Can Roe v. Wade Be Overturned After 40 Years?
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Though some may fear that the prospects of overturning *Roe v. Wade*¹ and *Doe v. Bolton*² are daunting, after 40 years as the “law of the land,” *Roe* is, in fact, weaker in many ways in 2013 than it was at previous anniversaries. While it is important to keep in mind that the Supreme Court has overturned its own decisions more than 200 times and some were decades old when overturned, the real issue is not the age of *Roe*. Rather, the critical factor is the strength and perseverance of a movement focused on overturning *Roe* and the prudence of our strategies.

**Roe is a Unique Obstacle**

*Roe* (with *Doe*) is a political and constitutional obstacle that prevents the reinvigoration of a culture of life as long as it stands. The Court’s creation of a national “right” to abortion—not its denial of constitutional personhood for the unborn—prevents state prohibitions of abortion. The Supreme Court has controlled the abortion issue, directly and through the lower federal courts, ever since 1973. In other words, what regulations or prohibitions of abortion are permitted in 2013 is within the control of the Supreme Court Justices.³

In 1973, the Justices stumbled into the abortion issue without understanding all the implications of the unprecedented social policy that they were creating. They had no evidentiary record from the lower courts which, in other constitutional cases, the Supreme Court has traditionally relied upon to decide constitutional questions. Some of the Justices, like Justice William Douglas and Justice William Brennan, had wanted to legalize abortion for years and were eager to do so. During a unique 15-week period between September 1971 and January 1972, when the Court was short-handed because of two vacancies, a 4-3 bloc of Justices— Justices Douglas, Brennan, Stewart, and Marshall—pushed to eliminate state abortion prohibitions. This momentum could not be reversed when Justices Powell and Rehnquist filled the Court’s vacancies in January 1972.⁴ Twelve months later, the Court proceeded to issue a sweeping decision that astounded virtually all observers.

A decision by the Supreme Court—even a disastrous decision like *Roe*—is difficult to overturn for several reasons:

- The Constitution gives life tenure to the Justices. Turnover in membership is infrequent, and the average tenure of the Justices has actually lengthened in the 20th century.

- The Constitution and our system of federalism diffuse power and thereby limit what can be done to counter the Supreme Court. A constitutional amendment can only be approved if two-thirds of both Houses of Congress and three-fourths of the states agree. Therefore, the amendment process is a highly difficult method to reverse the damage caused by a Supreme Court decision. Justice Antonin Scalia has observed that “the Constitution makes changing it too hard by requiring 38 states to ratify an amendment for it to take effect,” and that, as a result, “less than 2 percent of the U.S. population, residing in the 13 least populous states, could stop an amendment...”⁵

In the case of abortion, these obstacles are aggravated by additional hurdles that are unique to *Roe*:

- Change is extremely difficult when the Justices dig in their heels and obstinately refuse to reconsider their mistakes, as the Justices have done on abortion.⁶

- Planned Parenthood, the American Civil Liberties Union (ACLU), the Center for Reproductive Rights (CRR), numerous interest groups, political parties, medical organizations like the American Medical Association (AMA) and the American College of Obstetricians and Gynecologists (ACOG), and many wealthy foundations—supported by the media—are
doing their utmost to prop up the *Roe* decision and to counter efforts to overturn it in the courts, Congress, and state legislatures.

- The Court assumed a role as the “National Abortion Control Board” in *Roe*, by positioning itself as the final arbiter on abortion policy and creating a legal structure that works to insulate the Justices from knowing about the actual impact of their abortion decisions. Litigation is the only means by which the Justices can know about the impact of their abortion rules and have the opportunity to make adjustments through subsequent decisions. In doing so, the Justices must passively depend on cases appealed to them.

The degree to which *Roe* and the federal courts have been an obstacle to the enactment of even marginal regulations or restrictions on abortion is little understood. Perhaps the most extreme example is the 35-year struggle by the Illinois legislature to enact an enforceable parental involvement law.8

Unfortunately, there is no “silver bullet” that will adequately deal with these obstacles; rather, the myriad obstacles require a broadly-based legal, legislative, political, and cultural strategy.

**The Legal-Legislative-Political-Educational Dynamic**

*Roe v. Wade*, and the harsh way the Blackmun majority subsequently applied it (through “strict scrutiny” analysis) between 1973 and the 1989 *Webster v. Reproductive Health Services*9 decision, prevented pro-life citizens and legislators from passing life-affirming legislation to limit, contain, or reduce abortion. Before *Webster*, the Court allowed only public funding limitations and parental involvement legislation. But the Court’s decisions in *Webster*, *Planned Parenthood v. Casey*10 (1992), and *Gonzales v. Carhart*11 (2007) have been successive retreats from *Roe* by the Court as its membership changed. They have given the states a stronger and broader platform to limit, contain, or reduce abortion.

State organizations and legislators have taken advantage of the gains in *Webster, Casey*, and *Gonzales* to enact legislative fences (i.e., abortion regulations) that were not possible before the *Webster* decision, including informed consent laws, ultrasound laws, partial-birth abortion prohibitions, abortion clinic regulations, and prohibitions of abortion after 20 weeks gestation.12

It’s critical to understand the legal-legislative-political-educational dynamic that exists below the surface of political headlines: proposing legislation sparks media coverage and public education, and creates issues for political campaigns. Because of *Roe*, the federal courts dictate what is permissible and possible in state regulations; what’s possible in the courts is possible in the legislatures. If the courts sweep legislative fences off the legislative map by declaring them “unconstitutional,” it strips state legislators of the ability to sponsor them in the legislatures.

Without the ability to advocate for these fences in the legislatures, these limits would not be the subject of media attention and public education, and would not be the subject of political campaigns. If the courts sweep them off the legislative table, the legal-legislative-political-educational dynamic collapses. The pro-life movement would be reduced to picketing on a sidewalk. Picketing is all well and good, but political momentum requires actively fostering the legal-legislative-political-educational dynamic, which has been successively and effectively done since 1973.13 These legislative fences (or regulations) make it possible to develop political momentum.

The contrast between Canada and the U.S. on this point is instructive. Since 1988-1989, when the Canadian Supreme Court invalidated the Canadian abortion prohibition and the U.S. Supreme Court decided the *Webster* case, Canadian prolife organizations have taken an all-or-nothing approach, which prevented the legal-legislative-political-educational dynamic from ever developing momentum in Canada. Since 1988, there have been no limits on abortion in Canada, not even regulations or limits on abortion funding.14

By contrast, the cause for life in the U.S. pursued an all-or-something approach which fostered the legal-legislative-political-educational dynamic and developed considerable momentum against legal
abortion. In the U.S., there are hundreds of state and federal abortion restraints in effect in 2012. The Canadian all-or-nothing approach failed. The American all-or-something approach has established legislative fences against abortion that have actually limited and reduced abortion and demonstrated pro-life public sentiment.\(^{15}\)

**Roe 2.0: How Planned Parenthood v. Casey Changed Roe v. Wade**

Without understanding that *Roe* was significantly modified by the Supreme Court’s 1992 decision in Planned Parenthood v. *Casey*, there can be no effective strategy to overturn *Roe v. Wade*. Twenty years after *Roe*, the Court substantially changed *Roe* and the Court’s justification for upholding *Roe*.\(^{16}\)

In *Casey*, the Court said that *Roe* should not be overturned merely because its original rationale might have been wrong.\(^{17}\) Instead, the Court held that more was needed to justify overturning *Roe* because women had come to “rely” upon abortion as a backup to failed contraception. In other words, *Roe* must be reaffirmed because of women’s “reliance interest” in abortion.\(^{18}\) The recognition of the “reliance interest” changed the manner in which the Court maintained control over the abortion issue.

There is no majority of the Court today that defends a historical right to abortion or that believes that an abortion right is deeply rooted in American law or tradition. Nor is there a majority that holds to *Roe* or *Casey* because of a lack of information about fetal development or the fetus’ status as a person. The “reliance interest” rationale is the glue that now holds together a majority of the Justices in support of *Roe v. Wade*.

Consequently, historical arguments that *Roe* was wrong as an original matter of constitutional interpretation will always be necessary, but insufficient. Likewise, establishing and focusing on the humanity of the unborn child from conception will always be necessary, but insufficient. There is an intimate biological and psychological relationship between mother and child in pregnancy which is uniquely manifested in the contemporary debate over the “reliance interest” and the myth of legal abortion as a “necessary evil.”

This means that focusing on the unborn child alone will not effectively counter the support for legal abortion in the courts (and lead the Court to overturn *Roe* or *Casey*) or decisively change public opinion. The impact of abortion on the mother will always be a public concern.

Some might ask how the “reliance interest” rationale maintains its power if two of the three Justices who wrote the plurality opinion in *Casey* (Justices Souter and O’Connor) are no longer on the Court. The “reliance interest” rationale retains its power in the person of Justice Kennedy—the third author of the plurality opinion in *Casey*—and, more importantly, in the general pragmatic cast of American legal culture. The “reliance interests” rationale is mirrored in public opinion that legal abortion—at least to some degree—is a “necessary evil.”\(^{19}\)

Stripped of its arcane legal terminology, the “reliance interest” rationale of *Casey* is simply defined by “good results.” Has the Court’s management of the abortion issue yielded good results? Are women’s lives better with the Court in control of the abortion issue? Any public perception that the answer to these questions is “yes” must be countered with data about the negative impact of abortion on women. As Nicholas DiFonzo, professor of psychology at Rochester Institute of Technology explained in the November 2011 issue of *First Things*, specifics about the negative impact of abortion and the practical impact of abortion policies are critical to changing minds.\(^{20}\)

Educating about the negative impact of abortion on women includes both rebutting the medical mantra that “abortion is safer than childbirth” and increasing public awareness of the long-term risks of abortion to women. This is necessary to convert a “necessary evil” in the public mind into an “evil,” pure and simple.

**Gonzales Was a Victory, Not a Loss**

Contrary to misperceptions in some quarters, the Supreme Court’s 2007 decision in *Gonzales v. Carhart* was a significant victory, not a loss.\(^{21}\) It opened the door to enhanced regulations that protect both the unborn child and women’s health. If pro-life Americans have not understood the implications of Gonzales, pro-abortion advocates have. Nancy
Northrup, president of the Center for Reproductive Rights, was quoted, within days of the decision, as saying: “We are going to see a whole new onslaught of restrictions on abortion coming out of this decision.”

And this is exactly what pro-life advocates and legislators have undertaken since 2007. By allowing the legal-legislative-political-educational dynamic to work to tighten the legislative fences around Roe, Gonzales was a significant victory.

**Past Efforts to Challenge Roe “Directly”**

Some think that a “direct” court challenge to Roe has never happened or that it must happen immediately. Contrary to widespread misunderstanding, there have been numerous efforts from 1973 to 2006 to directly challenge Roe v. Wade in the courts and to present information about the humanity or “personhood” of the unborn child. The last time that the Justices directly addressed overruling Roe on the merits was in Casey, which reinforced Roe and gave us 20 more years of abortion-on-demand. Past efforts need to be understood before any effective direct assault against Roe in the courts can be launched.

**Direct Court Challenges**

That an unborn child is a person entitled to Constitutional protection was argued in the first abortion cases that the Supreme Court addressed: United States v. Vuitch, Roe v. Wade, Doe v. Bolton, and Byrne v. New York City Health and Hospital Corp. Shortly after Roe and Doe were decided, three or four states passed abortion prohibitions to directly challenge Roe v. Wade in the courts and to present information about the humanity or “personhood” of the unborn child. The last time that the Justices directly addressed overruling Roe was in Casey, which reinforced Roe and gave us 20 more years of abortion-on-demand. Past efforts need to be understood before any effective direct assault against Roe in the courts can be launched.

**Federal Constitutional Amendments 1973-1983**

After Roe and Doe were decided in January 1973, numerous constitutional amendments were introduced in Congress to overturn the decisions. Congress actively considered these amendments over the next three years and again from 1981 to 1983, culminating in a 49-50 vote against the “Hatch-Eagleton Federalism Amendment” (where a two-thirds vote was needed) in June 1983.

**Test Cases: 1973-2012**

During the decade that Congress considered a constitutional amendment, there was a simultaneous effort to engineer test cases in the courts to overturn or limit Roe and Doe by passing the strongest possible state regulations and prohibitions.

The approximately 30 abortion cases decided by the Supreme Court since Roe have illuminated the problems with Roe and its negative impact and have resulted in the Court retreating from Roe—in Webster (1989), Casey (1992), and most significantly in Gonzales (2007).

With the Gonzales decision, the Court’s abortion doctrine is now much more deferential to state regulations and partial prohibitions. This has prompted more states to pass stronger regulations and has prompted some federal courts to apply Gonzales in issuing new decisions that are more deferential to state regulations of and restrictions on abortion.


- **In July 2012**, the Eighth Circuit Court of Appeals, in Planned Parenthood v. Rounds, upheld the requirement in South Dakota’s informed consent law that patients be informed about the increased risk of suicide after abortion.

- **In August 2012**, a federal district court in Arizona, in Isaacson v. Horne, applied Casey and Gonzales to uphold Arizona’s prohibition of abortion after 20 weeks gestation. (This law is based on groundbreaking AUL model legislation. Subsequently, the law was enjoined by the Ninth Circuit Court of Appeals while litigation continues.)
• In October 2012, the Sixth Circuit Court of Appeals, in Planned Parenthood v. Dewine, upheld Ohio’s regulations of the abortion drug RU-486.33

These and other decisions have demonstrated federal courts’ increasing deference to state legislation, creating stronger legislative fences around the abortion license in the wake of Gonzales.

**Presidential Challenges to Roe 1983-1992**

Between 1983 to 1992, the U.S. Solicitor General, on behalf of the President of the United States, asked the Supreme Court to overturn Roe four times and was rejected in Thornburgh v. ACOG (1986), Webster (1989), Hodgson v. Minnesota (1990),35 and Casey (1992).

**Interest Group Briefs**

Since 1971, when the Supreme Court first addressed abortion in United States v. Vuitch,36 amicus curiae briefs have been filed by interest groups in the Supreme Court, arguing for constitutional personhood for the unborn child and/or that Roe be overturned. Such briefs have been filed in at least 25 abortion cases.

**Conclusions from Past Efforts to Challenge Roe**

The lesson from these past efforts is not that a direct attack on Roe should not be made. Instead, there are four important conclusions. First, failed efforts are not, as some assume, cost-free. Second, the next direct attack must be different from past failed efforts. Third, a successful direct attack must understand past efforts and why they failed. And fourth, a successful direct attack must also use existing medical data and/or the hundreds of medical studies on abortion’s risks to women that have been published in international medical journals since 1992.

What is clear from these efforts and from the Supreme Court’s decisions in Casey and Gonzales is that there are not currently five votes on the Court to overturn Roe.37 The right test case concerning the right legislation at the right time before the right Court must be purposely designed.

While Webster, Casey, and Gonzales have not resulted in the overturning of Roe, they “downsized” Roe. They have served to limit the Court’s abortion doctrine, limit the abortion license in practice, educate the public, and enable the states to pass broader regulations. They have also shown the practical problems with Roe and created precedents that show the Court retreating from Roe. These cases gave pro-life organizations and legislators greater latitude in advancing their goals.

**Prudential Fences to Reduce a Social Evil as a Means to Eliminate it**

The state regulations and partial prohibitions of abortion that serve as the basis for test cases in the courts also stand on their own as important legal fences around the Court’s abortion license. In other words, these laws—such as informed consent requirements and abortion clinic regulations—save lives now. When a direct assault is not feasible because of obstacles beyond our control, it is necessary to design and implement a larger and broader assault on the target and its foundation.

When it became apparent in the 1970s that an “all-or-nothing” approach to overturning Roe v. Wade was not going to be successful, the pro-life movement increasingly pursued a timeless strategy against a social evil: when a complete and immediate prohibition is not possible, enact prudential limits to contain the social evil as a means to ultimately eliminating it. Such an approach—sometimes called “containment”—was ethically and effectively applied against the British slave trade, against domestic slavery in the U.S, and against racial segregation laws in the U.S.

Importantly, limitations on the abortion license are not proposed in a vacuum; they are proposed in the face of the heavy constraints imposed by the federal courts.38 These limitations or life-affirming laws, which include informed consent requirements and prohibitions on abortion after 20 weeks gestation, have many positive goals:

- Saving lives;39
- Reducing abortion and the demand for abortion;
• Reducing society’s dependence on abortion;
• Cutting off public funding for abortion;
• Educating Americans about the sweeping scope of Roe and what Roe really means;
• Demonstrating public support for pro-life policies;
• Limiting the sweep of Roe; and
• Educating the public about abortion’s risks to women.

The goal is not to “submit” to the Court’s imposition of abortion policy, but to craft a life-affirming law that will not be blocked by the courts and can go into effect, accomplishing its intended results. The practical effect of Roe and Doe was to eliminate states’ pro-life laws and burden the states with the task of enacting new pro-life regulations or prohibitions that can comply with the vague and contradictory guidelines for new laws that the Court has adopted. The pursuit of abortion limitations that can withstand judicial scrutiny is critical to enacting protections for unborn children and women, and in reflecting the increasing pro-life convictions of the American public.

**Criticism of the Incremental Approach**

Despite the demonstrated benefits of legislation limiting the abortion license, the strategy of pursuing legal and legislative fences to contain this social evil as a means of eliminating it is often derided as “incrementalism.” However, there is a great difference between “incrementalism” and an incremental strategy directed by prudence.

Some activists morally object to anything other than a “direct” attack on abortion in either the legislatures or the courts. Yet an “indirect” attack is moral and often effective. To give one example, Boston College Professor Peter Kreeft quotes Kierkegaard in showing how “indirect” methods are both ethical and essential:

> An illusion can never be destroyed directly, and only by indirect means can it be radically removed... That is, one must approach from behind the person who is under an illusion...

A direct attack only strengthens a person in his illusion, and, at the same time, embitters him. There is nothing that requires such gentle handling as an illusion, if one wishes to dispel it. If anything prompts the prospective captive to set his will in opposition, all is lost. And this is what a direct attack achieves, and it implies moreover the presumption of requiring a man to make to another person, or in his presence, an admission which he can make most profitably to himself privately. This is what is achieved by the indirect method, which, loving and serving the truth, arranges everything dialectically for the prospective captive...40

Kierkegaard goes on:

> If real success is to attend the effort to bring a man to a definite position, one must first of all take pains to find him where he is and begin there. This is the secret of the art of helping others. Anyone who has not mastered this is himself deluded when he proposes to help others. In order to help another effectively I must first understand more than he—yet first of all surely I must understand what he understands.41

**Understanding the Gains Made**

The gains made since 1973 have to be understood in order to devise an effective path forward. The abortion issue in 2013 is not the abortion issue of 1973 or even 1992:

• The annual number of abortions declined considerably between 1992 and 2006.
• More states are passing more abortion-related regulations and partial abortion prohibitions.42
• There has been significant growth in legal protection for the unborn child in contexts other than abortion, such as civil recovery for prenatal injury and the wrongful death of an unborn child and legal protection available within state criminal laws.43
• A growing body of international data on abortion’s risks to women has developed.

• The substandard conditions in abortion clinics are becoming more widely publicized.

• With the Supreme Court’s decision in Gonzales, the Court’s abortion doctrine has become more deferential toward the state abortion-related regulations and restrictions, allowing more laws to go into effect and achieve their goals.

• Public sentiment has been moving in the pro-life direction: a “May 2012 Gallup poll... showed that people were more likely to identify as “pro-life” rather than pro-choice by a 50 to 41 margin.”44

• Planned Parenthood, the nation’s largest abortion provider, is under mounting pressure.

Because of the Court’s “reliance interest” rationale, and the attention given to the risks to women in the Gonzales decision, future state legislation needs to focus on the negative impact of abortion on women.

The Supreme Court’s Gonzales decision reflects the most “abortion-skeptical” majority in 40 years, and, building on the Court’s 1992 decision in Casey, opened the door to stronger legislative limitations on abortion. Considerable momentum in pro-life law and policy has been evident since 2001, and it has picked up steam in the last five years. These gains provide a necessary foundation for the way forward. Yet the obstacles are daunting and must be clearly understood and carefully countered.

2013: The Way Forward

The gains made since Roe was decided in 1973 are the result of prudential steps that will continue to generate future momentum. Based on the gains made and the foundation that already exists, the legal-legislative-political-educational dynamic must be pushed as aggressively in 2013:

• The target of law and policy is not simply Roe, but Roe 2.0: Planned Parenthood v. Casey and the “reliance interest” rationale. The “reliance interest” rationale of Casey is mirrored in the myth in public opinion that legalized abortion is a “necessary evil.” Pro-life efforts need to focus on rebutting the “reliance interest,” because that is the real target of opportunity in the courts, not the original underpinnings of Roe. If effective, these efforts will serve the dual purpose of rebutting the “reliance interest” and eradicating the public myth of abortion as a “necessary evil.” Rebutting both will shore up public opinion, increase public skepticism of abortion as good for women, and raise support for increasing limits and restrictions on abortion.

• Political developments, relieving or creating obstacles, will inevitably shape the steps forward. Elections will shape the opportunities or the obstacles and the timetable for overturning Roe.

• The negative impact of abortion on women must be highlighted. This includes highlighting the substandard conditions in abortion clinics and the medical risks to women through both education and legislation.

• Abortion must be constrained and limited by state legislation. The 25 percent drop in abortions between 1992 and 2006 shows the impact of state abortion-related laws. The enactment and enforcement of more life-affirming legislation will likely cause the abortion rate to drop.

• Legal protection for the unborn outside the context of abortion must be advanced. Legal protection for the unborn child was not comprehensive before Roe and must continue to grow and evolve in the years ahead.

• Criticism of Roe in popular and scholarly education must continue. The American public must better understand the legal scope of Roe, its negative impact, and its continuing relevance.

• Abortion providers must be de-funded. State and federal funding for abortion providers, like Planned Parenthood, not only subsidizes abortion, but it also funds those who oppose a revitalized culture of life.

• The right President and Senate must be elected to change the Supreme Court. A Supreme Court decision can only be overturned through a
constitutional amendment or through the Court reversing its own decision. The latter requires changing the Justices.

**Conclusion**

*Roe* can be overturned. The opportunity for a direct assault on *Roe* and *Doe* may come in the next five years or in the next decade. In the meantime, the progress made in creating political momentum through the legal-legislative-political-educational dynamic will provide the necessary foundation to successfully challenge *Roe*. 
3. See C.D. Forsythe & B.N. Kehr, A Road Map Through the Supreme Court’s Back Alley, 57 Vill. L. Rev. 45 (2012).
4. J.C. Jeffries, Jr., Justice Lewis F. Powell, Jr., A Biography 349 (1994) (“The reasons for that [Powell’s] vote are several. Most important, yet least noticed, was the sense of momentum inside the Court. The abortion laws had been struck down the year before by a vote of five to two [in the conference vote on December 16, 1971], and the majority against these statutes remained firm. Powell had no reason to think that his vote would matter one way or another. That the issue seemed settled was in itself no reason to support the constitutionalization of abortion, but it eased Powell’s way into a preexisting majority.”)
6. See J.W. Dellapenna, Dispelling the Myths of Abortion History 930 (2006). University of Chicago Law Professor Michael McConnell said on the “MacNeil/lehrer NewsHour” at the time of Casey that it would be “a recipe for disaster” if the Court was to “dig in its heels” like this. See also R.F. Nagel, The Implosion of American Federalism 99ff (2001) (Chapter 7: Judicial Supremacy and Nationhood); M.S. Paulsen, The Worst Constitutional Decision of All Time, 78 Notre Dame L Rev. 995 (2003).
13. See J. Dellapenna, supra.
18. C.D. Forsythe & S.B. Presser, supra, at 85.


29. The rationale for this is exhaustively laid out in D.J. Horan et al., supra. However, the medical data on the risks to women was only barely mentioned in that volume; the studies have significantly grown since 1990.

30. 667 F.3d 570, 579 (5th Cir. 2012).

31. 686 F.3d 889 (8th Cir. 2012).


34. 476 U.S. 747 (1986).


36. In Vuitch, the Supreme Court upheld the constitutionality of the criminal abortion statute of the District of Columbia, which prohibited abortion unless “necessary for the preservation of the mother’s life or health.” The decision indicated weak support for abortion statutes among the justices, and laid the foundation for the broad definition of “health” in Doe v. Bolton in 1973. See generally Vuitch, 402 U.S. 62 (1971).

37. See T.S. Collett, supra, at 732 (“At this time, it appears unlikely that Chief Justice Roberts or Justice Kennedy would supply the necessary fifth vote to reverse Roe, and there is no evidence that any Justice is willing to assert the constitutional personhood of the unborn.”)

38. One example of the severe obstacles in the courts in the 1970s and 1980s is that the Blackmun majority on the Court from 1973 to the 1989 Webster decision considered pro-life legislative motives or purposes to be unconstitutional in and of themselves. In October 2012, the Sixth Circuit Court of Appeals still considered an illicit “purpose” to be unconstitutional. Planned Parenthood v. Dewine, 2012 U.S. App. Lexis 20494, **44-45 n.17 (6th Cir. Oct. 2, 2012) (“Although Casey discusses the “purpose or effect” of the challenged legislation, Planned Parenthood does not attempt to argue that Ohio had an illicit purpose in passing the Act and focuses solely on the Act’s effects. The fact that the Act focuses solely on abortions (and not other off-label uses of mifepristone) certainly raises some eyebrows, but we will not presume a harmful purpose without evidence of an illicit motive.”).


41. Id. at 40.

42. “2011 and 2012 were record-setting years in terms of the amount of state-level pro-life legislation that was enacted. Since 2010, 32 states have enacted over 100 pro-life laws.” See M.J. New, CBS News Reports on Pro-life Progress (Aug. 31, 2012), available at http://www.nationalreview.com/corner/315662/cbs-news-reports-pro-life-progress-michael-j-new (last visited Oct. 17, 2012). A staffer with...
the Guttmacher Institute (AGI) was quoted in August 2012 as saying: “Since the November 2010 elections, we have just seen a huge tidal wave of abortion restrictions roll across states.” C. Reid, Since 2010, 32 states have restricted abortion (Aug. 26, 2012), available at http://www.cbsnews.com/8301-18563_162-57500585/since-2010-32-states-have-restricted-abortions/ (last visited Oct. 17, 2012). “In the first six months of 2012, 15 states passed 39 restrictions on abortion. Last year, 24 states passed 92 restrictions, an all-time record.” Id.


44. See M.J. New, CBS News Reports on Pro-Life Progress, supra. “On the abortion issue, a recent Gallup poll asked: ‘Would you consider yourself to be pro-choice or pro-life.’ Fifty percent of Americans now call themselves ‘pro-life.’ Forty-one percent call themselves ‘pro-choice,’ a record low.” C. Reid, supra.