

Will Overruling Roe Make Abortion Illegal?



**LIFE LEGAL
DEFENSE FUND**

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Executive Summary

What would be the legal status of abortion if the Supreme Court were to overrule *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)? **There is a widespread popular belief that such a decision would make abortion illegal throughout the United States, or that an overruling decision would return the country to the state of law that existed when *Roe* and *Doe* were decided on January 22, 1973. There is no basis in fact for either belief.**

More than two-thirds of the States have repealed their pre-*Roe* laws or have amended those laws to conform to *Roe v. Wade* and *Doe v. Bolton*, which allow abortion for *any* reason before viability and for virtually any reason after viability (no reviewing court has ever upheld a law restricting post-viability abortions). Only four states have enacted post-*Roe* laws purporting to prohibit some or most abortions throughout pregnancy. Of these, the Louisiana, Rhode Island and Utah laws have been declared unconstitutional by the federal courts and cannot now be enforced; South Dakota has recently enacted a trigger statute which would not go into effect unless *Roe* and *Doe* were overruled. Only the Louisiana, Rhode Island and South Dakota laws would effectively prohibit most abortions upon the overruling of *Roe* and *Doe*; the legislative history of the Utah law suggests that abortions could be performed for reasons relating to the mental health of the pregnant woman. Based upon the experience of States (particularly California) before *Roe*, mental health exceptions are subject to abuse.

Of the slightly less than one-third of the States that have not repealed their pre-*Roe* laws, most would be ineffective in prohibiting most abortions, either because the laws, by their express terms or as interpreted by courts, allow abortion on demand (Hawaii and New York), for a broad range of reasons, including mental health (Colorado, Delaware, Massachusetts and New Mexico), or for undefined reasons of health (Alabama), or because of state constitutional limitations (Massachusetts, Mississippi, New Mexico, New York, Vermont and possibly Arizona and West Virginia). In other States, the pre-*Roe* laws *prohibiting* abortion may have been repealed by implication with the enactment of comprehensive post-*Roe* laws *regulating* abortion, as the Fifth Circuit has already determined with respect to the Texas laws struck down in *Roe v. Wade*. Only three States that have not repealed their pre-*Roe* laws would prohibit most abortions throughout pregnancy—Michigan, Oklahoma and Wisconsin. In addition, an unrepealed provision of the pre-*Roe* Arkansas law probably would prohibit all abortions.

In sum, only seven States—Louisiana, Michigan, Oklahoma, Rhode Island, South Dakota, Wisconsin and probably Arkansas—would have enforceable laws on the books that would prohibit most abortions in the event *Roe*, *Doe* and *Casey* are overruled. These seven States account for less than 10% of the total population in the United States. In the other forty-three States (and the District of Columbia), which account for more than 90% of the population, abortion would be legal for most or all reasons throughout pregnancy.

A Summary of Abortion Laws If Roe and Doe are Overruled.

ABORTION ALLOWED (43 STATES)

1. Have eliminated old (pre-Roe) laws

Alaska†	Illinois	Minnesota†	North Carolina	Utah ¹
California†	Indiana	Missouri	North Dakota	Virginia
Connecticut	Iowa	Montana†	Ohio†	Washington
Dist. of Columbia	Kansas	Nebraska	Oregon	Wyoming
Florida†	Kentucky	Nevada	Pennsylvania	
Georgia	Maine	New Hampshire	South Carolina	
Idaho	Maryland	New Jersey†	Tennessee†	

2. Have old (pre-Roe) laws that would not prohibit most abortions

These states have not repealed their pre-1973 laws but for reasons varying with each state (for example, state reviewing court rulings), the existing laws probably won't effectively prohibit most abortions:

Alabama	Delaware	Mississippi†	Texas ²
Arizona†	Hawaii	New Mexico†	Vermont†
Colorado	Massachusetts†	New York†	West Virginia†

† Have state reviewing court rulings that would or may block enforcement of abortion prohibitions.

1 Has enacted post-Roe prohibition; scope of grave medical health exception is uncertain.

2 Status of pre-Roe law uncertain.

ABORTION PROHIBITED (7 STATES)

1. Have repealed pre-Roe prohibitions but have enacted new ones

Louisiana	<i>Life of the mother, reported rape and incest exceptions.</i>
Rhode Island	<i>Life of the mother exception.</i>
South Dakota	<i>Life of the mother exception. Trigger statute.</i>

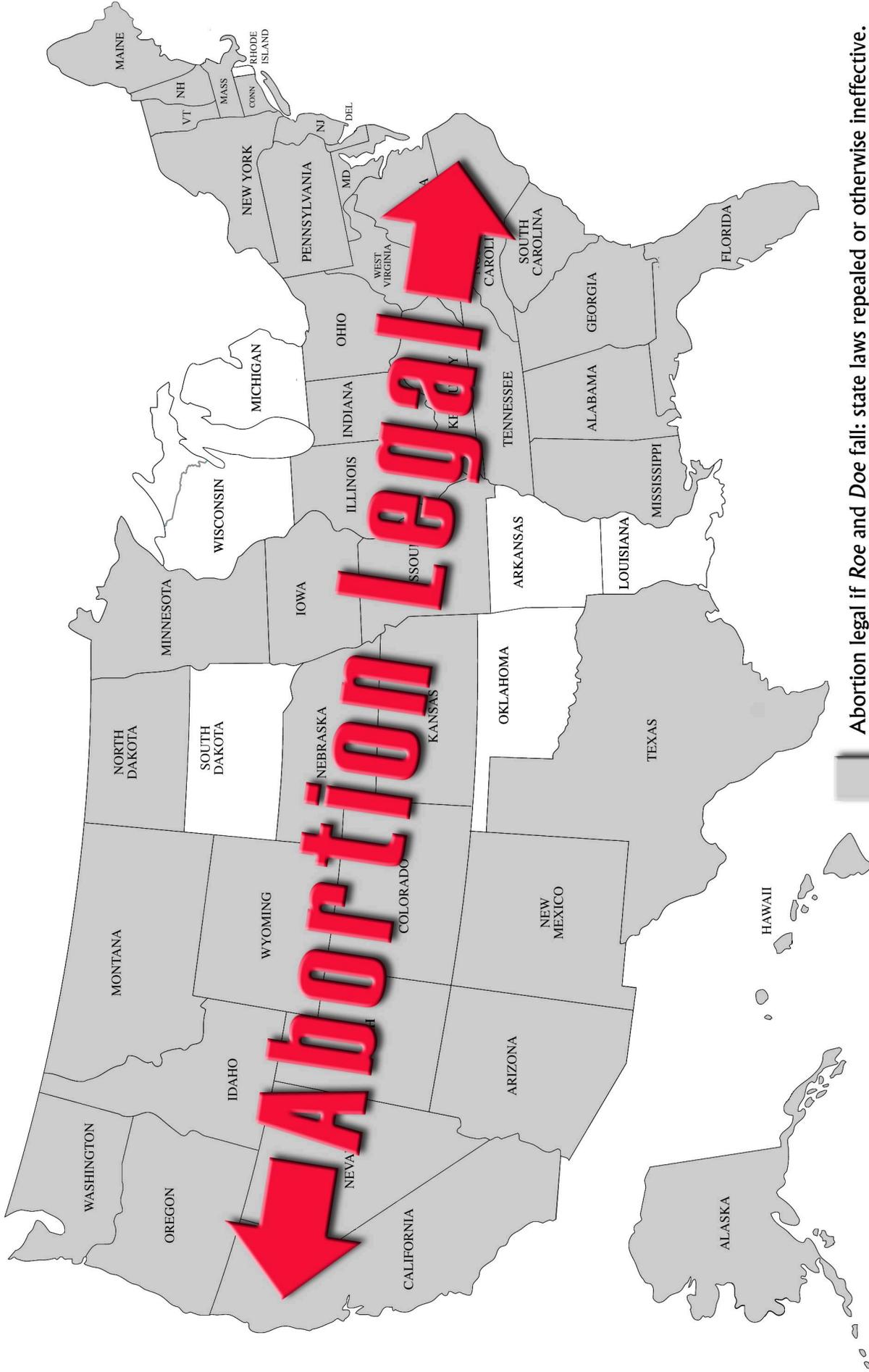
2. Have pre-Roe prohibitions

These states have not repealed their laws prohibiting abortion. If Roe is overruled, they would probably be enforceable.

Arkansas	<i>No exceptions.</i>	<i>Part of pre-Roe law repealed.</i>
Michigan	<i>Life of the mother exception.</i>	
Oklahoma	<i>Life of the mother exception.</i>	
Wisconsin	<i>Life of the mother exception.</i>	

According to U.S. Census Bureau 2003 statistics, the states with effective abortion prohibitions constitute just 9.7% of the U.S. population. Based on current abortion rates, **even if Roe fell today, more than a million abortions per year are projected to be performed legally.**

Status of Abortion Laws If Roe and Doe Are Overruled



Abortion legal if Roe and Doe fall: state laws repealed or otherwise ineffective.

Abortion restricted: existing state laws could be enforced.

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