

# Texas Law Review

## *See Also*

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Response

### Abortion in a Post-Truth Moment: A Response to Erwin Chemerinsky and Michele Goodwin

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*Through Obamacare, the current Administration has promoted the notion of abortion as healthcare. We, however, affirm the dignity of women by protecting the sanctity of human life. Numerous studies have shown that abortion endangers the health and well-being of women, and we stand firmly against it.* GOP Platform, 2016.<sup>1</sup>

In *Abortion: A Woman's Private Choice*,<sup>2</sup> Erwin Chemerinsky and Michele Goodwin respond to the crisis of abortion rights in our current political moment. While preserving the right to abortion is an ongoing challenge for reproductive-justice advocates and lawyers, the arrival of a new Republican administration led by Donald Trump and a Republican majority in the House and Senate heightens these concerns. The Republican Party Platform is plainly anti-abortion. As highlighted by Chemerinsky and Goodwin, it mentions abortion over thirty times often in reference to defunding abortion services and limiting access to abortion.<sup>3</sup>

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1. *Republican Platform 2016*, REPUBLICAN NATIONAL COMMITTEE (2016) [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) [<https://perma.cc/8LDY-LAT5>] (emphasis added).

2. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEXAS L. REV. 1189 (2017) [hereinafter *Private Choice*].

3. *See, e.g.*, REPUBLICAN NATIONAL COMMITTEE, *supra* note 1, at 13 (“We oppose the use of

The anti-abortion thrust of the new administration should come as no surprise given the success of state-level Republican efforts to push a variety of laws that have served to disenfranchise women's access to abortion including Targeted Regulation of Abortion Providers (TRAP).<sup>4</sup> As Justice Ginsburg described in her *Whole Women's Health v. Hellerstedt*<sup>5</sup> concurrence, TRAP laws "do little or nothing for health, but rather strew impediments to abortion."<sup>6</sup> Chemerinsky and Goodwin further note that perhaps the most worrying factor for abortion rights supporters is the potential vacancy of three Supreme Court seats during the Trump administration, which would likely be filled by anti-abortion conservatives.<sup>7</sup> In the face of ongoing and new threats to abortion access, Chemerinsky and Goodwin argue that abortion should be treated as a woman's private choice.<sup>8</sup> This reframing would prioritize the woman over her fetus and prevent the state from compelling the woman to be an incubator for a fetus. More specifically, Chemerinsky and Goodwin argue that strict scrutiny should be restored, abortions should be government funded, and informed-consent laws that discourage women from receiving abortions should be removed.<sup>9</sup>

I agree with Chemerinsky and Goodwin, as all supporters of abortion rights should. This response to their insightful essay situates their argument in a set of debates and discussions that undergird many of the logics utilized by the court to justify their choice of standard: medical, psychological, and scientific evidence on abortion. This is particularly relevant in our current moment given that congruous with the rise of Trump, and the larger victory of the Republican Party, that Chemerinsky and Goodwin rightly worry about, came another phenomenon credited to 2016: the emergence of a "post-truth" political moment.<sup>10</sup> Oxford English Dictionary made "post-truth" the 2016 word of the year, defining it as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief."<sup>11</sup> While "post-truth"

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public funds to perform or promote abortion . . .").

4. Chemerinsky & Goodwin, *supra* note 2, at 1194 n.35.

5. 136 S. Ct. 2292 (2016).

6. *Id.* at 2321 (Ginsburg, J., concurring) (quoting Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 921 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016)).

7. Chemerinsky & Goodwin, *supra* note 2, at 1195–96.

8. *Id.* at 1197–98.

9. *Id.* at 1237–45.

10. See, e.g., William Davies, *The Age of Post-Truth Politics*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html> [<https://perma.cc/84NQ-GWJ3>] (explaining that "experts and agencies involved in producing facts have multiplied, and many are now for hire," meaning that one with "sufficient money or political clout" can "find an expert willing to endorse a fact").

11. *Word of the Year 2016 Is...*, OXFORD DICTIONARIES (2016), <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> [<https://perma.cc/T8KF-ZM9N>] (internal quotations omitted).

as a concept certainly took central stage in the 2016 election, questions of objectivity, science, and medical knowledge have played a central role in the regulatory environment around abortion for decades. Stating claims about abortion and its consequences as “truth” or “fact” frequently provides the justifications of the legal regulation of abortion—exemplified by the statement from the GOP platform at the start of this Response. In other words, many American courts and legislators have been deploying a “post-truth” logic for years to justify the move away from a woman’s choice as the key way to frame the abortion issue. Perhaps more dangerously, outside of appeals to emotion and personal belief, conservatives have actively tried to shift scientific, medical, and psychological discourse to justify their political goals.

The combination of creating an evidence base and catering to emotion has been enormously successful for conservative efforts to limit abortion access. In the abortion context, it was Justice Blackmun’s decision in *Roe*<sup>12</sup> that set the stage to make medical evidence and expertise central to judicial decision and advocacy. In his quest to decriminalize abortion, Blackmun deferred significantly to medical evidence and expertise.<sup>13</sup> This was a smart strategic move at the time. Blackmun essentially helped insulate the Court from questions of politics by moving core concerns about life, viability, and mental health to the domain of expert knowledge.<sup>14</sup> Yet, it also seemed to inspire a new movement—one in which conservatives specifically turned to generating evidence to counter progressive claims that were largely supported by medical, psychological, and scientific studies. The rise of a conservative evidentiary base and conservative advocacy helped propel forward various conservative claims despite total rejection of studies by the vast majority of researchers studying abortion.<sup>15</sup> This new conservative

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

13. See *id.* at 116–17 (stating that the Court’s task was to decide *Roe* without regard to emotion by placing emphasis on “medical and medical-legal history”).

14. I discussed this idea in an earlier article. Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85 (2015). For further discussions on the role of expertise in law and regulation, see generally DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016) and Sheila Jasanoff, *(No?) Accounting for Expertise*, 30 SCI. & PUB. POL’Y 157 (2003). For discussion on race, law and politics of science and expertise in the context of genetics and reproduction, see generally, DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE 21ST CENTURY* (2012).

15. On the issue of mental health, see *Mental Health and Abortion*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/pi/women/programs/abortion/> [<https://perma.cc/G4DL-L8EQ>]. On the issue of fetal pain, see FACTS ARE IMPORTANT: FETAL PAIN, AM. COLL. ON OBSTETRICS AND GYNECOLOGY (2013), <https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactAreImportFetalPain.pdf?dmc=1&ts=20160329T0910222828> [<https://perma.cc/6TE5-SBAY>]. On the issue of abortion and breast cancer, see *Abortion, Miscarriage, and Breast Cancer Risk: 2003 Workshop*, NAT’L CANCER INST. (JAN. 12, 2010), <https://www.cancer.gov/types/breast/abortion-miscarriage-risk> [<https://perma.cc/KBG7-8DKA>] (providing a review of studies concluding that abortion and miscarriage do not increase a woman’s subsequent risk of

knowledge base seemed to provide the justifications needed for anti-abortion politicians to push the regulation of abortion provision for medical reasons.<sup>16</sup> New “facts” travelled and were legitimated by the Supreme Court and lower courts. At times, these ideas became common sense—as famously proclaimed by Justice Kennedy in *Gonzales v. Carhart*:<sup>17</sup> “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>18</sup>

Conservative “facts” were embedded in Circuit Court decisions to justify the need for informed-consent standards—which frequently built false information into the informed consent process—as was the case in the Fifth Circuit decision *Texas Medical Providers Performing Abortion Services v. Lakey*,<sup>19</sup> or were adopted uncritically by the very legislative processes that should be considering evidence in a measured way.<sup>20</sup> The latter point was exemplified in a report of the South Dakota Task Force on Abortion that refers to the fetus as an “unborn child” defined as such from the moment of conception<sup>21</sup> and takes seriously widely critiqued claims that abortion has negative mental health consequences and causes breast cancer further enabling the passage of South Dakota’s current regressive law on abortion.<sup>22</sup>

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developing breast cancer). For a discussion on abortion politics in the scientific literature, see generally Beverly Winikoff & Wendy R. Sheldon, *Abortion: What is the Problem?*, 379 LANCET 594 (2012) (reviewing a study documenting the increase in abortions globally and a coinciding increase in unsafe abortions and arguing that abortions must become safer in countries where abortion is illegal).

16. See Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 991–92 & n.5 (asserting “the woman-protective antiabortion argument on which the ban was based continues to spread” and compiling organizations who use these types of arguments); see also Tracy-Clark Flory, *Texas Claims Abortion is Linked to Cancer – It’s Not*, VOCATIV (Dec. 6, 2016) (arguing that a pamphlet published by the Texas Health and Human Services Department that claims abortion is linked to breast cancer, depression, and death is misleading); Susan Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POLICY REV. 8 (Summer 2006) (stating “antiabortion leaders frequently assert that abortion is not only wrong, but that it harms women physically and psychologically” and citing studies that these claims are unfounded).

17. 550 U.S. 124 (2007).

18. *Id.* at 159.

19. 667 F.3d 570 (5th Cir. 2012).

20. *Id.* at 572–80 (upholding a bill that would require more stringent informed-consent provisions, noting that the requirements that a woman receive a sonogram and check her unborn child’s fetal heartbeat are routine measures in pregnancy medicine, and are viewed as “medically necessary” for the mother and fetus).

21. REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, SOUTH DAKOTA TASK FORCE 10 (2005), <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf> [https://perma.cc/D6CZ-Y8AT].

22. *Id.* at 41–47, 52; see H.B. 1166, 80th Leg., (S.D. 2005) (A South Dakota bill advocating for more stringent informed consent provisions before a woman can obtain a medical abortion.); see also Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694, 1696 (2008) (analyzing the law and politics of abortion and constitutional principles governing new challenges to *Roe v. Wade*); Reva Siegel, *Mommy*

Perhaps most ironically, conservatives seemed to gain greater sophistication on what constitutes good evidence, providing ammunition for defeating progressive claims. This is true even when the progressive claims are based on generally accepted medical evidence and practice. In *Gonzales v. Carhart*, for example, conservative groups, in an advocacy move typically reserved for progressives, claimed that physicians supporting a health exception for the intact dilation and extraction procedure did not have randomized control trials—considered the gold-standard for public health evidence—to back up the claim that it might be necessary or safer for women.<sup>23</sup> In *Stenberg*,<sup>24</sup> an earlier case also considering a ban on intact dilation and extraction, Justice Breyer found that in the face of conflicting medical opinions it is important to err on the side of caution and find for a health exception for the late-term abortion procedure,<sup>25</sup> while in *Carhart* Justice Kennedy found no need for a health exception.<sup>26</sup> Despite the more progressive outcome in *Stenberg*, the judicial analysis in both decisions legitimated claims that conservatively-generated health allegations are equal in rigor and quality to the broader evidence produced by the medical community.<sup>27</sup>

Many advocates claim that the problematic legitimation of conservative science at the Supreme Court was finally dealt a blow in *Whole Woman's Health v. Hellerstedt*<sup>28</sup> when the Supreme Court discounted the claims of the Texas Department of Health and found that the two mandated regulations—that doctors who provide abortion services must obtain admitting privileges at local hospitals no farther than 30 miles away from the clinic and every health care facility offering abortion care

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*Dearest?*, THE AM. PROSPECT (September 17, 2006), <http://prospect.org/article/mommy-dearest> [<https://perma.cc/PM6B-VMVL>] (providing a critique of a South Dakota bill that would allow abortion only “to prevent the death of a pregnant mother”) (internal quotations omitted).

23. Brief for American Association of Pro Life Obstetricians and Gynecologists (AAPLOG) et al. as Amici Curiae Supporting Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1436688, at \*21–22. *But see* the response in the Brief of Amici Curiae American Medical Women’s Ass’n, American Public Health Association, et al. in Support of Respondents, *Gonzales v. Planned Parenthood Fed’n of Am., Inc.*, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2710731, at \*3.

24. 530 U.S. 914 (2000).

25. *Id.* at 936–37.

26. *Gonzalez v. Carhart*, 550 U.S. 124, 165–67 (2007).

27. For a description of Ginsburg’s dissent, see Aziza Ahmed, *Science and Democracy: The Shifting Role of Medical Evidence and Expertise in Abortion Jurisprudence*, BALKANIZATION BLOG (Oct. 16, 2014), <https://balkin.blogspot.com/2014/10/science-and-democracy-shifting-role-of.html> [<https://perma.cc/ADN5-R2KV>] (discussing how even Justice Ginsburg’s dissenting opinion, while citing to numerous studies that disprove the assertion of a link between mental health consequences and abortion, acknowledges a growing literature claiming that there are negative mental health consequences for women who choose to have abortions). For further discussion on this point, see Ahmed, *supra* note 14, at 85–86 (arguing that the Supreme Court selectively utilizes medical expertise and evidence to liberalize or constrain abortion access).

28. 136 S. Ct. 2292 (2016).

must meet building specifications to essentially comply with guidelines to become an Ambulatory Surgical Center (ASC)—were political and not measures designed to protect the health of women.<sup>29</sup> It is unclear how this will play out. As Chemerinsky and Goodwin point out, gains for abortion rights are tenuous. With new conservative appointments to the judiciary, evidence generated and promoted by conservatives may once again be legitimated by the courts.

Revisiting the roots of abortion jurisprudence as Chemerinsky and Goodwin do in their article, alongside excavating the political coding of judicial decisions and legislation in medical evidence mandates that we take a skeptical position towards the value of debates framed in evidence and expertise and evaluate the supposed neutrality offered by expert and evidentiary vocabulary for its political underpinnings. We should pay close attention to the construction of evidence and expertise to understand how courts legitimate shifts in legal standards that impact abortion access which has made the deploying of evidence itself indeterminate, as settled facts emerge as a product of political struggle and subject them to interrogation. By remaining skeptics of expertise we can retain the critical position offered by Chemerinsky and Goodwin to solidify the right to abortion as central and fundamental to the lives of women.

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29. *See id.* at 2311 (concluding that requiring admitting privileges did not advance Texas's interest in protecting women's health because health complications during abortion procedures are exceedingly rare); Chemerinsky & Goodwin, *supra* note 2, at 1217–20 (summarizing *Whole Woman's Health* and emphasizing that a legal abortion is no more dangerous than a penicillin shot).