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).

<sup>132</sup> *People v. Bricker*, 208 N.W.2d 172 (Mich. 1973) (statute reinterpreted 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).

<sup>133</sup> *Doe v. Dept. of Soc. Servs.*, 487 N.W.2d 166 (Mich. 1992) (finding that state constitution's equal protection clause does not require public funding for abortions).

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** 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.<sup>134</sup>

The Michigan Legislature, which is strongly anti-choice, will likely attempt to enact a new ban. Given the current pro-choice governor, such a measure would likely be vetoed; however, it might still be enacted through override vote or other measures. For example, anti-choice forces may resort to measures like the state's unique citizen initiative process, which is how the "Legal Birth Definition Act" was recently enacted, despite a previous veto by the governor.<sup>135</sup>

**Conclusion:** There is a pre-*Roe* ban on the books that will likely be enforceable within a short time after *Roe* is overruled and Michigan is highly vulnerable to enactment of a new ban.

**Legislative Session in Michigan: Jan. 12 – end of year, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>134</sup> *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).

<sup>135</sup> S.B. 395, 92nd Sess. (Mich. 2003).



# MINNESOTA

## MINNESOTA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS             | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|--------------------------------------|--|---|---|
| No ban                               | State constitutional right to privacy protects abortion rights | None                                    | Highly vulnerable to enactment of new ban |



**Existence and Status of Abortion Ban:** No abortion ban. The legislature repealed its pre-*Roe* ban.<sup>136</sup>

**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*.<sup>137</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Minnesota law specifically favors childbirth over abortions.<sup>138</sup>

There is a good chance that the present Minnesota Legislature would pass, and the governor would sign, a ban on abortion if *Roe* were overturned.

**Conclusion:** There is no abortion ban currently. The right to choose abortion is likely to be protected if *Roe* is overturned. Although Minnesota is highly vulnerable to enactment of a new ban, any new ban should be struck down by the courts under the state constitution.

**Legislative Session in Minnesota: Jan. 4 – May 23, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>136</sup> 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)).

<sup>137</sup> *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). Note that 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).

<sup>138</sup> See MINN. STAT. § 256B.011.



# MISSISSIPPI

## MISSISSIPPI AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|--|--|---|---|
| Pre-Roe ban (with exception for woman's life and rape) on the books; court has blocked enforcement | None established                                   | None                                    | Highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** Mississippi has a pre-*Roe* abortion ban in its statutes, with exceptions to protect a woman’s life and for cases where the pregnancy was caused by rape. The ban reads:

Any person willfully and knowingly causing, by means of any instrument, medicine, drug or other means whatever, any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage shall be guilty of a felony unless the same were done by a duly licensed, practicing physician: (a) [w]here necessary for the preservation of the mother’s life; (b) [w]here pregnancy was caused by rape.<sup>139</sup>

However, the ban has been declared unconstitutional by a state court.<sup>140</sup>

In the event that *Roe* is overruled, the ban would not be immediately enforceable, due to the court ruling finding the ban unconstitutional. However, state officials could seek to revive the ban by moving to set aside the rulings.

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** It is unlikely that a Mississippi court would find that the pre-*Roe* ban was impliedly repealed by later enacted statutes regulating abortion, because Mississippi courts have strict standards for finding such repeal.<sup>141</sup>

<sup>139</sup> MISS. CODE ANN. § 97-3-3; *see also id.* § 97-3-5 (prohibiting selling, lending, giving away, advertising instrument or drugs for abortion).

<sup>140</sup> *Spears v. State*, 278 So. 2d 443 (Miss. 1973) (statute unconstitutionally limits abortion).

<sup>141</sup> *See Roberts v. Miss. Republican Party*, 465 So. 2d 1050, 1052 (Miss. 1985) (suggesting that, “where in a subsequent statute there is no express repeal of a former, the court will not hold the former to be repealed by implication, unless there be a plain and unavoidable repugnancy between them” (quoting *White v. Johnson*, 23 Miss. 68 (1851))).

In addition, both the Mississippi Legislature and the governor of Mississippi are strongly anti-choice. Based on the state's track record of restricting abortion,<sup>142</sup> it is likely that even if Mississippi's pre-*Roe* ban were not revived, a new abortion ban would be enacted if *Roe* were overruled.

**Conclusion:** Mississippi currently has an abortion ban on the books, with life and rape exceptions. If *Roe* is overturned, abortion is likely to be banned -- either through revival of the old ban or passage of a new ban.

**Legislative Session in Mississippi: Jan. 4 – April 3, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## MISSOURI

### MISSOURI AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--------------------------------------|--|---|---|
| No ban                               | None established                                   | None                                    | Statutory language indicates intent to regulate abortion as permitted by federal law and to protect life of unborn; highly vulnerable to enactment of new ban |



**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.

<sup>142</sup> For example, Mississippi enacted a so-called “partial-birth abortion” ban, MISS. CODE ANN. § 41-41-71 – 73 (now unenforceable); a mandatory delay/biased counseling law, § 41-41-33 – 35; a parental consent law, § 41-41-51, -53, -55; and most recently, a requirement that second trimester abortions be performed in an ambulatory surgical center or hospital, H.B. 1038, 2004 Reg. Sess. (Miss. 2004) (enjoined, *Jackson Women’s Health Org v. Amy*, No. 3:04CV495LN (S.D. Miss. July 22, 2004).

**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.<sup>143</sup>

Given the abortion restrictions enacted in the past<sup>144</sup> and the current composition of the legislature, it is likely that, if *Roe* is overruled, Missouri will ban abortion as soon as the legislature has the opportunity to act.

**Conclusion:** There is no ban on the books but the legislature will likely enact a ban if *Roe* is overturned.

**Legislative Session in Missouri: Jan. 5 – May 30, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>143</sup> MO. ANN. STAT. § 188.010; *see also id.* § 1.205 (finding that life begins at conception and providing “[e]ffective January 1, 1988, 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.”)

<sup>144</sup> *See e.g.* MO. ANN. STAT. § 188.020 (physician-only law); § 188.025 (hospitalization requirement for abortions after 16 weeks); § 188.028 (parental consent law); § 188.043 (requiring \$500,000 medical malpractice insurance to perform abortions); § 188.052 (abortion reporting requirements).





# MONTANA

## MONTANA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS             | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS  |
|--------------------------------------|--|---|--|
| No ban                               | State constitutional right to privacy protects abortion rights | None                                    | Statutory public policy language protects life of the unborn; indicates intent to regulate abortion as permitted by law; highly vulnerable to enactment of new ban |



**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.<sup>145</sup>

The Montana Supreme Court has recognized strong protection for the right to choose abortion under this provision of the state Constitution.<sup>146</sup>

**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)<sup>147</sup> and to “restrict abortion to the extent permissible under decisions of appropriate courts of paramount legislation.”<sup>148</sup> Montana is highly vulnerable to enactment of a new ban.

<sup>145</sup> MONT. CONST. art. II, § 10.

<sup>146</sup> *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).

<sup>147</sup> 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).

<sup>148</sup> MONT. CODE ANN. § 50-20-103.

**Conclusion:** Currently there is no abortion ban on the books in Montana. Although a ban is likely to be enacted if *Roe* is overturned, it should be struck down by the courts pursuant to the right to privacy in the Montana Constitution.

**Legislative Session in Montana: Jan. 3 – late April, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## NEBRASKA

### NEBRASKA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--------------------------------------|--|---|---|
| No ban                               | None established                                   | None                                    | Anti-choice legislative declaration deplors the destruction of life resulting from the <i>Roe</i> decision; highly vulnerable to enactment of new ban |



**Existence and Status of Abortion Ban:** Nebraska does not have an abortion ban on the books. The legislature repealed its pre-*Roe* abortion ban.

Based on the state’s long record of restricting abortion,<sup>149</sup> and based on the current composition of the legislature, it is likely that, if *Roe* is overruled, the legislature will enact an 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*],”<sup>150</sup> and that because of “the legislative

<sup>149</sup> See, e.g., NEB. REV. STAT. § 28-327 (mandatory delay/biased counseling law), § 28-328 (partial-birth abortion law and is no longer enforceable), § 28-335 (physician-only law), § 28-337 (hospitals not required to admit patient for abortion), § 71-6901 – 6909 (parental notification law).

<sup>150</sup> NEB. REV. STAT. § 28-325(2).

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.”<sup>151</sup> Nebraska is highly vulnerable to enactment of a new ban.

**Conclusion:** Nebraska presently does not have an abortion ban on the books; however, it is likely that one will be enacted if *Roe* is overturned.

**Legislative Session in Nebraska: Jan. 5 – early June, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



**NEVADA**

**NEVADA AT A GLANCE**

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | Reproductive privacy act on the books   | Unlikely to enact new ban |



**Existence and Status of Abortion Ban:** No abortion ban.<sup>152</sup> 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 November 1990. The language on the ballot initiative (and now in the statutes) provides that abortion is legal in Nevada if performed by a doctor within 24 weeks of the commencement of the pregnancy (assuming other criteria are met).<sup>153</sup>

<sup>151</sup> NEB. REV. STAT. § 28-325(1) & (4).

<sup>152</sup> Nevada has several other statutes still on the books that are not enforced, such as a ban on abortion advertising. NEV. REV. STAT. ANN. 202.200.

<sup>153</sup> 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

Therefore, absent a referendum vote,<sup>154</sup> the state will continue to guarantee abortion rights even if *Roe* is overruled.

Of course, if *Roe* is overruled, there is some likelihood that the anti-choice movement will seek such a referendum vote. If such a referendum passes, then the current statute will be “void and of no effect.”<sup>155</sup> The anti-choice movement would then likely seek to restrict or ban abortion.

**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 via a referendum vote and a new abortion ban is enacted. The legislature itself is unlikely to enact a new ban.

**Legislative Session in Nevada: Feb. 7 – June 6, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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commencement of the pregnancy. (c) After the 24<sup>th</sup> 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.”)

<sup>154</sup> NEV. CONST. art. 19, § 1(3).

<sup>155</sup> *Id.*



## NEW HAMPSHIRE

### NEW HAMPSHIRE AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | None                                    | Unlikely to enact new ban |



**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:** If *Roe* is overruled, anti-choice forces in the legislature may attempt to enact an abortion ban again. Given the current moderate legislative composition, such efforts may not be successful (although the legislature did enact a parental notification law in 2003).<sup>156</sup>

**Conclusion:** New Hampshire does not currently have an abortion ban on the books. The legislature appears unlikely to enact a new ban.

**Legislative Session in New Hampshire: Jan. 5 – July 1, 2005**

*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>156</sup> N.H. REV. STAT. ANN. § 132:25, § 132:26 (held unconstitutional by *Planned Parenthood of N. New England v. Heed*, 296 F. Supp. 2d 59 (D.N.H. 2003)).



## NEW JERSEY

### NEW JERSEY AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                      | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--------------------------------------|---|---|---------------|
| No ban                               | State constitutional right to equal protection protects abortion rights | 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 Constitution contains an equal protection provision which states:

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.<sup>157</sup>

This provision has been interpreted by the New Jersey Supreme Court as giving strong protection to the right to choose.<sup>158</sup> 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 will continue to be protected if *Roe* is overturned.

**Legislative Session in New Jersey: Jan. 11 – end of year, 2005**

*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>157</sup> N. J. CONST. art. I, ¶ 1.

<sup>158</sup> *Planned Parenthood of Cent. N. J. v. Farmer*, 762 A.2d 620 (N.J. 2000) (striking down parental notification law under state Constitution’s equal protection clause); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (state Constitution’s equal protection provision mandates Medicaid funding for medically necessary abortions).



## NEW MEXICO

### NEW MEXICO AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                   | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|---|--|---|---------------|
| Pre- <i>Roe</i> ban (with various exceptions) on the books; court has partially blocked enforcement | State constitution's equal rights amendment protects abortion rights | None                                    |               |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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.<sup>159</sup> A state court has declared the statute largely unenforceable.<sup>160</sup>

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.

**State Constitutional Protection of Abortion Rights:** The New Mexico Constitution contains an Equal Rights Amendment, which 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*.<sup>161</sup> The Amendment states:

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.<sup>162</sup>

The Court interpreted this Amendment as independently protecting women’s access to abortion.<sup>163</sup> 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.

<sup>159</sup> N.M. STAT. ANN. § 30-5-1 (defining “justified medical termination”), § 30-5-3 (criminal abortion).

<sup>160</sup> *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 was 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).

<sup>161</sup> *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) (state must fund medically necessary abortions pursuant to Equal Rights Amendment).

<sup>162</sup> N.M. CONST. art. II, § 18.

<sup>163</sup> *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998), cert. denied, 526 U.S. 1020 (1999).

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** 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. The doctrine of implied repeal is disfavored by New Mexico courts, but it has been recognized by the New Mexico Supreme Court in some instances.<sup>164</sup>

**Conclusion:** New Mexico has an abortion ban, with various exceptions, on the books which is currently unenforceable. Even if *Roe* is overturned, abortion rights should be protected in New Mexico pursuant to the state Constitution.

**Legislative Session in New Mexico: Jan. 18 – March 19, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



**NEW YORK**

**NEW YORK AT A GLANCE**

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | None                                    | Unlikely to enact new ban |



**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.<sup>165</sup>

<sup>164</sup> 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).

<sup>165</sup> 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).



**Statutory Protection of Abortion Rights:** None.

**Other Factors:** The New York Legislature has rejected efforts to restrict abortion during the past 20 years, and New York remains one of a handful of states that provide Medicaid funding of abortion, even absent a court ruling. Consequently, the right to abortion will likely remain secure in New York even if *Roe* is overruled.

**Conclusion:** There is no ban on the books in New York. Abortion is likely to be protected even if *Roe* is overturned.

**Legislative Session in New York: Jan. 5 – end of year, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



**NORTH CAROLINA**

**NORTH CAROLINA AT A GLANCE**

| EXISTENCE AND STATUS OF ABORTION BAN                            | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|---|--|---|---------------|
| Pre- <i>Roe</i> ban on the books; court has blocked enforcement | None established                                   | None                                    |               |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** North Carolina has a pre-*Roe* abortion ban in its statutes. It states:

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.<sup>166</sup>

<sup>166</sup> N.C. GEN. STAT. § 14-44. *See also* §14-45 (“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”). Note that § 14-45.1 clarifies that, despite these two sections, it is not unlawful to “advise, procure, or cause a miscarriage or abortion” when the procedure is performed by a licensed physician in a certified hospital during the first 20 weeks of the pregnancy. This section requiring

The ban was challenged in court, and it appears that the ban has been declared unconstitutional.<sup>167</sup>

Therefore, if *Roe* is overturned, abortion will not be immediately banned in North Carolina. However, state officials might attempt to have the court ruling set aside.

**State Constitutional Protection of Abortion Rights:** None established.<sup>168</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Although an argument for implied repeal of the ban could be made, the success of such an argument is uncertain.<sup>169</sup>

Anti-choice forces in the legislature might attempt to enact a new ban. The success of such a legislative effort is uncertain, given the mixed record of the legislators and the current governor's pro-choice position.

**Conclusion:** There is an abortion ban currently on the books, which is presently unenforceable. It is unclear what will happen if *Roe* is overturned.

**Legislative Session in North Carolina: Jan. 26 – early July, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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hospitalization cannot be enforced. *See Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (striking down hospitalization requirement). However, if *Roe* is overturned, this provision may be enforceable again.

<sup>167</sup> *Corkey v. Edwards*, 322 F. Supp. 1248 (D.C.N.C. 1971) (upholding statutes except residency requirement), judgment vacated and case remanded for further consideration in light of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), 410 U.S. 950 (1973).

<sup>168</sup> *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).

<sup>169</sup> *See, e.g., State v. Greer*, 302 S.E.2d 774, 777 (N.C. 1983) (repeal by implication is not favored rule of statutory construction and is only used if two statutes are truly irreconcilably in conflict).



## NORTH DAKOTA

### NORTH DAKOTA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--------------------------------------|--|---|---|
| No ban                               | None established                                   | None                                    | Statutory public policy language protects life of unborn; highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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:** The legislature has declared its intent to protect every “unborn” human life,<sup>170</sup> and the state has a long record of restricting abortion.<sup>171</sup> In addition, both the legislature and governor are currently anti-choice. Therefore, North Dakota is highly vulnerable to enactment of a new ban if *Roe* is overturned.

**Conclusion:** North Dakota does not have a ban currently on the books, but is likely to ban abortion if *Roe* is overruled.

#### Legislative Session in North Dakota: Jan. 4 – late April, 2005

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>170</sup> “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.

<sup>171</sup> For example, the state still has a provision on the books requiring written spousal consent for a post-viability abortion unless the woman’s life or health is at risk, or she is separated from her husband. N.D. CENT. CODE § 14-02.1-03. This provision is currently 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 (1976) (striking down spousal consent requirement). The Legislature has also enacted mandatory delay/biased counseling requirements, parental consent requirements, a physician-only law, a hospitalization requirement for abortions performed post 12 weeks, and record keeping requirements. N.D. CENT. CODE § 14-02.1-01 – 02.1-12.



# OHIO

## OHIO AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS       | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|--------------------------------------|--|---|---|
| No ban                               | Constitutional protection specifically rejected by court | None                                    | Highly vulnerable to enactment of new ban |



**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.<sup>172</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Ohio is highly vulnerable to enactment of a new ban if *Roe* is overruled. The state has a long record of regulating abortion,<sup>173</sup> and both the legislature and the governor are currently anti-choice.

**Conclusion:** Although Ohio currently does not have an abortion ban, it is likely to ban abortion if *Roe* is overturned.

**Legislative Session in Ohio: Jan. 3 – end of year, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>172</sup> *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993).

<sup>173</sup> 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

## OKLAHOMA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|---|--|---|---|
| Pre-Roe ban (with exception for woman's life) on the books; court has blocked enforcement | None established                                   | None                                    | Penalty provisions of pre-Roe ban were recently amended |



**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.<sup>174</sup>

This ban has been found unconstitutional since *Roe* and is therefore unenforceable.<sup>175</sup>

However, as recently as 1997 and 1999, the Oklahoma Legislature amended the statute to change the penalty for performing an illegal abortion.<sup>176</sup> The statutes remained unenforceable after these amendments.

If *Roe* is overturned, state officials could argue that the recent amendments to the penalty section of the ban revived the ban and a prosecutor could, in principle, enforce the

<sup>174</sup> OKLA. STAT. ANN. tit. 21, § 861. The pregnant woman's behavior is also criminalized: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the county jail . . . or by fine . . ." *Id.* at § 862.

<sup>175</sup> *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. This statute provides: "[e]very person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to take any medicine, drug or substance whatever, or who uses or employs any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, is guilty in case the death of the child or of the mother is thereby produced, of manslaughter in the first degree." OKLA. STAT. ANN. tit. 21, § 714.

<sup>176</sup> *Id.* § 861.

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:** In 1992, anti-choice activists gathered enough signatures in the state to place an abortion ban initiative on the ballot, which was ultimately blocked by the Oklahoma Supreme Court.<sup>177</sup> 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.

**Conclusion:** Although the abortion ban is currently unenforceable, if *Roe* is overturned, the ban may be revived, putting women in Oklahoma at high risk. In addition, anti-choice activists will seek to enact a new ban, but the success of such efforts is uncertain.

**Legislative Session in Oklahoma: Feb. 7 – May 27, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>177</sup> *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992) (invalidating the ballot measure on the grounds that it sought a vote on a measure that would, if approved, be unconstitutional).



# OREGON

## OREGON AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                                      | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|---|---|---------------------------|
| No ban                               | Lower court decision has recognized state constitutional protection for abortion rights | None                                    | Unlikely to enact new ban |



**Existence and Status of Abortion Ban:** No abortion ban. The legislature repealed its pre-*Roe* ban.

**State Constitutional Protection of Abortion Rights:** An Oregon intermediate appellate court has found stronger protection for the right to choose abortion under the Oregon Constitution than exists under the U.S. Constitution.<sup>178</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** 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.<sup>179</sup> Thus, there is little likelihood that Oregon would ban abortions if *Roe* were overruled.

**Conclusion:** The right to choose is likely to be protected in Oregon.

**Legislative Session in Oregon: Jan. 10 – early July, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>178</sup> *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 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.

<sup>179</sup> More specifically, there were 747,599 Oregon citizens who voted against the initiative and 355,963 who voted for the initiative. “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

## PENNSYLVANIA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS       | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS  |
|--------------------------------------|--|---|--|
| No ban                               | Constitutional protection specifically rejected by court | None                                    | 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 specifically rejected the argument that the state Constitution provides broader protection for abortion rights than the U.S. Constitution.<sup>180</sup>

**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,<sup>181</sup> as well as numerous laws regulating abortion.<sup>182</sup> In addition, although there currently is a pro-choice governor, the Pennsylvania Legislature is extremely anti-choice.

**Conclusion:** Although there is no abortion ban currently on the books, the legislature is likely to attempt to enact an abortion ban if *Roe* is overturned. The current pro-choice governor may be able to prevent enactment but the state will remain at risk for the future.

**Legislative Session in Pennsylvania: Jan. 4 – end of year, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>180</sup> *Fischer v. Dept of Pub. Welfare*, 482 A.2d 1148 (Pa. Commw. Ct. 1984), *aff'd* 502 A.2d 114 (Pa. 1985) (challenge to restrictions on public funding of abortion under state equal protection clause and equal rights amendment denied; rape reporting requirement found to violate state constitutional privacy clause).

<sup>181</sup> 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.”).

<sup>182</sup> These laws include a parental consent law, 18 PA. CONS. STAT. § 3206 (upheld in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)); a mandatory delay/biased counseling law, §§ 3205, 3208 (upheld in *Casey*, 505 U.S. 833); a physician-only law, § 3204; regulations concerning payment and referral for abortions, § 3213; restrictions on use of public hospitals for abortions, § 3215; and a spousal notice requirement, § 3209 (struck down in *Casey*, 505 U.S. 833).





## RHODE ISLAND

### RHODE ISLAND AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                    | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|---|---|---|---------------|
| Pre-Roe ban (with exception for woman's life) on the books; court has blocked enforcement | State constitution specifies that it does not protect abortion rights | None                                    |               |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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.<sup>183</sup>

The ban has been declared unconstitutional by the courts.<sup>184</sup>

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.

**State Constitutional Protection of Abortion Rights:** No protection for the right to choose has been established under the Rhode Island Constitution and there is little chance it ever would be given the provision in the Constitution that states:

<sup>183</sup> R.I. GEN. LAWS §§ 11-3-1 – 11-3-5.

<sup>184</sup> *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 of 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 child; shall be deemed manslaughter." R.I. GEN. LAWS § 11-23-5. However, the term "quick child" has been interpreted to apply only to fetuses at 23 weeks or later. *Rodos v. Michaelson*, 527 F.2d 582 (1st Cir. 1975).

Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.<sup>185</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** The success of an argument that subsequent Rhode Island legislation has repealed the pre-*Roe* ban by implication is uncertain.<sup>186</sup> There is moderate risk that the state would enact a new ban

**Conclusion:** Although the abortion ban that is on the books is currently unenforceable, abortion is likely to be banned in Rhode Island if state officials successfully set aside the court ruling enjoining enforcement of the pre-*Roe* ban, or if the legislature enacts a new abortion ban.

**Legislative Session in Rhode Island: Jan. 4 – late June, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>185</sup> R.I. CONST. art. I, § 2.

<sup>186</sup> 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.”).



## SOUTH CAROLINA

### SOUTH CAROLINA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|--------------------------------------|--|---|---|
| No ban                               | None established                                   | None                                    | Highly vulnerable to enactment of new ban |

RISK FACTORS

HIGH

MEDIUM

LOW

**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:** Because South Carolina has a history of enacting abortion restrictions,<sup>187</sup> and the legislature and governor are currently anti-choice, it is likely that an abortion ban would be enacted if *Roe* were overruled.

**Conclusion:** Although there is no abortion ban currently in its statutes, South Carolina is likely to ban abortion if *Roe* is overturned.

#### Legislative Session in South Carolina: Jan. 11 – June 2, 2005

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>187</sup> For example, the Legislature has enacted a spousal consent provision, S.C. CODE ANN. § 44-41-20(c) which was struck down by the courts. *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977), *vacated and remanded on other grounds* 440 U.S. 445 (1979). Additionally, the Legislature has enacted a parental involvement law, S.C. CODE ANN. § 44-41-30-37; a physician-only law, § 44-41-20; a mandatory delay/biased counseling law, § 44-41-330; clinic-licensing requirements, § 44-41-75; and a so-called “partial-birth abortion” ban, § 44-41-85.



## SOUTH DAKOTA

### SOUTH DAKOTA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|--------------------------------------|--|---|---|
| No ban                               | None established                                   | None                                    | Highly vulnerable to enactment of new ban |



**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:** Because South Dakota has a history of enacting abortion restrictions,<sup>188</sup> and the legislature and governor are currently anti-choice, it is likely that an abortion ban would be enacted if *Roe* were overruled.

**Conclusion:** Although South Dakota currently does not ban abortion, it is likely to ban abortion if *Roe* is overturned.

**Legislative Session in South Dakota: Jan. 11 – late March, 2005**

*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>188</sup> For example, the South Dakota Legislature has enacted a so-called “partial-birth abortion” law, S.D. CODIFIED LAWS § 34-23A-27 to -32; a mandatory delay/biased counseling provision, § 34-23A-10.1 to -10.4; a parental involvement law, § 34-23A-27-7; and a physician-only law, § 34-23A-3. Not all of these laws are currently enforced. In addition, South Dakota enacted a trigger law, but this has since been amended to simply provide, “[n]othing in this chapter may be construed to repeal, by implication or otherwise, any provision not explicitly repealed.” § 34-23A-21.



# TENNESSEE

## TENNESSEE AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS             | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--------------------------------------|--|---|---------------|
| No ban                               | State constitutional right to privacy protects abortion rights | 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.<sup>189</sup>

**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 should protect the right to abortion in the event the legislature tries to enact an abortion ban.

**Legislative Session in Tennessee: Jan. 11 – late May, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>189</sup> *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 indefeasible 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

## TEXAS AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN                                  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS       | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|---|--|---|---|
| Pre-Roe ban (with exception for woman's life) repealed by implication | Constitutional protection specifically rejected by court | None                                    | Highly vulnerable to enactment of new ban |



**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.<sup>190</sup> 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 specifically rejected the argument that the Texas Constitution provides broader protection for the right to abortion than the U.S. Constitution.<sup>191</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Given the current composition of the legislature and the state's history of regulating abortion heavily, it is likely that Texas would enact a new statute banning abortion.

**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, the legislature is likely to enact a new abortion ban.

**Legislative Session in Texas: Jan. 11 – May 30, 2005**

*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>190</sup> *McCorvey v. Hill*, No. 03-10711 (5<sup>th</sup> Cir. Sept. 14, 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 constitutional. 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. *McCorvey v. Hill*, No. 03-10711 (5<sup>th</sup> Cir. Sept. 14, 2004).

<sup>191</sup> *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).



# UTAH

## UTAH AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--|--|---|---|
| Pre-Roe ban (with limited exceptions) on the books; amended in 1991; court has blocked enforcement | None established                                   | None                                    | Statutory public policy language protects life of unborn; highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** Utah’s pre-Roe abortion ban was amended and reenacted in 1991.<sup>192</sup> It contains several exceptions.<sup>193</sup> Because the statute has been enjoined by a federal court,<sup>194</sup> 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.”<sup>195</sup> 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.”<sup>196</sup> Additionally, arguments for the implied repeal of the 1991 statute based on more recently enacted abortion regulations may not be successful.<sup>197</sup>

<sup>192</sup> UTAH CODE ANN. § 76-7-302 (abortions prior to 20 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 prevent the “birth of a child” with “grave defects”; abortions after 20 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”).

<sup>193</sup> *Id.*

<sup>194</sup> *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992) (provision regulating abortions prior to 20 weeks unconstitutional); *rev’d in part Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (provision regulating abortion after 20 weeks unconstitutional).

<sup>195</sup> UTAH CODE ANN. § 76-7-317.2.

<sup>196</sup> *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).

<sup>197</sup> *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).

Moreover, even if a court were to reject an effort to lift the injunction preventing enforcement of the 1991 ban, it is very likely that Utah will enact a new abortion ban at the earliest opportunity, given its anti-choice legislature and governor, as well as its history of restricting abortion.

**Conclusion:** Although the abortion ban (with various exceptions) 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.

**Legislative Session in Utah: Jan. 17 – March 2, 2005**

*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>





# VERMONT

## VERMONT AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                                      | STATUTORY PROTECTION OF ABORTION RIGHTS       | OTHER FACTORS             |
|---|---|---|---------------------------|
| Pre- <i>Roe</i> ban (with exception for woman’s life) on the books; court has blocked enforcement | Lower court decision has recognized state constitutional protection for abortion rights | Strong pro-choice resolutions enacted in past | Unlikely to enact new ban |



**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.<sup>198</sup>

The ban was held invalid by the Vermont Supreme Court under state law principles before *Roe* was decided.<sup>199</sup>

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* but was based on state law principles.

**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.<sup>200</sup>

<sup>198</sup> VT. STAT. ANN. tit. 13 § 101 (note that the pregnant woman cannot be liable under this statute); *see also* § 104 (ban on abortion advertising).

<sup>199</sup> *Beecham v. Leahy*, 287 A.2d 836, 840 (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.”).

**Statutory Protection of Abortion Rights:** The Vermont Legislature has enacted strong pro-choice resolutions.<sup>201</sup>

**Other Factors:** Vermont is unlikely to enact a new ban.

**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.

**Legislative Session in Vermont: Jan. 5 – mid-May, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>200</sup> *Doe v. Celani*, No. S81-84CnC at 5 (Vt. Super. Ct. May 23, 1986) (holding that ban on Medicaid funding violated state constitution).

<sup>201</sup> See e.g. 2003 Vt. Acts & Resolves H.R. 4, S.R. 8 (2003) (“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 who 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 [Senate]: 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 [Senate] be directed to send a copy of this resolution to each member of the Vermont Congressional Delegation.”).



# VIRGINIA

## VIRGINIA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS                             |
|--------------------------------------|--|---|---|
| No ban                               | None established                                   | None                                    | Highly vulnerable to enactment of new ban |



**Existence and Status of Abortion Ban:** No abortion ban. The legislature repealed its pre-*Roe* ban.<sup>202</sup>

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Given Virginia’s record of hostility to abortion in recent legislative sessions,<sup>203</sup> Virginia is highly vulnerable to enactment of a new ban.

**Conclusion:** Although Virginia currently does not have an abortion ban on the books, the legislature may enact one if *Roe* is overturned.

**Legislative Session in Virginia: Jan. 12 – Feb. 26, 2005**  
 Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

<sup>202</sup> 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. 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 aid 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). Thus, this provision primarily operates as a physician-only law.

<sup>203</sup> For example, in 2003, the Virginia Legislature enacted a “partial-birth infanticide” law, VA CODE ANN § 18.2-71.1, which has been struck down by the court in *Richmond Med. Ctr. v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004), and a parental consent law, amending § 16.1-241. 2004 Va. Acts Ch. 588. The Legislature also attempted to enact other anti-choice legislation in 2003, which was vetoed by the governor. H.B. 1406, 2003 Leg. (Va. 2003) (authorizing “choose life” license plate).



## WASHINGTON

### WASHINGTON AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | Reproductive Privacy Act on the books   | Unlikely to enact new ban |



**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 reproductive privacy act that clearly establishes abortion as a fundamental right in Washington.<sup>204</sup> 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 chose 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 chose 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.<sup>205</sup>

**Other Factors:** Washington is unlikely to enact a new ban.

<sup>204</sup> WASH. REV. CODE ANN. §§ 9.02.100, -.110, -.140, -.160.

<sup>205</sup> *Id.* at § 9.02.100. Washington law also provides 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; provide defenses to prosecution, § 9.02.130; restrictions on abortion regulation, § 9.02.140; and rights to state benefits, § 9.02.160.

**Conclusion:** There is no abortion ban on the books, and abortion rights are likely to be protected even if *Roe* is overturned.

**Legislative Session in Washington: Jan. 10 – April 24, 2005**  
*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## WEST VIRGINIA

### WEST VIRGINIA AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN  | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS                 | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|---|--|---|---------------|
| Pre- <i>Roe</i> ban (with exception for woman's life) on the books; court has blocked enforcement | State constitutional right to due process protects abortion rights | None                                    |               |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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.<sup>206</sup>

<sup>206</sup> W.Va. Code Ann. § 61-2-8.

Because the ban has been enjoined by a federal court,<sup>207</sup> in the event that *Roe* is overruled, it would not be immediately enforceable. However, state officials might attempt to have the court ruling set aside.

**State Constitutional Protection of Abortion Rights:** Any ban on abortion is likely to be held unconstitutional under the West Virginia Constitution. The West Virginia Constitution provides broader protection for the right to choose abortion than the U.S. Constitution.<sup>208</sup>

**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, should not withstand a challenge under the West Virginia Constitution.

**Legislative Session in West Virginia: Feb. 9 – April 9, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>207</sup> *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644, 645 (4th Cir. 1975) (“[t]he West Virginia criminal abortion statute is unconstitutional beyond question” and “irreconcilable with *Roe v. Wade*”).

<sup>208</sup> *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). The court relied on article III, section 1 of the West Virginia Constitution, which provides, “All men are, by nature, equally free and independent, and have certain inherent rights, or which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety”; and article III, section 3, which provides, “Government is instituted for the common benefit, protection and security of the people, nation or community”; and article III, section 10, which provides, “No person shall be deprived of life, liberty, or property, without due process of law....”



# WISCONSIN

## WISCONSIN AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS |
|--|--|---|---------------|
| Pre-Roe ban (with exception for woman's life) on the books; court has partially blocked enforcement of part of ban | None established                                   | None                                    |               |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**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.<sup>209</sup> 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.<sup>210</sup> 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," approximately four months of pregnancy, and prior to viability, since Roe and its progeny 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.

**State Constitutional Protection of Abortion Rights:** None established.

**Statutory Protection of Abortion Rights:** None.

<sup>209</sup> 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; the abortion also must be performed in a "licensed maternity hospital" unless it is an emergency).

<sup>210</sup> *Babbitz v. McCann*, 310 F. Supp. 293 (D. Wis. 1970). The *Babbitz* court noted that "quickening" is defined in the dictionary as the point in pregnancy when it is possible to detect fetal movement, usually around 16 to 18 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.

**Other Factors:** An argument could be made that later enacted statutes impliedly repealed the pre-*Roe* abortion ban; however, Wisconsin courts have been reluctant to recognize this doctrine.<sup>211</sup>

**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.

**Legislative Session in Wisconsin: Jan. 11 (may change) – end of year, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



**WYOMING**

**WYOMING AT A GLANCE**

| EXISTENCE AND STATUS OF ABORTION BAN | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS             |
|--------------------------------------|--|---|---------------------------|
| No ban                               | None established                                   | None                                    | Unlikely to enact new ban |



**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:** In 1994, a ballot initiative to ban abortion in almost all circumstances was unsuccessful. This relatively recent rejection of an abortion ban by Wyoming voters, as well as the current composition of the legislature, makes enactment of an abortion ban unlikely.

<sup>211</sup> 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).



**Conclusion:** There is no abortion ban on the books in Wyoming, and it is unlikely that one would be enacted if *Roe* were overturned.

**Legislative Session in Wyoming: Jan. 11 – March 4, 2005**

*Source:* National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>



## COMMONWEALTH OF PUERTO RICO

### COMMONWEALTH OF PUERTO RICO AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS   | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS  |
|--|--|---|--|
| Pre- <i>Roe</i> ban repealed and reenacted (with exception for woman's life and health); court has interpreted law broadly | State constitutional right to privacy has not yet been extended to protect abortion rights, but has been broadly interpreted in other contexts | None                                    | Congress could exercise plenary power and ban abortion |

RISK FACTORS

HIGH

MEDIUM

LOW

**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*.<sup>212</sup> 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.”<sup>213</sup> 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.<sup>214</sup>

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 provides:

Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life.<sup>215</sup>

<sup>212</sup> *Montalvo v. Colon*, 377 F. Supp. 1332, 1344 (D.P.R. 1974) (holding that *Roe v. Wade* is binding upon Puerto Rico and that the Commonwealth’s statute prohibiting abortion was unconstitutional because it lacked a maternal-health exception and took “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”).

<sup>213</sup> 33 P.R. LAWS ANN. § 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.

<sup>214</sup> *People v. Duarte Mendoza*, 109 D.P.R. 596 (1980); *People v. Najul Bez*, 114 D.P.R. 493 (1983).

<sup>215</sup> P.R. Const., art. II, § 8.

The Puerto Rico Supreme Court has held that Puerto Rico’s guarantee of privacy provides more protection than the U.S. Constitution.<sup>216</sup> 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 Rican 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, Congress could exercise plenary power and ban abortion in Puerto Rico.<sup>217</sup>

**Conclusion:** Puerto Rico has an abortion ban on the books which has been interpreted by local courts 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 locally or by the U.S. Congress.

**Legislative Session in Puerto Rico: Jan. 10 – June 30, 2005**

**Second session: Sept. – Oct. 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>216</sup> *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).

<sup>217</sup> 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).

# TERRITORY OF GUAM

## TERRITORY OF GUAM AT A GLANCE

| EXISTENCE AND STATUS OF ABORTION BAN   | STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS | STATUTORY PROTECTION OF ABORTION RIGHTS | OTHER FACTORS   |
|--|--|---|---|
| 1990 ban (with limited exceptions) on the books; court has blocked enforcement | No constitution                                    | None                                    | Congress could exercise plenary power and ban abortion; highly vulnerable to enactment of new ban |

|              |      |        |     |
|--------------|------|--------|-----|
| RISK FACTORS | HIGH | MEDIUM | LOW |
|--------------|------|--------|-----|

**Existence and Status of Abortion Ban:** Guam did not have an abortion ban prior to *Roe*. In 1978, the legislature enacted a statute which provided that abortions may be performed in the first 13 weeks of pregnancy, or in the first 26 weeks of pregnancy if the physician determines “that the child would be born with a grave physical or mental defect; or that the pregnancy resulted from rape or incest” or at any time during the pregnancy if the physician determines that there is a substantial risk that continuing the pregnancy would “endanger the life of the mother or would gravely impair the physical or mental health of the mother.”<sup>218</sup>

In 1990, the legislature repealed this law and passed a new abortion ban with narrow exceptions, which stated:

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.<sup>219</sup>

This law was declared unconstitutional and enjoined.<sup>220</sup>

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

<sup>218</sup> 9 Guam Code Ann. § 31.20.

<sup>219</sup> 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 §§ 31.22-31.23).

<sup>220</sup> *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990) (declaring law “void” and “moot”); *aff’d*, 962 F.2d 1366 (9th Cir. 1992).

**State Constitutional Protection of Abortion Rights:** Guam does not have an independent constitution.<sup>221</sup>

**Statutory Protection of Abortion Rights:** None.

**Other Factors:** Guam’s legislature has been very hostile to abortion; the 1990 statute banning abortions passed unanimously even after the attorney general issued an opinion stating that the bill was unconstitutional.<sup>6</sup> It seems likely that if *Roe* were overturned, the legislature would quickly pass a new abortion ban. Alternatively, because Guam is a U.S. territory, Congress could exercise plenary power and ban abortion in Guam.<sup>222</sup>

**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 also be enacted by the U.S. Congress.

**Legislative Session in Guam: Jan. 10 – end of year, 2005**

Source: National Conference of State Legislators (NCSL) website  
<http://www.ncsl.org/programs/legman/about/sess2005.htm>

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<sup>221</sup> 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 U.S.C. §§ 1421-1428(e).

<sup>6</sup> *Id.* at 1425.

<sup>222</sup> 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 Guam. 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” and holding that Congress may legislate for Guam).

## APPENDIX





## MODEL LEGISLATION: REPRODUCTIVE PRIVACY ACT<sup>223</sup>

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF \_\_\_\_\_

### Section 1: SHORT TITLE

This Act may be cited as the “Reproductive Privacy 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 her 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.

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<sup>223</sup> 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].

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Additional optional provision, for states where advocates want to introduce broader Reproductive Privacy Act legislation:

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

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

### The decision in *Roe v. Wade*

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.<sup>224</sup> *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.”

Finding a need to balance a woman’s right to privacy with the state’s interest in protecting potential life, the Supreme Court in *Roe* established a framework for evaluating restrictions on abortion. The Court required the state to justify any interference with the abortion decision 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.<sup>225</sup> 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 and 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 choose 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. (See the Timeline in the Appendix for further discussion of these cases.)

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.”<sup>226</sup> After *Roe*, abortions were

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<sup>224</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>225</sup> “Viability” is the point in pregnancy at which the fetus is able to survive indefinitely outside the woman’s body.

<sup>226</sup> Willard Cates, Jr. and Robert W. Roach, “Illegal Abortions in the United States: 1972-74,” 8 FAM. PLAN. PERSP. 86, 92 (1976) (footnote omitted).

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 24 hours, after receiving certain state-scripted and biased information before obtaining an abortion ("mandatory delay/biased 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. It wasn't long before the Court abandoned full protection for the right. Just three years after *Roe*, the seven-justice *Roe* majority was reduced to six in a decision striking down parental consent, spousal consent, and a ban on saline abortions in *Planned Parenthood v. Danforth*.<sup>227</sup> Four years later, the balance shifted when five Justices held in *Harris v. McRae*<sup>228</sup> that the denial of Medicaid funding for abortion did not "interfere" with women's rights to make reproductive decisions, and that the state could promote fetal life throughout pregnancy by discriminatory funding. This effectively deprived poor women of their right to choose.

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*,<sup>229</sup> a plurality of the Court outlined a general scheme that would meet constitutional muster for states imposing parental consent requirements. As a consequence, over 30 states today require either parental notice or consent for a minor seeking an abortion.

While the Court endorsed lesser constitutional protections for the right to 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 24-hour waiting period, biased informed consent, and second-trimester hospitalization requirements in *City of Akron v. Akron Center for Reproductive Health*.<sup>230</sup> The majority Court also continued to adhere to the trimester framework of *Roe*, under which a woman's life and

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<sup>227</sup> 428 U.S. 52 (1976).

<sup>228</sup> 448 U.S. 297 (1980).

<sup>229</sup> 443 U.S. 622 (1979).

<sup>230</sup> 462 U.S. 416 (1983).

health must predominate even after fetal viability, in *Colautti v. Franklin*<sup>231</sup> and *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>232</sup>

In 1988, President Reagan appointed a new Justice to the Court, leaving many to believe that *Roe* would be overturned by a new Court majority. Yet, when *Webster v. Reproductive Health Services*<sup>233</sup> was decided in 1989, although Chief Justice Rehnquist's plurality opinion expressed the view that *Roe* was wrongly decided, a majority of Justices declined to overrule *Roe* explicitly, finding that the issue of the validity of *Roe* itself was not properly before them. The *Webster* plurality did, however, invite states to pass laws banning abortion to test *Roe* 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 statutes criminalizing virtually all abortions. These statutes were blocked, albeit with great reluctance, by some federal judges.

After *Webster*, in *Ohio v. Akron Center for Reproductive Health*,<sup>234</sup> a six-Justice majority upheld a one-parent notification statute that also contained a provision for a burdensome and potentially lengthy judicial procedure by which a minor could obtain a judge's permission to bypass the parental notification requirement ("judicial bypass"). In *Hodgson v. Minnesota*,<sup>235</sup> the Court invalidated as "unreasonable" a statute that required minors to notify both parents, with no judicial bypass option.

In the early 90s, with the retirement of two Justices, the overturning of *Roe* was a serious threat again. 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 re-enacted mandatory delay and biased consent requirements previously invalidated 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, *Planned Parenthood v. Casey*,<sup>236</sup> the parties once again asked the Court either to overrule *Roe* or re-affirm it. Despite the urging of the plaintiffs to retain "strict scrutiny" as the test for abortion regulations, the Court issued an opinion re-affirming *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 trimester 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

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<sup>231</sup> 439 U.S. 379 (1979).

<sup>232</sup> 476 U.S. 747 (1986).

<sup>233</sup> 492 U.S. 490 (1989).

<sup>234</sup> 497 U.S. 502 (1990).

<sup>235</sup> 497 U.S. 417 (1990).

<sup>236</sup> 505 U.S. 833 (1992).

so long as those regulations did not impose an “undue burden.”<sup>237</sup> 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.”<sup>238</sup> Under this new standard, the Court upheld Pennsylvania’s mandatory delay/informed consent 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 husband.

In 2000, in the most important decision since *Casey*, the Court struck down a Nebraska ban on so-called “partial-birth abortion” in a 5-4 vote. The decision in *Stenberg v. Carhart*<sup>239</sup> held that the Nebraska ban violated the Supreme Court precedents *Roe* and *Casey* in two ways. First, the Court held that the Nebraska ban was unconstitutional because it failed to include an exception—required by *Roe* and *Casey*—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 used starting as early as 12 weeks of pregnancy and thus imposed an undue burden on a woman’s ability to choose an abortion. Although the decision was heralded as a reaffirmation of the core principle of *Roe*, the narrow vote, and in particular, Justice Kennedy’s dissent on the issue of the health exception, was cause for alarm.

## Conclusion

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

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<sup>237</sup> More specifically, the Court stated, “The fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. *Casey*, 505 U.S. at 874.

<sup>238</sup> *Casey*, 505 U.S. at 877.

<sup>239</sup> 530 U.S. 914 (2000).

## TIMELINE OF SELECTED U.S. SUPREME COURT DECISIONS ON ABORTION AND THE RIGHT TO PRIVACY

### May 25, 1891

*Union Pacific Railway Co. v. Botsford*: The Court rejected the right of a defendant in a civil action to compel the plaintiff to submit to physical examination, writing that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . .”

### June 4, 1928

*Olmstead v. United States*: In a wiretapping case, Justice Brandeis, dissenting, wrote broadly of the right to be “let alone”:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

### June 1, 1942

*Skinner v. Oklahoma*: In a unanimous opinion, the Court held (per Justice Douglas) that, by forcing a prisoner to undergo sterilization, the State of Oklahoma violated the equal protection clause of the Fourteenth Amendment. The Court wrote that such an action treads on “one of the basic civil rights of man,” and that “marriage and procreation are fundamental to the very existence and survival of the race.”

### June 7, 1965

*Griswold v. Connecticut*: The Court held that the constitutional right to privacy, derived from the “penumbras and emanations” of the Bill of Rights, encompasses the right of married persons to use contraceptives. Justice Goldberg, in concurrence, relied extensively on the Ninth Amendment, which states that the specific rights enumerated in the Bill of Rights are not exhaustive.

### April 21, 1971

*United States v. Vuitch*: By a 5-4 vote, the Court held that a District of Columbia statute criminalizing abortion unless “necessary for the preservation of the mother’s life or health” was not unconstitutionally vague. However, the Court interpreted the term “health” to include “psychological as well as physical well-being.”

**December 13, 1971**

*Roe v. Wade* and *Doe v. Bolton* were argued for the first time before the Court.

**March 22, 1972**

*Eisenstadt v. Baird*: The Court held that a statute that allowed the provision of contraceptives to married adults, while prohibiting it for unmarried adults, violated the equal protection clause of the Fourteenth Amendment. In the course of its decision, the Court recognized that the right to privacy protects access to contraceptives for the married and unmarried alike. The opinion states, “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Chief Justice Burger dissented. Neither Justice Powell nor Justice Rehnquist participated in this decision, presumably because they had only been recently appointed and were not present for oral argument.

**October 11, 1972**

*Roe v. Wade* and *Doe v. Bolton* were re-argued before the Court.

**January 22, 1973**

*Roe v. Wade* and *Doe v. Bolton* were both decided by the Court with a 7-2 vote. *Roe* established that:

- the right to privacy recognized by the U.S. Constitution protects the right to decide whether to terminate a pregnancy;
- a fetus is not a “person” under the Fourteenth Amendment, nor may the state justify restrictions on abortion based on one theory of when life begins;
- restrictions on abortion must be narrowly tailored to serve a compelling state interest;
- the state’s interest in maternal health becomes compelling at the end of the first trimester of pregnancy;
- before viability, the state’s interest in fetal life is not compelling; and
- even after viability, when the state’s interest in fetal life becomes compelling, the state must allow abortions necessary to protect a woman’s life or health.

In *Doe*, the Court defined “health” to include “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”

Justices White and Rehnquist dissented in both cases.



**1975**

Justice Douglas (author of the *Griswold* opinion) retired and was replaced by Justice Stevens.

**September 1976**

In an attempt to undermine *Roe* through regulation, Congress enacted the first Hyde Amendment as a rider to the appropriations bill for the Department of Health, Education and Welfare (later renamed the Department of Health and Human Services (HHS)). The Hyde Amendment, which is renewed annually, limited federal funding for abortions through Medicaid and all other HHS programs to those necessary to save a woman's life and, in some years, in cases of rape and incest, or where the pregnancy would cause "severe and long-lasting physical health damage" to the woman.

**July 1, 1976**

*Planned Parenthood v. Danforth*: By a 6-3 vote, the Court invalidated a requirement that a married woman obtain her husband's consent for an abortion, reasoning that such a requirement granted unconstitutional veto power to a third party. In the same decision, the Court struck down a ban on the performance of abortions by saline amniocentesis. By a 5-4 vote (with Justice Stevens dissenting), the Court struck down a statute requiring minors seeking abortions to obtain the written consent of one parent, again reasoning that it provided unconstitutional veto power to a third party. Chief Justice Burger, in a retreat from his concurrence in *Roe*, joined Justice White's dissenting opinion.

**July 1, 1976**

*Singleton v. Wulff*: A plurality of the Court (Justices Blackmun, Brennan, White, and Marshall) recognized that physicians may assert the rights of their patients seeking abortions, reasoning in part that women may be "chilled" from bringing abortion cases for themselves "by a desire to protect the very privacy of her decision from the publicity of a court suit." Four Justices dissented from this portion of the opinion; Justice Stevens found it unnecessary to decide the question.

**July 1, 1976**

In a unanimous opinion delivered by Justice Blackmun in *Bellotti v. Baird (Bellotti I)*, the Court declined to rule on the merits of a Massachusetts statute requiring minors seeking abortions to obtain parental consent or a court order waiving parental consent. Instead, the Court held that the federal district court should have sought an interpretation of the statute from the Massachusetts Supreme Judicial Court. The U.S. Supreme Court held the statute unconstitutional three years later.

**June 9, 1977** {2M#} *Carey v. Population Services International*: The Court invalidated a New York statute making it a crime to sell or distribute contraceptives to minors under 16; for anyone other than a pharmacist to distribute contraceptives to anyone over 16; and for anyone to display or advertise contraceptives. The Court thus expanded the right to obtain and use contraceptives established in *Griswold* and *Eisenstadt* to minors.

**June 20, 1977**

In three cases decided on the same day, *Maher v. Roe*, *Beal v. Doe*, and *Poelker v. Doe*, the Court for the first time addressed restrictions on public funding for abortions, upholding all of them. In *Beal*, the Court held that the federal Medicaid statute does not require funding of abortions that are not “medically necessary.” In *Maher*, the same majority held that the Equal Protection Clause of the Fourteenth Amendment does not require state Medicaid programs to cover non-therapeutic abortions for indigent women just because it covers the expenses associated with childbirth. In other words, the Court found that states may constitutionally promote childbirth over abortion through Medicaid. Similarly, in *Poelker*, the Court held that a public hospital’s failure to provide non-therapeutic abortions did not violate the equal protection clause. In each case, the same three Justices—Brennan, Marshall, and Blackmun—dissented. Prefiguring its devastating decision three years later to uphold the Hyde Amendment, the Court in *Maher* wrote that the restriction on funding non-therapeutic abortions “does not impinge upon the fundamental right recognized in *Roe*” because it imposes “no restriction on access to abortions that was not already there.”

**January 9, 1979**

*Colautti v. Franklin*: By a 6-3 vote, the Court struck down a Pennsylvania statute requiring a physician performing an abortion to “preserve the life and health of the fetus [as though it were] intended to be born and not aborted” when the fetus is viable or if there is “sufficient reason to believe [it] may be viable.” The Court found the law to be unconstitutionally vague because it did not distinguish between “may be viable” and the definition of viability established in *Roe*. Moreover, the Court noted that the statute did not “clearly specify . . . that the woman’s life and health must always prevail over the fetus[’s] life and health when they conflict.”

**July 2, 1979**

*Bellotti v. Baird (Bellotti II)*: Before the Court for the second time, this case involved a Massachusetts parental consent statute. The Massachusetts Supreme Judicial Court interpreted the statute to: (1) require the consent of both parents for any non-emergency abortion for a woman under 18; (2) require that a parent, if available, be notified of a court procedure to authorize the abortion; and (3) allow the court to withhold consent for the abortion even if the minor is capable of making an informed and reasonable decision. Eight Justices found the statute unconstitutional: four because it granted absolute veto power of the minor’s decision to either the parents or the court, and four because the court procedure required parental consultation and allowed the court to override the decision of a mature minor. In addition, four Justices, in a plurality opinion written by Justice Powell, announced a framework for testing the constitutionality of parental involvement statutes in the future. Under this framework, a parental involvement requirement must contain an alternative bypass procedure in which the minor is entitled to a waiver of parental involvement if she is mature enough to make the abortion decision or if an abortion would be in her best interest. The procedure must allow her to proceed anonymously to protect her privacy, and must be sufficiently expeditious so that her abortion is not delayed.

**June 30, 1980**

*Harris v. McRae*: The Court upheld the validity of the Hyde Amendment under the right to privacy of the Fifth Amendment and under the Establishment Clause of the First Amendment. The Court ruled that the Hyde restrictions do not interfere with the due process liberty recognized in *Roe*, writing, “a woman’s freedom of choice [does not carry] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.” The Court further stated that the Hyde Amendment “leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have if Congress had chosen to subsidize no health care costs at all.” Finally, the Court held that states participating in the Medicaid program are not required by Title XIX of the Social Security Act to fund “medically necessary” abortions for which federal funds are not available. Justice Brennan wrote a dissenting opinion, joined by Justices Marshall and Blackmun, decrying the Court’s “failure to acknowledge that the discriminatory distribution of the benefits of governmental largess can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.” Similarly, Justice Stevens dissented, arguing that “the government must use neutral criteria in distributing benefits.” Justice Brennan’s dissent became the model for several state court rulings over the succeeding years requiring neutrality in funding between abortion and childbirth under state constitutions.

**March 23, 1981**

*H.L. v. Matheson*: The Court upheld a Utah parental notice statute that provided no procedure by which a minor could bypass parental involvement. The only plaintiff in the case was an unmarried, immature minor who was living with and dependent upon her parents; thus, the Court found she could not challenge the application of the statute to mature or emancipated minors. Three Justices dissented.

**1981**

Justice Stewart retired and was replaced by Justice O’Connor.

**1982**

The Solicitor General of the United States, who appears in court on behalf of the United States Government, filed an amicus brief in *City of Akron v. Akron Center for Reproductive Health* proposing an “undue burden” standard that would require courts to give “heavy deference” to state legislative judgment on abortion. The Solicitor proposed that the undue burden standard be developed on a case-by-case basis.

**June 15, 1983**

The Court decides two abortion cases on the same day. In *City of Akron v. Akron Center for Reproductive Health*, the Court struck down a city ordinance requiring that: 1) all second-trimester abortions be performed in a hospital; 2) a woman seeking an abortion wait at least twenty-four hours after giving written consent and receiving biased information from the attending physician; 3) women under age fifteen obtain the “informed” written consent of one parent twenty-four hours prior to an abortion; and 4) fetal remains be disposed of in a “humane and sanitary” manner. The Court’s 6-3 opinion

found that: 1) the hospital requirement did not serve the state's interest in protecting maternal health; 2) the biased informed consent provision followed by a mandatory 24-hour delay period did not serve the state's interest in insuring informed consent; 3) the parental consent requirement was invalid because it did not provide a confidential alternative bypass procedure; and 4) the fetal remains provision was unconstitutionally vague. In her dissent, Justice O'Connor (joined by Justices White and Rehnquist) rejected the trimester framework established in *Roe* in favor of applying the "undue burden" test, under which a statute would be invalid if it involved "absolute obstacles or severe limitations on the abortion decision." This was the first time that three Justices voted to discard *Roe* in a case involving restrictions on adult women.

In *Planned Parenthood v. Ashcroft*, the Court likewise invalidated a second-trimester hospitalization requirement, but upheld a number of other restrictions. For the first time, the Court approved a parental consent statute that contained a judicial bypass mechanism. The Court also upheld a provision requiring a pathology report for each abortion and the presence of a second physician during all post-viability abortions.

## **1986**

The Solicitor General of the United States filed an amicus brief in *Thornburgh v. American College of Obstetricians and Gynecologists* urging the Court to abandon *Roe* entirely. The brief also attacked the doctrine of incorporation, under which various substantive rights were made applicable to the states via the Due Process Clause of the Fourteenth Amendment.

### **June 11, 1986**

*Thornburgh v. American College of Obstetricians and Gynecologists*: The Court struck down, in its entirety, a Pennsylvania statute requiring that: 1) a woman seeking an abortion receive a state-scripted lecture from her attending physician and be told of the availability of additional state-printed materials, including information about fetal development, before giving her "informed" consent to the procedure; 2) abortion providers file reports with the state that name the performing and referring physicians, provide details about women obtaining abortions, and the method of payment; 3) a physician performing a post-viability abortion exercise the degree of care that is most likely to result in fetal survival, unless doing so "would present a significantly greater medical risk to the life or health of the pregnant woman;" and 4) a second physician be present during abortions where it is possible for the fetus to survive the procedure, regardless of whether an emergency exists. In invalidating the reporting requirements, the Court wrote that "the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." In invalidating the first restriction on post-viability abortion, the Court found that this provision required an unconstitutional "trade-off" between the woman's health and fetal survival. The Court found the second post-viability provision to be invalid because it contained no exception for emergency abortions.

In his dissent, Chief Justice Burger, who had concurred in *Roe*, stated his desire to "re-examine *Roe*," leaving a bare 5-4 majority in favor of maintaining *Roe*. Justice

O'Connor, also dissenting, urged once again the application of the "undue burden" standard she had defined in the *City of Akron* case three years earlier.

### **June 30, 1986**

*Bowers v. Hardwick*: By a 5-4 vote, the Court upheld a Georgia sodomy statute challenged by a gay man who claimed it violated his rights under the Ninth and Fourteenth Amendments. The Court declined to extend the right to privacy enumerated in *Roe* and *Griswold* to protect consensual sex between same-sex partners. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens. Justice Powell, who had supported the continuing validity of *Roe* a few weeks earlier in *Thornburgh*, concurred, but noted that the punishment for "a single private, consensual act of sodomy" under Georgia law may violate the Eighth Amendment's prohibition on cruel and unusual punishment.

### **1986**

Chief Justice Burger retired and was replaced as Chief Justice by Associate Justice Rehnquist; Rehnquist's Associate position was filled by Justice Scalia.

### **1987-88**

Justice Powell retired and was replaced by Justice Kennedy. With this shift in the composition of the Court, there is no clear majority supporting *Roe*.

### **1989**

The Solicitor General of the United States submitted an amicus brief in *Webster v. Reproductive Health Services*, asking the Court to overrule *Roe*. The brief relied extensively on purported historical evidence of a strong state interest in protecting fetal life.

### **July 3, 1989**

*Webster v. Reproductive Health Services*: In a 5-4 opinion, the Court upheld a Missouri ban on the use of public employees and facilities for performing abortions, except where necessary to save a woman's life. The Court found that the restriction was valid under *McRae* and preceding cases that held that the "[s]tate need not commit any resources to facilitating abortions." The Court also upheld a requirement that physicians test for viability at 20 weeks gestational age or more. Justices Rehnquist, White, and Kennedy urged reconsideration of *Roe*, indicating that were the question properly before them, they would overrule *Roe* by holding that the state had a compelling interest in fetal life from the moment of conception. Justice Scalia urged the Court to overrule *Roe* explicitly, and Justice O'Connor voted to uphold the statute but found no conflict with prior precedents. In his dissent, Justice Blackmun wrote: "For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." This case marked the first time that only four Justices voted to uphold *Roe* in its entirety.

On the same day the Court decided *Webster*, it granted *certiorari* in three abortion cases: two involving parental notice statutes and one involving a statute regulating clinics that

provide abortions. In one case, *Hodgson v. Minnesota*, the Solicitor General of the United States filed an amicus brief arguing that the scope of constitutional privacy rights should be determined by whether the right was specifically recognized in 1868, when the Fourteenth Amendment was ratified. As a fallback position, the Solicitor General argued that the state's interest in fetal life is compelling enough to overcome a woman's right to choose abortion in all cases.

### **June 25, 1990**

In *Hodgson v. Minnesota*, a closely divided Court held that Minnesota's blanket requirement that minors notify both parents before obtaining an abortion is "unreasonable" and hence unconstitutional, but that an alternative Minnesota statute, which includes a judicial bypass mechanism, is valid. Four Justices (Kennedy, Rehnquist, White, and Scalia) dissented and would have upheld the statute without the bypass.

The same day, in *Ohio v. Akron Center for Reproductive Health*, the Court upheld Ohio's one-parent notice requirement by a 6-3 vote despite numerous problems with the judicial bypass procedure provided in the statute. The Court left open the possibility that a one-parent notice statute does not require a bypass mechanism at all.

### **1990**

Justice Brennan retired and was replaced by Justice Souter.

### **May 23, 1991**

*Rust v. Sullivan*: In an extension of prior abortion funding cases, the Court, by a 5-4 vote, held a regulation that prohibited recipients of family planning funds under Title X of the Public Health Service Act from providing counseling about or referrals for abortions (the gag rule) does not violate either freedom of speech or the right to privacy. The Court also upheld provisions barring Title X projects from engaging in activities that "encourage, promote, or advocate abortion as a method of family planning," and requiring grantees that provided abortions with non-federal funds to keep these activities "physically and financially separate" from their Title X projects. Newly-appointed Justice Souter provided the crucial fifth vote to uphold the gag rule. Had Justice Brennan still been on the Court, the result would have undoubtedly been different.

### **1991**

Justice Marshall retired and was replaced by Justice Thomas.

### **1992**

The Solicitor General of the United States filed an amicus brief in *Planned Parenthood v. Casey*, arguing that there is no fundamental right to abortion, that even if there is, the state's compelling interest in protecting fetal life throughout pregnancy subsumes it, and that therefore the Court should uphold all the restrictions at issue in the case.

**June 29, 1992**

*Planned Parenthood v. Casey*: In a joint opinion upholding all but one provision of Pennsylvania's Abortion Control Act, Justices O'Connor, Kennedy, and Souter replaced the strict scrutiny standard established in *Roe* with an "undue burden" test for analysis of pre-viability restrictions on abortion. The joint opinion specifically re-affirmed *Roe*'s standard for evaluating restrictions on abortion after viability but eliminated *Roe*'s trimester framework by explicitly extending the state's interest in protecting potential life and maternal health to apply throughout pregnancy. Therefore, regulations that affect a woman's abortion decision that further these interests are valid unless they have the "purpose or effect" of "imposing a substantial obstacle" in the woman's path. Justice Scalia decried the "undue burden" test as unworkable, while Justice Blackmun announced the hope that all the restrictions upheld by the Court will ultimately, upon new evidence, be invalidated as undue burdens. In applying this new standard to the Pennsylvania statute, the Court upheld the requirement that a physician—and only a physician—must provide a woman with state-scripted information 24 hours in advance of a non-emergency abortion. The Court also upheld Pennsylvania's narrow definition of medical emergency. The Court struck down the statute's husband notification requirement, finding that, for a woman who doesn't choose to notify her husband, the requirement could enable her husband to prevent her from obtaining an abortion or harm her physically or otherwise—thus imposing an undue burden on her right.

**1993**

Justice White, one of two dissenting Justices in *Roe*, retired and was replaced by Justice Ginsburg.

**1994**

Justice Blackmun, author of *Roe*, retired and was replaced by Justice Breyer.

**March 31, 1997**

*Lambert v. Wicklund*: The Court held that, absent state court interpretation to the contrary, a requirement that an immature minor show that parental notification is not in her best interest is equivalent to a requirement that she show that abortion is in her best interest.

**June 16, 1997**

*Mazurek v. Armstrong*: The Court eliminated the crucial "purpose" prong in the undue burden test established in *Casey*, ruling that it was doubtful as to whether a statute could be ruled invalid based solely on its impermissible purpose without showing an impermissible effect. The Court also weakened the discretion of the lower federal courts to consider evidence of the process by which a statute was enacted, including information showing that a statute was drafted by anti-choice groups and unsupported by any evidence that it furthered maternal health. The ruling ignored past cases establishing that courts must take such facts into consideration when reviewing cases involving race discrimination.

**June 28, 2000**

*Stenberg v. Carhart*: In a 5-4 vote, the U.S. Court struck down a Nebraska ban on so-called “partial-birth abortion,” finding it an unconstitutional violation of *Roe v. Wade*. In an opinion written by Justice Breyer, the Court held that the Nebraska ban violated *Roe* and *Casey* both because the statute was a broad ban on the safest and most common second-trimester abortion procedure and thus imposed an undue burden on a woman’s ability to choose abortion, and because the statute failed to include an exception to preserve the health of the woman. The majority decision was joined by four justices. Four separate dissenting opinions were filed by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, demonstrating that *Roe* and the right to choose is imperiled.

**June 26, 2003**

*Lawrence v. Texas*: In a decision written by Justice Kennedy and joined by four justices, the Court reversed *Bowers v. Hardwick* and held that the right of two adults of the same sex to engage in consensual sexual activity without interference by the State is protected by the right to liberty under the Due Process Clause. Notably, Justice Kennedy’s decision cited *Casey* with approval numerous times for the proposition that the right to decide whether to obtain an abortion was similarly protected by the right to liberty under the Due Process Clause. Justice O’Connor filed a separate opinion concurring in the judgment. Justices Scalia, Rehnquist, and Thomas dissented.



## 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://alisdb.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/FormatForPrint.asp?inDoc=/ars/13/03603.htm>*

#### **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/FormatForPrint.asp?inDoc=/ars/13/03604.htm>*

#### **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/FormatForPrint.asp?inDoc=/ars/13/03605.htm>*

## 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:*

*[http://www.arkleg.state.ar.us/NXT/gateway.dll/ARCode/title03823.htm/subtitle04516.htm/chapter04537.htm/subchapter04538/section04539.htm#JD\\_5-61-101](http://www.arkleg.state.ar.us/NXT/gateway.dll/ARCode/title03823.htm/subtitle04516.htm/chapter04537.htm/subchapter04538/section04539.htm#JD_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:*

*[http://www.arkleg.state.ar.us/NXT/gateway.dll/ARCode/title03823.htm/subtitle04516.htm/chapter04537.htm/subchapter04538/section04540.htm#JD\\_5-61-102](http://www.arkleg.state.ar.us/NXT/gateway.dll/ARCode/title03823.htm/subtitle04516.htm/chapter04537.htm/subchapter04538/section04540.htm#JD_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?f=templates&fn=fs-main.htm&2.0>*

## **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://www.delcode.state.de.us/title11/c005/sc02/index.htm>*

**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://www.delcode.state.de.us/title24/c017/sc09/index.htm>*

## LOUISIANA

### §14-87. Abortion

A.(1) Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy:

- (a) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or
- (b) Using any instrument or external force whatsoever on a female.

(2) This Section shall not apply to the female who has an abortion.

B. It shall not be unlawful for a physician to perform any of the acts described in Subsection A of this Section if performed under the following circumstances:

- (1) The physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a dead unborn child.
- (2) The physician terminates a pregnancy for the express purpose of saving the life of the mother.
- (3) The physician terminates a pregnancy which is the result of rape as defined in either R.S. 14:42, R.S. 14:42.1, or R.S. 14:43 and 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 five days of the rape to determine whether she was pregnant prior to the rape and to prevent pregnancy and venereal disease, unless the rape victim is incapacitated to such a degree that she is unable to obtain this examination. If the victim is unable to obtain the examination due to such incapacity, then an examination shall be performed within five days after the incapacity is removed; and
- (b) The rape victim reports the rape to law enforcement officials within seven days of the rape unless the victim is incapacitated to such a degree that she is unable to report the rape. If the victim is unable to report the rape due to such incapacity, then a report shall be made within seven days after the incapacity is removed; and
- (c) The abortion is performed within thirteen weeks of conception.

(4) The physician terminates a pregnancy which is the result of incest as defined in R.S. §14:78, provided the crime is reported to law enforcement officials and the abortion is performed within thirteen weeks of conception.

C.(1) Prior to the performance of any abortion under Subsection (B)(3) or (B)(4) of this Section, the physician who is to perform the abortion shall obtain from the victim a statement in writing verifying that she has obtained the physical examination and shall obtain written verification by a law enforcement official that the victim reported the rape to law enforcement officials as required under this Section.

(2) Every physician who conducts a physical examination of a rape victim within five days of the rape shall immediately, upon written request of either the victim or the physician who is to perform the abortion on the victim, provide to the victim or the requesting physician written verification of his examination.

(3) Every law enforcement official who receives a report of a rape victim within seven days of the rape or receives a report of incest shall immediately, upon written request of

either the victim or the physician who is to perform the abortion, provide to the victim or requesting physician written verification of the report which was made to the official.

D. As used in this Section, the following words and phrases are defined as follows:

(1) "Law enforcement official or officer" means any peace officer or agency empowered to enforce the law in criminal matters within his or its respective jurisdiction, including but not limited to a state police officer, sheriff, constable, local police officer, and district attorney.

(2) "Physician" means any person licensed to practice medicine in this state.

(3) "Unborn child" means the unborn offspring of human beings from the moment of conception until birth.

(4) "Conception" means the contact of spermatozoan with the ovum.

E.(1) Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years and shall be fined not less than ten thousand dollars nor more than one hundred thousand dollars.

(2) This penalty shall not apply to the female who has an abortion.

*Source: [http://www.legis.state.la.us/lss\\_doc/lss\\_house/RS/14/Doc%2078688.html](http://www.legis.state.la.us/lss_doc/lss_house/RS/14/Doc%2078688.html)*

## **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 twelve L or twelve M shall be punished by imprisonment 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 twelve M, 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 twelve M, 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 section 12L or 12M; emergency excepted**

Except in an emergency requiring immediate action, no abortion may be performed under sections twelve L or twelve M 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 twelve S; 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.michiganlegislature.org/printDocument.asp?objName=mcl-750-14>*

## **MISSISSIPPI**

**97-3-3. Abortion; causing abortion or miscarriage.**

(1) Any person willfully and knowingly causing, by means of any instrument, medicine, drug or other means whatever, any woman pregnant with child to abort or miscarry, or

attempts to procure or produce an abortion or miscarriage shall be guilty of a felony unless the same were done by a duly licensed, practicing physician:

- (a) Where necessary for the preservation of the mother's life;
- (b) Where pregnancy was caused by rape.

Said person shall, upon conviction, be imprisoned in the State Penitentiary not less than one (1) year nor more than ten (10) years; provided, however, if the death of the mother results therefrom, the person procuring, causing or attempting to procure or cause the illegal abortion or miscarriage shall be guilty of murder.

- (2) No act prohibited in subsection (1) of this section shall be considered exempt under the provisions of subparagraph (1) thereof unless performed upon the prior advice in writing, of two (2) reputable licensed physicians.
- (3) The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this section.
- (4) Nothing in this section shall be construed as conflicting with Section 41-41-73.

*Source: <http://198.187.128.12/mississippi/lpext.dll?f=templates&fn=fs-main.htm&2.0>*

## **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-hit-h.htm&2.0>*

## **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.ncga.state.nc.us/Statutes/GeneralStatutes/HTML/BySection/Chapter\\_14/GS\\_14-44.html](http://www.ncga.state.nc.us/Statutes/GeneralStatutes/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.ncga.state.nc.us/Statutes/GeneralStatutes/HTML/BySection/Chapter\\_14/GS\\_14-45.html](http://www.ncga.state.nc.us/Statutes/GeneralStatutes/HTML/BySection/Chapter_14/GS_14-45.html)*

## **OKLAHOMA**

### **21-861. 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 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.

*Source: <http://www.lsb.state.ok.us/>*

## **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 supposedly 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.

## **TEXAS**

### **Title 9 Chapter 15 Article 1191. Abortion. (repealed by implication, see page 78 )**

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://www.le.state.ut.us/~code/TITLE76/htm/76\\_09013.htm](http://www.le.state.ut.us/~code/TITLE76/htm/76_09013.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://www.legis.state.wv.us/legishp.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](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 REPRODUCTIVE PRIVACY 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/waisgate?WAISdocID=67113512180+0+0+0&WAIAction=retrieve>*

### 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://www.cga.state.ct.us/2003/pub/Chap368y.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>*

*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://198.187.128.12/maryland/lpext.dll?f=templates&fn=fs-main.htm&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://www.leg.wa.gov/RCW/index.cfm?fuseaction=Section&Section=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://www.leg.wa.gov/RCW/index.cfm?fuseaction=section&section=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://www.leg.wa.gov/RCW/index.cfm?fuseaction=section&section=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://www.leg.wa.gov/RCW/index.cfm?fuseaction=section&section=9.02.160>*