Strategy, Morality, Courage: Bioethics and Health Law after *Dobbs*

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Abstract: Our paper examines what is required to protect and promote effective public discussion and policy development in the current climate of divisive disagreement about many public policy questions. We use abortion as a case example precisely because it is morally fraught. We first consider the changes made by *Dobbs*, as well as those which led up to the *Dobbs* decision, accompany it, and follow from it.

Charity Scott's essay on public health ethics published in the *Hastings Center Report* in 2008[1] introduced many in bioethics to "belief in a just world." Those who believe that the world is, by definition, just thereby justify regarding those in need as necessarily blameworthy, responsible for whatever befalls them, and undeserving of help from society. In her short essay, Professor Scott describes an unexpected response to a news story about a family whose children benefited from Georgia's children's health insurance program, PeachCare. In numerous letters to the editor, readers angrily condemned the parents for not obtaining employment that paid more than the jobs they held, and for having too many children. They argued that the family did not deserve to receive help from the state to meet their children's health care needs. However, all maintained that they supported PeachCare for *truly* deserving families. When the newspaper updated the story with information intended to demonstrate that the family did indeed deserve help from PeachCare — including that jobs available to the parents did not provide health insurance, and that contraceptive failure accounted for their most recent pregnancy — many readers doubled down on their judgments that the family was irresponsible, entitled, and undeserving.

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Professor Scott notes that this saga — perhaps somewhat surprising 15 years ago but common today — reflects "centuries-old debates about who the 'deserving poor' are."[2] She cites research suggesting that changing how the need for public assistance is described can lead many people to broaden their views about deservingness, even though some may continue to believe "that an individual does not deserve public assistance if his or her efforts do not succeed in avoiding the need for public aid." She notes that much of the time, "need arises from circumstances outside the control of the individual" rather than from individuals' "irresponsible behavior," and closes by recommending that public health advocates emphasize structural injustices. This change in focus can undermine the comfortable fiction that the world is always just and that those who fail to protect themselves from misfortune are therefore blameworthy.[3] It can also move at least some people to recognize that injustice does exist. And only by acknowledging genuine injustice can we hope to act to make the world more just.

It is unfortunately tempting to maintain the belief that the world justly assigns misfortune only to those who behave irresponsibly; this is easier to do when one's own privilege protects one against experiencing the consequences of accidents, structural barriers, and imperfect choices.[4] In a post-*Dobbs* society, it seems clear that the risks of pregnancy are increasingly viewed by many courts and legislatures as resulting from women's inevitably irresponsible desires to separate sexual activity from reproduction, while men's behavior is questioned far less often. At the same time, however, the reach of recent court decisions and statutes limiting abortion extends far beyond pregnancy, also affecting many health conditions that have little or nothing to do with reproduction. This means, for example, that patients with conditions treated by drugs that are restricted because they are also used for medication abortions have become victims of collateral damage.

American bioethics began over 50 years ago, at a time when social justice was ascendant, and law, policy, and morality seemed all to be coming together to protect and promote individual and civil rights. As historians have increasingly recognized, however, the legacy of slavery, the persistence of racism, and slow progress toward equal status for women all show that social justice remains a contested goal; indeed, resistance to it has become more overt in the 21st century.[5]

We have previously written about how complex and intertwined matters of race and sex, enslavement, eugenics, and voting rights helped lead to the *Dobbs* decision overturning *Roe v. Wade*[6] and have contributed to and complicated post-*Dobbs* law and policy.[7] Here, we deepen our consideration of contemporary developments, including but not limited to post-*Dobbs* statutes and case law, to address challenges currently posed to reproductive justice, public health, and even public policymaking and participatory democracy.

We have previously written about how complex and intertwined matters of race and sex, enslavement, eugenics, and voting rights helped lead to the *Dobbs* decision overturning *Roe v. Wade* and have contributed to and complicated post-*Dobbs* law and policy. Here, we deepen our consideration of more contemporary legal developments, including but not limited to post-*Dobbs* statutes and case law, to address challenges currently posed to reproductive justice, public health, and even public policymaking and participatory democracy.

Disagreements about abortion policy and practice are morally divisive and emotionally fraught. Those who believe abortion is wrong and also believe in a just world might readily conclude that banning abortion under virtually all circumstances is both appropriate and necessary, and might fail to recognize and appreciate the influences of poverty, social and structural injustice, and medical misfortune on the deservingness and blameworthiness of those who seek abortions. Blaming and refusing to assist others with health needs may also be exacerbated by efforts to distort and suppress the information necessary for effective and fair decisionmaking and public policy.[8] In recent

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times, we have seen that those seeking to challenge changes in law and policy, including but not limited to post-*Dobbs* hostility to abortion, are increasingly at risk of legal and/or professional sanctions, societal disapproval, and even physical danger. Developments like these threaten the capacity of the public to talk together about highly contested matters like abortion. Fair and effective public policymaking, challenging in the best of circumstances, can break down when advocates seek to formulate policy based on only one of two or more strongly opposing views.

Using abortion as a case example precisely because it is so morally problematic, we examine what is required to protect and promote effective public discussion and policy development in the current climate of divisive disagreement, especially about matters of science and ethics like abortion. Attempting to engage in transparent, productive conversation with a constituency resistant to the idea of democratic deliberation or critical reflection about strongly held beliefs can seem doomed from the start. Belief in a just world can lead people to wield all available tools to ensure that the world fits their beliefs. Are there morally responsible ways to effectively counter newly aggressive uses of law, policymaking, and social media that appear specifically designed to attack health justice work on issues like abortion? If we can find ways for health lawyers, bioethics scholars, health care providers, and an engaged public to preserve our collective ability to develop meaningful shared public policy about abortion, what we learn could also have implications for a broader range of health justice questions.

We first consider the changes that have been made by *Dobbs*, as well as additional changes that either foreshadow or follow from *Dobbs*.

What *Dobbs* Has Done

"[T]he Constitution does not confer a right to abortion. *Roe* and *Casey* abrogated that authority. We now overrule those decisions and return the authority to the people and their elected [state] representatives."[9] With this holding, the U.S. Supreme Court overruled fifty years of legal precedent surrounding the abortion issue and changed the landscape of reproductive rights — and arguably the trajectory of public health law.[10]

In support of this decision, the *Dobbs* majority explains: "Our decision returns the issue of abortion to those [state] legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting and running for office, Women are not without political power."[11]

This reasoning is problematic. While the United States is a representative democracy, the *Dobbs* majority overlooks the realities of voter suppression and partisan gerrymandering, along with the continuing erosion of regulatory authority.[12] The majority's reasoning also contains the inaccurate assumption that women alone[13] are affected and therefore the only individuals who should care about reproductive justice. Nothing could be further from the truth. The consequences of *Dobbs* are far-reaching — including but not limited to women, families, and physicians. And, *Dobbs* has a disparate impact on people of color, people with disabilities, and those lacking socioeconomic means and living in rural areas — those who are most vulnerable and therefore, as Professor Scott's essay points out, are often considered at fault for their choices.

Voting Rights and Gerrymandering

The concept of federalism is at the roots of *Dobbs*. The Tenth Amendment to the Constitution reserves "police powers" to the states, which includes the power to regulate health.[14] In theory, the Tenth Amendment provides a "laboratories of democracy"[15] system of governance, which, at face value, enables each state to respond to the needs, demographics, and geography of its populace when it comes to health-related matters, from abortion to physician-assisted suicide, and the numerous issues in between.[16] For the "laboratories of democracy" theory to work, however, the appropriate stakeholders must have a voice at the table and the political results at the ballot box must reflect the will of the voters.

In its 2013 decision in *Shelby County v. Holder*[17] the Court weakened the Voting Rights Act of 1965.[18] Specifically, the Court ruled that Section 4(b) of the Act, which required states with a history of voting discrimination to obtain "pre-clearance" from judges or the U.S. attorney general before changing their voting rules, was unconstitutional because it imposed an impermissible burden on federalism and equal sovereignty of the states.[19] In 2019, the Court handed down *Rucho v. Common Cause*,[20] ruling that partisan gerrymanding[21] presents a political question beyond the reach of the federal courts.[22] More recently, in 2021, the Court decided *Brnovich v. Democratic National Party*,[23] which further diminished voting rights protections as they relate to Section 2[24] of the Voting Rights Act.[25] That case involved laws that made it more difficult to vote — specifically, an Arizona law that allowed only voters to return absentee ballots and allowed ballots mistakenly cast in the wrong precinct to be thrown out.[26]

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Weakening voting rights protections and failing to root out political gerrymandering has led to a series of attempts by states to implement voting restrictions and realign voting districts in ways that directly undermine the presumption that individuals can indeed express their views and concerns at the ballot box. As these districts were redrawn during reapportionment to become more favorable to one political party — most recently conservative Republicans[27] — moderates are being replaced by ultra-partisans who take uncompromising positions without facing electoral accountability.[28] This has had direct consequences on public health policy generally, and abortion policy specifically.

A recent study examining the effects of partisan gerrymandering on pre-viability abortion bans is particularly compelling. This study found that abortion "remains available in 17 out of 18 states that have a pro-abortion public majority without a pro-Republican gerrymander." But "in nine out of 10 states that have a pro-abortion public majority with a pro-Republican gerrymander," legislators have imposed a pre-viability abortion ban.[29]

Abortion is a moral[30] and deeply personal decision. It is also a political lightning rod. The partisan divide, however, diminishes somewhat when considering the issue of abortion within the context of the law — i.e., should the government be involved in limiting or banning the procedure? When considered in this context, an overwhelming majority of Americans, 61%, believe that abortion should be legal in all or most cases, whereas only 37% believe that it should be illegal in all or most cases.[31] When voters can make their views known at the ballot box, i.e., where there have been state-wide initiatives — voters have consistently supported expansive reproductive rights. For instance, soon after *Dobbs* was decided, voters in Kansas, a historically "red" state, upheld a constitutional provision supporting abortion rights by a margin of 59% to 41%.[32]

The 2022 midterms confirmed the majority view when voters in Michigan, California, and Vermont voted to amend their state constitutions to allow for abortion rights,[33] and voters in Kentucky and Montana rejected constitutional provisions that would have resulted in restrictions on the practice.[34] The 2023 midterms showed similar results. For instance, Virginia Governor Glenn Youngkin, a Republican, campaigned in support of a fifteen-week abortion ban by arguing that voters needed to keep the Republican majority in the Virginia House of Representatives to pass the ban. Voters, however, disagreed and flipped the Virginia House in favor of the Democrats.[35] Likewise, in Kentucky, historically considered a "red" state, voters supported incumbent Democratic Governor Andy Beshear, who ran against an anti-abortion opponent.[36]

However, the 2023 Ohio midterm results best illustrate the stark disconnect between the language in the *Dobbs* majority opinion and the realities on the political ground. In November 2023, Ohio voters passed with a margin of 57% to 43% the *Right to Make Reproductive Decisions Including the Abortion Initiative* (Issue One) — which provides for a constitutional right to abortion and other reproductive health care in Ohio.[37] Despite the large margin by which Issue One passed, some Republican lawmakers in Ohio claimed that there was "foreign election interference" in the vote and proposed legislation to block the ability of courts to interpret the new constitutional amendment.[38]

Since the *Dobbs* ruling, fourteen states have banned abortion.[39] Eleven states are considered very restrictive or restrictive.[40] Fifteen states restrict abortion at or near the time of viability,[41] and the remaining states still allow the procedure, with varying restrictions.[42]

Despite the multiple types of abortion bans passed by the states,[43] one year after *Dobbs*, data reflected an *increase* in the overall number of abortions nationwide.[44] At the same time, in states where access was available, providers reported a significant increase in the provision of abortion services to people from out of state,[45] which may increase waiting times and decrease service availability for all.[46] As the American Congress of Obstetricians and Gynecologists (ACOG) reports, "delays of weeks or sometimes days [can] increase health risks."[47] Increased travel time,[48] waiting time, and associated costs (child care, lost wages, etc.) make obtaining care less accessible or even completely inaccessible, particularly for individuals without substantial financial means.[49]

As seen in Ohio, anti-abortion legislators are not consistently respecting the voice of the people or the will of the people in sister states.[50] In addition, reports are emerging that other states concerned about statewide measures to enshrine reproductive rights have added or are proposing additional obstacles to the public referendum process.[51] And in direct contravention of the reasoning in *Dobbs*, many anti-abortion legislators and politicians have called for a federal ban.[52] Such a ban could increase maternal mortality considerably overall, with a disparate impact on pregnant Black Americans, who already suffer from excess maternal mortality.[53]

Voter suppression laws and partisan gerrymandering tend to target the participation of people of color,

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who are more likely than white voters to be excluded from and disadvantaged by the legislative and redistricting processes.[54] Many of the states that made it more difficult to vote and that have engaged in partisan gerrymandering, such as Florida, Georgia, Mississippi, and Texas, are also among the states that have refused to accept Medicaid expansion.[55] These states are home to a high percentage of people of color and also have high rates of poverty.[56] Data show that people who fall below the federal poverty level or in the Medicaid coverage gap are likely to experience more chronic health conditions and to have poorer outcomes in disease outbreaks like the Covid-19 pandemic than do people with incomes above the federal poverty level.[57] Voter suppression, health disparities, and limited access to reproductive health care all seem to come together with a concentrated effect on poor people of color.

Seventy-five percent of people who sought abortion before *Dobbs* were at or below the federal poverty level and about 60% were people of color.[58] Poor women, particularly those who live in non-Medicaid-expansion states, face increased barriers to effective reproductive health care, including the sometimes high costs of obtaining effective contraception.[59] Consequently, they are five times more likely to experience unexpected pregnancy than more financially secure women.[60]

As one commentator wryly observed: "the party that has been promoting the tightening of abortion restrictions has done nothing to make becoming a mother a more attractive choice. Nothing."[61] In fact, states with the most restrictive laws are also the states that provide the least assistance for children and families.[62] State legislatures with restrictive abortion bans have ten percent fewer women in the legislature than do state legislatures with permissive policies.[63] Thus, women's views in those jurisdictions are inadequately considered by "legislative bodies that are charged with decisions about reproductive rights, health care, and the social supports necessary for healthy childbirth and child-rearing."[64] For a democracy to flourish, election results that reflect the will of the voters concerning reproductive rights should be respected. Instead, in the aftermath of *Dobbs*, the exact opposite has occurred.

This post-*Dobbs* legal landscape is consistent with Professor Scott's case example of just world theory, wherein the structural injustices that we have discussed above are simply not acknowledged to exist as barriers for the vulnerable populations they directly affect. Rather, people "deserve" the outcomes they receive, despite the lack of assistance or resources and the legal barriers raised. Indeed, post-*Dobbs* legislation in many states appears to reflect the belief that if the women subjected to intersecting punitive laws were in fact worthy, they would have "made better choices" rather than engaging in "irresponsible behavior." It may also be reasonable to regard post-*Dobbs* legislation as contributing to misinformation and promoting misunderstanding among the general public, who might determine that irresponsible behavior is the cause of misfortune when structural injustices are denied or downplayed and only imperfect individual choices and outcomes are visible.

Substituting Judgment Without Expert Knowledge

Public health interventions have led to a significant increase in life expectancy in the past century.[65] Much of this is attributable to the efforts of the Food and Drug Administration (FDA), including recent developments like approval of vaccines and medications for childhood illnesses and for infectious diseases such as Covid-19, increased tobacco regulation, and permitting Narcan to be sold "over the counter" to combat the opioid crisis.[66]

Anti-abortion opponents have challenged FDA authority, particularly as it relates to the abortion medication mifepristone, which is used in conjunction with misoprostol both to treat miscarriages and to terminate early-stage pregnancy. Mifepristone is also approved for the treatment of Cushing's Disease, diabetes, and high blood sugar,[67] and has overwhelming data supporting its safety and efficacy.[68]

At the same time, the Supreme Court overturned the long-standing deference afforded by the courts to administrative agencies, and limited agency enforcement tools, along with the ability of agencies to assert statute of limitation defenses for facial challenges to regulations.[69] The Court has also decided a series of cases that has evolved into the "major questions" doctrine, [70] which serves to "limit administrative agency actions that may have major economic or political impact to those with explicit statutory authority."[71]

The FDA — the oldest comprehensive consumer protection agency — is an administrative agency[72] housed within the Department of Health and Human Services. By the powers granted to it under the Federal Food, Drug and Cosmetic Act,[73] FDA provides scientific and medical expertise, ensuring that drugs and therapies marketed in the U.S. are safe and effective for their purpose[74] and "advancing public health by helping to speed product innovations."[75] The Court's action in reviewing *Chevron,* and its new emphasis on the "major questions doctrine," portend a shift that could detrimentally affect public health, as well

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as many other areas of social concern, including but not limited to governmental ability to address climate change and gun violence.[76] Specifically, in *Alliance for Hippocratic Medicine v. FDA*, a group of anti-abortion doctors and medical groups filed a lawsuit in the Northern District in Texas[77] against the FDA challenging its twenty-year approval of mifepristone, because it is taken in combination with misoprostol to induce abortion.

On April 7, 2023, District Judge Matthew J. Kacsmaryk ruled for the plaintiffs, issuing a nationwide preliminary injunction suspending the use of mifepristone.[78] The case bounced back between the Fifth Circuit and the Supreme Court.[79] On June 13, 2024, the Supreme Court unanimously held that Alliance lacked Article III standing to challenge the FDA's regulatory actions concerning mifepristone.[80] As of this writing, *Alliance* is headed back to the Supreme Court.

State laws, particularly in those states that have passed draconian abortion bans, are also integral to the medication abortion issue.[81] Since *Dobbs,* fourteen states[82] have enacted near-total abortion bans, including separate laws that prohibit medication abortions. Other states restrict access to medication abortion by requiring that it be provided by a physician, with some requiring in-patient visits or that mifepristone be taken in the presence of a physician.[83]

Moreover, because *Dobbs* provides states with the authority to regulate reproductive care without limitation, it essentially removes professional autonomy from doctors to practice medicine.[84] To practice, doctors are licensed by each state to ensure that they have the requisite education and training and follow the recognized standards of conduct and practice in serving their patients.[85] Restrictive abortion laws, which are inconsistent with medical standards of care,[86] have created uncertainty. This uncertainty has caused treatment delays, which have resulted in many instances where pregnant people were required to wait until they nearly died to terminate a pregnancy, and in maternal deaths.[87] These laws have instilled fear among physicians, as some impose prison sentences that range from ten years to life in prison, criminal fines from $10,000 to $100,000, and the suspension or loss of medical licenses.[88]

Physicians are between a rock and a hard place because if they comply with state abortion bans, they risk civil liability for failing to provide an abortion in situations where it is consistent with the standard of care, such as for ectopic pregnancies.[89] A recent study in Oklahoma, titled *No One Could Say*: *Accessing Emergency Obstetrics Information as A Prospective Prenatal Patient in Post-Roe Oklahoma,*[90] describes how physicians are subject to three overlapping abortion bans that are inconsistent as to when a "medical emergency" exists, and none of the participating hospitals has a clear policy supporting the physicians' ability to make clinically based judgments.[91] In attempting to regulate the morals of women, some legislators have failed to recognize that there are many conditions for which abortion may be medically necessary, such as ectopic pregnancy, preterm premature rupture of membranes, pulmonary hypertension, and cancer,[92] and hospitals, concerned with liability, have failed to provide doctors with clear policies supporting the ability to appropriately treat patients. Recent media reports highlight that physicians, particularly obstetricians, are leaving states with restrictive laws, affecting care for all[93] and creating maternity care deserts.[94] In short, legislators who are not medical experts are passing dangerous laws that detrimentally affect the practice of medicine and patient outcomes.

Here we see a striking parallel: In states with draconian abortion laws, legislators with little or no medical training are substituting their judgment for medical professionals and making it difficult, if not impossible, for physicians to treat patients within the standards of practice. Similarly, in *Alliance*, plaintiffs asked that judges, who are also not medically trained, substitute their judgment for that of FDA scientists and medical experts concerning the approval and distribution of drugs and related therapies.

Alliance was decided based on lack of standing; thus, its result does not provide for certainty or clarity. The possibility of a future similar attack, along with the diminution of regulatory authority, could create havoc affecting the development and approval of future medications and therapies, and have a chilling effect on pharmaceutical innovation in everything from Alzheimer's to ALS to diabetes and cancer.[95] Safety and efficacy are at the core of the FDA approval process.[96] Although its actions are at times imperfect, FDA has worked to follow the science in making regulatory decisions that balance competing goals of safety and access.[97] In fact, FDA's drug approval process is considered the gold standard around the world.[98] Ironically, this newest attack on FDA for being insufficiently restrictive marks a shift by the political right; for many years conservatives criticized the FDA as excessively restrictive, overly concerned with safety, and too bureaucratic and paternalistic.[99]

We next consider what data, theory, and policymaking tools need to be gathered, strengthened, and used to maintain the capacity for public moral argument and democratic deliberation.

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How to Know What's Right

The *Dobbs* majority's claim that voters have the capacity to establish reasonable abortion policy at the state level requires, at the very least, an election framework that provides for well-informed legislation and allows citizens equal opportunities to participate. A Brennan Center for Justice report connects the importance of self-determination in matters of reproductive justice and a functioning democracy:

> Abortion enables people to exercise self-determination over their bodies and their family lives so that they are not rendered second-class citizens by the unique burdens of pregnancy and childbearing. A functioning democracy protects these very same values: political self-determination requires voters to be able to effectively choose who governs, and the ballot lets voters defend themselves against policies that threaten their rights.[100]

The availability of good information and the ability of voters to use that information are background requirements on which to build understanding and action.

Data

On October 5, 2023, the National Academies of Science, Engineering, and Medicine's Standing Committee on Reproductive Health, Equity and Society hosted a public workshop entitled *Reproductive Health, Equity, and Society — A Workshop to Explore Data Needs in the Wake of the* Dobbs v. Jackson Women's Health Organization *Decision*.[101] A chief question underlying this workshop was "How is the Supreme Court's decision in *Dobbs* changing health and health care in the United States?" To answer such a question, timely, accurate, and comprehensive data on a variety of outcomes are needed.

Gathering data on abortion — both spontaneous and induced — has never been simple in the U.S. due to the shame, stigma, and secrecy that have historically surrounded all types of abortion, but particularly induced abortions. The increase in legal restrictions and the resulting fear and stigma have made data collection from patients and providers even more complex.

In the U.S., The National Center for Health Statistics (NCHS) has legal responsibility and authority for the registration of births, deaths, marriages, divorces, fetal deaths, and induced terminations of pregnancy (abortions) resides individually with the states (as well as cities in the case of New York City and Washington, D.C.) and Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.[102] As a result of this state authority, the collection of registration-based vital statistics at the national level has always relied on cooperative relationships between the states and the federal government. Currently this data collection is limited to data from birth and death records (including fetal deaths).

Fetal deaths of twenty weeks of gestation and greater have been a reportable component of U.S. vital statistics since the 1920s. Following the Supreme Court's 1973 ruling in *Roe*, the NCHS recognized a need for a separate reportable component on abortion, and in 1978, introduced the first standard report of induced termination of pregnancy.

Aggregated data on induced abortions have been compiled from the states since 1969 by the federal Centers for Disease Control and Prevention (CDC),[103] through voluntary partnerships with states. The CDC uses these data to produce an annual Abortion Surveillance report.[104] While states are not required to submit aggregated abortion data to the CDC, the large majority do so. In addition, following FDA's approval of mifepristone in 2000 and the significant growth of the use of medication abortion, most states adjusted their reporting forms for providers to include questions to patients about medication (nonsurgical) abortion, and such data are now included in the CDC's Abortion Surveillance report.

According to the Guttmacher Institute, as of September 1, 2023:[105]

- Forty-six states and the District of Columbia require hospitals, facilities, and physicians providing abortions to submit regular and confidential reports to the state;
- Eight states require providers to indicate the method of payment, such as insurance or self-pay, for the procedure;
- Sixteen states require providers to give some information about the patient's reason for seeking the procedure; eleven states ask whether the abortion was performed because of a threat to the patient's health or life;
- Eight states ask whether the abortion was performed because of rape or incest;
- Fifteen states ask whether the abortion was performed because of a diagnosed fetal abnormality; nine states ask whether the abortion was performed for other reasons (e.g. the patient's economic or familial circumstances);
- Six states require providers to report whether the fetus was viable;

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- Fourteen states require providers to indicate if state mandates for abortion counseling and parental involvement were satisfied;
- Nine states require providers to report whether state-mandated counseling was provided; and
- Fourteen states require providers to report whether state requirements for parental involvement were met.

Concerns over the accuracy of data on abortion have risen as fears of legal retribution and even criminalization have risen among providers about entering "too much" data into electronic medical records on abortion-related care and patients' abortion-related practices, questions, and concerns. This chilling climate pervades even whole health care systems and Institutional Review Boards in a number of states. Legislators in many states have sought to criminalize the actions of those involved in providing abortions; this new reality has made data collection from providers more challenging.

Not surprisingly, steep declines in surgical abortions have been documented in states where bans and penalties have been enacted.[106] However, it is unknown what proportion of the decline in clinic/surgical abortions is being made up for by self-managed medication abortions at home. Self-managed abortions with medication have occurred around the world for years, particularly in areas where surgical abortion access has been limited. Before the FDA removed the in-person dispensing requirement for mifepristone in December 2021, access to telemedicine abortion care (either through the medical system or self-managed) was extremely limited in the U.S. Interest in self-managed abortion has grown in the United States, particularly since the *Dobbs* decision. For example, research[107] has documented a sharp increase in requests for abortion pills to the company AidAccess (providing medication abortion pills to the U.S. since 2017) since the *Dobbs* ruling, rising from an average of 82.6 requests daily before the ruling to 213.7 requests/day after it was issued, with the largest increases in states that have banned abortion.

Safe abortion medications are currently sent through the mail to U.S. women from numerous organizations around the world, a practice that has grown significantly since *Dobbs*.[108] A chief downside, however, is that the increase in the incidence of at-home medication abortions makes the collection of accurate data on abortion incidence more complicated, and probably makes the data reported by providers less complete.

None of the new statutory abortion bans or restrictions criminalize those who obtain surgical self-managed abortions, yet there have long been documented cases of people facing criminal charges for self-managing an abortion or being suspected of so doing after a miscarriage.[109] Some states also impose criminal penalties on clinicians or others who help an individual obtain abortion services, including medication abortion.[110] These policies create a climate of fear related to self-managed abortion for both patients and clinicians; for instance, if a patient were to present to a clinician for a complication or follow-up care after a self-managed abortion, the patient might be reluctant to provide accurate information and the clinician might be reluctant to record accurate information. This reluctance puts both patients and data at risk.

An additional key area in which accurate data and surveillance are urgently needed pertains to cases where a pregnant woman with a wanted pregnancy who encounters serious health complications, or fatal fetal abnormalities that increase the mother's risk of carrying to term, is denied timely medical care because of physicians' fears of prosecution when they are uncertain how sick a woman has to be to be legally allowed to have an abortion-related surgical procedure.[111] Currently, there are only limited data on this issue.[112] However, there is no widespread, mandated systematic surveillance of the incidence of physicians' delaying assistance to severely ill pregnant women and of the outcomes of the women who are managed "expectantly" until their condition becomes life-threatening.

In sum, only with the availability of timely, accurate, and comprehensive data can we build a foundation for well-informed legislation. New barriers to the comprehensive collection of data about pregnancy, reproductive health, and abortion complicate an already fragmented reporting system and make it more difficult to substantiate the harms arising from post-*Dobbs* restrictions. The need to reassess and strengthen health information privacy, confidentiality, and data security has never been clearer.[113]

Theory and Policy

Given the proliferation of contemporary challenges to data gathering, public policy engagement, and public health decisionmaking, it is reasonable to ask whether it is possible to determine what's right without access to data supporting critical reflection and the development of responsive policy. In our representative democracy, we need to consider how to decide what positions to treat with respect in a pluralistic society. Policymaking has always been challenging in societies

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characterized by social and political diversity because those societies often give rise to multiple "reasonable, yet incompatible, comprehensive doctrines." As bioethics scholar Soren Holm observes:[114]

> [L]ike everyone else, I have to recognize that, despite the fact that I think I have good (and to me decisive) arguments against those who disagree with me, their disagreement is often not unreasonable, given that we are unable to agree on some of the basic premisses even after all the arguments have been put on the table. They and I have to live together in the same society, and just as I would not like to have their views imposed as public policy, I should not try to impose my view, either directly or indirectly through the use of questionable rhetorical strategies in the public debate. It is only if we all adhere to the civic virtues of integrity and magnanimity that there is any chance of our finding those areas of practical convergence that allow peaceful public decision-making in a context of fundamental moral disagreement.

It is essential to determine which positions on contested questions should be taken seriously by public policymakers, given that often "there are marked disagreements about moral issues [that] are seen as fundamental" under circumstances of "moral and scientific uncertainty." Fundamental disagreements have always characterized the abortion issue, and it is even truer since *Dobbs* that we are "in a situation where each side has arguments that it sees as compelling but which the other side rejects utterly."[115] Even without misinformation, scientific information is rarely unequivocally slam-dunk accurate and precise; medical and scientific information about abortion and the status of the fetus can legitimately be regarded as at least somewhat uncertain. Moreover, "there is no general agreement on what scientific facts are of relevance to ethical analysis"[116] and applicable in public policy decisionmaking about abortion, since public policy decisions necessarily implicate both scientific and ethical considerations. Each of two opposing reasonable but incompatible positions will necessarily be supported by a different data set that matches the position's determination of what is morally relevant, including some assessment of the harms, benefits, and consequences of pursuing policy based on a given position.

Harm-benefit analysis poses its own additional challenge; as Holm notes, one familiar way of testing the acceptability of a policy position is to ask whether its implementation would cause harm to others. This would be unproblematic if there were agreement about how to assess and measure harms. A narrow definition of harm helps to ensure reasonably broad freedom of action. "But it is not self-evident that the politically (or philosophically) relevant conception of harm can be restricted in a way that does, for instance, leave out harm to the reasonable sensibilities of others, or harm to the environment, or harm to social networks and cohesiveness." A broader conception of harm might certainly make moral sense to liberal policymakers, but it "could lead to rather illiberal conclusions"[117] — which is exactly what we have seen happen. When policymakers and plaintiffs oppose the availability of contraception and abortion, arguing that referral and even minimal information provision violates opponents' freedom of religious expression, this constitutes an extremely broad conception of harm.

One of the broadest conceptions of harm appeared recently in abortion case law. One of the conservative judges in the *Alliance* decision argued for an expanded view of standing to sue, based on the plaintiffs' experience of harm. This view of standing, based on "aesthetic injury," has origins in liberal litigation, where it has been used to establish the standing of plaintiffs who seek to contest federal agency actions alleged to threaten species preservation.[118] In the Fifth Circuit's *Alliance* decision reversing in part the FDA's approval of mifepristone, Judge James Ho[119] invoked "aesthetic injury" in support of the standing of obstetrician plaintiffs, arguing:

> Plaintiffs have demonstrated the aesthetic injury they experience in the course of their work.... Doctors delight in working with their unborn patients — and experience an aesthetic injury when they are aborted. ... Plaintiffs' declarations illustrate that they experience aesthetic injury from the destruction of unborn life. ... The FDA has approved the use of a drug that threatens to destroy the unborn children in whom Plaintiffs have an interest. ... I see no basis for allowing Article III standing based on aesthetic injury when it comes to animals and plants — but not unborn human life.

Engaging in reasoned consideration of fundamentally incompatible positions is essential to the work of identifying the scope and limits of reasonable public policy. Determining reasonable public policy about reproduction has, however, been made more difficult for liberal bioethics and health policy scholars because of arguments like Judge Ho's. When scientific and moral

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disagreements are so profound, progress is only possible when uncertainty is accepted as inevitable and advocacy is practiced through transparent communication. Yet many women's experiences post-*Dobbs* have awakened the recognition that certainty can be elusive, as abortion may be necessary even when a child is desperately wanted. Finally, to get beyond this impasse, we examine and argue for the exercise of moral courage and a reinvigoration of solidarity, so that individual actors can recognize and benefit from collective support for doing what's right.

How to Do What's Right

As soon as the adverse effects of *Dobbs* on pregnancy and reproductive health care began to be felt, advocates began to resist those effects. For example, *State of Washington v. FDA* was filed to counter the challenge to the use of mifepristone posed by *Alliance*.[120] Extreme partisan gerrymandering and voting rights restrictions have similarly been countered, with varying success to date. For example, in Kansas and Ohio, voters passed by wide margins state constitutional provisions enshrining rights to abortion and protecting reproductive health,[121] but challenges have been mounted against that progress.

Advocates have also used the federal preemption doctrine[122] to challenge new restrictive state laws. For example, in *GenBioPro v. Sorsaia*,[123] a federal district court in West Virginia found that the FDA's approval of mifepristone for use in medication abortion up to ten weeks of pregnancy preempts the requirement that mifepristone be provided only during an in-patient visit for the small category of abortions that are permitted under West Virginia law.[124] In addition, the federal government has asserted that the Emergency Medical Treatment and Active Labor Act (EMTALA),[125] which requires hospitals receiving Medicare funding to stabilize patients with emergency medical conditions, preempts restrictive state abortion laws. However, on June 27, 2024, the Supreme Court dismissed a pair of cases addressing whether EMTALA can coexist with a restrictive abortion ban in Idaho.[126] Although this action permits emergency abortions to continue in Idaho, the dismissal fails to provide clarity or certainty for patients and health care practitioners in states with restrictive abortion laws.

Clinicians have also increasingly spoken out against new restrictions that put both them and their patients at risk.[127] Numerous narratives have been published in medical journals and major media outlets. A coalition of patients and physicians has filed a lawsuit challenging the narrow scope of the emergency exception to Texas's highly restrictive new abortion law.[128] Clinicians are also developing creative workarounds, including relocating clinics to nearby states where access is still available, and increasing clinic staffing and operating hours, and using telehealth in states that allow access, to meet the increased demand from states with bans.[129]

In late 2022, physician and bioethicist Matt Wynia called for physicians to practice "professional civil disobedience" in response to *Dobbs*, requesting that professional associations provide legal, financial, and social support for members who disobey unjust laws.[130] And in 2023, lawyer and bioethicist Katie Watson asked physicians to practice medicine bravely when confronted with criminal law that contradicts medical judgment.[131] All these efforts are vital, and just the beginning of what is needed to restore and preserve health and voice, enhance civic responsibility, and promote reasoned policymaking, not only about abortion but about other health justice issues as well.

It Shouldn't Take Courage (But It Does)

That moral courage is required of abortion providers has been obvious for years; many wear bullet-proof vests. Similarly, the moral courage of volunteer clinic staff and escorts is obvious. Even providing mifepristone by mail, and helping women travel across state lines for abortions, requires courage in states with highly restrictive laws. Moral courage is needed to speak out in the face of opposition, and it is also needed to ensure that we continue to vote despite legislative attempts at voter suppression. Women who support abortion restrictions and regard themselves as "pro-life," but would prefer that their own lives be saved if they developed a serious condition that precluded the possibility of a viable healthy birth, need the courage to critically reflect on the challenges posed for their own thinking by this combination of potentially incompatible views. It is far more difficult to recognize flaws and contradictions in our own views than to see them in others' views — but some of us are gaining practice in this recognition.

Taking responsibility is also a courageous act. It is necessary to advocate for and to practice primary prevention of pregnancy if one wishes to avoid parenthood, through the use of one of the various effective contraceptive options.[132] As Gabrielle Blair emphasizes in her book *Ejaculate Responsibly*,[133] a key though overlooked aspect of prevention of unwanted pregnancy is male behavior; after all, men are the cause of 100% of undesired pregnancies. Vasectomy is safe and effective and far less invasive than tubal ligation; condoms are also effective contraception,

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available over the counter for relatively low cost, and have preventive public health benefits that go beyond pregnancy. A "male pill" is also currently being studied.[134] Making contraception broadly acceptable and available is a public policy responsibility that is also

> to accept as fair terms of cooperation, and that there is a willingness to discuss the fair terms that others propose ... [T]rue reciprocity can only occur if there is mutual respect, including "consistency of speech in different situations,

Creating fair and reasonable and consensus-based public policy addressing an issue as divisive and morally complex as abortion will remain difficult, but the attempt remains essential. Increasing information transparency can make it possible to engage productively with those potentially open to it, thus enabling support for individuals in need. Seeking productive engagement requires continual confrontation with those who may continue to reject it; it is necessary to face frustration and failure in order to be ready whenever the possibility of engagement presents itself.

in line with the growing "green bioethics" movement, one of the pillars of which is simplicity.[135] In this context, simplicity encourages individuals and communities, where possible, to take back some of their own power and to act in ways that decrease their dependence on the high-cost medical system. This is even more important when self-reliance by individuals can also benefit providers, many of whom are experiencing unprecedented legal and social pressures.

Solidarity helps spread the burden of showing up with courage around these issues.[136] especially because the need for courageous action reaches beyond pregnancy-related concerns and even beyond bioethics. A key issue in the U.S. today is an unprecedented level of concern about whether democracy can survive current assaults on our sociopolitical systems and structures. These assaults range from the incessant promulgation of "alternative facts"[137] to the portrayal of white heterosexual Christian men as victims in a zero-sum game of access to the benefits of citizenship.[138] The implications of this extreme weaponization of the First Amendment are profound and have consequences that reach far beyond health justice concerns. Holm's discussion of public policymaking delineates what is needed to make public policymaking effective. Using Rawls and deliberative democracy and referencing Amy Gutmann's important work on public moral deliberation and democracy, he posits that reciprocity is essential to public discourse:[139]

> Reciprocity has two components; it entails that the principles and standards that are proposed have to be ... viewed as reasonable for everyone
>
> performative consistency, ... and a commitment to "search for significant points of convergence between our own understandings" and those of others, even when we disagree with their overall positions.

Holm then notes that Rawls requires that citizens be able to explain their votes to each other. He argues that in deliberative democracy, the ability and willingness to explain and discuss policies may have to suffice: "it is often impossible to find [the right] solution or to know that it is the right solution in any absolute sense. The best we can do is to outline the area of acceptable policies, and then choose a policy within this area through a deliberative democratic process."[140]

This indeterminacy at the level of public policy is central to the abortion issue. Profound disagreements about both the science and the ethics of medical and personal decisionmaking applicable to abortion make it essentially impossible to craft a public policy that neatly divides legal and illegal choices in a way that is morally acceptable to all and adequately protects those whose health is endangered and whose providers are placed at legal risk by abortion restrictions.[141] This difficulty has resulted in a lopsided approach to public policymaking, as some of the most vocal abortion opponents reject public moral deliberation and consistency, and fail to honestly examine their positions or explain their reasoning to others. Legislators in some states have helped disseminate arguments that restrictive abortion laws affect only young, irresponsible people who use abortion as birth control. But as we have noted, medical professionals are increasingly

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making clear that "there is no way to outlaw abortion without endangering people who never intended to have an abortion."[142]

Creating fair and reasonable and consensus-based public policy addressing an issue as divisive and morally complex as abortion will remain difficult, but the attempt remains essential. Increasing information transparency can make it possible to engage productively with those potentially open to it, thus enabling support for individuals in need. Seeking productive engagement requires continual confrontation with those who may continue to reject it; it is necessary to face frustration and failure in order to be ready whenever the possibility of engagement presents itself.

Conclusion: Going High

Health justice is ever more necessary today. The barriers to overcome are formidable, starting with profound societal failures to provide civic education and promote civic engagement.[143] When the concerns and priorities of citizens with different perspectives diverge, we should follow Professor Scott's advice and seek to change people's views about deservingness by making extensive efforts to engage and expand the perspectives of those who are open to new information.

Identifying structural inequities in all their complexity and working to overcome the presumption that those caught in the trap of unjust laws are blameworthy are essential first steps. Health lawyers, bioethics scholars, health care providers, and an engaged public therefore have a duty to take appropriate actions to support the right of self-determination and strengthen the representative democracy essential to health justice. We have previously called on physicians and other health care providers to undertake collective action to overcome the injustices inherent in and exposed by the *Dobbs* decision.[144] We recognize, however, that our call for solidarity and collective action must be broader — health lawyers and bioethics scholars must also work to thoughtfully inform and engage the public to provide a workable blueprint to dismantle structural barriers and promote health justice. What we learn from addressing *Dobbs* can have broader public health implications.

To engage the public in reasoned policymaking requires reform and reenvisioning at many levels, including an enhanced commitment to public education. It means operating from the best efforts of the broad range of disciplines representing scholarship and practice in bioethics and health justice, and working to promote critical engagement with and reflection about the ethical underpinnings of representative democracy. It means recognizing that advocacy and activism are central not only to health law but also to bioethics. And it means modeling humility and the willingness to talk together in good faith with those with whom we disagree. But it doesn't mean that each of us must tackle everything on this daunting list; our work must be collaborative. Solidarity is not a solo effort.

In 2016, Michelle Obama famously said "When they go low, we go high." As she explained to Stephen Colbert in 2022:

> For me, going high is not losing the urgency or the passion or the rage, especially when you are justified in it. Going high means finding the purpose in your rage. I'm trying to push us to think about solutions that will actually unite us and get us focused on the real problem. That's what I mean when I say, 'go high'. So yes, go high. America, please go high.[145]

Going high thus represents another way of capturing the need to work toward solidarity through public policymaking about health and health care. It means seeking solutions at every level of social and structural influence on health and health care. As Professor Scott notes in closing her essay, "what aid one deserves depends on who or what is to blame for creating the need for aid."[146] When there are multiple potential reasons for the current landscape of abortion restrictions, and multiple potentially responsible actors, responsibly addressing the need for aid is a multilevel and long-term advocacy effort.

That effort is further complicated when some of those who should promote public reason promote instead perceptions, decisions, and policies designed to cement particular conclusions about blameworthiness and desert that support avoidance of any responsibility to help others. Public policymaking requires responsible engagement among parties who reasonably disagree, but there are many structural ways to shape policy unfairly, including voting restrictions, extreme gerrymandering, and criminalization of responsible medical practice. But there are at least as many ways we can counter unjust policies and practices and promote responsible decisionmaking. Not only since Dobbs but also since the Court handed down its many other highly consequential decisions near the end of the 2023-24 term, legal and policy responses to these changes have been proliferating rapidly and continually. Keeping up with developments is difficult but essential to effective action. When those who go low refuse to engage transparently and fairly about the intertwined matters of

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reproductive justice, health, and voice that concern us here, continuing what feels like a futile effort to promote public reason is profoundly frustrating — yet it is an effort that is profoundly necessary and ongoing, if we hope to shape a world that is sufficiently just to be worthy of our trust.

Note

The authors have no conflicts to disclose.

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7. See C. Coughlin and N. M. P. King, "*Dobbs*, the Intrusive State, and the Future of Solidarity," *Cambridge Quarterly of Healthcare Ethics* 32 (2023): 344-357. Many other scholars and advocates have made similar arguments. For example, see generally N. Huberfeld, L. C. McClain, A. Ahmed (eds), Symposium, "Seeking Reproductive Justice in the Next 50 Years," *Journal of Law, Medicine & Ethics* 51 (2023): 463–625; see also, e.g., C. D. Brindis et al., "Health-care Workforce Implications of the Dobbs v Jackson Women's Health Organization Decision," *Lancet* 403 (2024): 2747–50; C. D. Brindis et al., "Societal Implications of the Dobbs v Jackson Women's Health Organization Decision," *Lancet* 403 (2024): 2751–54; National Academies of Sciences, Engineering, and Medicine, *Pressing Issues around Contraception Access Following the Repeal of* Roe v. Wade*: Proceedings of a Workshop in Brief* (Washington, DC: The National Academies Press, 2024), *available at* <https://doi.org/10.17226/27795>. There is, of course, much more scholarship appearing continually on a broad range of relevant developments.
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12. "[C]ampaign finance loopholes have [also] resulted in a decision that is at odds with the will of the people." J. Weiss-Wolf et al., "Supreme Court's Abortion Ruling Shows What Happens When Democracy is Thwarted," *Brennan Center for Justice*, June 24, 2022, *available at* <https:// www.brennancenter.org/our-work/analysis-opinion/supreme-courts-abortion-ruling-shows-what-happens-when-democracy-thwarted>(last visited December 11, 2023).
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16. *Id.*
17. *Shelby Country v. Holder*, 133 S.Ct. 2612 (2013).
18. *Id.*, at 2631 (holding that Section 4(b) is unconstitutional because it imposes an impermissible burden on federalism and the equal sovereignty of the states).
19. *Id.*
20. *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).
21. Note that both major political parties have engaged in gerrymandering to enrich their majorities, rather than create districts based upon geographic boundaries. To do so, those in charge of redrawing maps use strategies such as (1) "cracking" or combining individuals who vote for a certain party in such a way as to form a super-majority in a few districts, thus eliminating their electoral influence in the surrounding areas, and (2) "packing" or combining individuals who vote for a certain party in such a way as to form a super-majority in a few districts, thus eliminating their electoral influence in the surrounding areas. C. Coughlin and A. Messenlehner, "Return NC to a Democracy through Fair Redistricting," *The Raleigh News & Observer*, February 11, 2017.
22. See *Rucho*, 139 S. Ct. at 2509. See also *Alexander v. South Carolina State Conference of NAACP, 602 U.S.* _____ (2024) (reversing district court's finding of racially based gerrymander and vote dilution because the design of South Carolina's district was clearly erroneous); see *Moore v. Harper*, 600 U.S. 1 (2023) (rejecting independent state legislature theory — that state legislatures have sole authority to establish election laws without judicial review, presentment to state governors, or constraint by state constitutions).
23. *Brnovich v. Democratic National Committee* 594 U.S. 647 (2021).
24. But see *Allen v. Milligan*, 599 U.S. 1 (2023), where the Supreme Court upheld the district court's decision that Alabama's maps were discriminatory against Alabama voters, thereby violating Section 2 of the Voting Rights Act. In doing so, the Court also rejected the argument that Section 2 requires redistricting to be race-neutral.
25. See also *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment et al.*, No. 22-1395, (8th Cir. Nov. 20, 2023). In that case, the Eighth Circuit Court of Appeals ruled that only the U.S. Attorney, rather than private parties, can bring a lawsuit under Section 2 of the Voting Rights Act. This case will probably be appealed to the Supreme Court.
26. See *Brnovich*, *supra* note 23.
27. Ironically, many of these conservative legislators who applaud *Dobbs* have expressed support for a federal abortion ban.
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30. As we stated in "*Dobbs*, The Intrusive State, and the Future of Solidarity": "Over 30 years ago, Larry Churchill argued that we are not morally smart enough to make abortion laws except at the very margins. There are simply too many morally relevant factors to consider. No single moral calculus can account for all these factors or judge their relative merit." Coughlin and King, *supra* note 7, at 350.
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41. These states are California, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Montana, New Hampshire, New York, Nevada, Pennsylvania, Rhode Island, Washington, Wyoming, and Virginia. See *New York Times*, *supra* note 39.
42. *Id.* To state this another way, as of this writing, there are only fourteen states where there is a total ban, so thirty-six states and the District of Columbia allow abortion in some form. See *New York Times*, *supra* note 39.
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46. *Id.;* K. Jones, "Expanding Access and Protection in States Where Abortion is Legal, Ctr. for Am. Progress," *Center for American Progress*, July 25, 2022, *available at* <https://www.americanprogress.org/article/expanding-access-and-protections-in-states-where-abortion-is-legal/> (last visited December 11, 2023); A. Sasani, "Abortion Clinics Saw Record Surge in Out-of-State Patients Post-Roe, Report Says," *The Guardian,* December 7, 2023, *available at* <https://www.theguardian.com/world/2023/dec/06/increase-out-of-state-abortion> (last visited December 11, 2023) ("The Kansas clinic tripled its staff and stopped offering other reproductive health services, like contraceptives and gender-affirming care. Despite their best efforts, hundreds of patients are still turned away each week.").
47. See A. Nambiar et al., "Maternal Morbidity and Fetal Outcomes Among Pregnant Women At 22 Weeks' Gestation or Less With Complications in Two Texas Hospitals After Legislation on Abortion," *American Journal of Obstetrics & Gynecology* 227, no. 4 (2022), *available at* <https://www.ajog.org/article/S0002-9378(22)00536-1/fulltext> (last visited December 11, 2023) (concluding that based on the limited size of the study that the Texas ban led to an average treatment delay of nine days and worse health outcomes.); S. M. Suter, "Alito is Wrong: We Can Assess the Impact of *Dobbs*, and It Is Bad for Women's Health," *Seton Hall Law Review* 53 (2023): 1477-1542, at 1496 (citing Nambiar et al., *supra* note 48).
48. I. Maddow-Zimet et al., "New State Abortion Data Indicate Widespread Travel for Care," *Guttmacher Institute*, *available at* <https://www.guttmacher.org/2023/09/new-state-abortion-data-indicate-widespread-travel-care> (last visited December 11, 2023).
49. People who live at or near the federal poverty line, or who fall within the coverage gap in non-expansion states are less likely to have paid time off or sick leave to allow for travel. K.M. Bridges, "A Post-*Roe* America: The Legal Consequences of the *Dobbs* Decision: Hearing before the Senate Committee on the Judiciary," *U.S. Senate Committee on the Judiciary*, July 12, 2022, *available at* <https://www.judiciary.senate.gov/committee-activity/hearings/a-post-roe-america-the-legal-

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consequences-of-the-dobbs-decision> (last visited December 11, 2023).

50. Some states, such as Texas and Idaho, that have banned the procedure have enacted laws to interfere with actions by individuals in states where abortion remains legal. Idaho H.B. 242; Texas S.B.8. Because of this type of overreach, other states with more permissive policies have sought to pass or update existing "shield" laws that provide varying degrees of protection, including shielding providers and patients from criminal or civil liability arising from care or even advice provided to an out-of-state resident. These laws differ, however, from state to state and provide for varying degrees of protection, ranging from prohibiting investigations regarding abortions, protecting individuals who receive abortion care in a state that allows abortion, and protecting providers from licensure or malpractice insurance coverage losses. Along with the District of Columbia, the following states offer some level of protections: Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. R. Seigel & A. Leiter, "State Abortion Shield Laws: Key Findings and Infographic," *Manatt*, September 26, 2023, *available at* <https://www.manatt.com/insights/white-papers/2023/state-abortion-shield-laws-key-findings-and-infogr#:~:text=In%20light%20of%20these%20conflicts,providers%20who%20perform%20abortions%2C%20including> (last visited December 11, 2023); B. Damante and K.B. Jones, "State Laws on Abortion," *Center for American Progress*, March 28, 2023, *available at* <https://www.americanprogress.org/article/state-laws-on-abortion/> (last visited December 11, 2023).
51. S. S. Greenberger, "As Abortion Measures Loom, GOP Raises New Barriers to Ballot Initiatives," *Stateline*, February 15, 2023, *available at* <https://stateline.org/2023/02/15/as-abortion-measures-loom-gop-raises-new-barriers-to-ballot-initiatives/> (last visited December 11, 2023).
52. See e.g., A. M. Ollstein, "Republican Graham Introduces Bill That Would Restrict Abortions Nationwide," *Politico*, September 13, 2022, *available at* <https://www.politico.com/news/2022/09/13/republicans-graham-bill-restrict-abortions-nationwide-00056404> (last visited December 11, 2023).
53. A.J. Stevenson, Research Note, "The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant," *Demography* 58, no. 6 (2021): 2019-2028, *available at* <DOI: 10.1215/00703370-9585908> (last visited December 11, 2023); K.B. Kozhimannil et al., "Abortion Access as a Racial Justice Issue," *New England Journal of Medicine* 387 (2022): 1537–1539.
54. See Common Cause, "Charge Report, Community Redistricting Report Card," *available at* <https://www.commoncause.org/resource/charge-report-community-redistricting-report-card/> (last visited December 11, 2023) ("Population growth in most states was driven by communities of color, but that fact did not guarantee a seat at the table for those communities when redistricting decisions were made.").
55. There appears to be a strong correlation between states that have restrictive abortion bans, have failed to adopt Medicaid expansion, and have high rates of maternal mortality. See *e.g.*, Pregnancy Justice, "Pregnancy Justice Report Reveals Massive Scope of the Criminalization of Pregnant People," September 19, 2023, *available at* <https://www.pregnancyjusticeus.org/press/pregnancy-justice-new-report-reveals-massive-scope-of-pregnancy-criminalization/> (last visited December 11, 2023).
56. R. Rudowitz et al., "How Many Uninsured Are in the Coverage Gap and How Many Could be Eligible if All States Adopted Medicaid Expansion," *Kaiser Family Foundation*, March 31, 2023, *available at* <https://www.kff.org/medicaid/issue-brief/how-many-uninsured-are-in-the-coverage-gap-and-how-many-could-be-eligible-if-all-states-adopted-the-medicaid-expansion/> (last visited December 11, 2023).
57. *Id.* See S. Giled and M.A. Wiess, "Impact of the Medicaid Coverage Gap: Comparing States that Have and Have Not Expanded Eligibility," *The Commonwealth Fund*, September 11, 2023, *available at* <https://www.commonwealthfund.org/publications/issue-briefs/2023/sep/impact-medicaid-coverage-gap-comparing-states-have-and-have-not> (last visited December 11, 2023); S. Artiga and A. Damico, "Health and Health Coverage in the South: A Data Update," *Kaiser Family Foundation*, February 10, 2016, *available at* <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-and-health-coverage-in-the-south-a-data-update/> (last visited December 11, 2023).
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61. A. Rupar, "Erin Ryan on Republicans' Abortion Problem," *Public Notice*, November 22, 2023, *available at* <https://www.publicnotice.co/p/erin-ryan-interview-republican-abortion-problem> (last visited December 11, 2023).
62. See generally, N. Cahn and J. Carbone, "Supporting Families in a Post-*Dobbs* World: Politics and a Winner Takes All Economy," *North Carolina Law Review* 101 (2023): 1549-1598.
63. A. Forman-Rabinovici and O. C.A. Johnson, "Political Equality, Gender and Democratic Legitimation in *Dobbs*," *Harvard Journal of Law & Gender* 46 (2023): 81-130, at 83.
64. *Id.*
65. See, e.g., J. D. Buxbaum et al., "Contributions of Public Health, Pharmaceuticals, And Other Medical Care To US Life Expectancy Changes, 1990-2015," *Health Affairs* 39, no. 9 (2020); 1546-1556, at 548, *available at* <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2020.00284> (last visited December 11, 2023).
66. C. Coughlin, "Challenging the FDA's Authority Isn't New — The Agency's History Shows What's At Stake When Drug Regulation Is In Limbo," *The Conversation*, April 26, 2023, *available at* <https://theconversation.com/challenging-the-fdas-authority-isnt-new-the-agencys-history-shows-whats-at-stake-when-drug-regulation-is-in-limbo-204263> (last visited December 11, 2023).
67. In 2012 the FDA approved a higher dose of mifepristone than used for abortions for the daily management of blood sugar levels with endogenous Cushing's syndrome. Endocrine Society Press Release, Endocrine Society Alarmed by Texas Court Ruling Banning Mifepristone, April 10, 2023, *available at* <https://www.endocrine.org/news-and-advocacy/news-room/2023/endocrine-society-alarmed-by-texas-court-ruling-banning-mifepristone> (last visited December 11, 2023).
68. G. Sedgh and Irum Taqi, "Mifepristone for Abortion in a Global Context: Safe, Effective, and Approved in Nearly 100 Countries," *Guttmacher Institute*, *available at* <https://www.guttmacher.org/2023/07/mifepristone-abortion-global-context-safe-effective-and-approved-nearly-100-countries> (last visited December 11, 2023).
69. See *Loper Bright Enterprises et al., v. Raimondo et al.*, 603 U.S. _____ (2024) (overturning the 40-year-old Chevron doctrine that provided for deference to reasonable agency interpretation where a statute is ambiguous); *Securities and Exchange Commission v. Jarkesy et al.*, 603 U.S. _____ (2024) (holding that the Seventh Amendment's jury trial guarantee includes agency-imposed civil penalties requiring an enforcement action in civil court); *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. ____ (2024) (holding

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that the six-year statute of limitations for a facial challenge to a regulation is triggered when the rule injures the particular plaintiff rather than within six years from when the regulation is first issued).

70. A brief overview of the Supreme Court cases that reflect the evolving major questions doctrine is as follows: In *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. 758 (2021), the Supreme Court held that the CDC lacked the legal authority to extend a nationwide eviction moratorium. Likewise, in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 595 U.S. 109 (2022), the Court rejected the Occupational Safety and Health Administration's emergency temporary standard imposing COVID-19 vaccination requirements on employers with over 100 employees. In *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022), the Court held that the Clean Air Act did not grant authority to the EPA to devise emission caps premised on "generation shifting." Most recently, in *Biden v. Nebraska*, 600 U.S. __ (2023), the Court struck down a Biden administration initiative through the Department of Education to cancel student debt. There is also significant action in the lower courts that could implicate the major questions doctrine. See P. Jacobi and J. Monas, "Major Floodgates: The Indeterminate Major Questions Doctrine Inundates Lower Courts," *Harvard Law School Journal on Legislation*, June 24, 2024, *available at* <https://journals.law.harvard.edu/jol/2024/06/24/major-floodgates-the-indeterminate-major-questions-doctrine-inundates-lower-courts/> (last visited July 31, 2024).
71. See W. E. Parmet and P. C. Erwin, "The Challenges to Public Health Law in the Aftermath of Covid-19," *American Journal of Public Health* 113 (2023): 267-68, *available at* <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2022.307208> (last visited December 11, 2023).
72. Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Article I, Section 8 — the "necessary-and-proper" clause — provides Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers ... in any Department or Officer thereof."
73. 21 U.S.C. § 301.
74. U.S. Food & Drug Administration, "How Drugs are Developed and Approved," *available at* <https://www.fda.gov/drugs/development-approval-process-drugs/how-drugs-are-developed-and-approved#:~:text=The%20mission%20of%20FDA's%20Center,country%20are%20safe%20and%20effective.> (last visited December 11, 2023).
75. U.S. Food & Drug Administration, "What Does FDA Do?" *available at* <https://www.fda.gov/about-fda/fda-basics/what-does-fda-do> (last visted December 11, 2023).
76. The Administrative Procedure Act, 5 U.S. C. § 555, sets forth the standards for administrative agency action and assists federal courts faced with challenges to agency rules and regulations.
77. Complaint and Plaintiff's Motion for Preliminary Injunction, *Alliance for Hippocratic Medicine et al., v. U.S. Food & Drug Administration*, 2:22-CV-223-Z (N.D. Tex. Nov. 18, 2022). It is widely believed that the plaintiffs filed this lawsuit in the Northern District of Texas so that District Judge Matthew J. Kacsmaryk, who is well-known for his anti-abortion views, could rule on it.
78. Memorandum Opinion and Order, *Alliance for Hippocratic Medicine et al., v. U.S. Food & Drug Administration*, 2:22-CV-223-Z (N.D. Tex. April 7, 2023). See L. Sobel, A. Salganicoff and M. Felix, "Legal Challenges to FDA Approval of Medication Abortion Pills," Kaiser Family Foundation, March 13, 2023, *available at* <https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-the-fda-approval-of-medication-abortion-pills/> (last visited December 11, 2023). On the same day that Judge Kacmaryk decided Alliance, District Judge Thomas O. Rice, Eastern District of Washington, decided *State of Washington v. FDA*, which enjoined the FDA from imposing restrictions in seventeen states on the distribution of mifepristone through its 2023 Risk Evaluation and Management Strategy (REMS). That case was filed by the Oregon and Washington Attorneys General, joined by sixteen other Attorneys General, challenging the FDA's decisions to impose restrictions through its 2023 REMS, arguing that the restrictions were unnecessary and limited mifepristone's availability. The case remains pending the outcome of *Alliance*. See L. Sobel and A. Salganicoff, "Q & A: Implications of Two Conflicting Federal Court Rulings on the Availability of Medication Abortion and the FDA's Authority to Regulate Drugs," *Kaiser Family Foundation*, April 8, 2023, *available at* <https://www.kff.org/policy-watch/q-a-implications-of-two-conflicting-federal-court-rulings-on-the-availability-of-medication-abortion-and-the-fdas-authority-to-regulate-drugs/> last visited December 11, 2023).
79. On April 12, 2023, the Fifth Circuit in *Alliance* reversed in part, allowing the FDA's twenty-plus-year approval to stand but blocking changes under the FDA's 2016 REMS requirement with respect to distribution. See Sobel et al., *supra* note 78. The U.S. Supreme Court then stayed the trial court's order, allowing mifepristone to remain available but returning the case to the Fifth Circuit. See J. A. Stamman, "Medication Abortion: New Litigation May Affect Access," Congressional Research Service, April 28, 2023, *available at* <https://crsreports.congress.gov/product/pdf/LSB/LSB10919> (last visited December 11, 2023) See also *Whole Woman's Health Alliance et al. v. FDA, et al.*, (W.D. Va. May 8, 2023) where abortion providers in Virginia, Montana, and Kansas challenged FDA's REMS for mifepristone, filing a motion for preliminary injunction to enjoin FDA from altering the status quo concerning the REMS in plaintiffs' states. The government opposed the motion for a preliminary injunction and moved to stay the case pending the outcome of *Alliance.* On August 21, 2023, the district court denied the plaintiffs' motion for a preliminary injunction.
80. *Food and Drug Administration v. Alliance for Hippocratic Medicine* et al., 602 U.S. 367 (2024).
81. For example, in 2022, Louisiana passed a law that punished a person with up to five years in prison for using the mail to send abortion medications to a patient. La. Senate Bill 388. But see U.S. Department of Justice, "Memorandum Opinion for the General Counsel United States Postal Service," December 23, 2022, *available at* <https://www.justice.gov/olc/opinion/file/1560596/download> (last visited December 11, 2023) (clarifying that federal law allows the U.S. Post Office to deliver abortion pills in states where medication abortion is banned because the sender doesn't know whether the person receiving the medications will use them illegally).
82. Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas and West Virginia.
83. See R. K. Jones, et al., "Medication Abortion Now Accounts for More than Half of All U.S. Abortions," *Guttmacher Institute*, *available at* <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> (last visited December 10, 2023).
84. See Suter, *supra* note 47, at 1496.
85. Federation of State Medical Boards, "About Physician Licensure," *available at* <https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/about-physician-licensure/#:~:text=Through%20licensing%2C%20state%20medical%20boards,conduct%20while%20serving%20their%20patients> (last visited December 11, 2023).
86. See Suter, *supra* note 47, at 1497; D. Fox " The Abortion Double Bind," *American Journal of Public Health* 113, no. 10 (2023): 1068-1072.

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87. See *e.g.*, S. Simmons-Duffin, "In Oklahoma, A Woman Was Told to Wait Until She's 'Crashing' for Abortion Care," *National Public Radio*, April 26, 2023), *available at* <https://www.npr.org/sections/health-shots/2023/04/25/1171851775/oklahoma-woman-abortion-ban-study-shows-confusion-at-hospitals> (last visited December 11, 2023); see also Fox, *supra* note 86.
88. Suter, *supra* note 47, at 1497; Fox, *supra* note 86. Moreover, the risk of civil and criminal penalties extends far beyond abortion. When the Alabama Supreme Court decided in a wrongful death action that frozen embryos are children, the University of Alabama at Birmingham halted its in vitro fertilization (IVF) program out of concern that many common IVF practices could give rise to liability. See A. Betts, "After Ruling, University of Alabama at Birmingham Health System Pauses I.V.F. Procedures," *New York Times*, February 21, 2024, *available at* <https://www.nytimes.com/2024/02/21/us/university-alabama-birmingham-ivf-embryo-ruling.html> (last visited February 22, 2024). See also LePage, *ex rel.* Embryo A and Embryo B v. The Center for Reproductive Medicine, CV-21-901607, SC-2022-0515 (Ala. S. Ct. Feb. 16, 2024) (consolidating and delivering a joint opinion in LePage *ex. rel. v. The Center for Reproductive Medicine*, CV-21-901607, SC-2022-0515, and Burdick-Aysenne *ex rel. Baby Aysenne, v. The Center for Reproductive Medicine*, CV-21-901640, SC-2022-0579).
89. See B. Balch, "What Doctors Should Know About Emergency Abortions in States With Bans," *Association of American Medical Colleges*, September 26, 2023, *available at* <https://www.aamc.org/news/what-doctors-should-know-about-emergency-abortions-states-bans> (last visited December 11, 2023).
90. Physicians for Human Rights, et al., "No One Could Say: Accessing Emergency Obstetrics Information as a Prospective Patient in Post-Roe Oklahoma," *available at* <https://reproductiverights.org/wp-content/uploads/2023/04/OklahomaAbortionBanReport_Full_SinglePages-NEW-4-27-23.pdf> (last visited December 11, 2023); see Suter, *supra* note 49, at 1497-98.
91. Suter, *supra* note 47, at 1497.
92. *Id.* at 1503. See R. Robinson, "6 Scenarios Where Abortion Can be Lifesaving," Everyday Health, September 28, 2022, *available at* <https://www.everydayhealth.com/abortion/scenarios-where-abortion-can-be-life-saving/> (last visited December 11, 2023).
93. See, e.g., P. Noor, "The Doctors Leaving Anti-Abortion States: 'I Couldn't Do My Job At All'," *Guardian*, October 26, 2022, *available at* <https://www.theguardian.com/world/2022/oct/26/us-abortion-ban-providers-doctors-leaving-states> (last visited December 11, 2023); N. El-Bawab, "Doctors Face A Tough Decision to Leave States with Abortion Bans," *ABC News*, June 23, 2023, *available at* <https://abcnews.go.com/US/doctors-face-tough-decision-leave-states-abortion-bans/story?id=100167986> (last visited December 11, 2023); S.G. Stolberg, "As Abortion Drives Doctors Away from Red States," *New York Times*, September 6, 2023, *available at* <https://www.nytimes.com/2023/09/06/us/politics/abortion-obstetricians-maternity-care.html> (last visited December 11, 2023).
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95. See MacKenzie and Rosen, *supra* note 58.
96. See, *e.g.*, C. Coughlin, "FDA's Accelerative Approval, Emergency Use Authorization, and Pre-Approval Access: Considerations for Use in Public Health Emergencies and Beyond," *University of North Carolina Journal of Law and Technology* 23, no. 4 (2022): 741-778.
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100. See Weiss-Wolf et al., *supra* note 12.
101. National Academies, "Reproductive Health, Equity, and Society - A Workshop to Explore Data Needs in the Wake of the *Dobbs v. Jackson Women's Health Organization* Decision," October 5, 2023, *available at* < https://www.nationalacademies.org/event/40805_10-2023_reproductive-health-equity-and-society-a-workshop-to-explore-data-needs-in-the-wake-of-the-dobbs-v-jackson-womens-health-organization-decision >(last visited December 11, 2023).
102. National Research Council and Committee on National Statistics, "Vital Statistics: Summary of a Workshop" 2009 (M. J. Siri and D. L. Cork, rapporteurs), *available at* <https://nap.nationalacademies.org/catalog/12714/vital-statistics-summary-of-a-workshop> (last visited December 11, 2023) (suggested citation: National Research Council. 2009. Vital Statistics: Summary of a Workshop. Washington, DC: The National Academies Press).Since it began in 1960, The National Center for Health Statistics (NCHS) has been the organization responsible for the federal aspects of this enterprise. NCHS has legislative authority to collect vital statistics annually. Currently, this data collection is limited to data from birth and death records (including fetal deaths). See 42 U.S.C. § 242k.
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106. See Texas S.B. 8; Society of Family Planning, also see #WeCount Report, *supra* note 44.
107. A.R.A. Aiken et al., Research Letter, "Requests for Self-Managed Medication Abortion Provided Using Online Telemedicine in 30 US States before and after the *Dobbs v. Jackson Women's Health Organization* Decision," *JAMA* 328, no. 17 (2022): 1768-1770.
108. In December 2022, the General Counsel's Office of the United States Postal Service issued a Memorandum clarifying that federal law allows the U.S. Post Office to deliver abortion pills in states where medication abortion is banned because the sender cannot know whether the person receiving the medications would use them legally or illegally. See *supra* note 81 and accompanying text.
109. Pregnancy Justice, "The Rise of Pregnancy Criminalization: A Pregnancy Justice Report," *available at* <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf> (last visited December 11, 2023); If/When/How, Self-Care, Criminalized: Preliminary Findings (August 1, 2022), *available at* <https://ifwhenhow.org/resources/self-care-criminalized-august-2022-preliminary-findings/> (last visited December 11, 2023).
110. E.g., Idaho H.B. 242, Texas S.B. 8.
111. When physicians feel forced by legislators to wait to act until these patients develop increased morbidity and face substantial mortality risk, the need for and cost of intensive medical services rise, when simpler, less expensive, less invasive, and less dangerous medical services would have clearly better served such patients. Such incidents go against the fundamental medical tenet of prevention and of providing needed medical care when the need first becomes apparent — it is

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anathema to physicians' code of ethics to deliberately wait for patients' health to worsen before doing anything. See Fox, *supra* note 86. See also Jones, *supra* note 46.

112 Nambiar et al., *supra* note 47, report that in two Texas hospitals, state-required 'expectant management' of obstetrical complications was associated with significant maternal morbidity: 57% of patients had a serious maternal morbidity compared with 33% who elected immediate pregnancy interruption under similar clinical circumstances reported in states without such legislation. The patients in the two Texas hospitals were observed on average nine days before developing complications that qualified as an immediate threat to maternal life.

113. E. Wright Clayton, P. J. Embi, and B. A. Malin, "*Dobbs* and the Future of Health Data Privacy for Patients and Healthcare Organizations," *Journal of the American Medical Informatics Association* 301, no. 1 (2023): 155-160.

114. S. Holm, "Policy-Making in Pluralistic Societies," in Steinbock B., ed., *Oxford Handbook of Bioethics* (New York: Oxford University Press 2009): 153-174.

115. *Id.* at 154.

116. *Id.* at 155.

117. *Id.* at 156.

118. *Alliance*, No. 23-10362 (5th Cir. Aug. 16, 2023) (J. J. Ho, concurring in part and dissenting in part) at 678-70.

119. *Id.*

120. See *supra* note 78.

121. See *Weems v. Montana* (Mont. Sup. Ct., May 12, 2023) (affirming the district court judgment that Mont. Code Ann. § 50-20-109(1)(a), restricting abortion care to physicians and physician assistants, violates the Montana Constitution's provision of a fundamental right of privacy, which includes seeking abortion care by a qualified provider of the pregnant person's choosing); *Oklahoma Call for Reproductive Justice v. Drummon* (Okla. Supr. Court. March 21, 2023) (ruling that the Oklahoma State Constitution protects the right to abortion in life-threatening situations, but declining to rule whether it protects the procedure outside of life-threatening emergencies); but see Planned Parenthood South Atlantic v. South Carolina (S.C. Sup. Ct., August 23, 2023) (upholding the 2023 version of a fetal heartbeat abortion ban, finding the ban does not violate the South Carolina Constitution and reversing its earlier decision in *Planned Parenthood South Atlantic v. State*, 438 S.C. 188 (2023) that the 2021 version of a fetal heartbeat bill violates the South Carolina Constitution).

122. Under the federal preemption doctrine, federal law may implicitly override state law when it is "impossible for a private party to comply with both state and federal requirements" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. See J.B. Sykes and N. Vanatko, "Federal Preemption: A Legal Primer," *Congressional Research Service*, July 23, 2019, *available at* <https://crsreports.congress.gov/product/pdf/R/R45825> (last visited December 11, 2023).

123. Civil Action 3:23-0058 (S.D.W. Va. May. 2, 2023).

124. *Id.*

125. 42 U.S.C. § 1395dd.

126. *Moyle v. United States*, 603 U.S. ____ (2024); See generally D. S. Cohen, G. Donley, and R Rebouché, "The New Abortion Battleground," *Columbia Law Review* 123, no. 1 (2023): 1-100.

127. See Jones, supra note 46.

128. See Center for Reproductive Rights, "Zurawski v. State of Texas," *available at* <https://reproductiverights.org/case/zurawski-v-texas-abortion-emergency-exceptions/zurawski-v-texas/> (last visited December 11, 2023); see also J. Hopkins Tanne, "Texas Court Hears Challenge to State's Strict Abortion Ban by Women Who Say They Were Harmed," *The BMJ News* 383 (2023): 2863.

129. See Cohen and Joffe, *supra* note 44.

130. M. K. Wynia, "Professional Civil Disobedience: Medical Society Responsibilities after *Dobbs*," *N Eng J Med* 287 (2022): 959-961. A different example of collective courage and solidarity has emerged in the form of shield laws that enable physicians to facilitate medication abortions across state lines. See P. Belluck, "Abortion Shield Laws: A New War Between the States," February 22, 2024, *available at* <https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html> (last visited February 22, 2024).

131. K. Watson, "Dark-Alley Ethics — How to Interpret Medical Exceptions to Bans on Abortion Provision," *N Eng J Med*. 388, no. 13 (2023): 1240-1245; see also K. Watson and M. Oberman, "Abortion Counseling, Liability, and the First Amendment," *N Eng J Med*. 389, no. 7 (2023): 663-667 (advocating for comprehensive counseling and referral as an ethical duty for physicians in highly restrictive states despite legal confusion).

132. Planned Parenthood of the Pacific Southwest, Inc., "12 Types of Birth Control," December 7, 2015, *available at* <https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/blog/12-types-of-birth-control> (last visited December 11, 2023).

133. G. Brown, *Ejaculate Responsibly: A Whole New Way to Think About Abortion* (New York: Workman Publishing Group, 2022).

134. National Institutes of Health, "Male Contraceptive Disables Sperm," February 28, 2023, *available at* <https://www.nih.gov/news-events/nih-research-matters/male-contraceptive-disables-sperm> (last visited December 4, 2023). An informed discussion of male contraception is incomplete without reference to male/female power dynamics, which is beyond the scope of our analysis.

135. C. Richie, *Principles of Green Bioethics: Sustainability in Health Care* (East Lansing: Michigan State University Press, 2019).

136. Solidarity, a concept that is at best only tacitly present in American bioethics, focuses on the social practices of mutuality, empathy, and benevolence, and emphasizes shared attention to the needs of others, thus directly opposing the individual focus and zero-sum reasoning of belief in a just world. See e.g., B. Jennings and A. Dawson, "Solidarity in the Moral Imagination of Bioethics," *Hastings Center Report* 45, no. 5 (2015): 31-38.

137. Kellyanne Conway is credited with first using the term. See E. Bradner, "Conway: Trump White House Offered 'Alternative Facts' on Crowd Size," *CNN*, January 23, 2017, *available at* <https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html > (last visited December 11, 2023).

138. See, e.g., J. Patrice, "Stephen Miller COINCIDENTALLY Lodges Complaint against Macy's on the One Week a Year when People Google 'Macy's," *Above the Law*, November 23, 2023, *available at* <https://abovethelaw.com/2023/11/stephen-miller-sues-macys/> (last visited December 11, 2023).

139. See Holm, *supra* note 114, at pp. 159-160 (internal citation omitted)

140. See Holm, *id.* at p. 162.

141. On this key difficulty and the need for moral humility, see L. R. Churchill, "Do We Know Enough Morally to Make Abortion Laws?" *Midwest Medical Ethics* 5, no. 3 (1989): 1-4; Fox, *supra* note 86; Rupar, *supra* note 64; K. Mucherson, "Regulating Reproductive Medicine in a World Without Roe," *N Eng J Med* 388, no. 4 (2023): 289-292.

142. See Rupar, *supra* note 61. When those who regard abortion as morally wrong in virtually all circumstances are offered more information about the harms arising from restrictive policies, they may be better able to acknowledge the moral wrong of forcing women to risk their lives to preserve nonviable pregnancies.

143. As commentator Chauncey DeVega has noted, many Americans lack appreciation of the complexity of political information and do not always pay close attention to issues of concern. C. DeVega, "Democracy's Last Thanksgiving: Experts Imagine America in a Year if Trump Wins the 2024 Election," *Salon*, November 23, 2023, *available at* <https://www.salon.

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com/2023/11/23/democracys-last-thanksgiving-experts-imagine-america-in-a-year-if-wins-the-2024/> (last visited December 11, 2023).
144. See Coughlin and King, *supra* note 7, at 350-351.
145. M. Willstein, "Colbert to Michelle Obama: How Can We 'Go High' When the Bar Is So Low?" *Daily Beast*, November 15, 2022, *available at* <https://www.thedailybeast.com/stephen-colbert-asks-michelle-obama-how-can-we-go-high-when-the-bar-is-so-low> (last visited December 11, 2023).
146. See Scott, *supra* note 1, at 19.

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