ISSN: 2358-1824

Cadernos Ibero-Americanos de Direito Sanitário
Cuadernos Iberoamericanos de Derecho Sanitario

Short Communication

Freedom From Choice: The U.S. Supreme Court Decision in Dobbs v. Jackson

Comunicação Breve

Liberdade para escolher: a decisão da Suprema Corte dos EUA no caso Dobbs v. Jackson

Comunicación Breve

Liberdad de elegir: la decisión de la Corte Suprema de los Estados Unidos en Dobbs v. Jackson

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Abstract
This article explores the last bastion of slavery in the USA – motherhood – as circumscribed by two landmark U.S. Supreme Court cases about abortion: Dobbs v. Jackson (2022) and the case it overruled, Roe v. Wade (1973). These two cases bookend a half century fraught with controversy that began when Roe v. Wade allowed pregnant patients to decide whether they want a legal abortion under USA law. The contrary opinion in Dobbs v. Jackson allowing individual states of the USA to prohibit abortion in the same time frame in which Roe v. Wade allowed patients to have an abortion (and explicitly overruling Roe v. Wade) exploded when a draft opinion was released across international social media – igniting protests at the gates of judges homes and during off duty activities such as eating in a restaurant. Beyond the implications of this unprecedented response towards legitimate juridical pronouncements in a democracy that prides itself on protecting free speech, the billions of dollars spent lobbying around abortion laws and the small number of pregnancies involved annually suggests that these cases are about unspoken issues that do not surface in the Supreme Court. This article therefore explores the notion that the public uproar about abortion masks the societal need for several important conversations that have not occurred. Under this view, close examination of cases that mark the beginning and end of U.S. Supreme Court case law regarding abortion posits a distraction from unresolved fundamental problems about public health. Achieving the goal of developing rational legislation that clarifies these issues to move towards resolution requires however a Constitutional base that presently does not exist in USA law. Therefore, this article proposes a U.S. Constitutional Amendment protecting the right to health that would provide a strong foundation for case law regarding medical decisions ostensibly protected by the abortion case law.
Keywords
Legal Abortion. Right to Health. Supreme Court Decisions. Jurisprudence.

Resumo
Este artigo explora o último bastião da escravidão nos EUA – a maternidade –, circunscrito por dois casos marcantes da Suprema Corte dos EUA sobre o aborto: Dobbs v. Jackson (2022) e o que foi anulado, Roe v. Wade (1973). Esses dois casos encerram meio século repleto de controvérsias que

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começaram quando Roe v. Wade permitiu que pacientes grávidas decidissem se queriam um aborto legal sob a lei dos EUA. A opinião contrária ao aborto em Dobbs v. Jackson – permitindo que estados dos EUA proíbam o aborto no mesmo período em que Roe v. Wade permitia que pacientes fizessem um aborto e, assim, anulando explicitamente Roe v. Wade – foi maciçamente divulgada em toda a mídia internacional, iniciando protestos nos portões das casas dos juízes e em seus momentos de lazer. Além das implicações dessa resposta sem precedentes a pronunciamentos jurídicos legítimos em uma democracia que se orgulha de proteger a liberdade de expressão, os bilhões de dólares gastos com o *lobby* junto às leis de aborto e o pequeno número de gestações envolvidas anualmente sugerem que esses casos são sobre questões não ditas que não abordadas na Corte Suprema americana. Este artigo, portanto, explora a noção de que o alvoroço público sobre o aborto mascara a necessidade social de se discutir temas importantes. Sob esse ponto de vista, o exame minucioso dos casos que marcam o início e o fim da jurisprudência da Suprema Corte dos EUA em relação ao aborto se coloca como uma distração em relação aos problemas fundamentais não resolvidos sobre a saúde pública. Atingir o objetivo de desenvolver uma legislação racional que esclareça essas questões para avançar para a solução requer, no entanto, uma base constitucional que atualmente não existe na lei dos EUA. Este artigo propõe uma Emenda Constitucional nos EUA, que proteja o direito à saúde para fornecer uma base sólida para a jurisprudência sobre decisões médicas ostensivamente protegidas pela jurisprudência sobre o aborto.
Palabras-chave
Aborto Legal. Direito à Saúde. Decisões da Suprema Corte. Jurisprudência.

Resumen
Este artículo explora el último bastión de la esclavitud en los EE. UU., la maternidad, circunscrito por dos casos históricos de la Corte Suprema de los EE. UU. sobre el aborto: Dobbs v. Jackson (2022) y lo que fue anulado, Roe v. Wade (1973). Estos dos casos culminan medio siglo lleno de controversias que comenzaron cuando Roe v. Wade permitió que las pacientes embarazadas decidieran si querían un aborto legal bajo la ley estadounidense. La opinión contraria ao caso Dobbs v. Jackson – que permitió que los estados de EE. UU. prohíban el aborto en el mismo período que Roe v. Wade permitió que las pacientes abortaran, anulando así explícitamente Roe v. Wade – fue enorme cuando circuló en todas las redes sociales internacionales, lo que provocó protestas en las puertas de las casas de los jueces y durante sus descansos. Además de las implicaciones de esta respuesta sin precedentes a los pronunciamientos legales legítimos en una democracia que se enorgullece de proteger la libertad de expresión, los miles de millones de dólares gastados en cabildear las leyes de aborto y la pequeña cantidad de embarazos involucrados anualmente sugieren que estos casos se tratan de temas no expresados que no se abordan. por la Corte Suprema de EE.UU. Este artículo, por lo tanto, explora la noción de que el alboroto público sobre el aborto enmascara una necesidad social de discutir temas importantes. Desde este punto de vista, el escrutinio de los casos que marcan el principio y el final de la jurisprudencia de la Corte Suprema de los EE.UU. en relación con el aborto se presenta como una distracción de los problemas fundamentales no resueltos sobre la salud pública. Lograr el objetivo de desarrollar una legislación racional que aclare estos temas para avanzar hacia la resolución requiere, sin embargo, una base constitucional que actualmente no existe en la ley estadounidense. Este artículo propone una Enmienda Constitucional de los Estados Unidos que protege el derecho a la salud para proporcionar una base sólida para la jurisprudencia sobre las decisiones médicas ostensiblemente protegidas por la jurisprudencia sobre el aborto.
Palabras clave
Aborto Legal. Derecho a la Salud. Decisiones de la Corte Suprema. Jurisprudencia.

Introduction

Summary Of The Case Law About Abortion in the USA

Existing policies and laws degrade women of all races and ethnicities as mothers and primary caretakers for the next generation. Protection for medical decision-making pronounced in the landmark decision of Roe v. Wade[2] and the frustrating originalist reality of its undoing when overruled in Dobbs v. Jackson[3] are flammable cultural artifacts that bear witness to a whole series of unjust but profound gender-based inequalities. These embedded sources of ongoing sexism are rooted in the slave-based economy that existed during the revolution and for nearly a century afterwards. These cultural artifacts are manifest by the dearth of national health care, remarkably dangerous rates of maternal mortality during pregnancy and soon thereafter, absence of paid maternity leave, return of the *double burden* of child care at home while performing paid work following the pandemic of Covid-19 a paucity of child care whether affordable or not, and lower wages such that working women accrue dramatically less pension funding than their male counterparts[4]. These combined factors cause health disparities among women compared to men at every stage of the human life cycle (1). Declaring abortion illegal is therefore only one brick in the wall that imprisons women, without infrastructure for health care or social determinants of health to operationalize gender equity, clothed in the language of preserving a place for *important personal decisions without government interference*. The U.S. Supreme Court abortion law cases discussed here state in their text that they deliberately ignore moral, ethical, religious, financial and circumstantial factors from the larger society that influence if not control the decision to terminate a pregnancy. Ironically both Dobbs v. Jackson and the Roe v. Wade precedent that Dobbs declared invalid agree to ignore these concerns despite their opposite outcomes and also despite the overarching importance of these factors for determining the outcome of personal decisions that the U.S. Supreme Court claims it protects. The lesson from Dobbs v. Jackson is that a political decison by the U.S. Supreme Court that is not rooted in Constitutional text may hold sway for fifty years but cannot withstand the test of time, and therefore Roe v. Wade was overruled. In his concurring opinion, Justice Kavanaugh opined:

> The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains. On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives […] (2)

Textualism and Originalism Beats the Precautionary Words of Mrs. Adams

It is impossible to overstate the importance of the contribution to governance and political theory made by the Founding Fathers who drafted the Declaration of Independence and the U.S. Constitution. They were pioneers, pathbreaking new territory in a legal landscape that did not have a precedent for

[2] https://tile.loc.gov/storage-services/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf
[3] https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf
[4] TIAA, a leading provider of secure retirements, is shining a light on the staggering 30% retirement income gap between men and women through its new #retireinequality movement. (3)

establishing the rule of law without monarchy. They were creative human beings, with flaws and limits like everyone. Taken in totality their achievements are extraordinary. Few people if anyone can meet their challenge to reshaping society. The flaws in their human qualities explain but do not excuse limits for U.S. Constitutional originalism theory and therefore must be reinterpreted carefully, to take into account inventions such as spacecraft, television the internet airplanes cryptocurrencies and the modern stock exchange that are necessary for the ongoing functioning of civil society. The originalist view of the U.S. Constitution admits that women were excluded from rights such as property and voting, and therefore were relegated to a background noise of daily life as part of the three-fifths ratio for the purposes of apportionment in the USA population under the U.S. Constitution that freed the original 13 colonies from monarchical rule. At the time of the writing of the U.S. Constitution, the well-educated businesswoman running a farm in Quincy, Massachusetts, Mrs. Abigail Adams, wrote it was important to *remember the ladies* and admonished that failure to include rights for women in the new Constitution would result in catastrophic consequences, many of which we live with today in the USA. First Lady Mrs. Abigail Adams was the wife of the second United States (U.S.) President and the mother of another U.S. President; she successfully ran a farm while her husband was away writing the Declaration of Independence. Her famous letters to her husband urged him to *remember the ladies* when declaring independent suffrage for humans who lacked the divine right of kings, and also described the hard work of managing a family business while raising and educating several children while combatting illness. Abigail Adams wrote a letter to her husband, John Adams, 95 days before Mr. Adams signed the Declaration of Independence "in the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more generous and favorable to them than your ancestors" (4).

Two centuries later, the long-term impact of this division was called *gender apartheid* by the U.S. Member of Congress Mrs. Bella Abzug, first female secretary of transportation and founder of Women's Environment & Development Organization (WEDO). Her words mark a practical starting point for analysis of the newly-born nation's well established and long sustained history of institution sexism that traverses race, and actually becomes more readily apparent when stratifying race by gender. Although 20th century women lobbied for the drafting and passage of the *Equal Rights Amendment* to the U.S. Constitution in the 1970's, few states ratified it. By contrast, since the 1980s, a small but dedicated group of constitutional radicals have been reclaiming the original text of the Constitution, claiming that historic presentism and disregard for the language itself have created policies that have led the people and their government far astray. Modern innovations call into question the limits of textualism and original text: the national economy thrives on goods and services that the Founders of the U.S. Constitution never could have imagined. Surely originalism would not favor a luddite approach that would bring all the USA power and its economy back to the time of the 18th century, without advances in commerce, the arts, sciences and entertainment and medicine. But what such textualism means for pre-existing issues that were unresolved at the time of the writing of the U.S. Constitution is unclear.

Spanked Not Thanked: The Legacy of Mrs. Adam's Warning

Few studies in reproductive epidemiology examine the role of all work, whether paid or unpaid; at home or in an office; in relation to reproductive health. And, instead of focusing on the small silo of abortion rights, reproductive health should embrace health concerns throughout the life cycle:

including development towards healthy puberty, safe and healthy pregnancy for those who want it and long-term protection of reproductive organs throughout the ageing process. Throughout the history of humanity, women have worked during pregnancy. In the English language, the term *labour* is used to label the act of childbirth itself. Anyone who has driven a car while experiencing morning sickness with a small child in the back seat, screaming and crying loudly futile protest against being strapped into a child safety seat, knows that pregnant women face distinct risks that impact future life. Whether using strong household chemicals to clean to future nursery and paint it to make it a fresh home for a newborn; or simply lifting siblings while engaging in a variety of child-rearing chores, characterizing work at home as *safer* for women or the unborn would not be a fair comparison to some types of sedentary work that are highly paid. Yet, maternal health and the efficacy of prenatal care and infant outcomes are very mysterious, not necessarily driven by human factors such as lifestyle, wealth, race or wishes.

Non-Abortion Case Law Governing Pregnant Workers

Cultural warfare against motherhood that falsely poises women in conflict and outright opposition to their children is not new and transcends the abortion case law to include women's reproductive health at work.

In the case of OCAW v. American Cyanamid, administrative adjudication and the U.S. Court of Appeals upheld so-called *Fetal Protection Policies* that required women of childbearing age and capability to provide medical proof of sterilization to retain or obtain employment in lead smelting[5]. Initially, the case was brought as an enforcement action against the employer alleging a violation of section 5(a)(1) of the Occupational Safety and Health Act (OSH) of 1970, the so-called *General Duties Clause*[6], before the Occupational Safety and Health Review Commission (OSHRC)[7]. The U.S.

[5] "Chapter 1. OSHRC dismissed the citation that alleged the forced sterilization policy constituted an on-going harm to workers under the employer's obligation to provide "employment and places of employment that are free from recognized hazards". This was appealed to the District of Columbia Circuit, Court of Appeals, OCAW v American Cyanamid, 741 F2d 444 (1984). (5, 6).

[6] The so-called *General Duties Clause* in section 5(a)(1) of OSH Act is the heart of the statute. It has been used many times to grant or approve the use of OSHA enforcement authority in cases where hazards were dangerous, but it did not conform to the plain meaning of the terms in a specific standard or regulation. OSH Act Section 5(a)(1) requires "each employer to furnish to each of his (sic) employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious harm to his (sic) employees" (7). The scope and nature of the general duties articulated in OSH Act Section 5 are not clearly defined within OSH Act, but these duties have consistently been interpreted broadly in case law and concomitant OSHA regulations. The concept that employers have straightforward, affirmative obligations to protect occupational safety and health appears in OSHA safety standards, as well as OSHA health standards. For example, 29 CFR 1910.165, concerning *Employee Alarm Systems* consistently places affirmative compliance obligations on the employer, such as "(b)(4) The employer shall explain to each employee the preferred means of reporting emergencies [...] (b)(5) The employer shall establish procedures for sounding emergency alarms in the workplace. [...] (c)(1) The employer shall assure that all devices, components, combinations of devices or systems constructed and installed to comply with this standard are approved. ... (d)(1) The employer shall assure that all employee alarm systems are maintained in operating condition" (7). This language reaffirms the centrality of the employer's role in controlling, correcting, and bearing ultimate responsibility for any or all recognized hazards within the enterprise. Other provisions within the general duties clause are equally consistent with this stern view of the employer's clear obligations to provide clean and healthful employment. OSH Act Section 5(a)(2) requires that employers "shall comply with the standards promulgated under this Act" (7). Similarly, the employer's obligation to prevent hazards gives rise to the employer's freedom to create work rules and a presumption that employee's conduct within the work environment is under the employer's control. OSH Act Section 5b requires compliance with employer work rules and OSHA standards. It requires that "Each employee shall comply with occupational safety and health standards, all rules, regulations, and orders issued pursuant to this act which are applicable to his (sic) own actions and conduct." (7). It should be noted, however, that there is no case law regarding Section 5(b).

[7] OSH Act created an agency to research occupational health issues – the National Institute of Occupational Safety and Health (NIOSH) – and the Occupational Safety and Health Review Commission (OSHRC), which was outside the traditional court system that, in theory, could be infused with special scientific expertise needed to evaluate health issues. Established under Section 10 c and Section 12 of OSH Act, OSHRC is empowered to hear any or all questions regarding the validity, form or appropriateness of OSHA fines, penalties and citations. The Commission does not have the authority to hear questions regarding the validity of OSHA standards; these questions must be reviewed by a federal District Court, Court of Appeals or the US Supreme Court. Commission decisions are public documents and

Congress created OSHRC under OSH Act to provide independent adjudicatory authority to settle disputes about fines and citations. Before OSHRC, the enforcement agency – Occupational Safety and Health Administration (OSHA) – alleged that the employer had failed to fulfill its duty to protect employees against *recognized hazards* under the OSH Act[8]. The courts did not examine the social impact of these policies, which had the effect of forcing women to choose between their jobs and their reproductive rights. The court did not view this choice as forced sterilizations under economic duress (4). Instead, the appellate court viewed the sterilizations as undertaken *voluntarily* by women who accepted the hazards of lead smelting for presumably higher pay. The courts offered no scientific criteria for risk assessment to scrutinize the job description that mandated sterilization, to determine whether such precautions were in fact appropriate for the job involved. Nor did the courts express disapproval of policies that impinged upon the human right to freedom of reproduction, as articulated in international human rights instruments and under U.S. Supreme Court law such as Griswold v. Conn[9]. Thus, fetal protection policies were condoned and otherwise unchecked for at least a decade after the court of appeals decision in OCAW v. American Cyanamid, until the U.S. Supreme Court decision in IUAW v. Johnson Controls[10]. Consistent with precedent, the Court of Appeals and lower courts approved fetal protection policies at as an acceptable approach to reducing the risk of birth defects, such as brain damage and irreparable impairment of the central nervous system, in children of female employees. Ten years after American Cyanamid, the U.S. Supreme Court case of IUAW v. Johnson Controls viewed exclusionary policies as illegal *prima facie* discrimination. The Court ignored however, underpinnings of such policies that pertained to special protections for maternal and child health and remained silent regarding criteria for maintaining a safe and healthful workplace that protected the reproductive health of pregnant workers. Although many other industrial economies such as Canada and the European Union have included special protections that can result in exclusion within the employment laws of their nations, the USA has none. In Canada, for example, Protective Reassignment is a part of well established industrial hygiene practices under law that can be triggered by exposure to reproductive toxins if their risks cannot be minimized after the disclosure of hazardous materials information and after a careful risk assessment following the criteria and analytical steps prescribed by statute.

Prior to the blanket discussion of sex-based discrimination in hiring and promotion in employment the lower courts had accepted the notion that such policies provide *necessary* protection, despite their economic harms to women and their implications for future harm to workers' functional capacity. When previous courts looked for standards to determine the reasonableness of the policy, it examined the perception of potential harm, and evidence of the existing harm to excluded employees,

its published opinions are available from the BNA in the Occupational Safety and Health Reporter, Health Law Reporter and its own hard-bound OSHC series. There are published procedures and rules of evidence for OSHRC practice.

[8] "Chapter 1. The purpose of the language is to make it possible for diligent employers and regulatory agencies to do whatever is reasonable and necessary to confront new or unexpected workplace hazards, as science reveals new problems regarding health in the workplace. The language in Section 5(a)(1) of OSHA Act is neither substance-specific nor is it limited in any other descriptive regard. Key notions, such as: work; employment; health; hazard; and worker; have deliberately not been defined. At the same time, the General Duties Clause holds the statute's weakness and the beauty of its strong heart. The same language that enables OSHA to regulate asbestos exposure or consider regulating ergonomics is the very reason that there is so much controversy when the dose-response between work and exposure is NOT incontrovertible. There is little consensus when there is scientific uncertainty. So that even when occupational physicians have treated thousands of cases of a work-related illness, the harm that seems obvious to us may not qualify for protection as a *recognized hazard*. That poses an ethical dilemma for the treating physician, who wants to help people without creating a conflict that may cost one's job." (5, 6)

[9] Griswold v. Connecticut, 381 U.S. 479 (1965) stated that there is a *fundamental freedom* to find a family (establishing a married couple's right to privacy within their own bedroom).

[10] US Supreme Court held that so-called *Fetal Protection Policies* were unconstitutional (8, 9).

following the criteria in Wright v. Olin[11]. In Wright, women who were employed at lower-exposure worksites were not penalized from the standpoint of pay and seniority rights, compared to the benefits afforded to male workers in the high-exposure worksites, but women were excluded from specific *restricted* job categories. No employees were required to be sterilized to obtain or maintain employment. The Fourth Circuit therefore held that the employer's exclusionary *Fetal Vulnerability Policy* was *rational* and not discriminatory, in light of *medical evidence* that women should be excluded from restricted areas where there were embryotoxins and chemicals that can cause reproductive harms, so long as the women were given counseling and could work elsewhere. According to one commentator, "traditional Title VII theory has proved inadequate to the analysis of the issue" (10), regarding the convergence of health concerns and prohibitions against discrimination. The Wright court focused its inquiry on potential harm to the employer and the unborn as weighed against the existing economic harm to excluded employees. The court upheld the employer's exclusionary policy, stating:

> it is not necessary to prove the existence of a general consensus... within the scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists... that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one. (11)

Protecting the integrity of pregnant women's medical decisions therefore requires a multi-faceted approach not limited to the unidimensional questions of whether to terminate a pregnancy by abortion. Yet the law does not require prenatal care or that women will be provided with full information regarding workplace health risks, decisions to be made based on genetic tests, woman's right to confidentiality, and control of information about her health and the health of her fetus. While requiring employment of pregnant workers, the Johnson Controls decision gave blueprint for drawing a distinction between impermissible harms that threaten workers' health, but must be corrected immediately through engineering controls, in contrast to cases where the worker can be employed with minor risk.

Nothing in the Johnson Controls decision suggests the need for criteria that would determine when a risk is so great that it rises to prohibit anyone from working due to dangerous working conditions. Thus, it assures working women the right to dirty jobs for the same pay as men in the same premises, without regard to difference in risk. More importantly, the Court failed to address the question whether there is a limit on the harmful exposure that a woman may undertake to keep her job, because it presumed all workers enjoy the same level of risk and the same standard of care[12]. This flawed paradigm is costly to our society; but remains unchallenged. For this reason fighting in the courts about the laws surrounding abortion offers an easy way out of these infrastructural dilemmas regarding employment exposures, access to prenatal care and the ability to understand the results from genetic testing. It is possible therefore that the expensive and time consuming controversies surrounding abortion are a distraction; offering a proxy war for more profound unresolved debates about the role of motherhood in the workplace the role of women as parental decisionmakers and as patients and ultimately, the role of women in a Constitution that deliberately failed to include them. Both Roe and Dobbs decisions circumvent discussion about religious beliefs concerning life that is

[11] Wright v. Olin 697 F.2d 1172 (4th Cir., 1982).
[12] Johnson Control prohibits the exclusion of fertile women from the working population even when confronted with reproductive toxins.

inextricably tied to a fundamental and natural human right to health not articulated in the U.S. Constitution. Could this lacuna in the U.S. Constitutional framework exist because of its slavery underpinnings and eugenic philosophies about whom should survive and rule civil society?

Complex but thus far unexplored policy questions embrace the relationship between the human right to health, the role of health in promoting work and the role of work in society in relation the unborn human generations. On the micro scale, these issues become intensely evidence specific and problematic (12), as exemplified by both cases, Roe and Dobbs. Yet, when viewed from the broad perspective of the basic societal need to have a new generation populated by the healthy offspring of the previous working generation, many of these issues become flashpoints for expensive litigation and propaganda campaigns in a highly divided polarized policy[13] without a philosophical touchstone in the Constitution itself. Even though the so-called *right to life* movement has been short-sighted in its failure to examine the needs of children from the perspective of parental exposures that impact birth defects during gestation or once they are born, their opinions are not to blame for the existing void in the law. Opponents of that movement are equally guilty of failing to bridge the gap between the choice to bear children and the obligation of the state, the medical community, and employers to protect the right to life post-conception but before birth. Sadly, the burden of these decisions victimizes mothers, who are too often blamed for everything, as a matter of cultural norms.

Can the U.S. Constitution be Saved? Proposed Constitutional Protection for Rights to Health

In sum, abortion case law, legislative lobbying around its ancillary industries and polarization of the general population about individual medical decisions all are distractions from the more fundamental societal question about whom should exist in society and for whom among those survivors the society should provide medical care. Women exist in every race, class, ethnicity religion and sexual orientation group throughout civil society. Thus questions such as abortion, child care, prenatal care, protection against cancer of the reproductive system (even after childbearing years) do not neatly fit within an originalist all male construct of a Constitution that forgot about women, despite Mrs. Adams' profound extra-legal text at the time of the writing of the U.S. Constitution. Supporting health care for women throughout motherhood, starting with pregnancy is expensive and fraught with uncertainty. There is no clear algorithm or economic equation, for example, that clearly demonstrates a clear and direct relationship between efforts such as time, money and emotional resources spent will result in health, wealth, or longevity, even when these efforts improve overall well-being.

Lippman summarized the theoretical extremes regarding pregnant women's rights to information regarding treatment and genetic testing, and the right to refuse them,

> It is not a dispute between advocates of prenatal diagnosis who are seen as defending women's already fragile rights to abortion and critics who are said to be fueling 'right to life' supporters seeking to impose limits on women (and their choices). (13)

Her comment underscores the dilemma facing women who are given a medical recommendation that they are at higher risk but can continue working if they so desire, but without adequate support

[13] "The abortion rights groups Planned Parenthood Action Fund, NARAL Pro-Choice America and EMILY's List announced that they would spend $150 million in nine key states ahead of the 2022 midterms — more than double their spending during the 2020 elections. Data from the nonprofit OpenSecrets shows that anti-abortion groups have also ramped up spending in recent years, although to a lesser extent." (14)

from their family, their employer or society at large. Women in general and pregnant women in particular, bear the impact of new genetic tests and technologies, designed to predict and even treat certain genetic problems during pregnancy, through prenatal diagnosis, fetal surgery and fetal gene therapy. Nonetheless, women patients are often excluded from the process of medical decision-making during pregnancy, even though medical decisions that are made by health care professionals affect them personally and affect the future well-being of the unborn.

Navigating the Treacherous Route for Legal Analysis of Abortion Rights

The concept that women have the right to make decisions about pregnancy and prenatal care has had a stormy legal history in the 20th, exemplified by the abortion controversies. Even though case law supports the fundamental nature of the right to bear and beget children[14], the societal need to support maternal health by limiting the hours of work in order to facilitate child-rearing[15], the notion that reproduction is a *major life activity* under law[16] and the notion that women have a choice to work in dangerous workplaces without regard to the risk of fetal exposure[17], there is little question that Roe v. Wade and its barren progeny dominate the popular understanding of reproductive health as used by the media and case law. Unfortunately, over-blown prominence given to the law of abortion, has become synonymous with the law and health policy use of the term *reproductive health*. However, abortion cannot address the myriad of ongoing postconceptual decisions impacting maternal and child health for those women who choose to maintain their pregnancy to term. Abortion jurisprudence therefore cannot provide a fertile line of precedent when addressing issues of potential reproductive harm as far as postconceptual health of mother and unborn is concerned.

Choice is only meaningful, however, if there is full disclosure of potential consequences, if that information is understood. Protecting the integrity of pregnant women's medical decisions as promised in Roe v. Wade, required that women will be provided with full information regarding all aspects of the available genetic tests; rejection of mandatory testing and protection of the woman's right to confidentiality and control of information about her health and the health of her fetus including information about workplace exposures and a right to have working conditions improved to accommodate pregnancy. Yet, without a strong infrastructure to support the health of mom and the unborn, any discussion of rights regarding the unpredictable course of pregnancy is illusory at best. Because abortion jurisprudence analytically stops at the termination decision. The law stops dead at this void. Neither pro-choice decisions nor the decisions limiting abortion provide language or statutory textual support for the pro-life decisions of pregnant women who choose to have a child and engage in the best efforts to have a healthy child. While no physician, pregnant woman or other person in society can guarantee the health of the unborn (however that may be defined) it is also true that good public health strategies and occupational health technologies can reduce risks and increase the likelihood of survival of health offspring. In addition, there is a complex area of precedents concerning forced treatment for pregnant women, forced sterilizations, and the governmental ability to incarcerate pregnant women whose actions are not approved. What rights do women have to information about their own pregnancy? What right is there *not to know* about prenatal health questions? The absence of guiding principles in this area leaves many important aspects of pregnant women's autonomy in

[14] Eisenstat v. Baird, 405 U.S. 438 (1972)
[15] Muller v. Oregon, 208 U.S. 412 (1908)
[16] Bragdon v. Abbott, 524 U.S. 624 (1998)
[17] IUAW v. Johnson Controls, International United Automobile Workers v. Johnson Controls, 499 U.S. 187 (1991)

medical decision-making unresolved. These are tough questions that policy makers have rarely addressed from the point of view of maternal needs or expertise, even though viewing maternal health as central to this process using existing technologies and laws would mean that some of these questions are easily resolved.

An Alternative to Maternal Slavery: Proposed U.S. Constitutional Amendment Operationalizing the Right to Health

In sum abortion case law, legislative lobbying around its attendant industries and politicization of a private medical decision all are distractions from the more fundamental societal question about whom should exist in society. Although the notion that working in dirty places is viewed by many labor movement members as expanding women's choice that is a choice that is only meaningful if there is full disclosure of potential consequences, if that information is understood. For these reasons, women's autonomous choices regarding the right to refuse or obtain paid employment during pregnancy requires sensible, inexpensive safeguards to prevent coercion or misinformation by spouses, family members, physicians, other health care professionals and the government. One of the greatest gifts of the existing Constitutional framework is its flexibility and that feature is the best argument for both: explaining its endurance during two and half centuries and its sustainable ongoing longevity. It is doubtful that a new group of authors would write as clearly and with as much candor about their goals and objectives, and with text so susceptible to operationalizability. Nonetheless, there is a quiet but pervasive need for redefining the population entitled to rights under their flawed but excellent framework. The efforts towards an Equal Rights Amendment for Women were not only unpopular and branded radical, but that its words perhaps did not go far enough because if it had been ratified, it would not address transgenic entities such as multispecies humans and robots that self-replicate or some members of the LGBTQ population. More importantly, the unresolved problems such as abortion laws and the absence of adequate protections from the time of unborn conception throughout life are not answered by an Equal Rights Amendment for Women.

As Kurt Vonnegut noted, an authoritarian regime is egalitarian if it treats everyone equally badly. Therefore, what is needed is not an Amendment for Equal Rights for Women, but an amendment providing health protections of all. The absence of such rights explains why leading cases discussed above address informational privacy or decisional privacy surrounding procreative decisions such as the decision whether to use contraception or to terminate pregnancy. Therefore, the following U.S. Constitutional Amendment is proposed: *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, shall have the right of access to preventive health care, the right to benefit from medical treatment and shall enjoy the protection of their health to the extent feasible and consistent with equal protections of the law. The Congress shall have the power to enforce by appropriate legislation the provisions of this Amendment.*

This proposed Constitutional language addresses the core issue that has been taboo in the underpinning of abortion case law: the right of moms and their babies to have health care that is not readily available and not a right under current law, even though it is nonetheless fundamental to respecting anyone's right to life. Neither moms nor their children can exist without sound preventive care and ongoing follow-up that ensures their well-being.

Conclusion

Roe v. Wade concerned choice after conception, in a manner that had greater impact on autonomy than privacy rights it supposedly protected pertaining to personal information and medical decisions. This was because without a fully matured infrastructure to deliver health care, any claims to protecting medical decisions were hollow absent, for example a primary care physician to consult with about the decisions. By contrast, information pertaining to the unborn, once a decision to have a child has been made is unfairly and unceremoniously cast aside under current statues and case law. The law is conspicuously silent about assuring treatment for women whether or not to they want to terminate a pregnancy. By contrast, Dobbs v. Jackson found no U.S. Constitutional language to justify the Roe decision. Neither Roe nor is antithetical overruling in Dobbs addressed this vital underlying issue: in New Jersey this is called the dead smelly cat in the middle of the table that no one wants to talk about, so they politely address other questions. Both bookends of the U.S. Supreme Court opinions about abortion provide sterling examples of this idiomatic expression because they share the value of not addressing the key underlying questions of maternal and child health. The sad price for this silence is found in the maternal mortality statistics. Obtaining prenatal risk information is consistent with the notion that increased knowledge leads to greater choice and control over individual medical decision-making. But these benefits of information will only be realized if the integrity of each women's decision whether to accept or reject a pregnancy is supported by the existing apparatus of protecting overall physical mental and social health. Operationalizable principles in a new model for interpreting existing international human rights norms for health can take this reality into account, without changing or violating existing principles of international laws. Applying these ideas and will benefit all people in their roles as children and as parents, and stewards for increased capacity building within reproductive health care infrastructures for posterity.

Conflicts of interest

The author declares she has no conflicts of interest.

Author contribution

The author is responsible for the conceptualization, writing, critical review and approval of final version to be published.

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How to cite

Feitshans I. Freedom From Choice: The U.S. Supreme Court Decision in Dobbs v. Jackson. Cadernos Ibero-Americanos de Direito Sanitário. 2023 jan./mar.;12(1):105-116
https://doi.org/10.17566/ciads.v12i1.998

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