The Courts and Women's Health

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Abstract

The Supreme Court decision upholding the constitutionality of the Affordable Healthcare Act will have a profound impact on the accessibility of health care. The requirements that insurers may not discriminate on the basis of pre-existing conditions or gender and that preventive health care and contraception costs must be included in coverage are just two features of particular importance to women. Decisions such as the 1993 *Daubert v. Merrell Dow Pharmaceuticals*, while perhaps initially viewed as not helpful, have clarified evidence standards in ways that are ultimately beneficial to all those seeking fair treatment by the courts and in fact emphasize the importance of statistical analysis. On the other hand, a series of decisions involving patent protection and liability of generic drug manufacturers presents a mixed case of support for women's health concerns.

Key Words: Reproductive rights, employment discrimination, health and safety, statistics and law

1. The Role of Courts

In the United States we have three constitutionally proscribed branches of government: legislative, executive and judicial. The roles of each are broadly described in the Constitution, with the details of their jurisdictions having evolved over the years. Similarly, in the federal system there are analogous powers and responsibilities at the state level. Briefly, Congress and state legislatures can pass laws; the executive branches of the federal and state governments can implement (or fail to implement) these laws. Courts have a dual judicial role: to decide whether a law has been followed or broken, but also to determine whether a law is constitutional, under either the U.S. Constitution or the constitutions of the states (special considerations govern the District of Columbia, Puerto Rico and other territories that are under U.S. jurisdiction).
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2. Areas of Judicial Impact on Women's Health

There are four lines of decisions that are particularly noteworthy in their impact of women's health:

Reproductive rights,
- Abortion
- Pregnancy

Employment and education rights
- Protective legislation

Access to employment and education
Compensation
Social security
Pensions
Safety
Devices and medication
Assault

General health
Access to health services
Cost of health services

2.1 Background to sex and the Supreme Court

In general, gaining equal rights has been an important aspect of improving the health of women. Absent education to know what is important for good health and how to achieve it and employment to provide the means to do so, progress would be slight. There is a series of significant decisions that establish (or don't) the rights of women as citizens, beginning with

875 *Minor v. Happersett,* 88 U.S. 162.

This ruling that women do not have a federally established right to vote was based on an interpretation of the Privileges and Immunities Clause of the 14th Amendment. The Court held that while Minor was a citizen of the United States, the constitutionally protected privileges of citizenship did not include the right to vote. The 14th Amendment, one of the post-Civil War guarantees of rights specifically guarantees all male citizens the right to vote.

1920 *19th Amendment of the U.S. Constitution*

Some 45 years after *Minor* the 19th Amendment was adopted: *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.*

1971 *Reed v. Reed,* 404 U.S. 71

For the first time the U.S. Supreme Court found a law that discriminates against women to be unconstitutional; the law gave preference in estate administration to males.

After this breakthrough, it looked as if the Court, and perhaps the country, was recognizing the rights of women and in 1972 the *Equal Right Amendment* was introduced in Congress, only to fail 10 years later as not enough states ratified it.

ERA: *Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*

1975 *Taylor v. Louisiana,* 419 U.S. 522

But progress continued in the courts with the decision that mandated that women must be treated equally with men in jury service. The Court applied a less stringent test to cases involving sex than those involving race; however, in

1973 *Frontiero v. Richardson,* 411 U.S. 677

a plurality (but not the majority) applied *strict scrutiny* to rule unconstitutional a regulation that gave spouses of female military personnel lesser rights than those granted to spouses of males. This, of course, applied at the time only to heterosexual unions.

1976 *Craig v. Boren,* 419 U.S. 190

Intermediate scrutiny was applied to invalidate an Oklahoma law that called for differential drinking ages (18 for women, 21 for men). The *rational basis* offered by the state was that it was men who would drive, not women, so it was important to keep young males from drinking (3.2 beer or anything stronger) until the more mature age of 21. Perhaps the Court might have found this a rational basis for the law, but it applied a high level of scrutiny to find it unconstitutional. It did not appear to the Court that the law in question was substantially related to the objective of road safety. While the discrimination in *Frontiero* could be said to be against women, in this case it was clear that only men benefitted from the court's opinion.

Briefly, here are the judicial standards for scrutiny as to the constitutionality of a law or regulation"

Rational basis: must be rationally related to a legitimate government interest

Intermediate scrutiny: must advance an important government interest by means that are substantially related to that interest

Strict scrutiny: the purpose, objective, or interest being pursued by the government must be "compelling." Also, the means to achieve the purpose, objective, or interest must be "narrowly tailored" to the accomplishment of the that purpose , objective, or interest, with no less restrictive means that would accomplish the government's objective just as well. (applied, e.g., to 1st Amendment content issues or race).

2.2 Reproductive rights

In 1942, the Court in *Skinner v. Oklahoma*, 316 U.S. 535, found that forced sterilization violated the fundamental right to choose to have children. In the first of the "right to choose" not to have children (or at least when not to have them) cases, *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court found Connecticut's prohibition on contraceptives for married couples to be a violation of fundamental marriage rights.

The case that found restrictive anti-abortion laws to violate the privacy right found in the "penumbra" of the Constitution, *Roe v. Wade,* 410 U.S. 113 (1973) continues to be the basis of the "right to choose," although subsequent cases have chipped away at it.

As to the treatment of pregnancy, there was an evolution from the 1974 *Geduldig v. Aiello*, 417 U.S. 494, and *General Electric v. Gilbert,* 429 U.S. 125, the following year, that found that denial of pregnancy-related health benefits constituted discrimination between pregnant and non-pregnant persons rather than against females, but one brought about by legislation. The 1978 *Pregnancy Discrimination Act* amended Title VII of the Civil Rights Act to require pregnancy and childbirth costs to be covered if other conditions were in employer benefit plans. Five years later, *Newport News Shipbuiolding Co. v. EEOC,* 462 U.S. 669, made clear the spouses must be covered equally.

2.3 Sex discrimination in employment

The relevant federal laws are the 1983 *Equal Pay Act,* which mandates equal pay for jobs requiring equal skills, effort, and responsibility performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex.. Obviously, there are very large loopholes in this legislation. The following year sex was added to protected categories along with race, color, religion and national origin, basically as an afterthought by members of Congress hoping to scuttle Title VII of the Civil Rights Act.

There are two kinds of discrimination covered by Title VII: disparate treatment and disparate impact. The latter is particularly important to statisticians because it must be shown that a facially neutral employment criterion has an adverse impact on a protected group – which needs to be shown by means of statistics. The first case in which the Supreme Court established that Title VII applied to disparate impact was

1971 *Griggs v. Duke Power Co., 401 U.S. 24.*

When the power company could no longer exclude blacks from employment as "line men," they instituted the requirement of high school graduation for the job. The plaintiffs showed that this had an adverse impact on blacks in the state of

North Carolina and that previously whites who were not high school graduates had been perfectly competent in the job.

Title VII applies to employment benefits including retirement, and the Court in

1983 *Arizona Governing Committee v. Norris,* 463 U.S. 1073

held that the argument that women on average live longer than men was not a justification for paying them less in monthly retirement benefits, in particular since the majority of men and women are "similarly situated" with respect to longevity and hence should be treated equally.

A series of cases expanded the scope of Title VII coverage:

1984 *Hison v. King & Spaulding,* 467 U.S. 69

determined that partnerships are employers subject to its provisions, while

1986 *Meritor Savings Bank v. Vinson,* 477 U.S. 57

held that sexual harassment constitutes sex discrimination as does sex stereotyping according to

1989 *Price Waterhouse v. Hopkins,* 490 U.S. 228

It is worth noting that the United States has failed to ratify the United Nations *Convention to End All Forms of Discrimination Against Women (CEDAW),* which would broaden protection to some extent, covering, for example, equal pay for "comparable work" as well as for "equal work," This concept has been strenuously opposed by many members of Congress, employers, etc.

Women's rights suffered a set-back with the 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618. The Court held that continued discrimination in the form of unequal pay was not actionable unless reported within the statute of limitations after the first discriminatory pay check. The, as in the case of pregnancy benefits, led to Congressional action to overcome the limitation on equity that the decision marked. In 2009 Congress passed what is known as the *Lilly Ledbetter Fair Pay Act,* to honour the plaintiff in the case.

In *Wal-Mart Stores v. Dukes,* 131 S. Ct. 2541 (2011), the Supreme Court forecast that it will be increasingly difficult to put together class-action suits such as have in the past assisted women to achieve employment equity.

There were two decisions in June 2013 that also limited the ability of women to obtain legal redress for employment discrimination. *Vance v. Ball State University* limits the definition of "supervisor" to those who have the power to hire and fire.

Were it not for a general deadlock in Congress over any legislation, a Congressional override like the Ledbetter act might occur. *University of Texas Southwestern Medical Center v. Nassar* established a "but for" standard in retaliation claims, making it much more difficult for plaintiffs to succeed.

2.4 Protective statutes

So-called "protective" legislation and practices as far back as the 19th century have tended to limit women's employment opportunities – few as drastic as that found discriminatory in the lower court decision

1983 *Christman v. American Cynamid,* 578 F. Supp. 63 (W.D.WVA).

The employer forced women to be sterilize in order to be employed in certain jobs, jobs which were later abolished. Less dramatic but also discriminatory, the practice of denying employment on the basis of potential childbearing was found to violate Title VII:

1991 *UAW v. Johnson Controls,* 499 U.S. 187.

2.5 The right to education

Title IX of the Education Amendments of 1972 says

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

1984 *Grove City College v. Bell,* 465 U.S. 555

Established that all of an institution's programs are covered if any federal funds at all are received by the institution.

The most prominent Title IX litigation involved discrimination in athletics in secondary schools and colleges and universities. By refusing to hear an appeal of the decision in favour of the women athletes in the 1996 *Cohen v. Brown University,* 101 F.3d 155 (1st Cir.) the Court recognized the role of statistics in showing that women's access to athletics was significantly less than that of their male colleagues.

In addition to benefitting from Title IX, those experiencing sex discrimination have sought relief under the U.S. Constitution. In the case analogous to *Brown v. Board of Education*, 347 U.S. 483 (1954), (which essentially found that separate cannot be equal in the case of race), *Vorchheimer v. School District of Philadelphia,* 430 U.S. 703 (1977), an equally divided Court determined that separate but equal was not unconstitutional at least at least in Philadelphia

schools. However, in a later case the Philadelphia system was found to violate the Pennsylvania state constitution guarantee of equal rights.

On the other hand, the excluded men fared better in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), gaining the access they thought to the nursing program at MUW. Subsequently women won admission to the Virginia Military Institute in *United States v. Virginia*, 518 U.S. 515 (1996) when the Court found a substitute "leadership" program to be unequal.

.3. Safety

3.1 Medication and devices

More than 300,000 cases were filed alleging injury from use of the Dalkon shield. Among the allegations of interest to statisticians were those that the testing was inadequate. The shield maker, A.H. Robbins filed for bankruptcy and was bought by American Home Products, who settled the cases by establishing $2.4 billion trust fund that they would administered. Cases like the Dalkon shield case were instrumental in securing the passage of

1990 *Safe Medical Devices Act*

and 1992 *Medical Device Amendments* to the *Food, Drug and Cosmetic Act.*

Other protective legislation, the efficacy of which in actually protecting women, includes

1980 *Infant Formula Act*
1983 *Orphan Drug Act*
1984 *Drug Price Competition and Patent Term Restoration Act*
1987 *Prescription Drug Marketing Act*
1994 *Dietary Supplement Health and Education Act*
2007 *Food and Drug Administration Amendments Act*
2011 *Food Safety Modernization Act*

It should be noted that patents of drugs can have detrimental effects on the health of women by blocking access to affordable genetic equivalents. In

2013 *Association for Molecular Pathology v. Myriad Genetics*, 569 U.S. 12-398

the Supreme Court ruled that simply isolating DNA does not make it patenable, which should make various procedures more affordable.

In a case involving whether Benedectin, taken by women suffering nausea in pregnancy, caused birth defects, the trial court granted summary judgment to

Merrell, finding that the petitioners' evidence, based on "animal studies, chemical structure analyses, and the unpublished 'reanalysis' of previously published human statistical studies" did not meet the "general acceptance" standard needed for admissible expert testimony. In upholding the decision in

1993 *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579,

the Supreme Court replaced the 1924 Frye standard for admissibility with the *Daubert standard* (Rule 702, Testimony by experts). Giving the judge a role as gatekeeper, the Court promulgated a rule sufficiently vague to have remained the subject of continuing litigation, with so-called *Daubert* hearings to determine the admissibility of expert testimony:

3.2 Health

3.2.1 VAWA

The *Violence Against Women Act* (VAWA, Title V of the *violent Crime Control Law*) was originally passed in 1994, reauthorized in 2000, 2005, and after protracted haggling, in 2013. In 2000 the Supreme Court had held that parts of VAWA were unconstitutional because the exceeded Congressional power under the *Commerce Clause* of the Constitution and under *Section 5* of the *14th Amendment* in *United States v. Morrison*, 529 U.S. 598 U.S. 598 (2000).

3.2.2 Affordable Care Act

In 2010 President Obama signed the *Patient Protection and Affordable Care Act* (known as "Obamacare"*).* In June 2012, in *National Federation of Independent Business v. Sebelius***,** 567 U.S. ___ **,** the Supreme Court found the law constitutional under the tax power afforded to Congress. Some of the provisions have already gone into effect, and in particular the mandate for universal coverage takes effect in January 2014. Provisions that affect the health of women include

- No higher rates based on gender or pre-existing conditions
- No denial of coverage based on pre-existing conditions
- No co-pay for a variety of preventive care and screenings
  - Well Woman visits
  - Mammograms
  - Breastfeeding support
  - Immunizations and vaccinations
- "Contraception mandate" – there is ongoing litigation concerning which employers can be exempted based on religious grounds

Medicaid expansion will also benefit many low-income women and their children, but it is a state-by-state option.

Conclusion

There has been a checkered history of judicial action on women's health, a record which is likely to continue. However, along with legislation and executive action, this branch of government is an important player in the improvement of the health of women.

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