

## Fetal Rights in the Trump Era

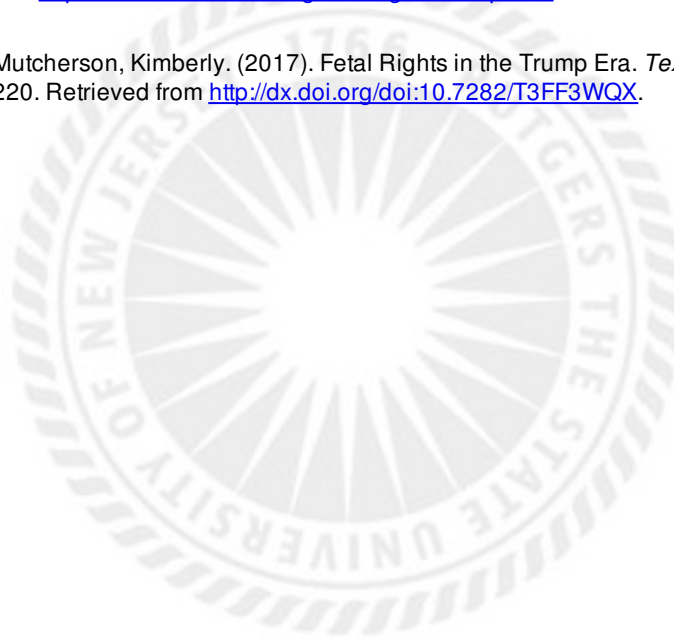
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# Texas Law Review

## *See Also*

Volume 95

Response

### Fetal Rights in the Trump Era

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The future of reproductive justice during the Trump era feels bleak to many of us who have been thinking, teaching, writing, lobbying, and agitating about issues related to contraception, abortion, childbirth choices, and parenting rights for years. Were the Supreme Court to reject constitutional protection for a woman's right to terminate a pregnancy, that decision would be one in a long line of rights denials and legally sanctioned indignities that we might see in the years to come. Like Dean Chemerinsky and Professor Goodwin's compelling piece,<sup>1</sup> this response recognizes the dangerous territory that we are entering and considers how activists, inside and outside of academia, can prepare to protect some of the vital gains that women have achieved in the passage of time since *Roe*<sup>2</sup> was decided. This piece explores how the jurisprudence of reproduction, including but not limited to abortion cases, has used and continues to use the fetus as a basis for undermining a woman's right to make choices related to pregnancy and the importance of activists remaining attuned to the dangers of fetal rights talk in the context of abortion, specifically, and reproductive justice

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\* Vice Dean and Professor of Law at Rutgers Law School (Camden location). My thanks to Michele Goodwin for inviting my participation in this special issue and to all of the advocates and activists who are fighting the good fight day after day.

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

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

generally.<sup>3</sup>

Chemerinsky and Goodwin rightly center on women in their discussion of the importance of the abortion right, but they also, quite rightly, take heed of the ways in which fetal life is used against women in the abortion context and beyond. Acts of verbal sleight of hand, like the Court's choice to use the term unborn child in *Gonzales v. Carhart*,<sup>4</sup> rather than the word fetus,<sup>5</sup> allow women to fade from view in direct proportion to a speaker's or writer's willingness or desire to elevate fetal life. And, in our technologically advanced world, the relationship to the fetus has only become more fraught as some lawmakers insist that there is no distinction between a product of conception inside of a woman's body, a fetus, and a product of conception outside of a woman's body, a child.

Expecting couples regularly share ultrasound photos of their future children while those children are in utero.<sup>6</sup> Prenatal testing and screening allows expectant parents to gather information about a future child well before he or she exists in the world outside her mother's womb and make sometimes-difficult decisions about whether a pregnancy should continue.<sup>7</sup> Fetal surgery allows highly skilled physicians to conduct surgical procedures while a future child is still gestating.<sup>8</sup>

In the realm of assisted reproduction, fertility providers can extrapolate about future children before a pregnancy even begins.<sup>9</sup> In vitro fertilization ("IVF") is a routine part of fertility practice and requires that prospective parents create extracorporeal embryos that can be frozen, sometimes for years, until such time as they are used in an attempt to create a pregnancy,

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3. I focus on the language of fetal rights and fetal protection with full knowledge that states and anti-choice activists have worked diligently and successfully in many cases over the last few decades to create woman-focused, so-called woman-protective, rationales to justify anti-abortion legislation. That these rationales actually do not serve to protect women goes without saying. See generally, Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007) (discussing the use of women-protective, anti-abortion arguments for banning abortion and their constitutional implications). My point is not to deny this clever turn of events, but to note that states and anti-choice activists continue to work on many fronts to undermine women's reproductive rights.

4. 550 U.S. 124 (2007).

5. *Id.* at 134. A fetus is "an unborn or unhatched vertebrate especially after attaining the basic structural plan of its kind; *specifically*: a developing human from usually three months after conception to birth." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

6. For a history of the ultrasound in pregnancy, see generally MALCOLM NICOLSON & JOHN E. E. FLEMING, *IMAGING AND IMAGINING THE FETUS: THE DEVELOPMENT OF OBSTETRIC ULTRASOUND* (2013).

7. For a feminist discussion of prenatal testing and its impact on pregnant women and their pregnancy choices, see generally BARBARA KATZ ROTHMAN, *THE TENTATIVE PREGNANCY: HOW AMNIOCENTESIS CHANGES THE EXPERIENCE OF MOTHERHOOD* (1993).

8. Paolo Sala et al., *Fetal Surgery: An Overview*, 69 *OBSTETRICAL & GYNECOLOGICAL SURVEY* 218, 219 (2014).

9. Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 *YALE J. HEALTH POL'Y L. & ETHICS* 283, 285 (2008).

donated to science, or discarded.<sup>10</sup> In their extracorporeal state, like in prenatal testing, these embryos can be screened for traits such as sex or genetically linked disabilities.<sup>11</sup> The ability to create embryos outside of the womb is the defining practice that undergirds “custody” disputes over frozen embryos, such as the battle between the actress Sofia Vergara and her ex-fiancé who is demanding the right to bring the embryos that they created together to life and even goes so far as to refer to them as his daughters.<sup>12</sup> He is aided in his quest by a Louisiana law that declares embryos to be juridical persons who can sue and be sued.<sup>13</sup> Our present landscape, even more so than in 1973, when *Roe* was decided, or even 1992, when *Casey*<sup>14</sup> came down, makes it increasingly difficult to separate a fetus from a live born infant, both because of technological advances and because antichoice rhetoric deliberately seeks to make this line as blurry as possible. The end result is that the debate about the relationship between a woman and the fetus she carries continually requires some articulation of why it is the woman, the actual live person, whose interests must remain paramount no matter the stage of her pregnancy, as Chemerinsky and Goodwin argue.<sup>15</sup>

Even if in the very early part of a pregnancy it is easy, and medically accurate, to speak of a fetus as simply a ball of cells that in no way resembles a baby, the argument only goes so far, as that ball of cells, if a

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10. According to the New York Times, in the United States alone, the number of frozen embryos could be as many as one million. See Tamar Lewin, *Industry’s Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html> [<https://perma.cc/GAJ6-QBB8>] (“[A] 2002 survey found about 400,000 frozen embryos, and another in 2011 estimated 612,000. Now, many reproductive endocrinologists say, the total may be about a million.”).

11. King, *supra* note 9, at 285–86.

12. Sofia Vergara and her former fiancé, Nick Loeb, are the genetic progenitors of two frozen embryos that have remained in cryopreservation since the couple ended their engagement and their relationship. The parties signed a standard contract from their fertility provider indicating that neither could use the embryos without the permission of the other. Despite the contract, Loeb had filed suit in Louisiana claiming that the embryos, named Emma and Isabella for purposes of the suit, are being denied access to a trust in their names because of Vergara’s refusal to give them a chance at life. Ruth Graham, *Sofia Vergara’s Frozen Embryos, “Emma” and “Isabella,” Are Suing Her*, SLATE (Dec. 8, 2016, 12:01 PM) [http://www.slate.com/blogs/xx\\_factor/2016/12/08/sofia\\_vergara\\_s\\_frozen\\_embryos\\_emma\\_and\\_isabella\\_are\\_suing\\_her.html](http://www.slate.com/blogs/xx_factor/2016/12/08/sofia_vergara_s_frozen_embryos_emma_and_isabella_are_suing_her.html) [<https://perma.cc/BXR9-W53N>].

13. “An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.” La. Rev. Stat. § 9:123 (2008). “As a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued.” *Id.* § 124. “An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum. If the in vitro fertilization patients express their identity, then their rights as parents as provided under the Louisiana Civil Code will be preserved. . . . A court . . . may appoint a curator . . . to protect the in vitro fertilized human ovum’s rights.” *Id.* § 126.

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

15. Chemerinsky & Goodwin, *supra* note 1, at 1224–30.

pregnancy continues and is healthy, will eventually become something that resembles the human form that we expect all people to value. Further, the ball-of-cells argument does not account for why a woman's right to determine her own reproductive future should be paramount throughout a pregnancy, not just when a fetus is not viable. As Judith Jarvis Thomson declares in her wonderful piece, *A Defense of Abortion*,<sup>16</sup> cited in the lead article, a woman's right to terminate her pregnancy does not hinge on the question of whether a fetus is a person.<sup>17</sup> Nor, frankly, does it hinge on when life begins, or whether a fetus should be considered a human being. As Jarvis does in her work, we can concede personhood (or life and status as a human being for that matter) without conceding the primacy of a woman's right to end her own pregnancy.<sup>18</sup> When Chemerinsky and Goodwin write, "Ultimately, the question is who should decide whether the fetus before viability is a human person: each woman for herself or the state legislature?,"<sup>19</sup> I don't quite agree that they are asking the right question. This is so because the status of the fetus, in the sense of where it falls along the spectrum of humanity or personhood, is not a relevant category to the larger argument about women's bodies and women's choices. Even if a fetus is a person, women are not uniquely obligated to sustain the life of another person as Jarvis's violinist thought project so aptly explains.<sup>20</sup> Instead, as I believe the authors rightly state later in their piece, the status of the fetus is relevant to whether the state might be able to require post-pregnancy termination.<sup>21</sup>

Though not explicitly described in the lead article, the necessary outcome of an abortion early in a pregnancy is the termination of fetal life (without regard to what value one puts on that life).<sup>22</sup> In later stages of pregnancy, ending a pregnancy might not necessarily involve the termination of fetal life as the fetus may be sufficiently developed so as to survive outside of the womb. In those cases, as hinted at in the lead article, the woman's right to no longer be pregnant is satisfied when the pregnancy terminates and the next question would be whether the right to terminate her pregnancy is accompanied by a right to demand the demise of the fetus. In a world in which abortion rights appear to be entering an ever-more-precarious state, the question of what exactly the right to terminate a pregnancy means is one for which those of us who are pro-choice will want to have clear answers.

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16. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

17. *Id.* at 48.

18. *Id.* at 48, 58–59.

19. Chemerinsky & Goodwin, *supra* note 1, at 1227.

20. See Thomson, *supra* note 16, at 48–50 (comparing the abortion decision to that of a person who awakens to find himself medically attached to a sick violinist whose life depends on the unpermitted and prolonged use of the attached person's kidneys).

21. Chemerinsky & Goodwin, *supra* note 1, at 1234.

22. To be clear, I have no problem conceding that a fetus is a living being.

At base, the right to terminate a pregnancy means the right not to be forced by the state to be an incubator in the way that Chemerinsky and Goodwin describe.<sup>23</sup> And, if the state chooses to support and subsidize childbirth, then as a neutral party, it must also support and subsidize a woman's decision to terminate her pregnancy, which supports the unconstitutionality of state and federal laws that refuse to provide funding for poor women who seek abortions.<sup>24</sup> But, given that technology now allows for babies to be delivered well before full term and survive,<sup>25</sup> albeit not without some measure of impairment in many cases, it is worthwhile to ponder what kind of legislation a state might produce if forced by the Constitution to allow pregnancy termination past the point of viability even where abortion was not necessary to save the life or health of the mother. In those cases, I surmise that the state would substitute abortion bans with laws that required terminations to take place in a setting that would maximize opportunities for the best outcome for a viable fetus that a pregnant woman no longer wished to gestate. This could mean requiring such terminations to take place in a hospital with access to all of the tools necessary in a neonatal setting to sustain the life of a very prematurely delivered infant, including the presence of experts in neonatal care—a requirement that would add tremendous expense to the pregnancy-termination procedure.

Beyond the pressures that such a rule would create on accessing abortion, one imagines that the woman's experience of the termination procedure would shift under the pressure of such a change of law. Specifically, a woman who may have opted to avoid genetic parenthood or at least genetic parenthood of this particular child<sup>26</sup> may find herself in the

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23. Chemerinsky & Goodwin, *supra* note 1, at 1232–33.

24. *Id.* at 1238–44.

25. In a study of infants born between 23–28 weeks of gestation and between 1993–2012 at Neonatal Research Network Centers, researchers found significant increases in survival rates to discharge “for infants born at 23, 24, 25, and 27 weeks, with the largest gains for those born at 23 and 24 weeks.” Barbara J. Stoll et al., *Trends in Care Practices, Morbidity, and Mortality of Extremely Preterm Neonates, 1993-2000*, 314 J. AM. MED. ASS'N 1039, 1045 (2015). Of course, survivability is a single measure and survivability without major morbidity is another important data point that varied by gestational age:

Although 6% (99 of 1550) infants born at 22 weeks survived to discharge, only 5 survived without major morbidity. However, an increase of approximately 2% per year was seen among infants born between 25 and 28 weeks . . . . By 2012, more than half of infants born at 28 weeks who survived to discharge survived without major morbidity.

*Id.*

26. I draw this distinction for two reasons. First, I focus on genetic parenthood because it may well be the case that women in this position would be assured no parental obligations for the child sustained without their consent, so that the issue would not be an obligation to care for a child but simply knowing that a child exists in the world to whom the woman is a genetic parent. Second, most women who have abortions are already parents. In fact, existing children are often a reason why women opt for pregnancy termination. In that case, the woman would be choosing abortion not to avoid parenthood at all, but to avoid becoming a parent to this particular child.

difficult position of now having a child in the world in circumstances that she deliberately did not want. It is not clear to me whether Chemerinsky and Goodwin's thoughts about privacy and abortion would extend beyond the choice of termination to a choice about whether to be a genetic parent.<sup>27</sup> And, if so, how they would justify extending the right.

I hope that this discussion does not read as a typical law review thought experiment in search of an actual difficult dilemma to process. The underlying premise of the issue that I raise here is one that could become all too real. Even now, the plaintiff who prevailed in *Whole Woman's Health*<sup>28</sup> and several new plaintiffs are pursuing litigation against the state of Texas challenging regulations that would require burials for aborted fetuses, including those lost through spontaneous abortion (miscarriage),<sup>29</sup> once again highlighting how the focus on fetuses, even a fetus that has been terminated, is a compelling and too often successful way to justify denying rights to pregnant women, and ultimately all women. While Texas officially claims that the proposed regulation pertaining to the disposal of fetal tissue is meant to protect the public health and safety, without giving any explanation of how the regulations achieve that goal, other public declarations about the law's purpose make clear that the goal is to protect "unborn life" and promote respect for the sanctity of such life achieved in this case by making it more difficult for women to access abortion services.<sup>30</sup>

The 2016 Supreme Court victory in *Whole Woman's Health* I beat back a certain variety of targeted regulation of abortion providers (TRAP) laws, specifically sham admitting-privileges and surgical-center requirements purporting to protect the health of women receiving abortions.<sup>31</sup> However, the need for *Whole Woman's Health* II makes clear that abortion foes will continue to use all tools at their disposal to make it ever more difficult—and, in some cases, impossible—for women to safely end their pregnancies, resulting in the births of more children born to reluctant or unwilling mothers or more women injuring themselves through attempts to self-induce abortions. The abortion debate hinges on a fight not

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27. See generally I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008) (arguing for a waivable right not to be a genetic parent, especially in the case of disputes over embryos).

28. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

29. Complaint at 1–3, *Whole Woman's Health v. Hellerstedt*, (W.D. Tex. 2016) (No. 1:16cv1300).

30. *Id.* at 10–11; see also 41 Tex. Reg. 9732–41 (Dec. 9, 2016) (adopting rules to amend 25 TEX. ADMIN. CODE §§ 1.132–1.137); Samantha Schmidt, *After Months of Controversy, Texas Will Require Aborted Fetuses to Be Cremated or Buried*, WASH. POST (Nov. 29, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/29/despite-months-of-outcry-texas-will-require-aborted-fetuses-to-be-cremated-or-buried/?utm\\_term=.d119609c9fa1](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/29/despite-months-of-outcry-texas-will-require-aborted-fetuses-to-be-cremated-or-buried/?utm_term=.d119609c9fa1) [https://perma.cc/LU4Z-8MEU] (quoting state senator Don Huffines as supporting the regulation and saying, "For far too long, Texas has allowed the most innocent among us to be thrown out with the daily waste . . . Life begins at conception.").

31. *Whole Woman's Health*, 136 S. Ct. at 2300.

just about the role of women in society and the breadth of women's rights to make decisions about the uses to which they will put their bodies, but also about the way to value, if at all, the existence of a fetus. Challenges to abortion rights rooted in the language of fetal protection are formidable and they are difficult to surmount. In the present political climate, we should prepare for the pendulum to turn away from woman-protective rationales for abortion restrictions and back to a focus on the fetus. The Texas fetal burial rule is on par with other attempts to conflate all products of conception, including embryos, as no different from the women who gestate them. It is the task of all of us who believe deeply in reproductive justice, including but not limited to the right to abortion, to continue to think deeply and creatively about how to shape our advocacy in ways that successfully counter appeals to fetal rights.