

Reflections on “Looking Back on *Planned Parenthood v. Casey*”

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THIS PAPER IS A COMMENT on a recent article about abortion by Professor Christina Whitman.ⁱ Her article is, by law review standards, rather short and perhaps not that significant and perhaps not worth the effort to criticize. Yet, I think it is important to do so. Professor Whitman is a prominent law professor who holds a distinguished chair at the University of Michigan Law School, one of the nation’s best law schools.ⁱⁱ Her article was published in a special issue of the *Michigan Law Review* that marked the centennial of that publication.ⁱⁱⁱ Moreover, her article calls for a type of scholarship that will make the law “honest and responsive”^{iv} and that will promote “more credible and stable legal doctrine.”^v Her article is, in my estimation, almost a complete failure in nearly every respect and if scholarship is to accomplish the ends that she proposes, it is important that these failures be explored.

A BRIEF SUMMARY OF PROFESSOR WHITMAN’S ARTICLE

I will begin with a brief summary of the article. Professor Whitman’s main point is that it is essential for scholarship and legal doctrine to take account of the experiences of the people affected. She begins her article in this fashion: “Scholarship that tells us what is really at stake in the lives of people affected makes the law honest and responsive. Whether or not it directly shapes doctrine, this type of scholarship can capture imagination and influence judgment.”^{vi} According to Professor Whitman, the Supreme Court’s abortion jurisprudence developed “without any genuine effort to understand and articulate the significance of the right claimed to the protected class.”^{vii} According to Professor Whitman, this failure has led to the following situation: “The right [to abortion] has survived almost three decades but is now barely alive, apparently settled into a minimal existence, protected only against the most overwhelming of state incursions.”^{viii}

Her article then addresses the implications of the failure to focus on why abortion is so important to women. She explores this in three main ways. First, she discusses the Court's abortion cases and concludes that *Casey* "make[s] only the most grudging acknowledgment of the right to choose to have an abortion."^{ix} "[O]nly a sliver remains..."^x and the right to abortion is protected "only from the most overwhelming and total coercion."^{xi} This treatment, she contends, "has much in common with the common law's traditional approach to consent in rape cases."^{xii} Just as rape law used to require that a woman provide evidence of strenuous resistance to sexual activity, abortion law "is willing to let a woman suffer the consequences if she is not strong or assertive enough to overcome financial, physical, or psychological barriers placed before her by the state."^{xiii}

Professor Whitman's second main point is that the Court's failure is in large part due to its failure to adequately understand the impact of pregnancy and forced motherhood on women. She points to two prior articles published in the *Michigan Law Review*^{xiv} as models of scholarship that would "ask lawmakers to face reality. To require a woman to carry a fetus to term, and to make her a mother imposes an extraordinary burden. That these burdens may be accepted and even welcomed at some points in a woman's life does not make them insignificant even when they are chosen. When they are compelled, they can be intolerable."^{xv}

This brings her to her third main point. Professor Whitman believes that "[i]t is unfair to characterize the debate over abortion as turning on the balance of morality and convenience, or even on the weighing of obligations to others versus self-actualization."^{xvi} It is important, Professor Whitman maintains, to understand that the choice to have an abortion is a "moral" choice too. A pregnant woman may well believe that "it may be immoral to give birth to a child unless ...[her] obligations [to her living children] can be fulfilled."^{xvii} Resolving this moral and legal conflict cannot usefully be addressed by focusing on an issue such as when life begins because that question is a "religious" one about which the government cannot take sides. Forcing childbirth is intolerable, to Professor Whitman, because it forces women "to subordinate their lives to the purposes of others—not just to their unwanted children, but also to

ethical and spiritual views that they do not share.”^{xviii} This is just as objectionable as fundamentalist Islamic regimes—such as the Taliban in Afghanistan—requiring women to wear the veil.^{xix} It is important to Professor Whitman that this debate not be marred by “rhetorical wars of description[;]”^{xx} we must, rather, try to appreciate and understand and “articulate why the issue is so important to both sides. [Such a focus, if heeded, will help to] make for more credible and more stable legal doctrine.”^{xxi}

CRITICAL COMMENTS

There is a lot about which to comment in Professor Whitman’s short article. In this comment, I will focus on three points. First, her entire discussion begins on the wrong track by her failure to understand or to fairly describe the existing legal framework. Describing the right to abortion as having a “minimal existence” just does not accurately capture the current state of affairs. I think that it is important to begin discussions about the legal situation by fairly describing the relevant law, and in the first section of this response I will attempt to do just that.

Second, her attempt to focus on abortion’s impact is a laudable objective. Her effort here, though, is marred by her one-sided portrayal. She does not even allude to the mounting evidence that abortion has had negative consequences for women, and she almost completely ignores that there is another human life at stake. This comment is not the place for a full account of the parts of the story that Professor Whitman neglects but I will point to some of the more serious gaps in her account.

Third, her characterization of the abortion issue as inescapably a religious and spiritual issue about which the government cannot take sides is a common argument. In this section of the comment, I will explain why her position is fundamentally mistaken.

ABORTION LAW

As Mary Ann Glendon recently noted, “journalists and other opinion leaders have persisted in misdescribing *Roe v. Wade* as a case that permits abortion in the first trimester of pregnancy, but permits regulation thereafter.”^{xxii} Professor Whitman’s article is just one more example, but

perhaps demonstrates that refutation on this point is still necessary.

In *Roe v. Wade*,^{xxiii} the Court set forth the trimester framework. The Court did acknowledge that the state had an important interest in the health of the pregnant woman and “another important and legitimate interest in protecting the potentiality of human life[.]”^{xxiv} and that at some point during pregnancy “each becomes ‘compelling’.”^{xxv} Perhaps these statements and Chief Justice Burger’s comment in his concurring opinion that “the Court today rejects any claim that the Constitution requires abortions on demand[.]”^{xxvi} created some confusion on this score. It was, however, clear to Justice White that the Court had basically accepted the claim that “for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc...or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.”^{xxvii} This seems clear from a close reading of *Roe v. Wade* and *Doe v. Bolton*.

Roe’s trimester framework gave states the ability to regulate abortion after the first trimester “in ways that are reasonably related to maternal health.”^{xxviii} Under *Roe*, the state had the ability to proscribe abortion after viability, but the Court added the proviso—“except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”^{xxix} In discussing the physician’s medical judgment, the Court in *Doe* explained that this would be “exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. [The Court noted that a]ll these factors relate to health.”^{xxx} Although there is some ambiguity here (the Court in *Doe* was discussing a vagueness challenge and not addressing the constitutionality of a law that failed to contain this broad formulation of health), the conclusion seems inescapable that the Court thought these factors would inform the interpretation of the “health” exception that *Roe* stated was required by the Constitution.^{xxxi}

This broad reading of the right to abortion as set forth in *Roe* and *Doe* was made plain in cases decided from 1973 up until and including the Court’s 1986 decision in *Thornburgh v. American College of*

Obstetricians and Gynecologists.^{xxxii} In *Thornburgh*, the Court invalidated a variety of abortion regulations, including an informed consent provision that required that certain information be provided to the woman seeking an abortion. This decision finally drove Chief Justice Burger to realize that his 1973 assessment that *Roe* did not endorse abortion on demand had been undermined by the Court's post-*Roe* decisions. In a dissent that called for the re-examination of *Roe*, he stated: "We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the 'demand' will not even have to be the result of an informed choice."^{xxxiii}

The Court did begin to move away from these more extreme readings, primarily in the 1989 decision in *Webster v. Reproductive Health Services*^{xxxiv} and in the 1992 decision in *Planned Parenthood v. Casey*.^{xxxv} In *Casey*, the Court did abandon the trimester framework in favor of the undue burden approach. This approach explicitly acknowledged that prior decisions had not given sufficient weight to the state's "interest in protecting fetal life or potential life."^{xxxvi} Under the undue burden approach, the Court accepted certain regulations, such as an informed consent provision and a 24-hour waiting provision, that it would have invalidated under its past decisions.^{xxxvii} It is this modification that Professor Whitman terms "[t]he *Casey* compromise[.],..."^{xxxviii} and that she contends has confined the right to abortion to "a minimal existence, protected only against the most overwhelming of state incursions."^{xxxix}

This reading is not, however, very persuasive. The joint opinion in *Casey* itself noted that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."^{xl} And, even after viability, the *Roe* "exceptions" were explicitly retained: "We also affirm *Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'^{xli}

Under the undue burden standard, a State may regulate but (it seems

clear) never actually legally prohibit an abortion. And, even this undue burden does not eviscerate the right to an abortion, as Professor Whitman contends. As Justice Scalia's dissent maintained, "in the 'undue burden' standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence."^{xlii} As Justice Scalia noted "despite flowery rhetoric about the State's 'substantial' and 'profound' interest in 'potential human life,' and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful."^{xliii}

Justice Scalia's reading is borne out by the Court's subsequent decision in the partial-birth abortion case, *Stenberg v. Carhart*,^{xliv} and also by the statistics about the number of legal abortions that occur every year, despite Professor Whitman's claim that the right to abortion has been reduced to a "sliver."^{xlv} In *Stenberg*, the Court invalidated a Nebraska law banning partial birth abortions. Perhaps not surprisingly, the *Stenberg* decision does not play a prominent role in Professor Whitman's account. She does cite *Stenberg* as an example of how the Court has removed almost all legal protection for the right to abortion,^{xlvi} and she reserves her most extensive discussion of *Stenberg* for a section of her article in which she cites the case as a "recent, disheartening example"^{xlvii} of unhelpful "rhetorical wars of description."^{xlviii}

Her mentions of *Stenberg* do not adequately account for the points made in the dissents. Those opinions make clear that the current law on abortion is not fairly characterized as providing only "a minimal existence"^{xlix} for the right to abortion. *Stenberg* protected a woman's right to a partial birth abortion even though banning that method of abortion would deny no woman the right to choose an abortion—other still-legal methods of abortion were freely available. The Court's major reason for invalidating the Nebraska law was that the law did not contain a health exception.¹ This conclusion required the Court to "cast aside the views of distinguished physicians and the statements of leading medical organizations, and...[to] award each physician a veto power over the State's judgment that the procedures should not be performed."^{li}

Thus, it is clear that the right to abortion is still given substantial weight by the Supreme Court. And, although Professor Whitman conveys

the impression that legal abortion is a rare thing, the most recent study issued by the Alan Guttmacher Institute reports that there were approximately 1.3 million abortions in 2000.^{lii} And, although not every state has regulated abortion up to the limits that the Court's precedents allow, the statistics from Pennsylvania (the state where *Casey* originated) indicate that legal abortions are still common. There were approximately 50,000 abortions in Pennsylvania in 1992 (the year *Casey* was decided) and 36,570 abortions in 2000.^{liii} This decline simply mirrors national trends with regard to abortion and does not appear to be the result of restrictive abortion laws.^{liv}

Moreover, recent lower court decisions indicate that the right to abortion is still far more than a mere sliver. For example, in *Women's Medical Professional Corporation v. Taft*,^{lv} a federal district court struck down Ohio's ban on partial birth abortion. Significantly, this ban applied both to pre- and post-viability partial birth abortions. Despite Professor Whitman's claim that *Casey* affords women limited freedom to obtain an abortion "if she does so before the fetus becomes viable[.]"^{lvi} the court even invalidated the portion of the Ohio law that applied to post-viability partial birth abortions. The court did so because the court concluded that the health exception in the Ohio law was too narrow. The law banned partial birth abortions except where such an abortion was necessary "to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial or irreversible impairment of a major bodily function."^{lvii} The court concluded that this exception was too narrow because it did not permit a woman to obtain a partial birth abortion post-viability when her physician believes that such a method of abortion is safer than other methods of abortion.^{lviii} Because of this conclusion, the court did not need to consider the plaintiffs' arguments that this health exception was too narrow because it failed to permit a partial birth abortion when such an abortion would be to further the mother's "mental health."^{lix}

It is true that the *Casey* decision modified the law on abortion to some extent. Yet, Professor Whitman's contention the right "is now barely alive, apparently settled into a minimal existence, protected only against the most overwhelming of state incursions..."^{lx} does not

accurately capture the current state of affairs.

THE IMPACT OF ABORTION

Professor Whitman's attempt to focus on abortion's impact is important. In this section of her article, she focuses on the impact of pregnancy and forced motherhood on women.^{lxi} She devotes significant attention here to the domestic violence context.^{lxii}

While there is much to be said for this focus on the impact of abortion on women, her attempt here is marred by her one-sided portrayal. There has been much recent attention to the issue of the negative effect of abortion on women.^{lxiii} The recent book by Elizabeth Ring-Cassidy and Ian Gentles, *Women's Health After Abortion: The Medical and Psychological Evidence*,^{lxiv} summarizes much of this evidence, and concludes that "recent research indicates that ...[induced abortion] carries with it clear hazards to women's physical and psychological health."^{lxv} The physical risks include increased risk of ectopic pregnancy, uterine perforation, uterine adhesions, pelvic inflammatory disease, and links between abortion and various cancers (especially breast cancer).^{lxvi} The psychological effects include depression, guilt, and low self-esteem. This is in part due to the fact that "[m]any women feel pressured into abortion by men."^{lxvii} Abortion can have negative effects on existing children and on men and "it is well established that abortion results in the deterioration of relationships between women and those who are close to them."^{lxviii}

While much of the research relating to abortion has generated controversy,^{lxix} there is too much evidence here to ignore. A recently-launched website devoted to the topic provides links to much of this evidence.^{lxx} Professor Whitman, who pleads for a "genuine effort to understand and articulate the significance of the right claimed to the protected class[,]..."^{lxxi} does not even allude to this body of evidence, even when it relates to a topic—domestic violence—about which she expresses particular concern.

In addition, Professor Whitman's effort to focus on the impact of abortion ignores the unborn completely. Even if one thought it appropriate to focus special (judicial) protection on the politically powerless

group, Professor Ely has noted that this ought to apply only to “those interests which, as compared with the interest to which they have been subordinated, constitute minorities unusually incapable of protecting themselves.”^{lxxii} Ely further notes that even if “compared with men, women may constitute such a ‘minority’; compared with the unborn, they do not.”^{lxxiii}

Professor Whitman’s only real mention of the unborn is when she notes that women “feel”^{lxxiv} differently about whether they are carrying an abortion child. As she notes, “[s]ome women find it impossible, especially in the early stages, to think of themselves as harboring a separate person.”^{lxxv} With all due respect to Professor Whitman and without questioning that some women may indeed find this impossible, this surely cannot resolve the question of whether a pregnant women is, in fact, carrying a distinct human being.

ABORTION AS A RELIGIOUS AND SPIRITUAL ISSUE

This brings me to my third point. Professor Whitman is at pains to make the point that abortion is a moral conflict. She seems to think that the “moral” banner has been seized unfairly by the pro-life side. The abortion rights position, she maintains, is not driven simply by “convenience” or “self-actualization.”^{lxxvi} As she makes the point, “[e]ach side has its own moral vision.”^{lxxvii} The difficult problem, according to Professor Whitman, is that these groups hold different positions on a question that is basically “religious,” and she contends, it is not appropriate for the government to take sides on such questions.

There are at least two basic problems with her discussion on this point. First, she makes an error precisely like the one that the Court made in *Roe v. Wade*. In *Roe*, the Court noted: “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at a consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”^{lxxviii} Professor Whitman makes a similar point: “The constitutional question posed by abortion cannot be ‘when does life begin.’ Legal analysis cannot answer that question, so it cannot be the test or doctrinal structure

on which the right to abortion hinges.”^{lxxxix} The problem with this false gesture of humility is that the Court, in fact, made a decision about the status of the unborn. The Court later noted that “we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”^{lxxx} This was because that Court had its own theory of human life that it enshrined into the law. The Court in *Roe* was in fact concluding that the unborn could not legally be regarded as a human person entitled to the protection of the law. In the Court’s chilling phrase, “the unborn have never been recognized in the law as persons in the whole sense.”^{lxxxi} Whatever this is, it is not a failure to decide.

Professor Whitman’s second basic problem in this section of her article is that she is wrong to consider the abortion question to be a “religious” one, and therefore beyond the capacity of the government to decide. As I already noted, the government must in fact make a decision—one way or the other—about who is entitled to the protections of the law. Moreover, she is quite wrong to use the “religious” label as a way to silence one particular perspective on the disputed question involved.

Her argument here is fairly common in these debates.^{lxxxii} The idea is that certain “coercive restraints on [individual liberty]...become constitutionally suspect when, in contemporary circumstances, they can no longer be justified to society in the non-sectarian terms that constitutional principles require.”^{lxxxiii} According to this view, “laws prohibiting the use of contraceptives, abortion, consensual homosexual acts, and same-sex marriage ought to be held unconstitutional because they cannot be justified in non-sectarian terms.”^{lxxxiv}

Certain Justices of the Supreme Court have sometimes expressed some sympathy for this argument. The clearest judicial example is Justice Stevens’s opinion in *Webster v. Reproductive Health Services* in which he concluded that the preamble to the Missouri abortion statute violated the Establishment Clause.^{lxxxv} The preamble stated that “the life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well-being.” The preamble required that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Constitution and Supreme Court precedent. According to Justice Stevens, “the

absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause.^{lxxxvi} That conclusion was based on his belief “that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose.”^{lxxxvii}

Justice Stevens’s opinion in *Boy Scouts of America v. Dale* is to the same effect.^{lxxxviii} There, in a case involving whether the Boy Scouts could be prevented from prohibiting homosexuals to serve as troop leaders, Justice Stevens referred to the Boy Scouts’ views about homosexuality as “atavistic opinions...[whose] roots have been nourished by sectarian doctrine.”^{lxxxix} According to Justice Stevens, it was not appropriate for the Court to permit the Boy Scouts to rely on such “prejudices;” according to Justice Stevens, “the light of reason” required that these prejudices be eradicated.^{xc}

This argument depends on the idea that legislation must be supported by a certain form of secular rationality. Fortunately, a majority of the Supreme Court has rejected this position. “The Court continually reaffirms the idea that a moral position should not be regarded as religious [and therefore illegitimate] simply because it happens to coincide with the tenets of some religious organizations.... The Court has consistently refused to restrict the types of moral arguments that are considered a legitimate part of public debate.... The Court has not insisted that laws be supported by a certain form of secular reasoning.... The Court has adopted a wide understanding that permits the inclusion of a range of comprehensive moral views, even if some might regard one or more of these comprehensive moral views as religious in some sense.”^{xci}

The conclusion from an article by Professor (now Judge) Michael McConnell provides an apt summary: “One false view of separation is the view that religious ideas must not serve as rationales for public policy. This view, called the ‘principle of secular rationale,’ is put forward as a means of protecting the public sphere from divisive, absolutist, intolerant impulses and from arguments that cannot be supported on the basis of accessible public reasons. But in fact, it rests on inaccurate stereotypes and questionable epistemological premises, and it

would disenfranchise religious persons as full participating members of the political community. The United States has never adhered to the principle of secular rationale. Indeed, our political history is rife with religious political activists and religious political arguments.... [T]here is no good democratic argument for excluding them. But more than this: to exclude them would be inconsistent with the very ideals of democratic equality that the principle of secular rationale ostensibly seeks to protect. It is time to stop challenging our fellow citizen's right to be part of democratic dialogue, and time to engage their arguments on the merits."^{xcii}

CONCLUSION

In sum, Professor Whitman's article is a failure at every turn. She begins with an indefensible mischaracterization of the Supreme Court's decisions on abortion. Her discussion of the impact of abortion neglects to even consider the mounting evidence about the negative effects of abortion on women and fails to address the unborn. Her purported agnosticism about when life begins is also a failure. The legal system has, of course, taken a position about which human beings are entitled to the protection of the laws. Her effort to avoid discussion of this key question by labeling the issue a "religious" one is no more successful here than similar efforts have been with regard to other contentious social questions. Professor Whitman maintains that the abortion debate needs to include "a genuine effort to understand why each side cares so much."^{xciii} Unfortunately, her effort provides virtually no help in beginning this process.

NOTES

i. Chris Whitman, "Looking Back on *Planned Parenthood v. Casey*," 100 MICH. L. REV. 1980 (2002).

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- ii. See biographical information on Professor Christina B. Whitman at http://cgi2.www.law.umich.edu/_FacultyBioPage/facultybiopagenew.asp?ID=47.
- iii. See Jeffrey S. Lehman's foreword to this special centennial edition. 100 MICH. L. REV. 1791 (2002).
- iv. Whitman, *supra* note 1, at 1980.
- v. *Id.* at 1996.
- vi. *Id.* at 1980.
- vii. *Id.*
- viii. *Id.*
- ix. *Id.* at 1985.
- x. *Id.* at 1988.
- xi. *Id.* at 1985.
- xii. *Id.* at 1989.
- xiii. *Id.* at 1990.
- xiv. Whitman discusses these two articles: Donald H. Regan, "Rewriting *Roe v. Wade*," 77 MICH. L. REV. 1569 (1979), and Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," 90 MICH. L. REV. 1 (1991).
- xv. Whitman, *supra* note 1, at 1993.
- xvi. *Id.*
- xvii. *Id.*
- xviii. *Id.* at 1994.
- xix. *Id.*
- xx. *Id.* at 1995.
- xxi. *Id.* at 1996.
- xxii. Mary Ann Glendon, "The Women of *Roe v. Wade*," FIRST THINGS, June/July 2003, at 20.
- xxiii. *Roe v. Wade*, 410 U.S. 113 (1973).

xxiv. *Id.* at 162.

xxv. *Id.* at 163.

xxvi. *Doe v. Bolton*, 410 U.S. 179, 208 (Burger, C. J., concurring).

xxvii. *Id.* at 221 (White, J., dissenting).

xxviii. *Roe v. Wade*, 410 U.S. at 164.

xxix. *Id.* at 165.

xxx. *Bolton*, 410 U.S. at 192.

xxxi. See Mary Ann Glendon, *Abortion and Divorce in Western Law* (1983), p. 22. See also Dennis J. Horan & Thomas J. Balch, "Roe v. Wade: No Justification in History, Law, or Logic" in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts*, ed. Dennis J. Horan, Edward R. Grant, and Paige C. Cunningham (1987), pp. 59-60 (citing authorities).

xxxii. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

xxxiii. *Id.* at 783-784 (Burger, C.J., dissenting).

xxxiv. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

xxxv. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

xxxvi. *Id.* at 876.

xxxvii. *Id.* at 926-939 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

xxxviii. Whitman, *supra* note 1, at 1981.

xxxix. Whitman, *supra* note 1, at 1980.

xl. *Planned Parenthood v. Casey*, 505 U.S. at 879.

xli. *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 164-165 (1973)).

xlii. *Id.* at 992 (Scalia, J., concurring in part and dissenting in part).

xliii. *Id.*

xliv. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

xliv. Whitman, *supra* note 1, at 1988.

xlvi. See Whitman, *supra* note 1, at 1987 & n. 33.

xlvii. Whitman, *supra* note 1, at 1995.

xlviii. *Id.*

xlix. *Id.* at 1980.

l. The Court also relied on the view that the Nebraska statute might apply to D & E abortions as well as to D & X abortions and that therefore the statute created an undue burden on the right to abortion. As the dissents explained, this reading of the statute was not persuasive. See *Stenberg v. Carhart*, 530 U.S. 914, 972-979 (2000) (Kennedy, J., dissenting); *id.* at 983-1005 (Thomas, J., dissenting). Justice O'Connor's opinion primarily rests on the health exception point, which Professor Whitman notes.

li. *Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting).

lii. The Alan Guttmacher Institute, "State Facts About Abortion: Pennsylvania," at <http://agi-usa.org/pubs/sfaa/pennsylvania.html>.

liii. See *id.*; also The Alan Guttmacher Inst., "Trends in Abortion in Pennsylvania, 1973-2000" at http://agi-usa.org/pubs/state_ab_pt/pennsylvania.pdf.

liv. *Id.* In addition, a New York Times article recently claimed that the decline in abortions is "largely because of a steady decrease among teenagers...who are avoiding pregnancy through birth control or abstinence." Kate Zernike, "30 Years After Roe v. Wade, New Trends but the Old Debate," N.Y. TIMES, Jan. 20, 2003, at A1. A National Right to Life committee analysis of teenage abortions attributes the decline in part to increasing pro-life sentiment among teenagers. Randall K. O'Bannon, "Teen Abortions Drop to Lowest Number Since Roe, 1999 Figures Show," National Right to Life website, at http://www.nrlc.org/news_and_views/May03/nv052103.html (May 21, 2003).

lv. *Women's Med. Prof'l Corp. v. Taft*, 162 F.Supp.2d 929 (S. D. Ohio 2001).

lvi. Whitman, *supra* note 1, at 1988.

lvii. OHIO REV. CODE ANN. § 2919.151(B)-(C) (2000).

lviii. *Women's Med.*, 162 F. Supp.2d at 962.

lix. *Id.* at n. 31.

lx. Whitman, *supra* note 1, at 1980.

lxi. *Id.* at 1991-1993.

lxii. *Id.* at 1990, 1992-1993.

lxiii. In addition to the book noted below, see Theresa Burke with David C. Reardon, *Forbidden Grief: The Unspoken Pain of Abortion* (2002); David C. Reardon, *Aborted Women, Silent No More* (1987) (2002).

lxiv. Elizabeth Ring-Cassidy & Ian Gentles, *Women's Health After Abortion: The Medical and Psychological Evidence* (2002).

lxv. *Id.* at 1.

lxvi. See www.abortionbreastcancer.com.

lxvii. Ring-Cassidy & Gentles, *supra* note 64, at 3.

lxviii. *Id.* at 3.

lxix. *Id.* at 1 (noting this controversy).

lxx. See www.poorchoice.org. See also www.afterabortion.org, www.afterabortion.com, www.womendeservebetter.com, www.helpafterabortion.com, www.hopeafterabortion.com, and www.rachelsvineyard.org.

lxxi. Whitman, *supra* note 1, at 1980.

lxxii. John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *YALE L. J.* 920, 934 (1973).

lxxiii. *Id.* at 934-935.

lxxiv. Whitman, *supra* note 1, at 1994.

lxxv. *Id.*

lxxvi. *Id.* at 1993.

lxxvii. *Id.*

lxxviii. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

lxxix. Whitman, *supra* note 1, at 1995.

lxxx. *Roe v. Wade*, 410 U.S. at 162.

lxxxii. *Id.* at 162. See Richard S. Myers, “An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching,” 72 U. DET. MERCY L. REV. 771, 783 (1995) (discussing this point).

lxxxiii. I have discussed this argument in several earlier articles, see Richard S. Myers, “The United States Supreme Court and the Privatization of Religion,” 6 CATH. SOC. SCI. REV. 223 (2001); Richard S. Myers, “Same-Sex ‘Marriage’ and the Public Policy Doctrine,” 32 CREIGHTON L. REV. 45 (1998); Richard S. Myers, “The Supreme Court and the Privatization of Religion,” 41 CATH. U. L. REV. 19 (1991); Richard S. Myers, “The End of Substantive Due Process?,” 45 WASH. & LEE L. REV. 557 (1988), and this discussion is drawn from that earlier treatment.

lxxxiv. Richard S. Myers, “The Supreme Court and the Privatization of Religion,” 41 CATH. U. L. REV. 19, 61 (1991).

lxxxv. Richard S. Myers, “The United States Supreme Court and the Privatization of Religion,” 6 CATH. SOC. SCI. REV. 223, 229 (2001).

lxxxvi. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

lxxxvii. *Id.* at 566 (Stevens, J., concurring in part and dissenting in part).

lxxxviii. *Id.* at 566-567 (footnote omitted).

lxxxix. *Boy Scouts of America v. Dale*, 120 U.S. 640 (2000).

lxxx. *Id.* at 699 (Stevens, J., dissenting).

lxxxi. *Id.* at 700 (Stevens, J., dissenting). See Richard S. Myers, “The Supreme Court and the Privatization of Religion,” 41 CATH. U. L. REV. 19, 60 n. 232 (1991) (noting that Justice Stevens seems to be hostile to religion). See also Robert F. Nagel, “Justice Stevens’ Religion Problem,” FIRST THINGS, June/July 2003, at 9.

lxxxii. Richard S. Myers, “Same-Sex ‘Marriage’ and the Public Policy Doctrine,” 32 CREIGHTON L. REV. 45, 63-64 (1998).

lxxxiii. Michael W. McConnell, “Five Reasons to Reject the Claim That Religious Arguments Should be Excluded from Democratic Deliberation,” 1999 UTAH L. REV. 639, 656-657.

lxxxiv. Whitman, *supra* note 1, at 1996.