

## Whole Woman's Health's Unexpected Win for Science



Rally in front of the Supreme Court during the *Whole Woman's Health v. Hellerstedt* hearing on March 2nd, 2016. Photo: Victoria Pickering via Flickr. License: <https://creativecommons.org/licenses/by-nc-nd/2.0/>.

In June 2016, the Supreme Court struck down a Texas anti-abortion TRAP (Targeted Regulation of Abortion Providers) law that threatened to shutter all but a handful of the state's clinics by requiring them to meet costly ambulatory surgical center standards and for their doctors to obtain admitting privileges at local hospitals.

The law, known as Texas Senate Bill 5, was an example of how the anti-abortion movement has used false scientific claims to incrementally cut off abortion rights. Americans United for Life (AUL), a "bill mill" that provides anti-abortion model legislation for conservative lawmakers,<sup>1</sup> recommends these restrictions under the guise of its "Women's Protection Project," which deploys false claims about women's health to enact medically unnecessary regulatory obstacles that force many clinics to close.<sup>2</sup> (Meeting detailed ambulatory surgical standards, for instance, would require prohibitively expensive renovations for most reproductive health clinics without improving quality of care. And requiring hospital admitting privileges presents a particularly absurd catch-22, since some hospitals only grant privileges to doctors regularly needing to hospitalize patients—a rarity for abortion providers.<sup>3</sup>) This has been an effective tactic; by the time of the *Whole Woman's Health* ruling, at least 18 clinics in Texas had closed due to the

law's requirements.<sup>4</sup>

Prior SCOTUS decisions upholding abortion restrictions deterred advocates from attempting legal challenges to much of the legislation chipping away at reproductive rights. But this time, the Supreme Court delivered a significant victory. Writing the majority opinion in *Whole Woman's Health v. Hellerstedt*, Justice Stephen Breyer rejected the lower court's argument "that legislatures, and not courts, must resolve questions of medical uncertainty," such as whether Texas' restrictions were medically warranted. Ironically, Breyer's opinion built on case law established by a prior ruling that upheld restrictions on abortion access, but which also established that the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."<sup>5</sup>

Beyond protecting the rights of Texas women, with this ruling Breyer established a new standard: no longer would the courts turn a blind eye while conservative state legislators use junk science and specious claims about women's health to circumvent the prohibition enshrined in *Roe v. Wade* on creating an "undue burden" to abortion access.

It's been a longstanding right-wing tactic to deploy false evidence to support TRAP laws such as the one at stake in *Whole*

*Woman's Health*, and to misleadingly claim that there is scientific uncertainty around an issue or procedure by putting forward its own dubious research. Writing for *The Public Eye* a decade ago, Pam Chamberlain concluded that advocates of "Biased, Agenda-Driven" science should be seen as "efficient cogs in the machinery that drives the current movement to limit women's reproductive health and freedom."<sup>6</sup> Devoted to undermining medical evidence as "fraudulent," anti-abortion scientists substitute their own discredited "facts": for instance, the persistent claim that abortion causes breast cancer, which disregards the findings of multiple large-scale peer-reviewed studies and conclusions from the American Cancer Society and the National Cancer Institute.<sup>7</sup>

This right-wing research almost never makes it into peer-reviewed journals that screen for flaws in methodology or analysis that yield biased results. For instance, the American Cancer Society details the methods of rigorous studies on abortion and breast cancer, explaining how factors such as recall bias, in which "women with breast cancer are more likely to accurately report their reproductive histories, including a history of having an abortion," can produce the appearance of a link where none exists.<sup>8</sup> In a rare case in which a study claiming a link between abortion and mental illness successfully passed itself off as legitimate, journal editors later discovered significant errors that led them to disavow the finding as unsupported by the data.<sup>9</sup> So when scientists talk about reaching "scientific consensus," they mean findings supported by overwhelming agreement from peer-reviewed sources and experts—not from a proliferation of illegitimate, ideologically-driven studies.

But that's not the way "science" is being used in making anti-abortion law. The National Right to Life Committee (NRLC) coined the incendiary nonmedical term "partial-birth" abortion to help pass a federal ban on a late-term proce-

dures.<sup>10</sup> The resulting 2003 Act asserted, "A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."<sup>11</sup> Reproductive rights advocates challenged the ban in *Gonzales v. Carhart* for denying access to a standard late-term abortion practice, intact dilation and extraction (intact D&E, also known as D&X) without an exception to protect women's health.

In explaining the *Carhart* decision, which upheld the ban, swing vote Justice Anthony Kennedy assumed (admitting he lacked "reliable data") that some women suffer regret and depres-

sion after abortion and would "struggle with grief more anguished and sorrow more profound" upon learning details of the procedure. This concern suggests the influence of a popular piece of anti-abortion science, "Post-Abortion Stress Syndrome," a condition not recognized by the American Psychological Association or American Psychiatric Association in which women are supposedly traumatized by regret.<sup>12</sup> Kennedy further wrote, "There is documented medical disagreement [on] whether the Act's prohibition would ever impose significant health risks on women...The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."<sup>13</sup>

However, as a press release from the American Congress of Obstetricians and Gynecologists pointed out at the time, this was not in fact an area of medical uncertainty. Rather, the release explained, "This decision discounts and disregards the medical consensus that intact D&E is safest and offers significant benefits for women suffering from certain conditions that make the potential complications of non-intact D&E especially dangerous."<sup>14</sup> In affirming the unfounded argument offered by the ban's defenders regarding "scientific uncertainty," the Court set a disheartening precedent for reproductive rights advocates—and provided encouragement for anti-abortion advocates seeking to undermine the meaning of scientific uncertainty by stacking their own flawed studies against peer-reviewed research. NRLC argued in a January 2015 memo that *Carhart* would support their new legislative focus, the "Unborn Child Protection from Dismemberment Abortion Act," which again used nonmedical terminology to stir emotion while obfuscating the actual practice being restricted—dilation and evacuation, the non-intact D&E procedure that *Carhart* pointed to as a sufficient alternative.<sup>15</sup> The NRLC aims to appeal to Justice Kennedy's apparent personal discomfort with abortion with

this as well as another legislative focus: 20-week abortion bans that are based on an alleged fetal capacity for pain, despite medical evidence to the contrary.<sup>16</sup>

The recent decision in *Whole Woman's Health*, though, breathes meaning back into science and cracks the foundation of the right-wing strategy of using manipulative, junk research. The ruling immediately thwarted efforts to maintain similar TRAP laws in Alabama, Mississippi, and Wisconsin.<sup>17</sup> In August, the Center for Reproductive Rights (CRR), whose lawyer Stephanie Toti argued the *Whole Woman's Health* case, threatened legal action if Texas enacts legislation based on a new AUL model bill that would require abortion providers to bury or cremate aborted fetuses. This measure is intended to raise clinic costs by claiming ludicrous public health risks (like HIV contamination of the water supply) and using manipulative rhetoric about fetal dignity.<sup>18</sup> A CRR press release stated: "the regulations offer no public health or safety benefit and therefore fly directly in the face of

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the Supreme Court's decision in *Whole Woman's Health v Hellerstedt*.<sup>19</sup>

The *Whole Woman's Health* decision and the reasoning given for it provided an energizing victory not just for reproductive rights and justice supporters, but more broadly for policy grounded in rigorous, evidence-based science. The Right relies on biased science in other areas as well, such as abstinence-only education or denying transgender rights. *Whole Woman's Health* has already motivated lower courts to strike down voting restrictions that are based on "mostly phantom election fraud."<sup>20</sup>

The impact of the assault on science goes beyond the courts and legislative arena to influence conservative movement mobilization as well. From the 72 percent of Republicans who deny human causes of climate change to the 40-odd percent of Americans who believe in creationism over evolution, the confident dismissal of reputable scientific sources is a core part of the U.S. right-wing identity today.<sup>21</sup> In studying the persistence of climate change doubt in the face of 97 percent scientific consensus,<sup>22</sup> Yale University professor Dan Kahan found that "people tend to use scientific knowledge to reinforce beliefs that have already been shaped by their worldview."<sup>23</sup>

Right-wing organizations can take advantage of this disposition by broadcasting misinformation suited to their agenda. For example, at the July 2016 NRLC convention, one workshop promised to expose the fraud behind "a cold, callous, commercial abortion and aborted baby parts trafficking chain"—an attack on Planned Parenthood, which was falsely portrayed as selling fetal tissue in manipulated footage released in 2015 by the Center for Medical Progress, an anti-abortion group presenting itself as a legitimate medical watchdog organization.<sup>24</sup> (The workshop was led by Ryan Bomberger, co-founder of The Radiance Foundation, infamous for putting up billboards claiming that abortion is a

form of "black genocide."<sup>25</sup>)

These approaches may be based on fabrications, but they serve their function well: energizing believers and providing an enemy—the "fraudulent" scientific establishment—to rally against. And sometimes, a justification to go further. As former PRA analyst Chip



Planned Parenthood protest in Washington, D.C. Photo: American Life League via Flickr. License: <https://creativecommons.org/licenses/by-nc/2.0/>.

Berlet has written, "coded" rhetoric in which leaders rely on demonization and conspiracy theories often helps incite "scripted violence," where leaders can engender a violent response from followers without technically calling for an attack.<sup>26</sup> When violence occurs, the broader movement can dismiss the perpetrator as mentally disturbed or a lone wolf. (Some commenters have referred to this psychological phenomenon as "stochastic terrorism."<sup>27</sup>)

Although multiple Republican-led investigations of Planned Parenthood following the "fetal tissue" videos failed to yield evidence of wrongdoing (and one actually indicted the video producers instead), blockades, threats, and

violence targeting abortion providers increased.<sup>28</sup> In November 2015, three people were fatally shot at a Colorado Springs Planned Parenthood.<sup>29</sup> The confessed shooter stated his belief that Planned Parenthood sold "baby parts" as motivating the attack.<sup>30</sup>

These attacks demonstrate the uniquely dangerous confluence of false science and coded rhetoric in the movement against abortion rights. Illegitimate science has provided an effective tool to conservatives in blocking vital policy initiatives—even life-saving policies at a global scale, as with climate change. In addition to endangering women's health by abridging reproductive rights, the tenor of anti-abortion science creates a further hazard of imminent violence against reproductive health providers and bystanders.

Despite *Whole Woman's Health's* stand for scientific integrity, the Right won't readily abandon a strategy that's long helped it mobilize supporters and pass legislation. Anti-abortion advocates hold out hope that many restrictions will continue to pass constitutional muster and tout the importance of the next Supreme Court nominee. Meanwhile, AUL and NRLC continue to offer a large repertoire of model bills based on junk science,<sup>31</sup> from the 20-week

"fetal pain" bans, to requiring doctors to read scripts fabricating risks from abortions, to banning telemedicine services for rural areas only for abortion and not other medical care.<sup>32</sup> Until they're brought under court scrutiny, laws undermining reproductive rights based on misinformation and fraudulent science will stand across the country. ☹

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