

MENSTRUAL JUSTICE AFTER *DOBBS*

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This Article identifies and analyzes the category of state and private regulation that is invisible and subordinates women and other menstruators in ways that impact their privacy, liberty, and equality. Because this category of regulation is pervasive, bringing it to light is critical for considering how best to curb its harm. This Article considers potential legal strategies to counter such menstruation regulation and argues that *Dobbs v. Jackson Women's Health Organization* offers some promise—but more cause for pessimism—regarding the U.S. Constitution's power to do so. This Article therefore explains how subconstitutional law offers greater potential, while cautioning that political science research shows progressive law reform can be limited by a misogynistic strategy, that is, the political strategy of maintaining patriarchal order and female gender roles.

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INTRODUCTION

This Article refocuses the scholarly conversation regarding the implications of *Dobbs v. Jackson Women's Health Organization*¹ on reproductive freedoms. Specifically, this Article focuses on a core and often overlooked part of women's reproductive health—menstruation. This Article highlights the category of state and private regulation of people who menstruate (“menstruators”) that is often invisible, subordinating, and harmful to their privacy, liberty, and equality.²

1. 142 S. Ct. 2228 (2022).

2. Menstruation regulation is a particular form of menstrual injustice, that is, the oppression of women, girls, and other individuals who menstruate. Margaret E. Johnson, *Menstrual Justice*, 53 UC DAVIS L. REV. 1, 5 (2019) [hereinafter Johnson, *Menstrual Justice*].

A note on language used in this Article. Menstruators include those who experience perimenopause and menopause as well. Menstruators may be cisgender women and girls, transgender men and boys, and nonbinary, gender queer, and intersex individuals. See Johnson, *Menstrual Justice*, *supra*, at 5 n.6; Marcy L. Karin, Margaret E. Johnson & Elizabeth B. Cooper, *Menstrual Dignity and the Bar Exam*, 55 UC DAVIS L. REV. 1, 24 (2021) [hereinafter Karin, Johnson & Cooper, *Menstrual Dignity*]. This Article aims to include all individuals who menstruate in its discussion of menstruation regulation. For ease of reference or because the research or cases are focused only on cisgender women, it may use gender-specific and binary terms like “girls” and “women” to describe menstruators. But using only “girls” or “women” as synonymous with menstruators excludes those persons who menstruate and are not cisgender women or girls. At the same time, the terms “girls” and “women” are overinclusive because transgender girls

Because the category of regulation is pervasive, bringing it to light is critical to analyzing how best to curb the various forms of resulting harm and achieve menstrual justice.³

Once menstruation regulation is identified, the next inquiry is whether law can curtail it. This Article first turns to constitutional law, examining whether the *Dobbs* decision might offer promise, or pessimism, for such a project. As *Dobbs* is the most consequential case for women's reproductive freedom in almost fifty years, understanding its implications for this type of menstruation regulation, as with other reproductive freedoms, is critical. This Article approaches *Dobbs* as the precedent it is and uses its frameworks to determine whether it could be useful for addressing menstruation regulation, ultimately finding that *Dobbs* provides some potential but more cause for pessimism. Given the limitations of *Dobbs*, this Article determines that subconstitutional laws may provide guardrails to and positive reforms of menstruation regulation, but it gives a cautionary note offered by political theorists—that progressive law reform is possible, but it must consider the realities of misogyny when formulating political strategy.

Regulating menstruation has grabbed headlines recently because states' criminal abortion bans often calculate legal timeframes based on women and other pregnant individuals' menstrual cycle and the first day of their last menstrual period (LMP).⁴ State bans use the LMP as if it

and transgender women do not menstruate. Furthermore, some cisgender girls and women do not menstruate because of menstrual suppressants, amenorrhea, pregnancy, perimenopause, menopause, and post-menopause. See Marcy L. Karin, *Addressing Periods at Work*, 16 HARV. L. & POL'Y REV. 449, 455 (2022); BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW'S SILENCE ON PERIODS* 133–35 (2022); Karin, Johnson & Cooper, *Menstrual Dignity*, *supra*, at 23–24. As I have written elsewhere, it is important to recognize all individuals who menstruate in crafting law and policy reform to ensure that menstrual discrimination can be addressed for all menstruators. When discussing individuals who menstruate this Article often refers to them as “menstruators” for inclusiveness and ease of reference. *E.g.*, Johnson, *Menstrual Justice*, *supra*, at 48, 61 & n.425, 78–79.

3. Doing so can help with the goal of menstrual justice. Margaret E. Johnson, *Asking the Menstruation Question To Achieve Menstrual Justice*, 41 COLUM. J. GENDER & L. 158, 159 (2021) [hereinafter Johnson, *Asking the Menstruation Question*] (“The goal of menstrual justice is to identify, reduce, and remedy harm resulting from structural oppression of menstruators (menstrual injustices). It also aims to support menstruators’ multidimensionality by working on inclusive, equitable, dignity-enhancing, and agency-enhancing reforms to law, policy, and praxis in collaboration with other social justice movements.”).

4. Menstruation occurs between menarche, one’s first period, which happens on average around age twelve, until menopause, the cessation of a period for at least one year, which happens on average at age fifty-one. See *Menstrual Periods Are Arriving Earlier for Younger Generations, Especially Among Racial Minority and Lower-Income Individuals*, HARV. T.H. CHAN SCH. PUB. HEALTH (May 29, 2024), <https://www.hsph.harvard.edu/news/press-releases/menstrual-periods-are-arriving->

were indicative of the developmental age of the fetus, despite the fact that the LMP can be an inaccurate measurement of the pregnancy's progression.⁵ Using the LMP as the basis for distinguishing between a legal and illegal abortion means that some states have put women's menstrual cycles under the microscope. With the increase of abortion bans post-*Dobbs*, regulation of women's LMPs has increased.

Nebraska and twenty-one other states have banned or severely restricted access to abortion⁶ since the Supreme Court's decision in *Dobbs* gave states a large role in controlling women's bodies. In overturning *Roe v. Wade*⁷ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸ the Court removed the U.S. Constitution's fundamental right to abortion care. Nebraska's regulation of abortion

earlier-for-younger-generations-especially-among-racial-minority-and-lower-income-individuals/ [https://perma.cc/X3YR-6WZ2]; *The Menopause Years*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Dec. 2018), <https://www.acog.org/womens-health/faqs/the-menopause-years> [https://perma.cc/H3B5-V5V5] (choose "What is menopause?"). And while not all women menstruate each month—due, for instance, to pregnancy, breastfeeding, menopause, medical conditions, or medications—most women do. *Amenorrhea: Absence of Periods*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Oct. 2020), <https://www.acog.org/womens-health/faqs/amenorrhea-absence-of-periods> [https://perma.cc/6EVS-7ELC] (choose "What is amenorrhea?" and "How common is amenorrhea?").

5. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. NO. 700, METHODS FOR ESTIMATING THE DUE DATE 2 (2017), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2017/05/methods-for-estimating-the-due-date.pdf> [https://perma.cc/CG5Y-P2Q5] (using LMP can provide an inaccurate measurement of even gestational pregnancy by more than five days because estimating the due date is based on an average menstrual cycle of twenty-eight days with ovulation occurring halfway through the cycle, and (1) not everyone is able to accurately recall their LMP date; (2) not everyone ovulates at the same point in their cycle; and (3) not everyone may have a twenty-eight day cycle); *see also Gestational Age vs Fetal Development – What Is the Difference?*, IND. UNIV.: KINSEY INST. BLOG (May 26, 2023), <https://blogs.iu.edu/kinseyinstitute/2023/05/26/gestational-age-vs-fetal-development-what-is-the-difference/> [https://perma.cc/E3KZ-TLWD] ("Fetal development markers . . . do not provide a consistently precise way to determine how advanced a pregnancy is.").

6. Nineteen states ban or restrict abortion prior to viability. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> [https://perma.cc/S2VR-TJY6]. Twelve states have a total ban (Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia); four at six weeks (Florida, Georgia, Iowa, and South Carolina); two at twelve weeks (Nebraska and North Carolina); and one at eighteen weeks (Utah). *Id.*

7. 410 U.S. 113, 153–54 (1973) (finding that a privacy right under the Fourteenth Amendment of the U.S. Constitution "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" but is not absolute).

8. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (upholding the right to an abortion under the liberty interest in the Due Process Clause of the Fourteenth Amendment).

shows how reproductive rights and freedoms are intertwined with the menstrual cycle, thereby heightening the regulation of menstruators, and with it, invading their privacy.⁹ On July 20, 2023, a Nebraskan teenager, Celeste Burgess, was sentenced to ninety days in jail and two years of probation after pleading guilty to illegal concealment of human remains, a common indirect tactic to criminalize abortion care, for using abortion pills to terminate her pregnancy.¹⁰ At the time, Nebraska had a twenty-week ban on abortions that was calculated from the pregnant person's first day of their LMP.¹¹ The police determined Celeste's LMP was outside the ban's time limit by searching her Facebook messages.¹²

And while the criminalization of abortion access is a reproductive right of great concern and attention now, it is just the tip of the iceberg of this category of harmful regulation of women. Other reproductive

9. Abortion bans are not the only way in which pregnant people are regulated. Other laws, such as chemical endangerment laws, fetal homicide statutes, and human skeletal remains laws, are also used, as in Celeste Burgess's case. *See, e.g.*, NEB. REV. STAT. ANN. § 28-1301 (2024). An Ohio woman, Brittany Watts, was criminally charged with abuse-of-corpse charges after spontaneously miscarrying at home and later seeking medical treatment at a hospital. Remy Tumin, *Ohio Woman Who Miscarried Faces Charge that She Abused Corpse*, N.Y. TIMES, <https://www.nytimes.com/2024/01/03/us/brittany-watts-ohio-miscarriage-abortion.html> (Jan. 11, 2024). On January 11, 2024, the grand jury refused to indict Ms. Watts, ending the criminal prosecution against her. Maria Sole Campinoti, Holly Yan, Zenebou Sylla & Samantha Beech, *Ohio Woman Who Suffered Miscarriage at Home Will Not Be Criminally Charged, Grand Jury Says*, CNN, <https://www.cnn.com/2024/01/11/us/brittany-watts-miscarriage-no-criminal-charges/index.html> [<https://perma.cc/FR7Z-H9N9>] (Jan. 11, 2024, 8:32 PM).

10. Michael Levenson, *Nebraska Teen Who Used Pills To End Pregnancy Gets 90 Days in Jail*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2023/07/20/us/celeste-burgess-abortion-pill-nebraska.html>. Nebraska's law did not permit Celeste to be criminalized for having an abortion. *See* Jessica Valenti, *The Year in Abortion: Criminalization*, ABORTION, EVERY DAY (Dec. 30, 2023), <https://jessica.substack.com/p/the-year-in-abortion-criminalization> ("When they can't *officially* prosecute women for abortion, conservatives will find another way to dole out punishment. This year, for example, a teenager in Nebraska was sentenced 90 days in jail for self-managing an abortion . . . they say the girl was prosecuted for how she handled the fetal remains: she pled guilty to 'concealing or abandoning a dead body.' But as you know by now, this is an oft-used criminalization tactic."). Celeste's mother, who helped her obtain the abortion pills, pled guilty to violating the abortion law and was sentenced on September 22, 2023, to two years in prison. Jesus Jiménez, *Mother Who Gave Abortion Pills to Teen Daughter Gets Two Years in Prison*, N.Y. TIMES (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/us/jessica-burgess-abortion-pill-nebraska.html>.

11. Thereafter, Nebraska created a twelve-week abortion ban. NEB. REV. STAT. ANN. § 28-3,106 (2024) (prohibiting abortion on a fetus whose postfertilization age is determined by a physician to be twenty or more weeks); *see also* Levenson, *supra* note 10.

12. Jiménez, *supra* note 10.

freedoms are also being targeted, such as in vitro fertilization (IVF),¹³ contraception,¹⁴ and, the focus of this Article, menstruation. The implications of *Dobbs* for women’s rights over their bodies outside of abortion—and in civil and not only criminal contexts—are still unfolding.¹⁵ In overturning the fundamental right to abortion care, the *Dobbs* decision unleashes the acceptability, and perhaps the constitutionality and legality, of restricting other fundamental rights as well.

It is thus an opportune moment to consider how to protect the right to reproductive freedom even before the decision to seek an abortion. For this reason, this Article focuses on the category of harmful and often invisible menstruation regulation. While pregnancy and abortion touch many women, menstruation touches all women. And it can do so outside of the criminal law, through noncriminal regulation that has been subject to less attention and scrutiny.¹⁶ Menstruation is intertwined with other forms of reproductive freedom. It is a marker of women and other pregnancy-capable individuals’ fertility.¹⁷ Menarche, one’s first period, often is perceived as the transition from childhood to the beginning of adulthood for women and other individuals who menstruate

13. *LePage v. Ctr. for Reprod. Med.*, SC-2022-0515, -0579, 2024 WL 656591, at *6, *8 (Ala. Feb. 16, 2024) (finding that the meaning of “minor child” in the wrongful death statute includes a frozen embryo). The Alabama ruling caused great upheaval to IVF services. Dara E. Purvis, *Alabama Court’s Ruling that Embryos Are Children Opens Up a Host of Other Legal Issues, Including Parental Rights*, CONVERSATION (Apr. 1, 2024, 8:28 AM), <https://theconversation.com/alabama-courts-ruling-that-embryos-are-children-opens-up-a-host-of-other-legal-issues-including-parental-rights-224717> [<https://perma.cc/428S-DXBK>]; see also Ruth Graham, *Southern Baptists Vote To Oppose I.V.F.*, N.Y. TIMES (June 12, 2024), <https://www.nytimes.com/2024/06/12/us/ivf-vote-southern-baptists.html>.

14. Lauren Weber, *Conservative Attacks on Birth Control Could Threaten Access*, WASH. POST (June 5, 2024), <https://www.washingtonpost.com/health/2024/06/05/birth-control-access-abortion-ban/> (discussing Missouri lawmakers blocking a bill for broader contraception access by falsely stating that birth control pills cause abortions).

15. For an essay of how “menstruation matters in life and law” in a post-*Dobbs* world, see, for example, Emily Gold Waldman & Bridget J. Crawford, *Menstruation in a Post-Dobbs World*, 98 N.Y.U. L. REV. ONLINE 191 (2023).

16. Criminal regulation of menstruation is worthy of its own article because it would entail extensive analysis of criminal and evidentiary law.

17. *Fertility Awareness-Based Methods of Family Planning*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Jan. 2019), <https://www.acog.org/womens-health/faqs/fertility-awareness-based-methods-of-family-planning> [<https://perma.cc/Q6WZ-XY79>] (choose “What is fertility awareness?” and “What is a menstrual cycle?”).

(“menstruators”).¹⁸ One’s period stops when pregnant.¹⁹ And the menstrual cycle, with its hormonal fluctuation, experiences of pain, uncontrolled bleeding, and other bodily changes, has been used to underscore women and other menstruators’ “otherness” from men.²⁰ Because menstruation is often seen as disgusting, shameful, and mysterious, it is ripe for this form of social control and harmful regulation.²¹

At first, it may seem unusual that menstruation—often kept cloaked in secrecy—could be subject to hyper-regulation. But this category of harmful regulation occurs in part specifically to keep menstruation invisible, particularly from public spaces like work and school. The regulation also controls related areas of reproduction, such as pregnancy and abortion. This Article identifies and examines the class of harmful state and private regulation of women and their menstruation as an additional form of reproductive oppression. It then explores whether, under constitutional law post-*Dobbs* as well as subconstitutional law, there are avenues to contest that regulation.

Finally, this Article examines whether law reform proposals targeting harmful menstruation regulation are effective and whether the political strategy of misogyny plays a role in their success. The research finds a correlation between misogyny—the enforcement of gendered norms and patriarchal structures and beliefs—and erosion of progressive reform. This Article explores how future law and policy reform curtailing harmful menstruation regulation and seeking menstrual justice may be implicated by misogyny. In addition, this Article posits that this understanding may aid consideration of other reforms designed to preserve other reproductive freedoms.

This Article proceeds in three parts. Part I discusses the category of regulation used to classify and subordinate individuals, particularly when such individuals are relatively powerless.²² This Part examines the ways

18. Menstruators are those people who have the capacity to menstruate and experience the menstrual cycle. See Johnson, *Menstrual Justice*, *supra* note 2, at 5 n.6. Nearly half the population menstruates for a large portion of their life. CRAWFORD & WALDMAN, *supra* note 2, at ix.

19. *Changes During Pregnancy*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (2023), <https://www.acog.org/womens-health/infographics/changes-during-pregnancy> [<https://perma.cc/6T3S-YCN5>].

20. See Mindy J. Erchull, “You Will Find Out When the Time Is Right”: Boys, Men, and Menstruation, in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES 395, 395–96, 398–99 (Chris Bobel et al. eds., 2020).

21. See Johnson, *Menstrual Justice*, *supra* note 2, at 15–22 (discussing historical, philosophical, cultural, and religious origins of contemporary menstruation taboo and stigma).

22. See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); Melissa Murray, *Loving’s Legacy*:

in which menstruators are subject to harmful regulation that impacts their privacy, liberty, and equality. Part II discusses the *Dobbs* decision and its implications for finding constitutional constraints on harmful state menstruation regulation. Because constitutional claims are uncertain avenues for protection, Part III explores areas of subconstitutional law that could offer greater privacy, liberty, and equality for women and other menstruators.²³ Finally, this Part examines the political strategy of misogyny and its potential impact on reforms to address harmful menstruation regulation.

I. IDENTIFYING EXISTING MENSTRUATION REGULATION

State and private actors often regulate individuals through classifications of favored and disfavored behavior.²⁴ A goal of certain categories of regulation can be to target individuals to become more productive and compliant for the benefit of those creating the regulation.²⁵ While the most visible and prominent form of regulation is directly done by the state through criminal law, civil law, and administrative rules, private actors also undertake regulation by “harnessing” the state through state permission for and encouragement of private enforcement of social norms.²⁶ And while some categories of regulation can be useful and beneficial, the focus of this Article is on those categories of regulation that are harmful and subordinating. State and private actors can use a class of harmful regulation to control individuals in ways that are “quotidian,”²⁷ meaning pervasive and a daily

Decriminalization and the Regulation of Sex and Sexuality, 86 FORDHAM L. REV. 2671 (2018); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulations*, 116 COLUM. L. REV. 573 (2016).

23. While the discussion of these rights treats them as artificially separate doctrines, this Article recognizes that there is an importance in understanding how liberty and equality operate together in constitutional doctrine to recognize rights. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 799 (2011) (“*Roe* and *Casey* were true liberty-based dignity cases. While both analyzed the abortion right under the Due Process Clause, both also kept the equality dimensions of the case steadily visible.”).

24. *See* Michael A. Peters, *Disciplinary Technologies and the School in the Epoch of Digital Reason: Revisiting Discipline and Punish After 40 Years*, 9 CONTEMP. READINGS L. & SOC. JUST., no. 1, 2017, at 28, 29.

25. FOUCAULT, *supra* note 22, at 211, 218.

26. Melissa Murray, *Consequential Sex: #MeToo*, Masterpiece Cakeshop, and *Private Sexual Regulation*, 113 NW. U. L. REV. 825, 837–39 (2019) [hereinafter Murray, *Consequential Sex*] (noting “harnessing” examples such as statutory provisions for attorney’s fees that encourage individuals to bring antidiscrimination lawsuits).

27. Here, I use the term “quotidian,” which Julie Suk uses to aptly describe misogyny’s control as pervasive and a daily presence. JULIE C. SUK, *AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT* 23 (2023).

presence, and not always obvious. The extensiveness of such harmful regulation can permit its normalization and legitimation without much objection. Identifying this category of regulation is therefore critical to understanding its oppressive functions, as well as finding ways to disrupt it.

Menstruators can be subject to a category of regulation that involves classification and social control through public and private monitoring, the meting out of rewards and discipline, and the enforcement of consequences.²⁸ This regulation may invade informational privacy, impede disabled individuals' liberty, and hamper workers' and students' equality. Through such types of regulation, both the state and private actors subordinate women and other menstruators by controlling their behavior.

Understanding subordinating classes of regulation is critical to recognizing unseen harms to women and other menstruators that could be ameliorated by law reform.²⁹ Examples of such regulation include invading women's informational privacy by extracting LMP data to curb abortion access and control entry to work and school activities, impeding certain intellectually or developmentally disabled women's liberty by nonconsensually sterilizing them to stop their menstruation, and hampering the equality of women workers and students by penalizing the time and discussion they need to address menstruation.

*A. Regulating Informational Privacy of Menstruators*³⁰

1. Regulating Informational Privacy in the Abortion Context

State and private actors are increasing their collection of LMP and other menstrual cycle information. The purpose of the collection and

28. Murray, *Consequential Sex*, *supra* note 26, at 835 ("I define 'regulation' as an action that shapes, guides, restricts, or punishes behavior through the imposition of consequences, whether legal or extralegal.").

29. MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 1 (2007) ("[H]ermeneutical injustice occurs . . . when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences. . . . [A]n example . . . might be that you suffer sexual harassment in a culture that still lacks that critical concept. . . . [H]ermeneutical injustice is caused by structural prejudice in the economy of collective hermeneutical resources.").

30. In discussing categories of regulation, this Article distinguishes informational privacy from decisional privacy and liberty per the Supreme Court's distinction offered in *Dobbs*. Informational privacy is "the right to shield information from disclosure," whereas decisional privacy and liberty is "the right to make and implement important personal decisions without governmental interference." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267 (2022) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

dissemination of this information is in part to monitor and regulate pregnancy and abortion care.³¹ Women often learn they are pregnant when they realize they have not menstruated on schedule, and gestational pregnancy—the measurement of a pregnancy and the window for legal abortion care—is typically gauged by counting the number of weeks since a pregnant person’s LMP.³² Predictably, then, a connection exists between regulation of pregnancy, abortion, and menstruation.

LMP information is critical to states trying to enforce abortion-restriction laws that distinguish legal and illegal abortions through LMP. Since *Dobbs*, followed by the enactment (or going into effect) of many states’ bans and restrictions, states have created even more opportunities for monitoring and regulating LMP data.³³ For example, in Kentucky,

31. One example of this is that the same medications used for medication abortion, mifepristone and misoprostol, are used to restore a missing period even before a pregnancy is known. Mariana Lenhard, *These Drugs Could Restore a Period Before Pregnancy Is Confirmed*, SCI. AM. (Oct. 26, 2022), <https://www.scientificamerican.com/article/these-drugs-could-restore-a-period-before-pregnancy-is-confirmed> [<https://perma.cc/7LPV-ZHHC>].

32. Menstruation ceases when one becomes pregnant. For an individual whose menstrual cycle is twenty-eight days long, counting from the first day of the individual’s LMP identifies a pregnancy when LMP is more than twenty-eight days prior. Therefore, health care professionals often initially determine pregnancy and then measure the advancement of a pregnancy from LMP. *The Menstrual Cycle: Menstruation, Ovulation, and How Pregnancy Occurs*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (2022), <https://www.acog.org/womens-health/infographics/the-menstrual-cycle> [<https://perma.cc/3HZW-GUDT>] (“The menstrual cycle is the monthly process of changes that occur to prepare the body for possible pregnancy. A menstrual cycle is defined as the first day of menstrual bleeding of one cycle to the first day of menstrual bleeding of the next cycle. The average menstrual cycle lasts about 28 days.”).

It is important to note, however, that this counting method is not a biologically accurate measurement of pregnancy or fetal age because pregnancy does not occur until the following three things occur: (1) ovulation, which happens around day fourteen of the menstrual cycle; (2) egg fertilization by sperm; and (3) implantation of the egg in the uterine lining. *Id.*; Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, GUTTMACHER REP. ON PUB. POL’Y, May 2007, at 7–8 (explaining that the medical profession describes pregnancy as a process that is accomplished after fertilization of the egg and implantation of the pre-embryo in the uterus wall is complete, which can occur between eight and eighteen days after fertilization, and that one-third to one-half of all fertilized eggs do not result in a pregnancy because they do not complete the implantation process). *See also* Jennifer Weiss-Wolf, *When “Six Weeks” Is Actually Two: Understanding Periods Is Essential to Fighting Abortion Bans*, MS. MAG. (Sept. 8, 2021), <https://msmagazine.com/2021/09/08/six-week-abortion-ban-greg-abbott-texas-two-weeks-last-missed-period/> [<https://perma.cc/3QHZ-Q6PQ>]; *Methods for Estimating the Due Date*, *supra* note 5, at 2 (indicating that ultrasound is the more accurate method to create the estimated due date rather than LMP). Because fertilization and implantation are not easy for health care professionals to determine, the system of measuring pregnancy from LMP is widely used, despite its limitations. *See id.*

33. *See After Roe Fell: Abortion Laws by State*, *supra* note 6. To determine compliance or noncompliance with laws that restrict abortion to certain gestational

abortions are prohibited after a gestational pregnancy has lasted more than fifteen weeks since LMP.³⁴ Beyond enforcing criminal statutes regarding untimely abortion care, state officials also may monitor clinical records of abortion patients' LMPs to determine if care providers are complying with licensing requirements.³⁵ In addition, private actors may harness the state's regulatory power through state laws permitting private civil law enforcement of abortion laws.³⁶ Such monitoring of LMP data reinforces the message of *Dobbs*—that women and other menstruators' bodily privacy and liberty are subject to state invasion and control.³⁷

The state can use many sources to track LMPs and measure the length of gestational pregnancy, such as the internet, social media, government records, provider records, and period-tracking phone apps.³⁸ The data can be bought from third-party brokers, accessed due to lax privacy protections by apps, obtained under licensing protocols for health

pregnancy weeks, the state must investigate whether the person allegedly terminating their pregnancy was pregnant and, if the pregnancy was advanced enough, that any termination was illegal. Both elements begin with measuring the gestational pregnancy, which means identifying the LMP of the person. Of course, government monitoring of pregnant people existed prior to *Dobbs*. Moreover, such regulation has disproportionately targeted persons of color, with punitive effects. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1422 (1991); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 300–01, 308 (2013).

34. KY. REV. STAT. ANN. § 311.781(1) (West 2023).

35. See *infra* notes 43–50 and accompanying text.

36. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2023).

37. For more on state encroachment on abortion informational privacy, see Carmel Shachar & Carleen Zubrzycki, *Informational Privacy After Dobbs*, 75 ALA. L. REV. 1 (2023); Wendy A. Bach & Nicolas Terry, *HIPAA v. Dobbs*, 38 BERKELEY TECH. L.J. 609 (2023).

38. Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. BALT. L. REV. 1 (2020) (discussing the monitoring of internet search history and text messages to enforce abortion regulation). For other articles discussing lack of informational privacy in technology and how it impacts reproductive rights, see Anya E.R. Prince, *Reproductive Health Surveillance*, 64 B.C. L. REV. 1077 (2023); Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, 75 STAN. L. REV. 1233 (2023) (analyzing the promise and peril of “femtech” to fill the void of reproductive rights post-*Dobbs*); Michele Estrin Gilman, *Periods for Profit and the Rise of Menstrual Surveillance*, 41 COLUM. J. GENDER & L. 100 (2021) (discussing the lack of privacy protections in period-tracking apps) [hereafter Gilman, *Periods for Profit*]. In addition, states could require the provision of LMP data. E.g., H.B. 3216, § 5A, 59th Leg., 2nd Sess. (Okla. 2024) (requiring a physician who performed an abortion to report it to the state and include identifying information about the patient and her LMP data). This bill eventually died, but it is possible that a similar bill may become law in the future.

providers' records review, and subpoenaed.³⁹ Because noncompliance with abortion and licensing laws carries heavy civil and criminal penalties, women and other individuals capable of pregnancy fear state and private regulation of LMP information. Since *Dobbs*, many women have deleted their period-tracking mobile phone apps to avoid the vast "dragnet" for LMP.⁴⁰

Using abortion regulation to justify state and private actors' invasion of women's informational privacy regarding their LMP is problematic for several reasons. First, such information is highly personal and should be protected from state intrusion. Second, LMP data may provide personal information other than menstrual cycle information. For instance, period apps, used by over fifty million users, do not just simply collect the LMP data—they also collect information about sexual activities and fertility attempts.⁴¹ Third, LMP data showing missed menstrual cycles do not necessarily show that abortion care was accessed. Rather, there are myriad reasons why someone may not be pregnant despite a lengthy time since their LMP, such as misremembering their actual LMP, suffering from amenorrhea, or experiencing a miscarriage.⁴²

Missouri's regulation provides an apt example of the misuse of regulation to these unjust ends. A licensure regulation in Missouri allows the Missouri Department of Health and Senior Services (DHSS) to collect

39. Conti-Cook, *supra* note 38, at 55–57; Kendra Albert, Maggie Delano & Emma Weil, *Fear, Uncertainty, and Period Trackers*, MEDIUM (June 28, 2022), https://medium.com/@Kendra_Serra/fear-uncertainty-and-period-trackers-340ab8fdff74 [<https://perma.cc/6GVX-HTR3>] (identifying that abortion prosecution has been linked to pregnancy and abortion information in texts, emails, and internet search history, and less so in period apps).

40. Katherine Dugan, *When It Comes to Period Trackers, Concerns Span Ideological Divides*, WASH. POST (Aug. 10, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/08/10/when-it-comes-period-trackers-concerns-span-ideological-divides/>.

41. In 2020, period-tracking apps were used by over fifty million people worldwide, with the BBC reporting two hundred million menstrual-related app downloads in 2016. Donna Rosato, *What Your Period Tracker App Knows About You*, CONSUMER REPS. (Jan. 28, 2020), <https://www.consumerreports.org/health/health-privacy/what-your-period-tracker-app-knows-about-you-a8701683935/> [<https://perma.cc/LRH9-NNPJ>]; Andrea Ford, Guilia De Togni & Livia Miller, *Hormonal Health: Period Tracking Apps, Wellness, and Self-Management in the Era of Surveillance Capitalism*, 7 ENGAGING SCI. TECH. & SOC'Y, no. 1, 2021, at 48, 49–50. Women track their periods for many reasons: (1) to gather information on the frequency of their menstrual cycle to better understand their health; (2) to prepare for their menstrual flow; and (3) to attempt to regulate their fertility, to become or avoid becoming pregnant. Beyond these purposes, the period apps prompt users to input different but related aspects of the user's life, such as sexual behavior. Gilman, *Periods for Profit*, *supra* note 38, at 102–03; CRAWFORD & WALDMAN, *supra* note 2, at 183–84.

42. See *infra* text accompanying note 49.

women's health information from Missouri abortion clinics.⁴³ State officials zealously monitored the Planned Parenthood clinic, the only abortion clinic operating in Missouri at the time, and collected patient data in hopes of shutting down the clinic for a violation.⁴⁴ The government collected the available patients' data for licensure review and used it to calculate the advancement of their gestational pregnancy at the time of their abortion.⁴⁵ A government employee extracted the clinic's data on patients' LMP dates and input it into a circulated DHSS spreadsheet; the goal was to find patients having two abortions close in time leading to an inference that the clinic underreported abortion complications and violated the terms of their license.⁴⁶ Based on this data, DHSS indeed refused to renew the clinic's license. In an administrative hearing reviewing this decision, DHSS Director Dr. Randall Williams confirmed in testimony that "the Missouri state health department had a spreadsheet that tracked the menstrual cycles of Planned Parenthood patients . . . [And used it] to find so-called failed abortions," that is,

43. MO. CODE REGS. ANN. tit. 19, § 10–15.010 (2023).

44. See Crystal Thomas, *Missouri Health Director Kept Spreadsheet of Planned Parenthood Patients' Periods*, KAN. CITY STAR, <https://www.kansascity.com/news/politics-government/article236773058.html> (Oct. 30, 2019, 10:42 AM).

45. The President and CEO of Reproductive Health Services of Planned Parenthood stated that DHSS did have copies of complication reports regarding abortions and that those reports contained LMP data, perhaps explaining the source of the Department spreadsheet's information. Lisa Gutierrez & Crystal Thomas, *Tracking Patients' Info Raises Uproar in Missouri*, KAN. CITY STAR, Oct. 31, 2019, at 2A.

46. As discussed *infra* in text accompanying note 49, the data did not and could not prove abortion complications. Nonetheless, the employee circulated the spreadsheet to DHSS with the subject line "Duplicate ITOPs [(Induced Termination of Pregnancies)] with last normal menses date." *Id.*; Yasmeen Abutaleb & Emily Wax-Thibodeaux, *Missouri Reviewed Data About Planned Parenthood's Patients, Including Their Periods, To Identify Failed Abortions*, WASH. POST (Oct. 30, 2019, 6:15 PM), https://www.washingtonpost.com/health/missouri-tracked-planned-parenthood-patients-periods-in-spreadsheet-top-health-official-says/2019/10/30/e96791d0-fb42-11e9-ac8c-8eced29ca6ef_story.html ("Missouri's top health official said Tuesday the state monitored detailed personal information about Planned Parenthood patients, in some cases reviewing women's menstrual cycles, with the aim of identifying those who had failed abortions."); Editorial Board, *Missouri's Spreadsheet on Women's Menstrual Cycles Is Totally Normal. In Dystopia*, KAN. CITY STAR (Oct. 31, 2019, 5:00 AM), <https://www.kansascity.com/opinion/editorials/article236834368.html>. DHSS denied that Director Williams had requested the spreadsheet or ever possessed it, but the *Kansas City Star* noted that the spreadsheet was titled "Director's Request." Gutierrez & Thomas, *supra* note 45, at A2. The spreadsheet also contained information about "patient's medical identification numbers, dates of medical procedures and the gestational ages of fetuses," with the last column being "the date of the last menstrual period of each patient calculated by the health department." Allison Kite & Crystal Thomas, *Parson Won't Investigate Spreadsheet of Patients*, KAN. CITY STAR, Nov. 2, 2019, at A4. No patient names were included. *Id.*

ones that did not terminate a pregnancy and were not reported as complications under state reporting laws.⁴⁷

In reviewing the agency's action, Missouri's Administrative Hearing Commission found DHSS to have wrongfully withheld the license because the clinic's operations were in fact safe and legal.⁴⁸ The state had made egregiously faulty assumptions. For example, the state wrongly believed that LMP data would indicate whether the clinic failed to report an abortion procedure complication, opening the way for revoking licensure. But, as one expert explained:

Periods in and around a pregnancy, whether it is a pregnancy that is continued to full-term and delivered, a miscarriage or an abortion, can vary up to eight to 12 weeks. They can be irregular, you can [have] incremental spotting, you can have bleeding. So it's very unclear to me how they would be using just that data point to determine whether or not there was a complication. That suggests to me a complete lack of understanding of how abortion care is delivered, frankly.⁴⁹

In sum, government officials wrongly trampled on women's informational privacy by cavalierly republishing their LMP in pursuit of misguided findings of licensure violations.⁵⁰

47. Gutierrez & Thomas, *supra* note 45, at 1A. Under its license, the clinic had to identify and report all failed abortions. See Thomas, *supra* note 44.

48. Reis Thebault & Emily Wax-Thibodeaux, *Missouri's Last Abortion Clinic Will Stay Open After Ruling Ends Contentious Year-Long Legal Battle*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/ruling-saves-missouri-abortion-clinic/>.

49. Gutierrez & Thomas, *supra* note 45, at A2 (quoting Dr. Jennifer Villavicencio, fellow of American College of Obstetrics and Gynecology and clinical lecturer with the Department of Obstetrics and Gynecology at the University of Michigan). Another expert explained that the practice of extracting, calculating, and sharing patients' LMP information was ethically "bonkers" and without medical reason. *Id.* The Department stated that it complied with HIPAA, the federal patient privacy law, because no data was released. *Id.* at A3. The investigator took records of 3,000 abortions performed in 2018. The spreadsheets tracked individual patients using patient identification numbers (even though it did not include their names) and included dates of procedures, gestational ages of fetuses, and LMP data. The investigator found sixty-seven instances where the same patient had more than one abortion in the same year, four instances where a patient had to return more than once to have a successful abortion, and one case where a failed abortion was not reported by the clinic. *Id.* at A2.

50. Such inappropriate menstruation regulation occurred by the first Trump Administration's Office of Refugee Resettlement as well when it collected LMP information from unaccompanied minors. The goal of this collection also appears to have been political, namely, to deter individual women from obtaining abortion care. The official reportedly sought out women who appeared pregnant based on their LMP data and counseled them against abortion. Jennifer Wright, *The U.S. Is Tracking Migrant*

Regulation also empowers private actors to learn information about women's menstrual cycles to regulate abortion access. The novel Texas law, S.B. 8, that "deputizes" private citizens to bring civil lawsuits against persons aiding another to obtain an abortion is an example of private regulation by harnessing state authority. Under it, any individual may sue to hold another civilly liable for performing, aiding, or assisting an abortion after so-called fetal "cardiac activity,"⁵¹ which is usually five to six weeks from the LMP date.⁵² S.B. 8 encourages private citizens to monitor other persons to determine if they are getting an illegal abortion and to file a lawsuit to obtain money damages from the persons involved in the abortion care. Private citizens can get at least \$10,000 for each violation, plus attorney's fees and costs.⁵³ This means that community

Girls' Periods To Stop Them from Getting Abortions, HARPER'S BAZAAR (Apr. 2, 2019), <https://www.harpersbazaar.com/culture/politics/a26985261/trump-administration-abortion-period-tracking-migrant-women> [https://perma.cc/6TMJ-R4EK] (noting that there are "28 pages detailing the periods, pregnancies and reason for the pregnancy" of the refugees and that Scott Lloyd is an anti-abortion advocate who changed policy to require him "to sign off on all abortion requests . . . and in one instance, attempted to use a migrant girl as a way to test an 'abortion reversal' method"). Lloyd has admitted that he believes "abortion is the destruction of human life," and has never approved an abortion request." Brigitte Amiri, *Scott Lloyd's Anti-Abortion Ideology Is Harming the People His Agency Is Supposed To Protect*, ACLU (Mar. 1, 2018), <https://www.aclu.org/news/reproductive-freedom/scott-lloyds-anti-abortion-ideology-harming-people-his-agency> [https://perma.cc/H6JL-EPXH] (reporting on Lloyd's deposition testimony).

51. Laws that cite "cardiac activity" are sometimes called "heartbeat" acts. This is a misnomer because "cardiac activity" could be simple electrical activity and not anything that resembles a heartbeat. Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html>.

52. Anna Smith Haghighi, *When Does a Fetus Have a Heartbeat*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/when-does-a-fetus-have-a-heartbeat> [https://perma.cc/68S5-5WND] (Jan. 29, 2024); TEX. HEALTH & SAFETY CODE ANN. § 171.204, .208 (West 2023). The law explicitly defines the "gestational age" of the fetus and calculates the "pregnancy" based on the first day of the person's LMP. § 171.201(2), (5). Several states have enacted laws modeled on Texas's S.B. 8. See Kate Zernike, *Idaho Is First State To Pass Abortion Ban Based on Texas' Law*, N.Y. TIMES (Mar. 14, 2022), <https://www.nytimes.com/2022/03/14/us/idaho-abortion-bill-texas.html>; Luke Vander Ploeg & Kate Zernike, *Oklahoma Governor Signs Bill That Bans Most Abortions*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/us/oklahoma-abortion-ban-law-governor.html>.

53. § 171.208(b). The law is somewhat limited in that bystanders need to be directly impacted by the abortion care to have standing to sue. See *Gomez v. Braid*, No. 04-22-00829-CV, 2024 WL 697105, at *1-2 (Tex. Ct. App. Feb. 21, 2024) (discussing trial court's ruling); AP, *Lawsuit Against Doctor Who Defied Texas' Abortion Law Is Dismissed*, NBC NEWS (Dec. 9, 2022, 2:12 PM), <https://www.nbcnews.com/news/us-news/lawsuit-doctor-defied-texas-abortion-law-dismissed-rcna61043> [https://perma.cc/4NTC-C58E]; *Texas Court Throws Out Case Against Doctor Who Violated Abortion Ban*, CTR. FOR REPROD. RTS. (Dec. 8, 2022),

and family members are now financially incentivized to track other individuals' LMP dates to see if they become pregnant or miss their period but never birth a child, raising an inference that they were pregnant and obtained an illegal abortion.

The above forms of regulation permit state and private actors to invade women's private menstruation information and then use that information to threaten abortion care access based on faulty assumptions and the pursuit of personal financial gain.

2. Regulating Informational Privacy in the Work and School Contexts

Workplaces and schools use informal, sometimes coercive means to regulate menstruating, perimenopausal, and menopausal individuals. Employers and schools, both public and private, condition employment and school activities on consent to disclosure of LMP information, often without good reason. This regulation shapes attitudes towards workers and students based on the revealed menstrual cycle, pregnancy status, and potential abortion care access information.

Employers regulate workers' menstrual cycle information in hopes of reducing health insurance costs, employee absenteeism, loss of employee productivity, and employee retention costs, especially for those who can become pregnant. To gain this information, some employers offer workers incentives for consenting to disclosure without transparently explaining how the information will be used. For example, some employers provide gift cards to encourage workers to disclose their menstrual cycle as part of employer "wellness" programs. Similarly, some employers offer workers complimentary health data apps with period-tracking capability. These offers often are boosted by incentives for regularly inputting data.⁵⁴ For instance, one employer gave "\$1 a day in gift cards" to employees to use the app.⁵⁵ But employers often do not explain that they use the disclosures to manage health insurance costs, including charging workers for their expected health insurance costs based on the information. Without understanding the potential implications of using the health data app, one employee reported taking

<https://reproductiverights.org/texas-court-throws-out-case-against-doctor-who-violated-abortion-ban/> [<https://perma.cc/RSG3-G5LP>] ("The court rejected the idea that bystanders can sue abortion providers or helpers, ruling from the bench that a person does not have legal standing to sue if they have not been directly impacted by the abortion services provided.").

54. Drew Harwell, *Is Your Pregnancy App Sharing Your Intimate Data with Your Boss?*, WASH. POST (Apr. 10, 2019), <https://www.washingtonpost.com/technology/2019/04/10/tracking-your-pregnancy-an-app-may-be-more-public-than-you-think/>.

55. *Id.*

the gift card offer in exchange for her disclosure of health information because “[t]hat’s diaper and formula money.”⁵⁶

Employers’ regulation of employees’ period information can be unknowingly subordinating and harmful to the employee. For instance, the private app data can be shared widely to regulate the workers. Employee data inputted in the fertility tracking app Ovia, which markets itself to employers for use by their employees, “is viewable by the company, their insurers[,] . . . and other self-insured companies, the third-party administrators that process women’s medical claims.”⁵⁷ This means that employers have information about the “worker’s fertility, pregnancy, abortion, or menopause,” which is significantly more information than employers have about workers who are non-menstruators.⁵⁸ This information can fuel stereotypes about menstruating workers as atypical and result in discriminatory adverse actions against them in the workplace.⁵⁹ For example, if older women are entering information in their period-tracking app about their perimenopause and menopause symptoms—namely “forgetfulness, depression, anxiety, sleep deprivation, and cognitive impairment,” symptoms experienced by twenty-five percent of such women—and that data is accessible to their employer, the employer may use those symptoms against the women in making workplace decisions.⁶⁰ In addition, employers can regulate employees using app data that indicates an employee’s pregnancy was terminated. Without more information about the cause or the employee’s compliance with state abortion restrictions, the employer could report the behavior to law enforcement, and, in states permitting private enforcement of abortion bans, bring their own civil action.⁶¹ Employees’ loss of control over their own health and demographic data can occur without the users’ knowledge or meaningful consent.⁶² Accordingly, the

56. *Id.*

57. *Id.*

58. Elizabeth A. Brown, *The Femtech Paradox: How Workplace Monitoring Threatens Women’s Equity*, 61 JURIMETRICS 289, 290 (2021).

59. *Id.* at 302–04.

60. *See id.*

61. As Brown posits, “[a]n employer’s AI might search, for example, for terms like ‘mifepristone’ or simply ‘abortion.’ The potential consequences of such disclosures could be dire.” *Id.* at 321.

62. As *The Washington Post* reported:

Women who use Ovia must consent to its 6,000-word “terms of use,” which grant the company a “royalty-free, perpetual, and irrevocable license, throughout the universe” to “utilize and exploit” their de-identified personal information for scientific research and “external and internal marketing purposes.” Ovia may also “sell, lease or lend aggregated Personal Information to third parties,” the document adds.

disclosure of users' data could "potentially disadvantage women in the workplace, insurance markets, and credit scoring."⁶³

Some employers and schools regulate menstruating workers and students by coercively and unnecessarily requiring their disclosure of LMP data as part of the screening for employment onboarding and athletic participation. The disclosure of this information in this way is unnecessary, however. To the extent that detailed information is needed about certain health conditions, employers and schools can screen for the specific health conditions or obtain a doctor's note relating to the health of the prospective employee or athlete. They do not need to capture LMP data for those purposes. Still, employers and schools often require it as a condition of employment and school activity enrollment.

For example, in California, Kristina Raines received an employment offer as a food service aid contingent on a health screening that required information about her LMP. Raines answered most of the questions on the written questionnaire, but she refused to answer the question about her LMP.⁶⁴ At that point, the employer ended the screening abruptly and withdrew her employment offer.⁶⁵ Raines and other employees have brought claims of discrimination challenging the employer's practices that regulate menstruation and invade their private information.⁶⁶

Schools regulate menstruating students by requiring the disclosure of their LMP data information prior to athletic participation. For example, from 2002 to 2022, the Florida State High School Athletic Association asked female athletes to answer questions on paper forms about their menstrual cycle prior to sport participation.⁶⁷ In 2023, the

Harwell, *supra* note 54. This is even though an Ovia spokesperson said they do not sell aggregate data to advertisers. *Id.* But see Alexandra M. Taylor, Note, *Fertile Ground: Rethinking Regulatory Standards for Femtech*, 54 UC DAVIS L. REV. 2267, 2272 (2021) (citing *No Body's Business But Mine: How Menstruation Apps Are Sharing Your Data*, PRIV. INT'L (Sept. 9, 2019), <https://privacyinternational.org/long-read/3196/no-bodys-business-mine-how-menstruations-apps-are-sharing-your-data> [<https://perma.cc/G58H-W6CS>]).

63. Gilman, *Periods for Profit*, *supra* note 38, at 100. As Gilman states:

Based on data scraped from Femtech tools, women may find themselves paying higher rates for loans or insurance or being denied employment by applicant screening systems. This is because the data is linked to gender, and gender-based decision-making can be deployed in ways that are discriminatory to women. These harms are usually invisible; consumers rarely learn the reasons behind these algorithmically determined outcomes.

Id. at 105 (footnote omitted).

64. *Raines v. U.S. Healthworks Med. Grp.*, 534 P.3d 40, 42 (Cal. 2023).

65. *Id.*

66. *Id.*

67. Katherine Kokal, *Florida Student Athletes Asked To Report Their Menstrual History. Here Are the Questions*, PALM BEACH POST, <https://www.palmbeachpost.com/story/news/education/2022/10/04/why-florida-student->

Association switched to collecting this information digitally. This switch in collection method concerned parents because the *Dobbs* decision had just been issued, and Florida had just restricted abortion care to fifteen weeks. Understandably then, they worried that the digital menstrual cycle data would be accessed to identify and scrutinize girls and other menstruating students who become pregnant and lose their pregnancies or terminate them through illegal abortion care.⁶⁸ While information about menstrual cycles can screen for “bone health and energy levels,” which are relevant for athletes,⁶⁹ the American Academy of Pediatrics does not recommend that schools obtain or retain LMP information.⁷⁰ Instead, the Academy recommends that schools collect a form signed by

athletes-asked-their-periods-play/8084649001/ [https://perma.cc/J3E7-7ZN6] (Feb. 8, 2023, 3:41 PM). The pre-participation form stated:

When was your first menstrual period?

When was your most recent menstrual period?

How much time do you usually have from the start of one period to the [sic] start of another?

How many periods have you had in the last year?

What was the longest time between periods in the last year?

Id. These questions were marked as optional.

68. Shira Li Bartov, *Florida Student-Athletes Are Now Being Asked To Report Their Periods Online*, NEWSWEEK, <https://www.newsweek.com/florida-student-athletes-being-asked-report-periods-online-1749549> [https://perma.cc/5YN7-3ZWK] (Oct. 7, 2022, 12:23 PM). The Association is using Aktivite, a third party, to collect and store the information, but it said schools would maintain the information as well. Julianne McShane, *Form that Asks Female Student-Athletes in Florida About Their Menstrual Histories Sparks Calls for Change*, NBC NEWS, <https://www.nbcnews.com/news/us-news/florida-schools-ask-student-athletes-menstrual-history-parents-worry-p-rcna50794> [https://perma.cc/Q3QW-VMXS] (Oct. 6, 2022, 5:00 PM). Aktivite stated it would disclose information to coaches to treat athletes' health emergencies, and that it also would provide information in response to subpoenas. *Id.* Also, students and parents were concerned that the menstruation questions could disclose “an intersex condition” or that the athlete was “born without a uterus,” information that a student may not want to share. Meghan Mangrum, *Texas Schools Want to Know When Female Student-Athletes Had Their Last Period*, DALL. MORNING NEWS, <https://www.dallasnews.com/news/education/2022/10/19/texas-schools-require-student-athletes-to-report-information-about-their-menstrual-periods/> [https://perma.cc/X7RC-RM27] (Oct. 19, 2022, 4:10 PM).

69. Bartov, *supra* note 68; McShane, *supra* note 68 (“Dr. Thresia Gambon, a pediatrician and the president of the Florida Chapter of the American Academy of Pediatrics, said a student-athlete’s menstrual history can provide important insight for doctors, noting that irregular menstruation is one component – along with disordered eating and osteoporosis – of the female athlete triad, a disorder that can lead to reproductive, bone and cardiovascular issues.”).

70. McShane, *supra* note 68 (“[Dr. Gambon] said she does not see why schools need that information.”). In fact, “the American Academy of Pediatrics’ guidelines for physical evaluation forms for student-athletes . . . explicitly state that forms related to medical histories and physical examinations should not be shared with schools.” *Id.*

a medical officer stating whether the athlete is cleared to play, while the athlete's doctor, who is bound to maintain the privacy of health records, completes and retains the detailed form.⁷¹ After the outcry against Florida's digital LMP collection, in February 2023, the Florida Association voted to take out the extensive menstrual cycle questions and accept a form used in other states that simply shows that a medical officer has medically cleared the student.⁷² Despite Florida's change of course, most state schools continue to require and maintain athletes' menstrual cycle information, with only a handful requiring a simple medical clearance instead.⁷³

The above examples show that state and private actors regulate informational privacy of individuals' menstrual cycles to regulate abortion, pregnancy, and work and school access. Often this invasion is without valid justification, raising the concern that the regulation aims to control or mark women and other menstruators as aberrant for accessing health care or seeking entry into work and school spaces. The regulation by state and private actors places women in the category of suspects for committing illegal acts and can make their LMP critical evidence thereto, when the menstrual cycle can in fact indicate a variety of events in a woman's life, possibly pregnancy and abortion, but also an erratic or disrupted menstrual cycle, lack of pregnancy, miscarriage, or other situations. Rather than viewing the menstrual cycle as a part of private bodily systems, the state and private actors view it as their information,

71. PREPARTICIPATION PHYSICAL EVALUATION (INTERIM GUIDANCE), AM. ACAD. OF PEDIATRICS (2023), [https://downloads.aap.org/AAP/PDF/PPE-History-Form-\(English\)-rev.pdf](https://downloads.aap.org/AAP/PDF/PPE-History-Form-(English)-rev.pdf) [<https://perma.cc/XJV3-8W47>] ("This form should be placed into the athlete's medical file and should not be shared with schools or sports organizations. The Medical Eligibility Form is the only form that should be submitted to a school or sports organization.") (emphasis omitted).

72. Sarah McCammon, *Florida High School Athletes Won't Have To Report Their Periods After Emergency Vote*, NPR, <https://www.npr.org/2023/02/09/1155731808/plan-to-collect-menstrual-data-on-high-school-athletes-in-florida-is-voted-down> [<https://perma.cc/V6MX-2PLU>] (Feb. 9, 2023, 5:28 PM). Unfortunately, in revising the form, the state included a new question, the athlete's "sex assigned at birth," showing another area of government regulation and social control—transgender athletes. *Id.*

73. Lindsey Darvin, David Schultz & Tia Spanuolo, *Analysis: Why Compelling Student Athletes To Share Menstrual Data May Violate Federal Laws*, PBS NEWS (Feb. 23, 2023, 11:24 AM), <https://www.pbs.org/newshour/health/analysis-why-compelling-student-athletes-to-share-menstrual-data-may-violate-federal-laws> (mapping thirty-eight states that ask menstruation questions, five states that ask menstruation questions but require information be retained by athlete's doctor, five states that do not ask menstruation questions, and two that ask only about menstruation irregularities); Colleen Wilson, *Oklahoma School Athletics Questionnaire Stirs Controversy with Menstrual Period Questions*, Fox 25, <https://okcfox.com/news/local/oklahoma-school-athletics-questionnaire-stirs-controversy-with-menstrual-period-questions-transgender-form-ossaa-female-athletes> [<https://perma.cc/CP2B-7QKW>] (May 3, 2024, 4:14 PM).

not the woman's, and extraction of it as cost-free to the woman being scrutinized. Such regulation arguably supports misogynistic roles for women and girls as pregnant, mothers, and not full participants in work or school athletics, and creates a chilling effect on their pursuit of health care, employment, and education.

B. Regulating Liberty⁷⁴ and Decisional Privacy⁷⁵ of Disabled Individuals To Stop Their Menstruation

In addition to regulating informational privacy of menstruators, state and private actors may regulate health decisions, or the decisional privacy or liberty, of menstruators. The National Women's Law Center (NWLC) has highlighted a stark example of this regulation: the nonconsensual sterilization of women with intellectual and developmental disabilities.⁷⁶ A web of government, institutional, and caretaking actors, believing themselves to be acting in the best interest of these women, attempt to "manage[]" their menstruation because it is perceived as too messy and potentially upsetting.⁷⁷ Of course, these decisions involve many situation-specific factors with the menstruator, their family, caretakers, and other stakeholders. Nonetheless, given that there are newly accepted approaches to supporting the decision-making of individuals with

74. The *Dobbs* majority explained that liberty requires ordered liberty, which sets limits and defines the boundary between competing interests, such as those involving intimate and personal choices central to personal dignity and autonomy. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022).

75. See *supra* note 30 (discussing the distinction between informational and decisional privacy as discussed in *Dobbs*).

76. NAT'L WOMEN'S L. CTR., FORCED STERILIZATION OF DISABLED PEOPLE IN THE UNITED STATES (2022) [hereinafter FORCED STERILIZATION], https://nwlc.org/wp-content/uploads/2022/01/f.NWLC_SterilizationReport_2021.pdf [https://perma.cc/Z3B9-YQ7P]. Similarly, a recent *New York Times* investigation shed light on this type of regulation occurring in Europe. Sarah Hurtes, *Despite Bans, Disabled Women Are Still Being Sterilized in Europe*, N.Y. TIMES (Nov. 25, 2023), <https://www.nytimes.com/2023/11/25/world/europe/europe-disabled-women-sterilization.html> ("Thirty-seven European nations and the European Union have ratified the Istanbul Convention, which declares, without exception, that nonconsensual sterilization is a human rights violation. But a New York Times investigation found over a third of those countries have made exceptions, often for people that the government deems too disabled to consent."). As Catalina Devandas Aguilar, a former United Nations special rapporteur for disability rights, stated: "So many times, you hear it's in the best interest of the woman . . . But often, it's because it's more convenient for the family or the institution that takes care of them." *Id.* Coerced sterilization of disabled women and girls to control their menstruation also occurs in Australia. See Beth Goldblatt & Linda Steele, *Bloody Unfair: Inequality Related to Menstruation – Considering the Role of Discrimination Law*, 41 SYDNEY L. REV. 293, 312 (2019).

77. Prianka Nair, *Menstruation: An Ableist Narrative*, 41 COLUM. J. GENDER & L. 180, 181 (2021).

intellectual disabilities,⁷⁸ the continued legalization of these practices is problematic.

In understanding this form of regulation, it is helpful to consider that “managing” menstruation implies that menstruators’ periods should be invisible and menstruators kept “clean.” This characterization is rooted in the long-standing taboo and stigma of menstruation.⁷⁹ For instance:

Roman philosopher Pliny the Elder taught that “menstrual blood could make seeds infertile, kill insects, kill flowers, kill grass, cause fruit to fall off trees, dull razors, and drive dogs mad. The glance of a menstruating woman could kill bees, her touch could make a horse miscarry, and contact with her blood could cause another woman to lose her child.”⁸⁰

One recent study showed that people found a potentially menstruating woman as lower in competency and likeability.⁸¹

Nonconsensual sterilization regulates disabled people who menstruate based on negative stereotypes that menstruation must be managed in a particular way and that the only way to protect them from any menstrual pain or blood is through a hysterectomy. In this way, the state and powerful individuals can use coerced sterilization to limit choice, narrow options, and control the behavior of people with vulnerabilities and limited powers of self-determination within the legal system. Nonconsensual sterilization can permit more powerful individuals to override disabled women’s autonomy over their reproductive system. In the United States, coerced sterilization of a disabled menstruator may happen by a guardian or “a family member, a doctor, a social worker, someone running a hospital or institution, or

78. See *infra* notes 95–96, 264–68.

79. Johnson, *Menstrual Justice*, *supra* note 2, at 15–23 (detailing historical and contemporary narratives of menstruation and menstruators as “dirty, impure, and incompetent” within philosophy, religion, and culture).

80. *Id.* at 16 (quoting ELISSA STEIN & SUSAN KIM, *FLOW: THE CULTURAL STORY OF MENSTRUATION* 37 (2009)).

81. *Id.* at 49 (citing Tomi-Ann Roberts, Jamie L. Goldenberg, Cathleen Power & Tom Pyszczynski, “Feminine Protection”: *The Effects of Menstruation on Attitudes Towards Women*, 26 *PSYCH. WOMEN Q.* 131, 131 (2002)). The taboo and stigma of menstruation also may cause disabled menstruators to self-regulate and socially control themselves. As Prianka Nair states, “menstruators with disabilities experience shame around menstruation, embarrassed about the ‘burden’ of their menstrual experiences on their caregivers and concerned about breaching menstrual etiquette around hygiene.” Nair, *supra* note 77, at 181. They can begin to internalize the idea that they cannot “manage” their menstruation and then may choose sterilization to confirm it. See *id.*

someone from the government” seeking a court order.⁸² The petitioner often justifies the sterilization as beneficial for the disabled menstruator, as in their “best interests.”⁸³

For example, one court ordered the forced sterilization of P.S., a premenarche child with autism.⁸⁴ P.S.’s parents requested a court order for nonconsensual sterilization.⁸⁵ The court ordered that P.S. be subject to a partial hysterectomy,⁸⁶ finding that it would be too dangerous for P.S. to experience the expected bleeding during menstruation and hormonal and emotional changes while premenstrual, based on her self-destructive tendencies and hyperirritability.⁸⁷ The court believed sterilization was appropriate to deal with P.S.’s anticipated reaction to menstruating.

P.S. is far from alone. An NWLC report shows the prevalence of forced sterilization of disabled women and girls in the United States.⁸⁸ Thirty-one states and the District of Columbia legally permit the forced sterilization of disabled individuals who have mostly intellectual,

82. FORCED STERILIZATION, *supra* note 76, at 34. In terms of regulating sexual activity, research shows that there is no support for the stereotype that puberty onset (and menstruation) increases female sexual arousal and activity. Both noted sexologist Dr. Alfred Kinsey in the 1950s and researchers replicating his study did not “find any relations between timing of puberty and women’s sexual attitudes and behaviors.” Jennifer M. Ostovich & John Sabini, *Timing of Puberty and Sexuality in Men and Women*, 34 ARCHIVES SEXUAL BEHAV. 197, 204 (2005).

83. FORCED STERILIZATION, *supra* note 76, at 38.

84. *P.S. by Harbin v. W.S.*, 452 N.E.2d 969 (Ind. 1983).

85. Under state law, a court must grant a sterilization order for an adult or a child if there is no consent or an inability to consent. FORCED STERILIZATION, *supra* note 76, at 34.

86. A partial hysterectomy removes the uterus, leaving the cervix intact, resulting in the teenager losing her future capacity to become pregnant or to menstruate. *Types of Hysterectomy Surgery*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/abdominal-hysterectomy/multimedia/types-of-hysterectomy-surgery/img-20007786> [https://perma.cc/NB4Q-KSZT].

87. *P.S. by Harbin*, 452 N.E.2d at 971–73; *see also* Nair, *supra* note 77, at 181 n.3.

88. FORCED STERILIZATION, *supra* note 76. A note on language: The NWLC identifies that they use the term “disabled people” per the preference of disabled people. *Id.* at 2. This Article primarily follows that terminology. *See also* Valerie Novack, *Why Voting Matters for the Disability Community*, CTR. FOR AM. PROGRESS (Oct. 22, 2020), <https://www.americanprogress.org/article/voting-matters-disability-community/> (“The disability community is rapidly evolving to using identity-first language in place of person-first language. This is because it views disability as being a core component of identity, much like race and gender. Some members of the community, such as people with intellectual and developmental disabilities, prefer person-first language. In this [article], the terms are used interchangeably.”).

developmental, and other disabilities related to mental health.⁸⁹ Iowa and Nevada passed their laws in 2019; these are not antiquated laws kept on the books due to oversight.⁹⁰ Many of these laws require a petitioner to go to court to seek an order of sterilization when the disabled individual will not consent or is considered unable to consent. Courts apply the “best interests” standard in granting sterilization orders.⁹¹

Disabled women and other disabled menstruators are regulated through laws that permit nonconsensual sterilization. Individuals petition courts, who intercede to make decisions for disabled individuals alleged to lack decision-making capabilities. Private and public actors shape behavior by imposing consequences. A disabled menstruator whose menstruation is perceived to be unmanageable may be subject to a court proceeding that can result in her coerced sterilization—which terminates her menstrual activity.⁹² The regulation is based in part on characterizing the disabled individual as unable to make her own decisions, even with support. Such erasure of autonomy for disabled individuals can be seen in the fact that disabled women, and especially disabled women of color, are sterilized more often than others.⁹³

In deciding a petition for nonconsensual sterilization, courts use their own “substituted judgment,” or their evaluation of what they think is in the “best interest of the individual” regarding their menstruation and how it should be controlled. These two methods have been critiqued for denying the disabled individual their liberty interests to make the

89. FORCED STERILIZATION, *supra* note 76, at 15–19. Seventeen states permit sterilization on disabled children (under age eighteen), three states prohibit it, and eleven states and the District of Columbia do not specify. *Id.* at 34–35.

90. *Id.* at 28.

91. *Id.* at 38. *See, e.g., In re Susan S.*, No. 7764, 1996 WL 75343, at *12–13 (Del. Ch. Feb. 8, 1996) (granting Susan’s parents’ request that Susan be subjected to a partial hysterectomy after finding it was in her best interest since she was autistic, and menstruation caused her to engage in self-harm and made her vulnerable to pregnancy).

92. Perhaps sterilization versus another route is chosen to manage a seriously disabled woman’s menstruation because hysterectomies, as opposed to contraception (that could diminish the bleeding), are more readily covered under Medicare. *See* Gina Jiménez, *For Young People on Medicare, a Hysterectomy Sometimes Is More Affordable than Birth Control*, KFF HEALTH NEWS (Mar. 7, 2023), <https://kffhealthnews.org/news/article/medicare-birth-control-disabilities-coverage/> [<https://perma.cc/YXK3-9NAZ>].

93. *See* FORCED STERILIZATION, *supra* note 76, at 8. *See also* Goldblatt & Steele, *supra* note 76 (stating that the sterilization of disabled menstruators is based on discriminatory stereotypes, including the idea that it is inefficient and unnecessary for individuals with disability to menstruate because they should not become pregnant). For more information on the sterilization of disabled women and girls, see STERILIZATION OF WOMEN AND GIRLS WITH DISABILITIES, OPEN SOC’Y FOUNDS. (2011), <https://www.opensocietyfoundations.org/publications/sterilization-women-and-girls-disabilities-0> [<https://perma.cc/WV6L-ZN9U>].

choice.⁹⁴ This method ignores “supported” decision-making for disabled individuals. Supported decision-making enlists the “support from trusted persons in their life, in order to make their own decisions about their life.”⁹⁵ The NWLC explains:

Disabled people can make their own decisions about sterilization if they get the right support. For example, some people might need the doctor to explain sterilization in a different way. Some might need tools to communicate what they want. But in most states, the judge does not need to make sure disabled people get this support. Sometimes the judge says that the person cannot give consent. But in reality, that person just might not have gotten the support they needed.⁹⁶

The regulation of disabled women and other menstruators through nonconsensual sterilization also manifests a belief that they are aberrant because they will not be able handle the blood and pain of menstruation. Research shows, however, that with support, individuals like P.S. with a neurological and developmental disorder like autism can avoid and handle distress from menstruation.⁹⁷ Specifically, effective support would include “increas[ing] knowledge of menstrual-related issues in young people and their parents . . . particularly in the form of accessible, step-by-step guides and strategies for how to deal with pain and mood changes in particular.”⁹⁸ Given that there are new state-sanctioned approaches to supporting and achieving decision-making by individuals with intellectual and developmental disabilities (I/DD), the continued legalization of

94. For a discussion of the meaning of “substituted judgment” and a “best interests” decision, see, for example, *In re Susan S.*, 1996 WL 75343, at *8 (explaining that the doctrine of “substituted judgment” is when “the court must imagine what the disabled person would want done,” whereas the doctrine of “best interests” is when the court “must decide from an Olympian vantage point what is in the best interests of the incompetent person while taking into consideration all known and relevant information”).

95. N.Y. MENTAL HYG. LAW § 82.02(i) (McKinney 2025).

96. FORCED STERILIZATION, *supra* note 76, at 38.

97. *Menstruation*, NAT’L AUTISTIC SOC’Y, <https://www.autism.org.uk/advice-and-guidance/topics/physical-health/menstruation> [https://perma.cc/6FNT-VFDH] (offering “[w]ays to support autistic people with challenges around menstruation”); Robyn Steward, Laura Crane, Eilish Mairi Roy, Anna Remington & Elizabeth Pellicano, “*Life Is Much More Difficult To Manage During Periods*”: *Autistic Experiences of Menstruation*, 48 J. AUTISM & DEV DISORDERS 4287, 4290–92 (2018).

98. Steward, Crane, Roy, Remington & Pellicano, *supra* note 97, at 4291 (citation omitted). In addition, the study authors stated that education is especially important because autistic menstruators may be less likely to gather sexual health information from peers and parents may be less likely to discuss these topics with them. *Id.* at 4291–92.

nonconsensual sterilization without supportive decision-making is problematic.

C. Regulating Equality in Work and School for Menstruators

State and private actors also regulate the equality of menstruators at work and school. Often this regulation involves bathroom access restrictions that do not allow for the necessary added time and accommodations menstruating people need.⁹⁹ Menstruating individuals “have unique sanitation needs as compared to their non-menstruating peers, including the need to visit bathrooms more often or for longer lengths of time when managing their periods.”¹⁰⁰ Yet, employers and schools often not only fail to provide such accommodations but also restrict bathroom use for employees and students. These rules regulate the equality of menstruating people because they have a disparate impact on them for the greater need their menstruation requires.

In the workplace, employers increasingly use technology to regulate workers for cost efficiency, productivity, and security including limiting employees’ bathroom access.¹⁰¹ This regulation can be punitive, including the docking of pay for extended bathroom use and terminating workers for having periods and attending to their menstruation. For example, Amazon’s “Time off Task” (TOT) policy “tracks workers through devices that tell employees what to do next,” requiring workers to “log out of the devices when they go on time off task.”¹⁰² Workers have stated that under the Amazon’s TOT policy, they are “afraid to take bathroom breaks or seek first aid lest they tally up too long a pause.”¹⁰³

99. Margaret L. Schmitt, Christine Hagstrom, Caitlin Gruer, Azure Nowara, Katie Keeley, Nana Ekua Adenu-Mensah & Marni Sommer, “*Girls May Bleed Through Pads Because of Demerits*”: Adolescent Girls’ Experiences with Menstruation and School Bathrooms in the U.S.A., 39 J. ADOLESCENT RSCH. 511, 527–28 (2024) (explaining how restrictive school bathroom access policies can be problematic for student menstruators).

100. *Id.* at 513. While the authors are focused on adolescent girls, this point can be applied to all menstruators.

101. For a detailed historical accounting of workplace regulation of menstruating workers, see SHARRA L. VOSTRAL, UNDER WRAPS: A HISTORY OF MENSTRUAL HYGIENE TECHNOLOGY 98–104 (2008).

102. Laura Hautala, *Amazon Adjusts ‘Time Off Task’ Policy that Critics Said Limited Bathroom Breaks*, CNET (June 2, 2021, 10:08 AM), <https://www.cnet.com/tech/tech-industry/amazon-adjusts-time-off-task-policy-that-critics-said-limited-bathroom-breaks/> [https://perma.cc/7BTG-FM2C]; see Brian Fung, *Amazon Changes Employee Policies for Time Off, Marijuana*, CNN BUS., <https://www.cnn.com/2021/06/01/tech/amazon-marijuana-time-off-task/index.html> [https://perma.cc/C8U4-9L4S] (June 2, 2021, 9:49 AM).

103. Hautala, *supra* note 102 (recounting how, due to TOT policy, “delivery drivers [were] peeing in cups and defecating in bags because their work pace won’t let them stop to find a bathroom”).

While it is appropriate for employers to require their employees to work while on duty, regulation of “break time” is inappropriate if it is too strict and fails to provide time for an employee to manage their normal bodily functions. For this reason, the policy can have greater impact on menstruating employees, who may need more TOT than non-menstruating workers to access bathroom facilities more frequently or for longer intervals to change tampons or pads, clean or change menstrual cups, wash their hands and body, or change clothing.¹⁰⁴ Workers experiencing menopause may need to seek a cold wet towel or fan to address menopausal symptoms such as hot flashes. Without accounting for the needs of a menstruating or menopausal person, employers send the message that menstruating is aberrant and should not happen to workers. It can reinforce the discriminatory idea that women do not belong in the workforce.

Employers also regulate workers’ bathroom access and break time with increased use of digital productivity measurement tools, such as cameras and keystroke activity detectors. These devices actively track workers to create a “worker productivity score.”¹⁰⁵ Eight of the ten largest private companies in the United States engage in such monitoring.¹⁰⁶ Workers complain that because of the monitoring, “their jobs are relentless, that they don’t have control — and in some cases, that they don’t even have enough time to use the bathroom.”¹⁰⁷ One worker explained that “[w]hile the tracker was on, ‘you couldn’t choose those bathroom or coffee moments — you just had to wing it.’”¹⁰⁸ As a result, “[m]any employees, whether working remotely or in person, are subject to trackers, scores, ‘idle’ buttons, or just quiet, constantly accumulating

104. Eleanor Delamater & Mathilde Roux, *5 Ways Employers Can Make Workplaces More Menstruation-Friendly*, U.S. DEP’T LAB. BLOG (May 29, 2024), <https://web.archive.org/web/20240529180114/https://blog.dol.gov/2024/05/29/5-ways-employers-can-make-workplaces-more-menstruation-friendly>.

105. Jodi Kantor & Arya Sundaram, *The Rise of the Worker Productivity Score*, N.Y. TIMES (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html>. Remote monitoring by cameras is occurring in education and standardized test-taking contexts as well in ways that can adversely impact menstruators. See *Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 607–08, 617 (N.D. Ohio 2022) (discussing remote exam taking scans and finding them unconstitutional under the Fourth Amendment), *vacated*, Nos. 22-3795, 23-3043, 23-3081, 2023 WL 8468654 (6th Cir. Dec. 4, 2023) (due to plaintiff’s death); Karin, Johnson & Cooper, *Menstrual Dignity*, *supra* note 2, at 46–48 (discussing the negative impact on menstruators of the legal bar examiners’ remote monitoring of test takers during the COVID-19 pandemic).

106. Kantor & Sundaram, *supra* note 105.

107. *Id.*

108. *Id.*

records. Pauses can lead to penalties, from lost pay to lost jobs.”¹⁰⁹ Workers who may need more time away from their station for attending to their menstruation or menopausal symptoms could be disproportionately financially penalized by this remote monitoring.

In addition to regulating breaks, employers regulate women by discriminating against them for the very act of menstruation. For example, Joyce Flores, a prison dental hygienist, was fired for wearing a tampon to work. Her employer, the Virginia Department of Corrections (VDOC), relied upon its faulty employee body scanning equipment, knowing it could not distinguish between a tampon and illicit contraband, and cognizant that its security trainings wrongfully targeted the lower abdomen as a common contraband smuggling site.¹¹⁰ In Flores’s case, VDOC determined she had smuggled in contraband when the body scanner showed an “abnormal image” visible in Flores’s lower body cavity.¹¹¹ Despite Flores explaining the image showed her tampon and showing security officers that she was menstruating, VDOC terminated her.¹¹²

Like employers, schools regulate students’ bathroom access by limiting their ability to go to the bathroom, and the amount of time they may be in the bathroom, in ways that subordinate menstruating students and limit their equality. As discussed above, menstruating women and girls may require bathroom access more frequently and for longer time periods than others. This access is even more critical for adolescents because many who have only recently begun to menstruate can “experience unpredictable, prolonged or heavy menstrual bleeding following menarche.”¹¹³ Given that menstrual etiquette teaches menstruators to avoid staining their clothes from leaked menses, bathroom access is important to avoid related “feelings of shame and embarrassment,” “teasing” from other students, and reduced classroom concentration that may result.¹¹⁴ Rather than providing accommodations for these needs, bathroom regulation does the opposite. Bathroom regulation directs menstruating students to consider skipping school to hide their menstruation if they have a heavy flow or concerns about

109. *Id.*

110. *Flores v. Va. Dep’t of Corr.*, No. 20-cv-00087, 2023 WL 6304680, at *1–2 (W.D. Va. Sept. 27, 2023).

111. *Id.* at *1.

112. *Former Virginia Prison Staffer Claims Smuggling Accusations Led to Firing but Body Scan Detected Tampon*, ABC 8NEWS, <https://www.wric.com/news/virginia-news/former-virginia-prison-staffer-claims-smuggling-accusations-led-to-firing-but-body-scan-detected-tampon/> (Mar. 5, 2021, 6:59 PM).

113. Schmitt et al., *supra* note 99, at 513.

114. *Id.*

leaking. A 2019 United Kingdom study of 1,000 girls aged fourteen to twenty-one found that twenty percent of girls and young women report being “teased or bullied because of their periods and [that] many suffer in silence.”¹¹⁵ When targeted with harassment, only half spoke to anyone about it; and “[s]ome 67 per cent said abuse was mainly occurring in schools, with 66 per cent saying they have missed classes because of their period.”¹¹⁶

The impact of limited bathroom access has become even more critical for menstruating students as schools use technology and bathroom closures to address safety concerns of bullying and drug use. While safety is an important concern, it is not clear that safety is balanced appropriately against students’ health, including those who are menstruating. Some school districts use a special phone app that regulates students’ bathroom breaks, limiting them to two seven-minute breaks per day.¹¹⁷ The app is not calibrated to a student’s individual needs and could revoke a student’s bathroom privilege if they take too many or too long of breaks.¹¹⁸ According to student Cirene Cruz, she exceeded the app’s time limit because of her period, and one teacher’s punishment for doing so was a bathroom ban for the rest of the month.¹¹⁹ When that occurs, what can a menstruating student do when she needs to attend school and has her period?

Even if a student is granted permission to go to the bathroom, she may be unable to find an available one in time. Some schools are locking up bathrooms, making fewer bathrooms available, and not placing them in convenient locations.¹²⁰ This disproportionately burdens menstruating

115. Maya Oppenheim, *One in Five Girls and Young Women Bullied or Teased over Periods, Study Finds*, INDEPENDENT (May 28, 2019, 10:24 BST) <https://www.independent.co.uk/news/uk/home-news/periods-bully-menstruation-teasing-girls-plan-international-a8932121.html> (citing a Plan International UK study). Many students avoid school when menstruating if concerned about leaking. THINX & PERIOD, *STATE OF THE PERIOD: THE WIDESPREAD IMPACT OF PERIOD POVERTY ON US STUDENTS 2* (2019), https://cdn.shopify.com/s/files/1/0795/1599/files/State-of-the-Period-white-paper_Thinx_PERIOD.pdf [<https://perma.cc/N3CM-UJ3T>].

116. Oppenheim, *supra* note 115.

117. Leqi Zhong, *App that Times Bathroom Breaks Stirs Controversy at Fresno High*, FRESNO BEE, *reprinted in* GOV’T TECH. (Mar. 22, 2024), <https://www.govtech.com/education/k-12/app-that-times-bathroom-breaks-stirs-controversy-at-fresno-high> [<https://perma.cc/2KFN-X2UV>].

118. *Id.*

119. *Id.*

120. Such as at one high school in Maryland:

Already, some county schools now lock certain bathrooms during the day. Aanika Arjumand, a 16-year-old junior at Gaithersburg High School, said she often travels from the first floor of her high school to the third floor to

students who may need to access a bathroom quickly during the brief break between classes or if an emergency arises.¹²¹ For menstruating students to be treated similarly to non-menstruating students, they need to be able to access the bathroom when they need it, since menstrual flow, unlike other bathroom needs, is not in one's personal control.

Schools also negatively impact menstruating students' equality through regulation of their language around menstruation in ways non-menstruating students are not regulated.¹²² Schools justify their "no-period-talk" policies to avoid "embarrassing" non-menstruating students and curtail any seeming "sex" talk. As one example of regulating menstruators' language, schools instruct menstruating students to use code words when discussing menstrual products, whether it be "penguins" for menstrual pads and "turtles" for tampons,¹²³ or simply the word "marshmallow."¹²⁴ Even parents are told that their menstruating students should not discuss periods openly at school or with boys at school.¹²⁵ Perhaps the most extreme version of period language regulation is the 2023 Florida House Bill 1069, called the "Don't Say Period Bill," which would have prohibited instruction and discussion

find an unlocked restroom. The girls' bathrooms that usually are locked, she said, are the ones that have menstrual product dispensers.

"It's really unfair to a lot of the girls who generally just want to use a space for how it's intended to be used," Arjumand said.

Nicole Asbury, *Bathrooms Are Now Some of the Most Dangerous Places in Montgomery Schools*, WASH. POST (Feb. 26, 2023, 6:00 AM), <https://www.washingtonpost.com/education/2023/02/26/montgomery-county-schools-bathrooms-dangerous/>.

121. *See id.*

122. Beyond language, in one school, menstruating students were instructed to "[m]ake sure that no one views or handles [menstrual] product[s]." Elissa Nadworny & Clare Lombardo, *Periods! Why These 8th-Graders Aren't Afraid To Talk About Them*, NPR (May 15, 2019, 5:02 AM), <https://www.npr.org/2019/05/15/721729850/periods-why-these-eighth-graders-arent-afraid-to-talk-about-them> [<https://perma.cc/2P2A-J7H8>] (discussing eighth grade girls' podcast on the stigma of menstruation).

123. Johnson, *Menstrual Justice*, *supra* note 2, at 51 n.352 (citing TONJANIQUE EVANS, WHITNEY SMITH & DEMETRIA THEMISTOCLES, LEGIS. CLINIC, UNIV. OF THE D.C. DAVID A. CLARKE SCH. OF L., PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES 7 (2018), https://web.archive.org/web/20200307214433/https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018_periods_policy_report.pdf).

124. Code Switch, *Dispatches from the Schoolyard*, NPR, at 5:14 (May 22, 2019, 12:18 AM), <https://www.npr.org/transcripts/704860132> [<https://perma.cc/3NBS-CH8M>].

125. *See, e.g.*, Ron Malcolm, *Girls with Autism and Their Menstrual Cycle: A Social Story*, AUTISM PARENTING MAG. (Jan. 5, 2025), <https://www.autismparentingmagazine.com/autism-girls-menstrual-cycle/> [<https://perma.cc/HS7A-ZABE>].

regarding the menstrual cycle prior to grade six.¹²⁶ Because menstruation can start as early as eight years old, with an average onset of twelve years old, menstrual education beginning with grade six would come far too late to help students to understand, before menarche, the bleeding, hormonal changes, menstrual disorders, and pain issues related to their menstrual cycle.

Beyond language and bathroom access, states also regulate menstruators' access to school generally. For example, C.S., an eleven-year-old student with Down Syndrome, had an accommodation of assistance with toileting at a school after-care program. When she started to menstruate, rather than assisting her with her menstruation as well, the school expelled her. The school claimed that assistance with menstruation would be too burdensome.¹²⁷

These examples of school and work regulation of menstruators construct the menstruator's sense of self as less than human and unworthy of equal employment or education, compared to people who do not menstruate. This regulation denies basic needs and treats basic bodily functions as abnormal. In this way, the regulation reinforces gendered stereotypes of menstruators as dirty and stigmatized and unsuited for public spaces.

II. IMPLICATIONS OF *DOBBS* FOR CURTAILING MENSTRUATION REGULATION

As Part I identified, harmful state and private regulation of menstruators implicates their informational privacy, decisional privacy and liberty, and equality. This state regulation raises the question of whether there are constitutional limitations to the harmful regulation of

126. H.B. 1069, 2023 Leg., Reg. Sess. (Fla. 2023). *See also* Timothy Bella, *Florida Bill Would Ban Young Girls from Discussing Periods in School*, WASH. POST (March 17, 2023, 11:05 AM), <https://www.washingtonpost.com/politics/2023/03/17/florida-bill-girls-periods-school-gop/>; Ken Tran, *Florida Bill Would Ban Girls from Talking About Their Periods in School, GOP Lawmaker Says*, USA TODAY, <https://www.usatoday.com/story/news/politics/2023/03/19/florida-republican-bill-girls-periods-school/11504099002/> [<https://perma.cc/EA9W-R54S>] (Mar. 21, 2023, 12:36 PM). After scrutiny by legislators, the media, and others, the bill eventually was modified to exclude this provision. *See* Act of May 17, 2023, ch. 2023-105, Laws of Florida. *See also* Barbara Russo, *Will Discussing Menstruation in Public Schools Be Banned?*, N.Y. FAM. (May 18, 2023), <https://www.newyorkfamily.com/will-discussing-menstruation-schools-banned/> [<https://perma.cc/7449-YWU3>].

127. C.S. sued, claiming her expulsion was discriminatory on the basis of sex under Title IX, the federal law that prohibits sex discrimination in educational programs. Amended Complaint at 1, 5, *C.S. ex rel. Spaw v. Stepping Stone Sch.*, No. 20-cv-00741 (W.D. Tex. July 10, 2020); Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–88. Thereafter, C.S.'s case settled. *See* Joint Motion to Dismiss Action with Prejudice, No. 20-cv-00741 (W.D. Tex. filed Nov. 6, 2020), ECF No. 12.

menstruators. Part II explores this question under the new legal landscape created by and rules articulated in the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.¹²⁸

A. *Dobbs v. Jackson Women's Health Organization*

In *Dobbs*, the Supreme Court considered the constitutionality of the Mississippi Gestational Act, which banned abortion at fifteen weeks from LMP, except in the case of a medical emergency or a severe fetal abnormality.¹²⁹ At the time of its decision, *Roe v. Wade*¹³⁰ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³¹ were good law. Together, they provided that abortion care was a fundamental right under the Fourteenth Amendment's Substantive Due Process Clause and that state restrictions would be subject to strict scrutiny review, including striking down any undue burden on abortion care prior to viability, around twenty-four weeks from LMP.¹³² In *Dobbs*, the Court decided that abortion was not a fundamental right under the Fourteenth Amendment and overruled *Roe* and *Casey*.¹³³ Having so decided, the Court left it to the states to decide whether and how abortion would be legal and upheld the Mississippi law under the most deferential level of review, rational basis scrutiny.¹³⁴

The *Dobbs* decision has been heavily criticized for pulling out of thin air new Fourteenth Amendment standards regarding unenumerated fundamental rights to privacy and liberty.¹³⁵ The decision also has been critiqued as a political rather than a judicial act.¹³⁶ Also highlighted by the critique is that the *Dobbs* decision seemingly shut the door to an equality argument for abortion care access that would have been based

128. 142 S. Ct. 2228 (2022).

129. *Id.* at 2242–43 (analyzing MISS. CODE ANN. § 41-41-191(4)(b) (2024)).

130. 410 U.S. 113, 153–54 (1973) (finding that a privacy right under the Fourteenth Amendment “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” but is not absolute, and thus can be curtailed later in the pregnancy when state interests in “safeguarding health, in maintaining medical standards, and in protecting potential life” become compelling).

131. 505 U.S. 833, 846 (1992) (upholding the right to an abortion under the liberty interest in the Due Process Clause of the Fourteenth Amendment).

132. *Roe*, 410 U.S. at 160, 163.

133. *Dobbs*, 142 S. Ct. at 2258, 2279.

134. *Id.* at 2239.

135. Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J. 161, 163–66 (2023).

136. See Gary Langer, *More Say Politics, Not the Law, Drive Supreme Court Decisions: POLL*, ABC NEWS (May 9, 2023, 5:01 AM), <https://abcnews.go.com/Politics/politics-law-drive-supreme-court-decisions-poll/story?id=99168846> [<https://perma.cc/4M3B-7VCK>].

on the history of the Fourteenth Amendment's ratification and recent precedent and legal developments.¹³⁷ The result is that the *Dobbs* decision has wreaked havoc on women's lives and access to abortion care. Since the decision was issued, as discussed above, many states have banned abortion, and additional states have severely restricted it.¹³⁸ *Dobbs* has also opened the door to future restrictions on other reproductive freedoms. And while the Constitution does not apply generally to private action, the *Dobbs* ruling may also foster a climate supportive of private sector encroachments on reproductive freedoms.

With this understanding of the failings of the *Dobbs* decision, this Part nonetheless engages with the decision and its new standards to determine if there is any promising doctrine or reasoning from the case that might help curtail subordinating regulation of menstruating individuals. This Part analyzes the *Dobbs* decision's narrowing of constitutional privacy, liberty, and equality rights. First, the Court found that *Roe* and *Casey* were wrongly decided and that there was no fundamental liberty or privacy right to obtain an abortion under the Fourteenth Amendment. Second, it made this decision by distinguishing decisional privacy from informational privacy.¹³⁹ Third, the Court determined that *Roe* and *Casey* were not required to be upheld under the doctrine of stare decisis.¹⁴⁰ And fourth, the Court found that the Equal Protection Clause, which protects against sex discrimination by state actors, did not apply to state bans on abortion because they were not a sex-based classification based on invidious discrimination against one sex.¹⁴¹

B. Uncertain Constitutional Law Constraints on State Menstruation Regulation Post-Dobbs

This section discusses each of these rulings in more detail below and analyzes their implications for state regulation of menstruators.

137. See generally Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 68 (2023).

138. See *supra* text accompanying note 6.

139. Shachar & Zubrzycki, *supra* note 37, at 11–12 (“In *Dobbs*, drawing on a widely cited distinction from *Whalen v. Roe*, the Supreme Court distinguished between ‘privacy’ as a term for substantive protections of behavior, and ‘privacy’ as relates to the control and disclosure of intimate information.” (footnote omitted)).

140. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278 (2022).

141. *Id.* at 2245–46.

1. Informational Privacy

The *Dobbs* decision identified a distinction between informational and decisional privacy, and in so doing dangled the possibility there might be protections under the Constitution against disclosure of certain private information.¹⁴² Nonetheless, as discussed below, it is likely that any right to informational privacy would not cover state regulation of menstrual information.

Prior to *Dobbs*, the Supreme Court conceded that there might be a constitutional right to informational privacy, but if it existed, its specifics were “murky.”¹⁴³ Professors Shachar and Zubrzycki argue that there might be a stronger argument for it going forward under *Dobbs*. In *Dobbs*, the Court made a distinction between informational and decisional privacy.¹⁴⁴ Explaining this distinction, the *Dobbs* majority decision stated that *Roe* conflated two types of privacy rights, namely, “[1] the right to shield information from disclosure and [2] the right to make and implement personal decisions without governmental interference,” when discussing the “right to personal privacy.”¹⁴⁵ The *Dobbs* majority then declared that only the decisional privacy right was at issue.¹⁴⁶ As a result, it appears that *Dobbs* leaves in place an

142. Shachar & Zubrzycki, *supra* note 37, at 3.

143. Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1417 (2012). The limited precedent prior to *Dobbs* discussed the right to privacy from information collection and disclosure but never grounded the right in specific constitutional text nor found that it was infringed after weighing privacy expectations and public interest needs. Shachar & Zubrzycki, *supra* note 37, at 13–14 (discussing *Whalen v. Roe*, 429 U.S. 589, 602 (1977)). In *Whalen*, the Court held that while there is a right to privacy grounded in the liberty interest, perhaps of the Fifth and Fourteenth Amendments, plaintiffs’ privacy was not violated when health care information was disclosed to the state, given that the disclosures were necessary, albeit “unpleasant,” and plaintiffs had only a limited expectation of privacy in this context. *Id.* In *Nixon v. Administrator of General Services*, the Court (quoting *Whalen*) articulated an “individual interest in avoiding disclosure of personal matters” but found against the plaintiff because the collection, but not disclosure, of information did not violate his privacy interest pursuant to the balancing test that weighs the privacy invasion against the public interest. 433 U.S. 425, 457–58, 484 (1977). In *NASA v. Nelson*, the Court, without declaring a constitutional right to informational privacy, found it would not have been violated if it did exist, given the protection against disclosure and reasonable need for the information. 562 U.S. 134, 138 (2011). Overall, the Court’s precedent indicated that the right seemed more focused on disclosure than collection of private information. Given the lack of clarity, it was believed there was no robust right to informational privacy.

144. *See Dobbs*, 142 S. Ct. at 2267.

145. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

146. *Id.* at 2267–68.

informational privacy constitutional right that protects against disclosure.¹⁴⁷

Even though the treatment of informational privacy by the *Dobbs* opinion is probably dicta, it is important to explore the implications of a constitutional informational privacy right as it relates to personal information about individuals' LMP and menstrual cycle.¹⁴⁸ Turning to the examples discussed above regarding informational privacy of LMP and other menstrual-cycle information, it is unclear whether there would be any constitutional protection from collection of the information, or even its disclosure. The specific examples previously discussed included government officials collecting LMP data to scrutinize abortion case providers' licenses, to influence individuals against seeking abortion, to manage health insurance costs, and to prescreen the health of job applicants and school athletic participants.¹⁴⁹

Because it is unclear that the collection of personal information is protected, school collection of LMP information may not be protected under any constitutional information privacy right.¹⁵⁰ The more interesting question, perhaps, is whether there is a right against disclosure of personal information that might be violated with the collection and dissemination of menstrual information. For instance, in the school setting, the collection and dissemination of menstrual information by public schools to coaches and other school officials could be subject to an examination of the students' expectation of privacy and the government's need for the information. As discussed above, while there may be a need for the government to have doctors collect specific health information about their patients, there is no need for the dissemination of this information to public school officials, as is done by thirty-eight states.¹⁵¹

The possibility that there would be a finding of a constitutional right against disclosure of personal information is slim, especially given that the Supreme Court has never found that such a right has been violated. Given the fact that *Dobbs* may set the stage for further restrictions on rights of women and girls' reproductive freedoms, it is also unlikely that

147. Shachar & Zubrzycki, *supra* note 37, at 2.

148. Here, I set aside the collection and dissemination of menstrual information in the context of criminal prosecution, although other scholars have argued that health information collected and disseminated in abortion prosecutions may be protected. *See id.* at 41–42.

149. *See supra* Part I.

150. Although outside the scope of this Article, it is important to note that under the Fourth Amendment, the Supreme Court found a constitutional right to privacy from collection and dissemination of diagnostic testing of mothers. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

151. *See supra* note 73.

this Supreme Court in particular would extend such freedoms by finding a violation of informational privacy.

2. Liberty and Decisional Privacy

Dobbs presents only limited hope for expanded liberty or decisional privacy rights, but it can be useful to consider how the rules laid out in *Dobbs* may provide an opportunity for arguments to constrain menstruation regulation. This section discusses how the overturning of *Roe* and *Casey* may provide an opportunity for a persuasive argument to overturn precedent that supports coerced sterilization and how the foreclosure of abortion rights portends other limitations on reproductive freedom.

The main issue in *Dobbs* focuses on the constitutional liberty and decisional privacy right for abortion care. As stated earlier, the Supreme Court's decision in *Dobbs* overturned *Roe* and *Casey* and held that there is no fundamental right to women's access to abortion care. This decision overturned almost fifty years of precedent and created a new standard to determine the existence of substantive due process rights under the Fourteenth Amendment. This new three-part standard, with its preferencing of rights grounded in constitutional text and the country's history and tradition, disadvantages the establishment of women's liberty interests since women only were permitted to be full citizens in recent times.¹⁵² The first part of the standard examines the text of the Constitution, which does not provide for abortion as a right.¹⁵³ Second, the Court used a historical analysis of criminal laws to determine that a right to abortion is not "rooted in our Nation's history and tradition and [not] an essential component of . . . 'ordered liberty.'"¹⁵⁴ Third, the Court also underscored its view that abortion was unique from other substantive due process rights because "[a]bortion destroys . . . 'potential life' and . . . the life of an 'unborn human being,'" and it does not fit with precedents regarding the right to marry, obtain contraceptives, live with relatives, make education decisions for one's children, refuse sterilization, and other autonomy-related decisions.¹⁵⁵

152. See Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae in Support of Respondents at 7–11, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072 [hereafter Brief of Equal Protection Constitutional Law Scholars].

153. *Dobbs*, 142 S. Ct. at 2235, 2242, 2244–45.

154. *Id.* at 2248, 2253.

155. *Id.* at 2236, 2257–58 (citing the precedents in which abortion does not fit as "the right to marry a person of a different race"; "the right to marry while in prison";

Having made these decisions, the *Dobbs* majority opinion also decided that under the stare decisis doctrine, which requires adherence to Court precedent, the Court need not follow *Roe* and *Casey* and accordingly overruled those cases.¹⁵⁶ In making this decision, the Court stated that “*Roe* was . . . egregiously wrong and deeply damaging.”¹⁵⁷ The Court also emphasized that *Roe*’s quality of reasoning was poor, as it “failed to ground its decision in text, history, or precedent.”¹⁵⁸

After overruling *Roe* and *Casey*, the Court explained that laws affecting abortion would be upheld if they could pass the highly deferential rational basis standard of review, under which courts almost always uphold state laws.¹⁵⁹ Under this standard, the Court upheld the

“the right to obtain contraceptives”; “the right to reside with relatives”; “the right to make decisions about the education of one’s children”; “the right not to be sterilized without consent”; “the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures”; or a broader right to autonomy whether the right “is part of a broader entrenched right that is supported by other precedents”). *See also* *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (first citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); then citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942) (procreation); then citing *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (contraception); then citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); then citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (child rearing and education); and then citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same)).

156. For a thorough analysis of the *Dobbs* stare decisis decision, see Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 749–60 (2024).

157. *Dobbs*, 142 S. Ct. at 2265.

158. *Id.* at 2266. In deciding the third factor of the new stare decisis test, the Court decided that the *Casey* undue burden test for evaluating abortion regulations is unworkable because it is “ambigu[ous]” and led to “a long list of Circuit conflicts.” And regarding the fourth factor, the majority ruled that *Roe* and *Casey* had a negative effect on other areas of law because they “distort[ed]” doctrines of constitutional scrutiny over facial challenges, standing, res judicata, severability, constitutional avoidance, and the First Amendment. And finally, the majority decided that the Court cannot assess the reliance on *Roe* and *Casey* doctrine because abortion is “unplanned activity.” *Id.* at 2271, 2274–76.

159. *Id.* at 2284. Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071–72 (2015) (showing that between the 1971 and 2014 Terms, the Supreme Court had only found seventeen laws—out of over a hundred cases—to have violated the Equal Protection Clause of the Constitution under rational basis review). When the Court has found a law to not survive the rational basis test it is because of the following nine factors, according to Holoszyc-Pimentel: “history of discrimination, political powerlessness, capacity to contribute to society, immutability, burdening a significant right, animus, federalism concerns, discrimination of an unusual character, and inhibiting personal relationships.” *Id.* at 2072. As he states, “two are particularly likely to be present when the Court applies rational basis with bite: immutability and burdening a significant right.” *Id.* He notes, however, that the Court in a majority opinion has never stated that there is in fact a standard of “rational-basis-with-bite.” *Id.* at 2072–73.

Mississippi Gestational Act because it was merely rationally related to legitimate means rather than narrowly tailored to meet compelling interests under the more searching standard of strict scrutiny.¹⁶⁰ By removing the fundamental right to terminate a pregnancy and the strict scrutiny review, the *Dobbs* opinion unleashed states to enforce outright bans on abortion care.¹⁶¹

In finding no fundamental right to abortion and upholding the Mississippi Gestational Act, the *Dobbs* majority argued that its ruling was narrow and would apply only to abortion. The narrowness of this ruling has not yet been tested, but states have started restricting other reproductive freedoms since *Dobbs* was issued. The understanding that *Dobbs* does in fact remove fundamental rights to liberty interests in other areas was conveyed by Justice Clarence Thomas's concurrence and the joint dissent in *Dobbs*. In his concurring opinion, Justice Thomas stated that the doctrine of substantive due process lacks basis in the Constitution and the Court's corresponding precedents, namely *Griswold v. Connecticut*,¹⁶² *Lawrence v. Texas*,¹⁶³ and *Obergefell v. Hodges*,¹⁶⁴ which protect the right to contraception, intimate relationships and marriage between persons of the same sex, respectively, should be overruled.¹⁶⁵ The joint dissent by Justices Stephen Breyer, Sonia Sotomayor, and Elena

160. *Dobbs*, 142 S. Ct. at 2284. Finding no fundamental right to an abortion, the Supreme Court in *Dobbs* stated that laws regulating abortion will be reviewed under the rational basis test, namely a review of whether the state has a legitimate interest in the regulation's purpose and whether the regulation is rationally related to such legitimate interest. The Court found that the state interests in "protecting the life of the unborn" and ending "abortions . . . [using] the dilation and evacuation procedure," a "barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession," were legitimate interests satisfying the rational basis test. *Id.*

161. At the same time, many states have passed constitutional amendments to protect abortion rights, including reproductive freedom amendments that may provide greater rights than were permitted under *Casey*. Alicia Bannon, *So You Passed a State Constitutional Amendment Protecting Abortion. Now What?*, ST. CT. REP. (Dec. 12, 2024), <https://statecourtreport.org/our-work/analysis-opinion/so-you-passed-state-constitutional-amendment-protecting-abortion-now-what> [<https://perma.cc/9D7C-BMFB>] ("[S]everal state amendments have protections that appear to go far beyond [*Casey*'s] undue burden [test]. In Michigan, for example, a 2022 amendment establishes a 'fundamental right' to reproductive freedom, including abortion care, and states that this right 'shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.'"). *See also State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS. <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/> [<https://perma.cc/7F4N-TD5P>] (identifying state constitutional provisions relating to abortion).

162. 381 U.S. 479 (1965).

163. 539 U.S. 558 (2003).

164. 576 U.S. 644 (2015).

165. *Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring).

Kagan also countered the majority's pronouncement that its decision was limited only to abortion, arguing instead that the majority opinion's rationale appears to apply equally to other Court decisions "protecting autonomous decision making over the most personal of life decisions."¹⁶⁶ The *Dobbs* dissent reasons that none of these rights would pass the *Dobbs* test, as a majority of the Court today would likely hold that they are not "deeply rooted in [U.S.] history."¹⁶⁷

Turning to menstruation regulation, choosing to menstruate and maintain a regular menstrual cycle by deciding not to have a hysterectomy should be a matter of liberty and decisional privacy. This is in part because the menstrual cycle is part of the reproductive system, which is a health indicator (often called the fifth vital sign) and important to hormonal function.¹⁶⁸

The Supreme Court's 1927 decision in *Buck v. Bell*¹⁶⁹ permits nonconsensual or coerced sterilization of institutionalized women with

166. *Id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting). The joint dissent wrote:

[N]o one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions.

Id. (Breyer, Sotomayor & Kagan, JJ., dissenting) (citations omitted).

167. *Id.* (Breyer, Sotomayor & Kagan, JJ., dissenting). In addition, given the *Dobbs* stare decisis rule and how the majority applied it to overturn *Roe* and *Casey*, the dissenting opinion explains that such a rule makes it more probable that *Griswold*, *Lawrence*, and *Obergefell* could be overruled. *Id.* (Breyer, Sotomayor & Kagan, JJ., dissenting).

168. *Menstrual Cycles as a Fifth Vital Sign*, U.S. DEP'T HEALTH & HUM. SERVS., EUNICE KENNEDY SHRIVER NAT'L INST. CHILD HEALTH & HUM. DEV.: DIR.'S CORNER, https://www.nichd.nih.gov/about/org/od/directors_corner/prev_updates/menstrual-cycles [<https://perma.cc/XA5E-GWZ4>] (Sept. 13, 2021) ("The menstrual cycle—a complex process orchestrated by interactions between many of the body's tissues, cells, and hormones—reflects a person's overall health status and can be thought of as a 'fifth vital sign,' along with blood pressure, body temperature, heart rate, and respiratory rate. Menstrual irregularities can indicate hormonal imbalances, gynecological diseases, or infections. Stress, changes in weight or diet, certain medications, and other lifestyle factors can cause temporary changes in the menstrual cycle."). A hysterectomy may negatively impact a woman's ovarian endocrine and hormonal function. Yibao Huang, Meng Wu, Chuqing Wu, Qingqing Zhu, Tong Wu, Xiaoran Zhu, Mingfu Wu & Shuxuan Wang, *Effect of Hysterectomy on Ovarian Function: A Systematic Review and Meta-Analysis*, 16 J. OVARIAN RSCH. 35 (2023).

169. 274 U.S. 200 (1927).

mental disabilities when there are adequate procedural safeguards.¹⁷⁰ This case is often discussed as wrongly decided but has not been explicitly overruled.¹⁷¹

In 1942, the Supreme Court revisited the issue of a fundamental right to procreation in *Skinner v. Oklahoma ex rel. Williamson*.¹⁷² The Court contorted its reasoning to avoid overruling *Buck* while nonetheless declaring procreation to be a fundamental right and striking down a forced sterilization law targeting individuals convicted of certain crimes.¹⁷³ In *Dobbs*, the Court cited *Skinner* favorably regarding the right to procreation.¹⁷⁴ To this day, however, the Court has not repudiated *Buck* and only rarely has cited it favorably.¹⁷⁵

Since the *Dobbs* Court put the issue on the table of overturning long-standing precedent that it deemed “egregiously wrong,”¹⁷⁶ *Buck v. Bell* is a strong candidate for explicit reversal. In *Buck*, the state sought to sterilize an institutionalized woman who was deemed disabled for what we would acknowledge today as discriminatory and eugenics-based reasons, that is, to curb the perpetuation of what was termed “feeble minded[ness].”¹⁷⁷ The issue in *Buck* was whether the statute that permitted such sterilization violated the Due Process Clause and the Equal Protection Clause under the Fourteenth Amendment.¹⁷⁸ The Court, seemingly dismissing out of hand any fundamental right to procreation,

170. *Id.* at 205–07.

171. See Katie Kronick, *Left Behind, Again: Intellectual Disability and the Resentencing Movement*, 101 N.C. L. REV. 959, 993–95 (2023).

172. 316 U.S. 535 (1942).

173. *Id.* at 541 (finding that the statute violated “one of the basic civils right of man,” and the Equal Protection Clause, applying strict scrutiny). See also Colin Starger, *The Virtue of Obscurity*, 59 VILL. L. REV. TOLLE LEGE 17, 20–22 (2014) (discussing how Justice William Douglas, in writing the majority in *Skinner*, sidestepped the precedent of *Buck* by focusing on the Equal Protection Clause analysis).

174. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022).

175. Kronick, *supra* note 171, at 995 & n.206 (stating that “the Supreme Court has not strongly repudiated *Buck v. Bell*,” that *Roe* cited *Buck* favorably, and that “the Eighth Circuit cited [it] for the proposition that involuntary sterilization is not always unconstitutional if it is a narrowly tailored means to achieve a compelling government interest” in *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001)).

176. Another other example of the Supreme Court’s willingness to overturn long-standing precedent is *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), where the Supreme Court overturned the long-standing case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (setting forth a two-step deference rule for judicial review of agency action).

177. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

178. *Id.* (“An Act of Virginia, approved March 20, 1924, recites that the health of the patient and the welfare of society may be promoted in certain cases by sterilization of mental defectives, under careful safeguard, &c . . .”). See also 1924 Va. Acts 569.

found that the sterilization law was justified.¹⁷⁹ The Court explained in clearly offensive and troubling reasoning that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”¹⁸⁰ The Court also dismissed any equal protection claim, tortuously reasoning that the law’s differential treatment of institutionalized disabled individuals was justified in that it promotes equality “so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others.”¹⁸¹

As discussed above, to this day, *Buck* remains good law. The Court in *Buck* based its decision on stereotypes of disabled people and their offspring, cavalierly permitting them to be permanently sterilized without their consent. As a result, legally sanctioned nonconsensual sterilization of disabled individuals continues.¹⁸² Sterilization as a tool for regulating marginalized individuals has a long history in the United States, targeting communities of color, the impoverished, and persons with a disability.¹⁸³ Justifications for such sterilization include state purposes of “population control, immigration, and welfare costs.”¹⁸⁴ As Professor Robyn Powell

179. *Buck*, 274 U.S. at 207.

180. *Id.*

181. *Id.* at 208.

182. See *supra* notes 82–98 and accompanying text.

183. For literature regarding the history and current-day landscape of sterilization of marginalized people, see MELISSA MURRAY & KRISTIN LUKER, *CASES ON REPRODUCTIVE RIGHTS AND JUSTICE* 1055–1100 (2d ed. 2023); Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 696–705, 719–20 (2021); Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM, no. 2, 2022, at 37, 71 [hereinafter Powell, *Achieving Justice*]; Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 130–31 (2016); MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 23–26 (2020); LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 50–53 (2017); LAURA BRIGGS, *REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO* 142–61 (2002); Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 468–71 (2019); Virginia Espino, “Woman Sterilized as Gives Birth”: *Forced Sterilization and Chicana Resistance in the 1970s*, in *LAS OBRERAS: CHICANA POLITICS OF WORK AND FAMILY* 65 (Vicki L. Ruiz ed., 2000); Maya Manian, *Coerced Sterilization of Mexican Women: The Story of Madrigal v. Quilligan*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 97 (Melissa Murray, Katherine Shaw & Reva Seigel eds., 2019); and Nair, *supra* note 77.

184. Manian, *supra* note 183, at 98. As Manian reports, “[a] 1970 National Fertility Study found that twenty percent of all married black women and roughly the same percentage of Chicana women had been sterilized; over thirty-five percent of women of childbearing age in Puerto Rico had been sterilized. . . . In 1909, [California] became the third state to adopt laws authorizing the sterilization of the ‘feeble-minded.’” *Id.* at 99. For a discussion of sterilization of women who were incarcerated in prisons,

states, “by 1970, nearly 70,000 Americans, many of whom were disabled, poor, or people of color, were forcibly sterilized.”¹⁸⁵ Recognizing the wrongful sterilization of so many, the American College of Obstetricians and Gynecologists (ACOG) stated: “An ethical approach to the provision of sterilization should . . . promote access for women who wish to use [sterilization] as a method of contraception but at the same time safeguard against coercive or otherwise unjust uses.”¹⁸⁶

To achieve ACOG’s mandate of safeguarding against coercive sterilization, and given the Court’s current decisions overruling precedent deemed “egregiously wrong,” one option could be for the courts to repudiate explicitly and overturn *Buck*. Perhaps the strongest arguments for repudiating *Buck* are the ones the *Dobbs* majority focused on as well: “the nature of [the opinion’s] error [and] the quality of [its] reasoning.”¹⁸⁷ First, as to the nature of the Court’s error, *Buck* is roundly critiqued for denying autonomy for disabled individuals who can in fact make decisions using supported decision-making.¹⁸⁸ Moreover, the *Buck* decision was not based on “text, history, or precedent,”¹⁸⁹ and its use of discriminatory language regarding individuals with disability indicates it was not fairly decided. Second, as to the quality of its reasoning, *Buck* relied on “exceptionally weak grounds,” as was said about *Roe*.¹⁹⁰

In the end, while the Court’s willingness in *Dobbs* to overturn precedent may provide a pathway for *Buck* to be overruled, it is unclear whether a majority of the Court would overturn *Buck* or expand any reproductive freedom under a liberty right. Meanwhile, the case is currently good law, and menstruation regulation of disabled individuals through forced sterilization is permitted in thirty-one states.¹⁹¹

Another argument in seeking constitutional constraint on government regulation of disabled menstruators could be that despite *Dobbs*’s eradication of the fundamental right to abortion, there could and should be a fundamental right to decide to continue to menstruate.

see Kronick, *supra* note 171, at 995 & n.6 (“Between 2006 and 2010, California forced the sterilization of almost 150 women incarcerated in state prisons.”).

185. Powell, *Achieving Justice*, *supra* note 183, at 71.

186. *Permanent Contraception: Ethical Issues and Considerations*, 143 OBSTETRICS & GYNECOLOGY, no. 2, 2024, at e31, e33.

187. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022) (remarking that the other pieces of the rule, “the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance,” also lend support for overturning *Buck*).

188. See, e.g., Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101 (2011).

189. *Dobbs*, 142 S. Ct. at 2266.

190. *Id.*

191. See *supra* note 89 and accompanying text.

Applying the *Dobbs* test regarding unenumerated fundamental rights to menstruation, it is possible that a right to menstruate could be found under the Fourteenth Amendment. While there is no constitutional text explicating a right to menstruate and no known body of law that historically protects the right to menstruate,¹⁹² a right to menstruate may be part of a “broader entrenched right that is supported by other precedents.”¹⁹³ Menstruation is part of the reproductive system and can be monitored to try to determine one’s fertility. Menstruation biologically happens approximately once a month when there is no pregnancy—no fertilized egg that has implanted in the uterus—and so the body sheds the built-up uterine wall. Accordingly, the right to menstruate may be protected by specific analogy to the fundamental right to privacy that afforded access to contraception in *Griswold* and *Eisenstadt*, which the *Dobbs* majority assures remain good law.¹⁹⁴ Since menstruation is also separate from the concern of *Dobbs* regarding abortion, and that is, as it stated, “potential life,” any right to menstruate, similar to a right to menstruation, would be distinct from and not implicated by *Dobbs*.¹⁹⁵ If either *Buck* were overturned or a fundamental right to menstruate were established, strict scrutiny would be applied, requiring a very tight nexus between government interest and means.¹⁹⁶ Given the fact that supported decision-making is a new state-sanctioned way of ensuring greater opportunity for seriously disabled women and girls to make decisions,¹⁹⁷ it is possible that those state laws permitting forced sterilization without engaging in this process would not pass muster.

192. While there is a “deeply rooted” practice of menstrual stigma and taboo, Johnson, *Menstrual Justice*, *supra* note 2, at 50, there does not appear to be explicit state or caselaw supporting any right to menstruate.

193. *Dobbs*, 142 S. Ct. at 2244.

194. *Dobbs*, 142 S. Ct. at 2280. *See also* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a state law that criminalized the provision of contraceptives to married couples and upholding a fundamental right to privacy that protected the marital relationship from “maximum destructive impact” if contraceptive access was criminalized); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the right to privacy protects unmarried individuals from government intrusion into their use of contraceptives).

195. *Dobbs*, 142 S. Ct. at 2280.

196. *See* *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (stating that strict scrutiny is necessary for review of a fundamental right, like procreation).

197. *See infra* text accompanying notes 264–67 (discussing supported decision-making).

3. The Equal Protection Clause

This Article's final domain of menstruation regulation is regulation at work and school that treats menstruators differently simply because they menstruate.¹⁹⁸ Workers experience disproportional bathroom and break access and discipline for menstruating. Students experience disproportionate bathroom access and language control as well as discipline for menstruating. This section analyzes the implication of *Dobbs*'s dismissal of any viable equal protection claim against state abortion restrictions and finds that a class of regulation of menstruation can violate the Equal Protection Clause even after *Dobbs*.¹⁹⁹

The *Dobbs* majority ruled that "a State's regulation of abortion is not a sex-based classification" under the Equal Protection Clause because the act of preventing abortion does not constitute sex discrimination.²⁰⁰ The *Dobbs* majority, relying on *Geduldig v. Aiello*,²⁰¹ stated the regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other."²⁰² Since there is no protected category of persons, the *Dobbs* Court stated that "laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures," which is rational basis review.²⁰³ And as explained above, the Mississippi law's regulation of abortion was found to pass this deferential standard.²⁰⁴

Given the reasoning in *Dobbs*, a question remains whether there nonetheless might be a claim under the Equal Protection Clause for discrimination against menstruators. Under the reasoning in *Dobbs*, there

198. See *supra* Section I.C.

199. For purposes of this section, I assume the state action necessary for constitutional claims will be satisfied by these actions against public employees and public school students.

200. *Dobbs*, 142 S. Ct. at 2245–46.

201. 417 U.S. 484 (1974).

202. *Dobbs*, 142 S. Ct. at 2245–46 (alteration in original) (quoting *Geduldig*, 417 U.S. at 496 n.20). In *Geduldig*, the Court upheld the state's exclusion of pregnancy-related disabilities from its disability insurance system, even though only women would suffer. 417 U.S. at 486, 494–95 ("California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program."). The Court in *Geduldig* reasoned that because California was not excluding women from accessing the provided coverage, which excluded pregnancy coverage, there was no sex discrimination under the Equal Protection Clause. See *id.* at 494–95. Similarly, the *Dobbs* majority decided that "the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women." *Dobbs*, 142 S. Ct. at 2246 (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993)).

203. *Dobbs*, 142 S. Ct. at 2246, 2284.

204. *Id.* at 2284.

is an argument that menstruation regulation alone, without a showing that it is motivated by invidious sex discrimination, is not sex discrimination under the Equal Protection Clause. This is because discrimination against individuals who menstruate could result because menstruation is a taboo or carries stigma or some other reason that is seen as distinct from discriminating against women and girls because they are cisgender women and girls, for instance, or discriminating against transgender men because they are transgender. Such an argument seems tortured and unconvincing, but it nonetheless could win at the Court, given the *Dobbs* ruling.

In contrast, there are arguments distinguishing the *Dobbs* ruling that could support a claim that state regulation of menstruation violates the Equal Protection Clause as sex discrimination. First, the discussion of the Equal Protection Clause was dicta and hence not controlling, since the case was decided on substantive due process grounds.²⁰⁵ Second, the *Dobbs* reasoning does not comport with precedent and should not be followed. As Professors Mayeri, Murray, and Siegel argued in their amicus brief in *Dobbs*, since the *Geduldig* case was decided, the Supreme Court has in fact decided issues of pregnancy and parenting under the Equal Protection Clause. Specifically, in *United States v. Virginia*,²⁰⁶ the Court articulated that the Equal Protection Clause offers heightened scrutiny for sex discrimination and sex stereotyping, including for pregnancy and parenting.²⁰⁷ Similarly, in *Nevada Department of Human Resources v. Hibbs*,²⁰⁸ the Supreme Court upheld the Federal Family Medical Leave Act as a proper exercise of Congress's powers under Section 5 of the Fourteenth Amendment because it addresses such equal protection issues as equal employment and harmful sex stereotypes around parenting.²⁰⁹ In deciding those cases, the Court did not raise *Geduldig* as an obstacle. There could be an argument, therefore, that the

205. Siegel, Mayeri & Murray, *supra* note 137, at 68–69. *But see* *L. W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 481 (6th Cir.) (citing and relying on the Equal Protection Clause ruling in *Dobbs*), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023), and *cert. granted in part sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024).

206. 518 U.S. 515 (1996).

207. Brief of Equal Protection Constitutional Law Scholars, *supra* note 152, at 9–10. In *United States v. Virginia*, the Supreme Court struck down the Virginia Military Institute's male-student-only policy under the Equal Protection Clause, finding that the exclusion of women was based on stereotypes around women's capabilities. 518 U.S. at 533.

208. 538 U.S. 721 (2003).

209. *Id.* at 727–28, 734–37. Quoting *United States v. Virginia*, the *Hibbs* decision made clear that “[t]he State’s justification for such a classification ‘must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.’” *Id.* at 729 (quoting 518 U.S. at 533).

Dobbs discussion of the Equal Protection Clause should be given very little weight.²¹⁰ In addition, the Supreme Court in *Bostock v. Clayton County*²¹¹ decided that discrimination on the basis of an individual being transgender is prohibited “sex” discrimination under Title VII of the 1964 Civil Rights Act.²¹² Accordingly, there is an argument that a state actor violates the Equal Protection Clause when they discriminate against a transgender individual who menstruates.

But even if *Geduldig* were controlling on issues of pregnancy and abortion under the Equal Protection Clause, there could be an argument that such a ruling does not extend to menstruation. In *Geduldig*, California offered the same insurance offerings to men and women.²¹³ The Court ruled that excluding pregnancy from the insurance coverage was not sex discrimination because the state’s action targeted women who become pregnant, not all women.²¹⁴ Using the situation in *Flores* as an example,²¹⁵ the Virginia Department of Correction’s (VDOC) screening mechanisms intentionally screened tampon-wearing women employees as contraband suspects, leading to their termination. This screening operation therefore targeted all women, since menstruation is part of their natural body functioning.²¹⁶ While it is true menstruation may not occur due to chemical suppressants, amenorrhea, or menopause, menstruation is possible for most women, and any cessation of menstruation may be restarted at any moment by a change of medication, physical circumstance, or spotting during menopause. And if a woman is menstruating, she may be wearing a tampon. Because most women do indeed menstruate at some point in their life, there is an even stronger argument than in *Geduldig* that regulating menstruation is regulating one sex over another.²¹⁷ In fact, this reasoning would follow the *Flores* court’s reasoning that menstrual discrimination is sex discrimination under Title VII.²¹⁸ Accordingly, there could be an argument that the

210. See Siegel, Mayeri & Murray, *supra* note 137, at 68–69.

211. 140 S. Ct. 1731 (2020).

212. *Id.* at 1741–43.

213. *Geduldig v. Aiello*, 417 U.S. 484, 496–97, 496 n.20 (1974).

214. *Id.*

215. See *supra* text accompanying notes 110–12.

216. It should be noted that this discussion focuses on cisgender women because most sex discrimination cases discussing women (that do not also include gender identity discrimination claims) are focused on cisgender women.

217. See *Geduldig*, 417 U.S. at 497 n.20.

218. *Flores v. Va. Dep’t of Corr.*, No. 20-cv-00087, 2023 WL 6304680, at *1 (W.D. Va. Sept. 27, 2023) (deciding this issue under Title VII of the Civil Rights Act). Under this reasoning, employers who discriminate against transgender individuals who menstruate because they menstruate would violate Title VII as well.

Equal Protection Clause would protect against menstruation regulation as discrimination.

If state menstruation regulation could be reviewed under the Equal Protection Clause, *United States v. Virginia* would be instructive. Under *Virginia*, sex classifications are reviewed with “skeptical scrutiny,” and a party defending a “gender-based government action must show an ‘exceedingly persuasive justification.’”²¹⁹ Specifically, a state must show that the classification at issue “serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”²²⁰ In the *Flores* situation, for instance, the government had important security and safety reasons for screening and disciplining employees for bringing in contraband, but firing Flores for a screening that was knowingly unreliable as to whether she had contraband or a tampon was not “substantially related” to that purpose. Rather, the state’s reason for firing her could have been found to impermissibly “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”²²¹ As the court stated in *Flores*, the VDOC wrongly trained its employees to believe that women hiding contraband in their vaginas was how most contraband entered the facility.²²² The VDOC used gender stereotypes about women’s lower body cavities as vessels for illegal contraband, as opposed to sites for tampons to manage normal menstruation. As such, the state could be found to have violated the Equal Protection Clause.²²³ Nonetheless, given *Dobbs*’s discussion precluding constitutional claims for certain forms of sex-based discrimination, such as abortion restrictions,²²⁴ it could be difficult to prevail on such a claim based on menstruation regulation.²²⁵

219. 518 U.S. 515, 531, 533 (1996) (quoting *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136–37 (1994) and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

220. *Id.* at 533 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

221. *Id.*

222. *Flores*, 2023 WL 6304680, at *2.

223. Such a conclusion is supported by *Hibbs*, which upheld the constitutionality of the Family Medical Leave Act as proper Equal Protection Clause legislation protecting parental and family leave. *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 734–37 (2003). See also Brief of Equal Protection Constitutional Law Scholars, *supra* note 152, at 10.

224. See *supra* text accompanying notes 200–04.

225. In addition, to the extent that there is a neutral policy that has a disparate impact on menstruating individuals, the Equal Protection Clause is not a viable avenue, making the need for subconstitutional redress even more important. See Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1155 (2024) (discussing how

In sum, inappropriate employer regulation of menstruating employees and school regulation of menstruating students could be constrained by constitutional protections, but given the *Dobbs* decision and significant hurdles to obtaining relief from such regulation through constitutional rights to informational privacy, decisional privacy, and liberty or equality protections, it is important to consider other legal protections. Part III considers subconstitutional law and policy as potential curbs and reforms to subordinating and harmful menstruation regulation.

III. SUBCONSTITUTIONAL LAW AND POLICY LIMITS ON STATE AND PRIVATE MENSTRUATION REGULATION

Given the limited constitutional arguments available in a post-*Dobbs* world for curbing the harmful regulation of menstruators, this Part examines whether and how subconstitutional law and policy, as well as reform proposals, can address the regulation. New laws offer support for menstruators, such as state laws requiring free period products in schools,²²⁶ court decisions finding menstruation discrimination to be sex discrimination under Title VII,²²⁷ and requiring accommodations for certain circumstances surrounding menstruation.²²⁸ These new laws and court decisions open the door for greater privacy, liberty, and equality to combat menstruation regulation. This Part also considers how the political strategy of exploiting misogyny may thwart reforms aimed at curbing harmful regulation of women and girls when such reforms seek to topple patriarchal order or gendered roles that hinder women from entering the workplace, competing in athletics, or making choices regarding their pregnancies.

equal protection claims alleging transgender discrimination have typically failed for not alleging disparate treatment, as opposed to disparate impact).

226. *Period Products in Schools*, ALL. FOR PERIOD SUPPLIES, <https://allianceforperiodsupplies.org/period-products-in-schools/> [https://perma.cc/WYR8-9CFY] (noting that, as of January 1, 2025, “28 states and Washington D.C. have passed legislation to help students who menstruate have free access to period products while in school”).

227. *E.g.*, *Flores*, 2023 WL 6304680, at *2.

228. *See infra* text accompanying notes 310–13 (discussing the Pregnant Workers Fairness Act and EEOC regulations interpreting the Act).

*A. Subconstitutional Law, Policy, and Law Reform Regarding
Menstruation Regulation*

1. Informational Privacy Laws

State and private actors regulate the use of period-tracking app information for a variety of reasons, including to counsel pregnant individuals against abortion care, to scrutinize and enforce abortion restrictions under Texas S.B. 8, and to screen out work applicants and prospective athletes. Given the resulting harm from this regulation and the limited certainty of constitutional protections, this section explores the potential relief offered by subconstitutional laws.

Period-tracking apps share user information with third parties without notice or meaningful consent. In general, apps control the terms of privacy, typically gaining consent by having users accept their privacy conditions, which are often long, complicated, and not open to negotiation—making it unrealistic to suppose that users can read and understand the privacy risks and truly consent.²²⁹ Post-*Dobbs*, many period app users chose to delete apps or sought more secure apps to protect their privacy.²³⁰ User behavior shows that there is a need for privacy protection, and yet there is no U.S. law that prevents an app from selling a user's health data to third parties provided there is no misrepresentation, notice is given, and consent is obtained.²³¹ Also, there is no national governing body that reviews the security of apps.²³² Thus, there is limited federal protection against state and private regulation through period apps.²³³ The My Body, My Data Act, as well as the

229. Gilman, *Periods for Profit*, supra note 38, at 109–10; Rosato, supra note 41.

230. Flora Garamvolgyi, *Why US Women Are Deleting Their Period Tracking Apps*, GUARDIAN (June 28, 2022, 6:00 AM), <https://www.theguardian.com/world/2022/jun/28/why-us-woman-are-deleting-their-period-tracking-apps> [<https://perma.cc/8NYE-MDH7>].

231. Jerry Beilinson, *Glow Pregnancy App Exposed Women to Privacy Threats, Consumer Reports Finds*, CONSUMER REPS., <https://www.consumerreports.org/electronics-computers/mobile-security-software/glow-pregnancy-app-exposed-women-to-privacy-threats-a1100919965/> [<https://perma.cc/3WEG-YLEW>] (Sept. 17, 2020); J. Frazee, M. Finley & JJ Rohack, *mHealth and Unregulated Data: Is This Farewell to Patient Privacy?*, 13 IND. HEALTH L. REV. 384, 399 (2016). See also 42 C.F.R. § 401.716 (2024).

232. Beilinson, supra note 231.

233. The Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191 (1996), and its Privacy, Security, and Breach Notification Rules (HIPAA Rules), which protect against the use and disclosure of patient health information gathered by medical providers, do not require protection of app users' data. Gilman, *Periods for Profit*, supra note 38, at 109. This is because such apps are not classified as regulated entities under the law. 45 C.F.R. § 164.104 (2024); *Protecting the Privacy and Security*

Privacy in Education Regarding Individuals' Own Data (PERIOD) Act, have been introduced to offer protection, but both bills died in the 118th Congress.²³⁴ The My Body, My Data Act would have provided users with the ability to learn the location of their data and to request correction and/or deletion of it.²³⁵ The PERIOD Act would have prohibited an educational institution from receiving federal funds if it requires student disclosure of menstrual cycle information.²³⁶

Despite the lack of comprehensive data protection, some extreme cases of invasions of informational privacy by period apps have been remedied through litigation. For example, the Federal Trade Commission (FTC) sued and settled under the FTC Act a case against Flo, a period-tracking app. The FTC alleged that Flo sold consumer information to third parties without disclosure to users.²³⁷ The allegations included that

of Your Health Information When Using Your Personal Cell Phone or Tablet, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html> (last visited Mar. 13, 2025).

In addition, the Fair Trade Commission (FTC) Act and FTC Health Breach Notification Rule offer only limited regulation of privacy and security for app users. Under the FTC Act, the FTC can bring an enforcement action for “unfair or deceptive acts or practices” and false advertising, 15 U.S.C. § 45 (unfair and deceptive practices); § 52 (false advertisement). Under the FTC Health Breach Notification Rule, non-HIPAA vendors of personal health records and related entities are required to notify users, the FTC, and other entities of any breach of unsecured personally identifiable health information. 16 C.F.R. pt. 318 (2024). This Rule covers apps, such as period-tracking apps. *See* § 318.1(a). If a covered entity fails to notify users, it has engaged in an unfair or deceptive trade act or practice that can be enforced by the FTC. Even with this amendment, the FTC’s authority is limited to enforcement and does not provide greater safeguards to consumer consent to privacy risk. Gilman, *Periods for Profit*, *supra* note 38, at 110; *Mobile Health Apps Interactive Tool*, FTC, <https://www.ftc.gov/business-guidance/resources/mobile-health-apps-interactive-tool> [<https://perma.cc/6SSN-5GNE>] (Nov. 2024) (stating that a company could be violating the FTC Act only if it “share[s] consumers’ health information with third parties after telling or implying to consumers that their information will be kept private”). Similarly, while the Food and Drug Administration has begun reviewing period-tracking apps as medical devices, their review does not concern privacy or security issues. *See FDA Allows Marketing of First Direct-to-Consumer App for Contraceptive Use To Prevent Pregnancy*, U.S. FOOD & DRUG ADMIN. (Aug. 10, 2018), <https://www.fda.gov/news-events/press-announcements/fda-allows-marketing-first-direct-consumer-app-contraceptive-use-prevent-pregnancy> (noting review will establish criteria for “accuracy, reliability and effectiveness”); *see also* Taylor, *supra* note 62, at 2279–82.

234. My Body, My Data Act of 2023, S. 1656, 118th Cong. (2023); PERIOD Act, H.R. 951, 118th Cong. (2023).

235. S. 1656 (authorizing FTC to enforce requirement that regulated entities have comprehensive privacy policies and users’ requests for any retained information, correction of such information, and deletion of such information from a regulated entity).

236. H.R. 951.

237. Sara Merken, *Fertility App Maker Flo Health Faces Consolidated Privacy Lawsuit*, REUTERS (Sept. 3, 2021, 8:59 PM), <https://www.reuters.com/legal/litigation/fertility-app-maker-flo-health-faces-consolidated-privacy-lawsuit-2021-09-03/>; Natasha

Flo was “sharing its user’s data with outside data analytics companies including Facebook and Google despite promising users that their data would remain private.”²³⁸ In addition, the California Attorney General sued the ovulation and fertility tracking app Glow under California’s Confidentiality of Medical Information Act, Unfair Competition Law, and False Advertising Law for security vulnerabilities that permitted individuals to access the users’ information.²³⁹ *Consumer Reports* found that non-hackers could access a Glow user’s inputted period data, and an unsophisticated hacker could access users’ personal information, including emails, passwords, and personal information shared on the app’s discussion boards.²⁴⁰ The settlement enjoined Glow to “consider how privacy or security lapses may impact online threats affecting women.”²⁴¹ While these lawsuits had success in enforcing some control over the disclosure and regulation of period app information that could be used to determine LMP, without enactment of more comprehensive enforcement laws, that control is limited.

Fortunately, there are other potential legal reforms that hold promise for curbing informational privacy infringement of menstruators through period app regulation.²⁴² One model is the California Consumer Privacy

Singer, *Flo Settles F.T.C. Charges of Misleading Users on Privacy*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/business/flo-privacy.html>. See also *Flo Health, Inc.*, FTC, <https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3133-flo-health-inc> [<https://perma.cc/4SQH-RD5X>] (collecting documents on FTC’s cases against Flo).

238. Gilman, *Periods for Profit*, *supra* note 38, at 103.

239. Complaint for Injunction, Civil Penalties & Other Equitable Relief at 1–2, *State v. Upward Labs Holdings, Inc.*, No. CGC-20-586611 (Cal. Super. Ct. filed Sept. 17, 2020) (citing CAL. CIV. CODE §§ 56.06(d), 56.101(a), 56.10(a) (West 2024); CAL. BUS. AND PROF. CODE §§ 17200 et seq., 17500 et seq. (West 2024)).

240. Beilinson, *supra* note 231.

241. [Proposed] Final Judgment and Permanent Injunction at 10–11, *Upward Labs*, No. CGC-20-586611 (Cal. Super. Ct. Sept. 18, 2020); Press Release, Cal. Dep’t of Just., Off. of the Att’y Gen., Attorney General Becerra Announces Landmark Settlement Against Glow, Inc. – Fertility App Risked Exposing Millions of Women’s Personal and Medical Information (Sept. 17, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-landmark-settlement-against-glow-inc-%E2%80%93> [<https://perma.cc/QE75-DTUH>] (noting settlement included “a \$250,000 civil penalty . . . [and] injunctive terms that require Glow to comply with state consumer protection and privacy laws”).

242. While new privacy laws can create additional protections, Professors Kevin Davis and Florencia Marotta-Wurgler argue that traditional contract law provides privacy protections as well. See generally Kevin E. Davis & Florencia Marotta-Wurgler, *Contracting for Personal Data*, 94 N.Y.U. L. REV. 662 (2019) (conducting an empirical analysis of the effects of the European Union’s General Data Protection Regulation (GDPR) and traditional contract law on privacy provisions for personal data).

Act (CCPA),²⁴³ broadened by the California Privacy Rights Act of 2020 (CPRA).²⁴⁴ The CCPA gives period-tracking app users the right to: delete personal information;²⁴⁵ correct inaccurate personal information;²⁴⁶ know what personal information is being collected;²⁴⁷ know what personal

243. California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100–.199.100 (West 2024); *see also* Jordan M. Blanke, *The CCPA, “Inferences Drawn,” and Federal Preemption*, 29 RICH. J.L. & TECH. 53, 61 (2022); Prince, *supra* note 38, at 1110 (noting the CCPA does not circumscribe “what data can be collected, how they can be analyzed, and with whom they can be shared”).

244. CAL. CIV. CODE §§ 1798.100–.190.100 (West 2023) (ballot initiative amending CCPA).

245. § 1798.105. The definition of “personal information” is expansive:

[I]nformation that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes, but is not limited to, the following if it identifies, relates to, describes, is reasonably capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household:

- (A) Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers.
- (B) Any personal information described in subdivision (e) of Section 1798.80.
- (C) Characteristics of protected classifications under California or federal law.
- (D) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.
- (E) Biometric information.
- (F) Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer’s interaction with an internet website application, or advertisement.
- (G) Geolocation data.
- (H) Audio, electronic, visual, thermal, olfactory, or similar information.
- (I) Professional or employment-related information.
- (J) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (20 U.S.C. Sec. 1232g; 34 C.F.R. Part 99).
- (K) Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.
- (L) Sensitive personal information.

§ 1798.140(v)(1)(A)–(L).

246. § 1798.106.

247. § 1798.110.

information is sold or shared, and with whom;²⁴⁸ opt out of the sale or sharing of personal information;²⁴⁹ and limit use and disclosure of sensitive information.²⁵⁰ The CPRA extended the CCPA by requiring businesses to: specify the purpose for data collection;²⁵¹ adhere to time limits on data collection;²⁵² require any third party obtaining the consumer's information to follow the CCPA;²⁵³ and "implement reasonable security."²⁵⁴ The CPRA also adds hefty financial penalties for intentional violations and violations "involving the personal information of minor consumers"²⁵⁵ and establishes a California Privacy Protection Agency with power to enforce the CCPA.²⁵⁶

Another possible reform would be privacy legislation that addresses health data provided in the workplace context. First, such legislation should provide users the choice of "when and how their health data may be disclosed" and to whom, including the employer.²⁵⁷ Second, it should ensure that employees' health data disclosures are truly voluntary, without economic or health insurance coverage pressure.²⁵⁸ Third, it should require that period-tracking apps have simple privacy terms that are easy to read and understand, as well as identify the type of data collected, how it is being used, and who else has access to it so that the user can make an informed decision to opt in (or opt out) of sharing their information.²⁵⁹ Fourth, it should require period-tracking apps to provide a standard privacy notice to consumers with easy and uniform information.²⁶⁰ These reforms also could include special protection against subpoenaing menstrual history data.²⁶¹ Such reforms could protect

248. § 1798.115.

249. § 1798.120.

250. § 1798.121.

251. § 1798.100(a)(1)–(2).

252. § 1798.100(a)(3).

253. § 1798.100(d).

254. § 1798.100(e).

255. § 1798.199.55(a)(2).

256. § 1798.199.10.

257. Brown, *supra* note 58, at 324–25.

258. *Id.* And while determining the parameters of voluntariness is both a complicated issue and outside the scope of this Article, the question is more thoroughly addressed in Brown's article.

259. *Id.*

260. *See id.* at 326.

261. Such a law was proposed in Virginia in 2022 but ultimately vetoed by Governor Glenn Youngkin. Laura Vozzella & Gregory S. Schneider, *Youngkin Opposes Effort To Shield Menstrual Data*, WASH. POST (Feb. 14, 2023), <https://www.washingtonpost.com/dc-md-va/2023/02/14/youngkin-menstrual-data-abortion-virginia/>. Virginia later enacted a similar bill in 2024:

menstruators from the politicization of their LMP data that subjects it to being extracted from health care providers and used by governments or employers to scrutinize pregnancy and abortion care.²⁶²

2. Liberty and Decisional Privacy Laws

This section explores subconstitutional laws that may offer some protection from decisional privacy and liberty harms from state and private regulation of individuals with intellectual and developmental disabilities (I/DD) who do not consent to being sterilized to control their menstruation. A helpful model comes from New York State. New York's new Reproductive Health Act (RHA) rejects nonconsensual sterilization and defines the right to choose or refuse sterilization as a "fundamental right." It states that "comprehensive reproductive health care is a fundamental component of every individual's health, privacy and equality."²⁶³ The RHA promises greater equality by guaranteeing the right to choose whether to be sterilized. Coupled with this law, New York also recently enacted a law that promotes supported decision-making (SDM) and SDM agreements.²⁶⁴ Close to half of all states and the District of Columbia also recognize decisions made through SDM agreements.²⁶⁵

SDM permits I/DD individuals to utilize support to make important decisions.²⁶⁶ The SDM process can ensure that any sterilization decision

No search warrant, subpoena, court order, or other process shall be issued, executed, or served for the purpose of the search and seizure or production of menstrual health data, including data stored on a computer, computer network, or other device containing electronic or digital information. For the purposes of this section, "menstrual health data" means any information, recorded in any form or medium, that is created or received by an entity that relates to or is used to determine, predict, or estimate the past, present, or future menstrual health or menstrual status of an individual.

H.B. 78, 2024 Leg. Sess. (Va. 2023), 2024 Va. Acts ch. 523.

262. See Prince, *supra* note 38 for a comprehensive article about reproductive health data privacy protection and recommendations regarding legislative reform targeting data brokers, inferred information, data collection, and across states.

263. N.Y. PUB. HEALTH LAW § 2599-AA (McKinney 2025). As powerful as this law is, it is unclear how it supports either a private or public right of action.

264. N.Y. MENTAL HYG. LAW §§ 82.01–.15 (McKinney 2025).

265. Sarah Lorr, *The Capacity To Marry*, 126 COLUM. L. REV. (forthcoming 2026) (manuscript at 16 n.55), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5141801; see also *U.S. Supported Decision-Making Laws*, CTR. FOR PUB. REPRESENTATION, <https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions/> [<https://perma.cc/D5NF-2V7T>].

266. § 82.02(i). For an in-depth description of the New York State SDM project that led to the new law, see Kristin Booth Glen, *Supported Decision-Making from Theory to Practice: Further Reflections on an Intentional Pilot Project*, 13 ALB. GOV'T L. REV.

is made consensually by the individual without undue influence of regulation and stereotypes. The importance of SDM is seen in the work of the North Dakota Protection and Advocacy Project in response to substituted decision-making.²⁶⁷ The Project has been successful in helping individuals with disabilities resist forced sterilization by scrutinizing the alleged need for the sterilization in cases seeking to bypass the menstruator's consent.²⁶⁸ These efforts to obtain equality for disabled individuals, including those who menstruate, offer great examples of possible reforms in other states.

3. Equality Laws

Given *Dobbs*'s discussion precluding constitutional claims for certain forms of sex-based discrimination, such as abortion restrictions,²⁶⁹ it could be difficult to prevail on such a claim based on menstruation regulation.²⁷⁰ Therefore, this section explores subconstitutional equality laws that might offer some protection from discrimination against menstruators by state and private regulation. Federal antidiscrimination laws, for instance, place limits on how employers and schools may treat their workers and students.²⁷¹ While employer and school regulation of workers and students respectively often has the understandable stated aims of cost effectiveness, efficiency, productivity, and security, the regulations cannot discriminate on the basis of sex.

As discussed earlier, in *Flores v. Virginia Department of Corrections*, the federal district court determined that the federal antidiscrimination in employment law, Title VII of the Civil Rights Act

94 (2020). SDM is the recommended process for decision-making in other geographic locations as well. See *Supported Decision-Making*, DISABILITY RTS. N.D. [hereinafter DISABILITY RTS. N.D.], <https://www.ndpanda.org/resources/supported-decision-making> [https://perma.cc/Y59V-8MG8] (“[SDM] is a process for making well-informed, voluntary decisions by methods less restrictive than guardianship or conservatorship. [SDM] allows individuals to make their own decisions and stay in charge of their lives, while receiving the help and assistance they need. . . . Using the [SDM] model, older adults and people with disabilities choose someone they trust, often a friend, family member or professional, to serve as their ‘Supporter.’”).

267. See DISABILITY RTS. N.D., *supra* note 266.

268. Nair, *supra* note 77, at 184–85.

269. See *supra* Section II.B.3.

270. See *supra* note 225 and accompanying text.

271. See generally Johnson, *Menstrual Justice*, *supra* note 2, at 31–37; CRAWFORD & WALDMAN, *supra* note 2; see also Karin, Johnson & Cooper, *supra* note 2, at 56–64 (discussing the Equal Protection Clause and menstruation); Marcy L. Karin, Naomi Cahn, Elizabeth B. Cooper, Bridget J. Crawford, Margaret E. Johnson & Emily Gold Waldman, *Title IX and “Menstruation or Related Conditions,”* 30 MICH. J. GENDER & L. 25 (2023).

of 1964, covered menstruation discrimination as a form of illicit sex-based discrimination. In ruling on the defendant's motion to dismiss, the court found that being fired for menstruating (and wearing a tampon) could be sex discrimination.²⁷² The court stated: "[B]ut for Flores's menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged."²⁷³ Denying the defendant's motion for judgment as a matter of law after the trial, the court found that evidence of sex discrimination included the fact that the defendant permitted false training that unfairly targeted women's lower body cavities as high risk for contraband smuggling, which is untrue.²⁷⁴ In addition, the court found evidence of sex discrimination in the fact that Virginia Department of Corrections, knowing their scanning equipment was deficient in distinguishing between contraband and a tampon, pursued women as the most likely smugglers of contraband through their lower body cavities.²⁷⁵ Accordingly, as seen in *Flores*, Title VII can be interpreted to offer protection against menstruation regulation as sex-based discrimination.

But the courts do not agree on this point. In *Coleman v. Bobby Dodd Institute, Inc.*,²⁷⁶ a Georgia federal district court found that menstruation discrimination is not covered as sex discrimination under Title VII.²⁷⁷ Ms. Coleman was fired for bleeding on the job due to her unexpected and heavy flow during perimenopause. In her lawsuit claiming sex discrimination, the court granted the defendant's motion to dismiss because, without a comparator male who was treated similarly to her, there was no sex discrimination, as menstruation was not a proxy for sex.²⁷⁸

Near the end of the Biden Administration, the Department of Education and the Equal Employment Opportunity Commission explained in final rulemakings that menstruation discrimination is in fact sex discrimination under Title IX of the Education Amendments of 1972

272. *Flores v. Va. Dep't of Corr.*, No. 20-cv-00087, 2021 WL 668802, at *5–6 (W.D. Va. Feb. 22, 2021).

273. *Id.* at *6 (emphasis omitted).

274. *Flores*, 2023 WL 6304680, at *2 (W.D. Va. Sept. 27, 2023) (stating, dismissing the defendant's motion for judgment after a jury verdict in favor of plaintiff, that training instructed that "most contraband will be concealed in the woman [sic] internal body cavity," despite the fact that "VDOC represented that only 9% of contraband detected in its facilities . . . was in any body cavity—let alone female body cavities in particular").

275. *Id.*

276. No. 17-CV-29, 2017 WL 2486080 (M.D. Ga. June 8, 2017), *appeal dismissed*, No. 17-13023-BB, 2017 WL 6762403 (11th Cir. Nov. 6, 2017).

277. *Id.* at *2.

278. *Id.*

and Title VII of the Civil Rights Act of 1964, respectively.²⁷⁹ Such implementation of federal antidiscrimination law in education and employment, respectively, provides promise for claims of sex discrimination regarding limited bathroom access, restricted language usage, and expulsion from school or termination from work because of menstruation. Unfortunately, on January 9, 2025, the U.S. District Court for the Eastern District of Kentucky issued a nationwide vacatur of the Title IX rule.²⁸⁰ The fate of the rule was made even more uncertain under the new Trump Administration, when the Department of Education clarified on February 4, 2025, that it would enforce the 2020 Title IX Rule promulgated in the first Trump Administration, without stating whether and to what extent it would formally withdraw the 2024 rule.²⁸¹

The final EEOC regulation interpreting the Pregnant Workers Fairness Act (PWFA)²⁸² indicates that accommodations for menstruation, which could include bathroom access, could be required under certain circumstances.²⁸³ This regulatory assertion provides some, but not definitive, clarity on this issue. This rule has also been under attack since

279. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33812–13 (Apr. 29, 2024) (codified at 34 C.F.R. Part 106); Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29101 n.40 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636). By November 2024, the Department of Education was enjoined under orders from several federal courts from enforcing the 2024 Title IX Amendments in twenty-six states and against certain specific schools. *Federal Register Notices and Regulations: Amendments to the Department's Regulations Implementing Title IX*, U.S. DEP'T ED., <https://www.ed.gov/laws-and-policy/civil-rights-laws/civil-rights-faqs/federal-register-notices-and-regulations> [<https://perma.cc/HB73-PX45>].

280. *Tennessee v. Cardona*, __ F.3d __, No. 24-072, 2025 WL 63795 (E.D. Ky. Jan. 10, 2025), *appeal docketed sub nom. Tennessee v. McMahon*, No. 25-5205 (6th Cir. Mar. 12, 2025). Rejecting a *Bostock* analysis, the court ruled that “there is nothing in the text or statutory design of Title IX to suggest that discrimination ‘on the basis of sex’ meant anything other than . . . that recipients of federal funds under Title IX may not treat a person worse than another similarly-situated individual on the basis of the person’s sex, i.e., male or female.” *Id.* at *2–3 (emphasis omitted).

281. CRAIG TRAINOR, DEP'T OF ED., OFF. OF C.R., DEAR COLLEAGUE LETTER (Feb. 4, 2025), <https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf> [<https://perma.cc/P7GC-U8RD>].

282. Pregnant Workers Fairness Act, 42 U.S.C. §§ 2000gg to gg–6 (2023). PWFA requires that an employer provide a reasonable accommodation for a limitation arising from a qualified employee’s or applicant’s limitations related to pregnancy, childbirth, or related medical conditions provided it does not create an undue burden. § 2000gg–1.

283. *See* Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. at 29101, 29175.

it was promulgated, and the new EEOC Chair is focusing on different enforcement priorities.²⁸⁴

The Biden Administration's Department of Labor posted a blogpost proposing how to create a menstruation-friendly workplace. The blogpost discussed providing work flexibilities that could address bathroom access, and educating and training workers and managers about menstruation and implications for work.²⁸⁵ The Trump Administration removed it.

Workplace menstruation discrimination might also be actionable under the Pregnancy Discrimination Act of 1978 (PDA)²⁸⁶ and the Americans with Disabilities Amendments Act (ADAAA).²⁸⁷ The PDA offers protection against sex discrimination that includes "pregnancy, childbirth, or related medical conditions," a provision that could prohibit menstruation discrimination in certain instances.²⁸⁸ And while there is no certain antidiscrimination coverage under the Americans with Disabilities Act for discrimination that might come from employers' access to employee period-tracking app data,²⁸⁹ the ADAAA might cover "some

284. Madeleine Gyory, *Reproductive Rights Face Headwinds As EEOC, DOJ Change Tack*, BLOOMBERG L. (Mar. 12, 2025), <https://news.bloomberglaw.com/us-law-week/Reproductive-Rights-Face%20Headwinds-As-EEOC,-DOJ-Change-Tack>.

285. Delamater & Roux, *supra* note 104. This communication provides critical support for women and other menstruators in the workplace to lessen harmful regulation, listing the following five suggested employer actions:

1. Provide a sufficient supply of varied period products in bathrooms and ensure menstruators can access products privately.
2. Allow flexibility in uniforms, with options in dark colors to ensure menstruators do not need to worry that an unexpected period or heavier flow will lead to noticeable stains.
3. Allow scheduling and work flexibilities such as telework, flexible work hours or shift modifications.
4. Guarantee access to paid sick leave, provide explicit guidance that menstruation is a qualifying condition for the leave – whether for symptom management or for related medical appointments – and ensure that employees and their managers are aware these are allowable reasons to use sick leave.
5. Educate and train workers and managers about the symptoms of menstruation and how they can impact employees at work and include support services for menstruation in any Employee Assistance Program offered.

Id.

286. 42 U.S.C. § 2000e(k).

287. 42 U.S.C. § 12101 et seq.

288. 42 U.S.C. § 2000e(k); *cf.* Brown, *supra* note 58, at 313.

289. The ADA protects a qualified employee from discrimination based on the employee's actual record of having, or being regarded as having, a disability, defined as a "physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. §§ 12102(1)(A), 12112(a). The ADA also requires an

qualified workers with menstruation- or menopause-related impairments” to be protected from discrimination because it includes episodic issues related to endocrine and reproductive functions.²⁹⁰

B. How Misogyny Further Constrains Menstruation Regulation Reform

Given the promise of subconstitutional law and policy reform, as well as some of the disappointing court decisions and unsuccessful reforms, it is important to examine how future proposals might be successful. Research in political theory on the correlation between misogyny and social justice reform may provide some insight.

This research shows that misogyny is an effective political strategy. Some of the fallout from *Dobbs* evidences what British political theorist Nitasha Kaul shows is the success of a political strategy based on misogyny, exercising power to devalue and “subdue[] and dominate[]” women and pregnancy-capable people as well as anything “feminized.”²⁹¹ As Kaul discusses, the push and pull of misogyny is that “[t]he ‘feminine’

employer to provide a reasonable accommodation to such qualified employee with disability if it does not impose an undue burden on the employer. 42 U.S.C. § 12112(b)(5)(A).

In *Sipple v. Crossmark Inc.*, the plaintiff brought a disability discrimination claim under the California Fair Employment and Housing Act (FEHA), which is based on the ADA and interpreted similarly to it. No. 10-cv-00570, 2012 WL 2798791, at *1, *4 (E.D. Cal. July 9, 2012). She stated in her complaint that she was denied requested accommodations for the following medically verified menopausal symptoms: “menopausal symptoms, including ‘hot flashes,’ dizziness, migranes [sic] and a general sense of physical weakness.” *Id.* at *1. The court clarified that “the effects of menopause may constitute a disability if shown to affect a body system as defined by the FEHA and if shown to sufficiently limit a major life activity.” *Id.* at *5. However, here the plaintiff did not allege that any symptoms were impacting her body system. *Id.* One can easily see how this ruling could be extended to routine menopausal cramping or ovulation pain that is not related to endometriosis (which is seen as a disability). See Karin, *supra* note 2, at 477–81. For a fuller discussion of this case and the ADA as it relates to femtech generally, see Brown, *supra* note 58, at 313–15.

290. Karin, *supra* note 2, at 480; see also *ADA Amendments Act of 2008 Frequently Asked Questions*, U.S. DEP’T LAB., <https://web.archive.org/web/20250102222037/https://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments> (Jan. 1, 2009) (noting the ADAAA broadened the scope of the ADA to include certain impairments as disabilities). For cases applying this new standard, see, for example, *Mullen v. New Balance Athletics, Inc.*, No. 17-cv-194, 2019 WL 958370, at *1, *6 (D. Me. Feb. 27, 2019) (denying defendant’s motion for summary judgment because there existed a genuine dispute as to whether impairment to plaintiff’s endocrine system causing early menopause “constituted a substantial limitation on that system when compared to an average person,” as required by the ADAAA).

291. Nitasha Kaul, *The Misogyny of Authoritarians in Contemporary Democracies*, 23 INT’L STUD. REV. 1619, 1622 (2021).

is eulogized so long as it conforms to male dominance and sexism, and demonized when it defies sexist-gendered norms.”²⁹²

Misogyny enforces social order and is “distinct from sexism, masculinity, and patriarchy.”²⁹³ As a political strategy, misogyny enforces patriarchal order “from family to the state” through ideology that seeks conformity and punishes those who transgress sexist norms.²⁹⁴ Misogyny as a political strategy exercises power “such that not only women, but also that which is constructed/perceived/presented as ‘feminine,’ which is ‘feminized,’ is also seen as inferior and devalued.”²⁹⁵ And it “rewards women [and others] who reinforce the status quo and punishes those who don’t.”²⁹⁶

Research shows that the strategy of misogyny increases political power for a couple of reasons.²⁹⁷ Misogyny supports authoritarianism. Research evidences a “strong positive correlation between authoritarian attributes and antifeminist dispositions, with no sex differences in respondents.”²⁹⁸ In addition, misogyny silences critics by “feminizing” them as ineffective or lacking in autonomy.²⁹⁹ For instance, one early study found that “factors such as age, education, race, socioeconomic status, social class identification, marital status and occupation did not

292. *Id.* at 1624. Kaul continues: “Therefore, women, when they follow sexist norms (not only in terms of personal identity and behavior, but also in terms of providing care), can be accepted, promoted, and protected. However, when women challenge the patriarchal status quo by refusing to conform or to provide care, they can be punished or met with violence. This punishment can take the form of misogynist violence, ranging from insults to abuse to physical intimidation or worse.” *Id.*

293. *Id.* at 1622. As Kaul explains, misogyny “is not *only* about a direct expression of hate or disgust toward (embodied) women by (embodied) men.” *Id.*

294. *Id.* at 1623–24. According to Kate Manne, misogyny can be understood as the “moral manifestation of a sexist ideology,” so that “sexism is the ideology that *supports* patriarchal social relations, but misogyny *enforces* it when there’s a threat of that system going away.” Sean Illing, *What We Get Wrong About Misogyny*, Vox, <https://www.vox.com/identities/2017/12/5/16705284/elizabeth-warren-loss-2020-sexism-misogyny-kate-manne> [<https://perma.cc/9977-VEQ2>] (Mar. 7, 2020, 7:00 AM) (interview with Manne); *see also* Kaul, *supra* note 291, at 1623 (“Misogyny is ‘about controlling and punishing women who challenge male dominance.’” (quoting Illing, *supra*)).

295. Kaul, *supra* note 291, at 1622. Kaul continues: “Thus, specific identities/groups/behaviors that are constructed/perceived/presented as ‘feminine’ and are ‘feminized’ (for instance, minorities, indigenous communities, environmental concerns, and human rights concerns) are able to be legitimately subdued and dominated.” *Id.*

296. *Id.* at 1623 (quoting Illing, *supra* note 294).

297. *Id.* at 1631. While Kaul’s research studies authoritarian regimes and political strategy, her research findings seem helpful for all political contexts in understanding how misogyny enforces political strategy.

298. *Id.* at 1631 (emphasis omitted).

299. *Id.*

significantly contribute to the relationship and that authoritarianism was itself the only significant correlate of variations in antifeminism scores.”³⁰⁰ Other subsequent studies reinforce this finding and show the strong relationship between misogyny and antidemocratic attitudes.³⁰¹ Misogyny even contributes to an individual’s views on an issue that is seemingly non-gendered like the environment and climate change.³⁰² Accordingly, while many objections to progressive law reforms may be grounded in non-patriarchal or sexist principles, of course, the theory shows that an overlay of misogyny can be used to counter reform and make it difficult to limit harmful regulation.

In addition, misogyny as a political strategy uses contradictory action to further entrench the enforcement of patriarchal order.³⁰³ For instance, “feminist and progressive gains are used to promote conservative patriarchal ends, either through policies that do not deliver in practice because they are not intended to do so or through policy institutions that are headed by people who oppose the reasons why those institutions exist.”³⁰⁴ The token legislative or policy reform is used to “delegitimise[e] the critics of misogyny by accusing them of overreacting to someone who has enacted anti-sexist policy.”³⁰⁵

300. *Id.* at 1631 (quoting Richard Centers, *Authoritarianism and Misogyny*, 61 J. SOC. PSYCH. 81, 85 (1963)).

301. Kaul writes:

Early experimental findings . . . [found] that for both men and women there was a strongly positive correlation between authoritarian and antifeminist beliefs, and this persists even when controlled for age, education, and religion [Studies found] that “high scores on authoritarianism were related to traditional gender-role identity and attitudes, rating political events concerning women as less important, and rating feminists and women as having relatively more power and influence in society.” Authoritarians are “ideologically coherent in their support for at least one type of hegemonic structure—traditionally gendered relationships.” In addition, multiple analyses have also noted the interrelationships between misogyny and other forms of bigotry, “believing that feminism has upset the natural order”; there are also studies that show the relationship between misogynist views and the likelihood of expressing antidemocratic sentiment.

Id. at 1631 (emphasis omitted) (citations omitted) (citing Jessica Lovet Gracey, *The Demographics of Misogyny*, in MISOGYNY AND MEDIA IN THE AGE OF TRUMP 71, 75, 82 (Maria B. Marron ed., 2020)).

302. Nitasha Kaul & Tom Buchanan, *Misogyny, Authoritarianism, and Climate Change*, 23 ANALYSES SOC. ISSUES PUB. POL’Y 308, 326 (2023) (“Climate change beliefs are . . . associated with both authoritarianism and misogyny. . . . [B]oth authoritarianism and misogyny make an independent contribution to environmental attitudes.”).

303. *Id.* at 1633.

304. *Id.*

305. *Id.* at 1635.

In analyzing the reach of misogyny as a political strategy, menstruation is a useful example. In menstruation regulation reform, a common form of legislative or policy reform that fills the “token” role consists of laws providing free period products in schools.³⁰⁶ These laws are generally popular and give politicians something to hold up as anti-sexist bona fides. Interestingly, even the token legislation providing products in schools sometimes falls short. While states may tout that they have laws that require schools to provide free period products, ten states and the District of Columbia do not fund the initiatives, so in fact the products are not provided, and eight states provide funding, sometimes for only one year, but do not *require* the provision of period products.³⁰⁷ And, once any form of legislation providing for free period products in schools is passed, it is generally difficult to pass any other menstruation regulation reform.³⁰⁸ As a result, reform that might target the more structural discrimination and harmful regulation is unsuccessful. Moreover, legislative initiatives for free products in school sometimes fail due to the taboo of menstruation. In Idaho, for instance, during debate on such a bill, a female legislator called the bill “embarrassing” because of its “topic.”³⁰⁹

The political strategy of misogyny may be seen in the limited nature or failure of proposed law reforms that challenge patriarchal order and sexist gendered roles relating to menstruation regulation. For example, this strategy can be seen in the EEOC’s final rule regarding the PWFA, the federal civil rights law setting forth required accommodations for pregnancy, childbirth, and related medical conditions.³¹⁰ PWFA is a landmark law that requires structural changes in workplaces to include workers who have been seen as abnormal because they are pregnant, give birth to children, and menstruate. The EEOC’s proposed rule would have opened the workplace to workers who violated the sexist gendered norm that workers should not require support or accommodations for

306. See *Period Products in Schools*, *supra* note 226.

307. *Id.* (showing that ten states require period products and provide funding for them, ten states and the District of Columbia require period products in schools without providing funding for them, and eight states provide funding, sometimes for only one year, but do not have legislation requiring the provision of period products in schools).

308. For an argument that menstruation law reform stops at the “tangible,” namely provision of products, see Nay Alhelou, Purvaja S. Kavattur, Lillian Rountree & Inga T. Winkler, ‘We Like Things Tangible:’ *A Critical Analysis of Menstrual Hygiene and Health Policy-Making in India, Kenya, Senegal and the United States*, 17 GLOB. PUB. HEALTH 2690 (2022).

309. Michael Daly, *Idaho GOP Women Deny Girls Free Tampons in School*, DAILY BEAST, <https://www.thedailybeast.com/idaho-republicans-deny-girls-free-tampons-in-school> [https://perma.cc/ME99-Z8LP] (Mar. 23, 2023, 6:39 PM).

310. Pregnant Workers Fairness Act (PWFA), 42 U.S.C. §§ 2000gg to gg-6.

reproduction.³¹¹ Furthering inclusiveness of “nonstandard” workers, the proposed rule stated that menstruation *is* subject to accommodation as a related medical condition to pregnancy and childbirth.³¹² Unfortunately, the final rule rolled this proposal back after receiving comments opposing the inclusion of menstruation (as well as comments in favor of it). As a result, the EEOC’s final rule stated that “menstruation” would only be subject to accommodation as a medical condition related to pregnancy and childbirth on a “case-by-case basis.”³¹³

For future reforms to curb menstruation regulation, it is important to consider the research about misogyny as a political strategy. In constructing laws and policies, as well as advocacy for reform, perhaps it is useful to consider how misogyny might frame the reforms and how to counter such framing to bolster their reception. Similarly, it is important to consider how the agenda for menstrual justice could be co-opted with limited or non-existent reforms that could provide cover for a broader misogynistic agenda. These same considerations should be concerns for the broader reproductive rights and justice movements as well. Issues of autonomy, dignity, and equality of women and other pregnancy-capable individuals—as well as inclusion of consideration of reproduction and related issues in workplaces, schools, and other institutions—inevitably challenge the patriarchal order and can create a tension with sexist gendered norms.³¹⁴ Accordingly, understanding and addressing misogyny’s role in political and legal reform is critical for seeking ways to further reproductive justice.

CONCLUSION

The Supreme Court decision in *Dobbs* curtailed access to abortion and permits increased regulation of women’s reproductive freedom.

311. See Regulations To Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714 (proposed Aug. 11, 2023).

312. *Id.* at 54767 (defining “menstrual cycles” as “related medical conditions” because they “*are* medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth, as applied to the specific employee or applicant in question” (emphasis added)).

313. Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29101 (Apr. 19, 2024) (codified at 29 C.F.R. pt. 1636) (“A number of comments argued for or against the inclusion of menstruation in the list of ‘related medical conditions.’ While the limited number of Federal courts that have addressed the issue of whether menstruation falls within the Title VII definition of ‘related medical conditions’ have not always held that it does, read together, the majority of these cases illustrate that, at a minimum, menstruation is covered under Title VII when it has a nexus to a current or prior pregnancy or childbirth. Accordingly, as with many conditions that can be ‘related medical conditions,’ this determination will be made on a case by-case basis.”).

314. See *supra* Section III.B.

Because menstruation is already a highly regulated site of reproductive freedom, it is important in a post-*Dobbs* world to acknowledge that menstruation is regulated and to explore constitutional and subconstitutional laws to deter the resulting harms and seek menstrual justice. By narrowing the privacy, liberty, and equality rights of people who seek abortions, *Dobbs* appears to permit state control of reproductive freedoms to take even deeper root. Menstruation, as an essential part of the reproductive system, is a potential legal battlefield threatening the imposition of additional control. Nonetheless, menstruation itself may be protected from harmful regulation—by existing constitutional or subconstitutional laws—and protection of rights relating to menstruation may provide a vehicle for achieving greater reproductive freedom. However, the political strategy of misogyny may hinder progress. Understanding this may offer guidance in crafting proposals and advocacy campaigns for legal reform to support menstrual justice and other reproductive freedoms.