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ARTICLE

Health Law and Democracy

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Abstract

Current political divisions are destabilizing existing laws affecting the health field. Major changes in the field of health law have one thing in common: changes in who holds political power – Congress and state legislatures, governors, presidents, judges, and agency officials. The laws that structure financial, economic, educational, and health care systems, environmental conditions, and civil society are primarily the product of elections that populate our political institutions. These structural determinants of health in turn create laws that influence how – and how well – we live and whether our society functions fairly under the rule of law. Thus, who gets elected matters a great deal to the health and safety of Americans. At the same time, changes in health laws resulting from elections may reveal shifts in the structures underlying our legal and economic systems and whether those shifts support or weaken principles of justice and the rule of law.

Keywords: Health Law; Voting; Elections; Structural Determinants of Health; Social Determinants of Health

> "The poor have sometimes objected to being governed badly; the rich have always objected to being governed at all."[1]

It is no coincidence that so many people in the United States, the richest country in the world, face lower life expectancies, rising health risks, and declining economic opportunity,[2] when their ability to have a voice in the country's governance – by voting – is threatened or constrained. The relationship between population health and the health of our democratic institutions is becoming increasingly clear. No longer can we credibly assume that all people can control their own health by simply choosing to eat healthful foods, get medical check-ups, and not smoke, take dangerous drugs, or drink too much alcohol. There are too many other factors that make it more or less possible for people to live a healthy life.

These factors are the fundamental causes of health and well-being among Americans. Often called the structural determinants of health, they include the laws and political institutions that govern the economic, social, and physical environments in which we live, work, and play.[3] These structural determinants, in turn, affect what are known as the social determinants of health: income and wealth,

[1]G.K. Chesterton, The Man Who Was Thursday: A Nightmare 82 (Dover Publ'ns 1986) (1908) (quote from protagonist).

[2]*See generally* Anne Case & Angus Deaton, Deaths of Despair and the Future of Capitalism (2020); David Rosner & Gerald Markowitz, Building the Worlds that Kill Us: Disease, Death and Inequality in American History (2024).

[3]Jonathan C. Heller et al., *Keeping It Political and Powerful: Defining the Structural Determinants of Health*, 102 Milbank Q. 351, 357-59 (2024).

education, occupation, housing, transportation, and climate.[4] While the structural determinants of laws and institutions are inherent features of any society, their direction is not. They can operate to increase the likelihood of health and well-being or increase the probability of illness, injury, and premature death. It depends on how government institutions structure financial systems, economic systems, educational systems, environmental conditions, health care systems, and civil society. The officials who design, interpret, and carry out the governing laws – presidents, governors, legislatures, administrative agency officials, and courts – critically shape and influence how – and how well – we live.

It matters a great deal who these officials are, what laws they support, and whether and how they implement those laws. Thus, who gets elected matters a great deal to the health of Americans. This is why voting is at the root of our health and well-being. As the U.S. Supreme Court wrote in 2015, it is "the core principle of republican government … that the voters should choose their representatives, not the other way around."[5] Voters unable to cast a ballot effectively have no voice in how they are governed. Elections have consequences. One consequence is the possibility of living a healthy life free from avoidable pain and misery.

Recognizing the importance of voting to health poses a challenge to health law scholars. The number and types of laws that have shaped the health policy landscape are too numerous to subsume within a single field of law. We are not experts in election law, environmental law, banking law, or property law. Yet, laws in such specialties can generate not only health consequences that should not be ignored, but also reconfigure basic principles of law that then apply in the health law field.[6] Health lawyers are in a good position to recognize the broader changes in the legal system, because health law touches so many different legal domains.

This essay first considers the challenges to our democratic institutions that could undermine the rule of law in the United States. The next two sections consider how the field of health law has developed in response to several key changes in social policy. A fourth section provides examples of laws affecting social determinants of health and laws destabilizing health laws. Finally, the essay considers the challenges of political polarization in the future of health law.

Challenges to Democracy

There is a disturbing growth of literature on threats to democracy around the world[7] and in the United States in particular.[8] Books specific to the United States describe Republican efforts to solidify a

[4]*See generally* Why Are Some People Healthy and Others Not? The Determinants of Health of Populations (Roger G. Evans et al. eds., 1994); Nancy E. Adler et al., *Socioeconomic Status and Health: The Challenge of the Gradient*, 49 Am. Psych. 15 (1994); World Health Org., Social Determinants of Health: The Solid Facts (Michael Marmot & Richard Wilkinson eds., 2d ed. 2003), https://iris.who.int/handle/10665/326568; World Health Org., Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health (2008), https://www.who.int/publications/i/item/WHO-IER-CSDH-08.1; Heller, *supra* note 3.

[5]Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (internal quotation marks omitted).

[6]Wendy K. Mariner, *Toward an Architecture of Health Law*, 35(1) Am. J.L. & Med. 67, 69 (2009) ("as health law gained acceptance as a distinct specialty, the legal principles governing much of its subject matter loosened their parochial ties to medicine as the rationale for singular rules" and many health matters became subject to ordinary principles and doctrines.)

[7]*See, e.g.*, Steven Levitsky & Daniel Ziblatt, How Democracies Die (2018); Michael Lind, The New Class War: Saving Democracy from the Managerial Elite (2020); Anne Appelbaum, Twilight of Democracy: The Seductive Lure of Authoritarianism (2021) [hereinafter Appelbaum, Twilight of Democracy]; Anne Appelbaum, Autocracy, Inc.: The Dictators Who Want to Run the World (2024).

[8]*See, e.g.*, Steven Levitsky & Daniel Ziblatt, Tyranny of the Minority: Why American Democracy Reached the Breaking Point (2023); Rena Steinzor, American Apocalypse: The Six Far-Right Groups Waging War on Democracy (2024) (describing the similar goals and activities of big business, the House Freedom Caucus, the Federalist Society, Fox News, white evangelicals, and armed militias to dismantle national government powers, policies, and programs).

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permanent majority in government.[9] These include projects to restrict voting by groups thought to vote for Democrats[10] and present selective versions of history that exclude our failures to live up to our ideals.[11] Both of these endeavors, as well as controlling education and the media, are classic strategies used by authoritarian governments to stay in power.[12]

Interestingly, books attacking Democrats and the Left wing tend to criticize policies rather than assert a strategic program for political domination.[13] They do not seriously allege efforts to take over political power or dismantle democratic institutions, perhaps because Democrats are notoriously unlikely to organize their disparate factions into such a campaign. A major critique is that Democrats practice identity politics, dividing the population into racial, religious, gender, ethnic, geographic, and economic groups and oppressors and oppressed, with less attention to the common hopes and aspirations of all Americans.[14] Of course, Republican efforts to win elections, appoint and elect judges, and install favored professors in universities are not wholly coordinated either.[15] But their independent efforts have the same goals, and they have been remarkably successful.[16]

Lilliana Mason argues that we no longer identify with the different social and cultural communities to which we belong – sports, hobbies, social clubs, work colleagues – that connect us with people of different political views.[17] Rather, our various identities have merged into partisan political identities, leading to "social sorting" that distances us from those with different political views and encourages polarization.[18] Ezra Klein argues that America's political polarization is built into the structure of government and elections– designed to allow a clash of ideas that result in productive compromises and better policies.[19] But today, too many politicians and advocates eschew compromise.[20] Opponents are often portrayed not as fellow human beings whose views deserve consideration, but as enemies who must be defeated. The result is a winner-take-all battle.

The laws governing matters of health, like other social policies, are always subject to change, depending on who is elected to an official position, whether President, Senator, board of health or school board member. The field of health law developed and grew within the political culture prevailing in most of the twentieth century. The past four decades produced a shift in politics and law. Today, we are faced with more extreme possibilities for change, both for the rule of law and for the health prospects of Americans.

[9]*See, e.g.*, Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (2016); Michael J. Graetz & Linda Greenhouse, The Burger Court and the Rise of the Judicial Right (2016).

[10]*See, e.g.*, Ari Berman, Minority Rule: The Right-Wing Attack on the Will of the People—and the Fight to Resist It (2024); David Daley, Antidemocratic: Inside the Far Right's 50-Year Plot to Control American Elections (2024).

[11]Steve Benen, Ministry of Truth: Democracy, Reality, and the Republicans' War on the Recent Past (2024).

[12]*See* Anthony P. Carnevale et al., Geo. Univ. Ctr. on Educ. and the Workforce, The Role of Education in Taming Authoritarian Attitudes (2020), https://cew.georgetown.edu/wp-content/uploads/The-Role-of-Education-in-Taming-Authoritarian-Attitudes-Full-Report.pdf [https://perma.cc/Y4KH-UPV6]; Dariela Sosa, *Understanding the Impact of Journalism Inside Authoritarian Regimes*, Glob. Investigative Journalism Network (Aug. 9, 2022), https://gijn.org/stories/understanding-the-impact-of-journalism-inside-authoritarian-regimes/ [https://perma.cc/D75V-SXWW].

[13]*See, e.g.*, Michael J. Sandel, The Tyranny of Merit: Can We Find the Common Good? (2020) (critiquing merit-based decision making for suggesting that those unable to achieve success must blame themselves).

[14]Ana Catalano Weeks & Peter Allen, *Backlash Against "Identity Politics": Far Right Success and Mainstream Party Attention to Identity Groups*, 11 Pols. Grps. & Identities 935, 935 (2023).

[15]*See, e.g.*, Linda Greenhouse, Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months That Transformed the Supreme Court (2021); Larry M. Bartels & Nicholas Carnes, *House Republicans Were Rewarded for Supporting Donald Trump's 'Stop the Steal' Efforts*, 120 Proc. Nat'l Acad. Scis. art no. e2309072120 (2023); Sheldon Whitehouse with Melanie Wachtell Stinnett, Captured: The Corporate Infiltration of American Democracy (2017) (on corporate capture of regulatory agencies with carefully selected nominees for office).

[16]*See, e.g.*, Greenhouse, *supra* note 15; Bartels & Carnes, *supra* note 15; Whitehouse with Stinnett, *supra* note 15.

[17]Lilliana Mason, Uncivil Agreement: How Politics Became Our Identity 25 (2018).

[18]*Id.* at 40, 72.

[19]Ezra Klein, Why We're Polarized 13-14 (2020).

[20]*Id.* at 12.

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Health Law in the Liberal International Order

In the first half of the twentieth century, most early textbooks about law and medicine were practical manuals focused on hospital administration, professional licensure, privileges, and liability.[21] Hospitals were not yet centers of technological competition,[22] and lawsuits were relatively few.[23] In the 1950s and 1960s, law ventured into forensic medicine with attention to the use of medical evidence in litigation, especially in determinations of the cause of death, criminal prosecutions, malpractice trials, and civil commitment proceedings.[24] Initially viewed as legal advice to assist medicine, rather than a field of law, this medical-legal specialty had trouble arriving at a generally accepted definition of its scope or even a name for itself.[25] But times were changing.

World War II forced an examination of how even physicians could engage in torturing and killing their fellow citizens.[26] The civil rights movement of the late 1960s and early 1970s brought attention to the rights of patients, such as informed consent to medical care and experimentation, confidentiality of personal medical information, and equitable access to quality care.[27] The era of medical professional hegemony was declining.[28] The historical deference afforded to physicians came under scrutiny as medical practice incorporated new, more sophisticated drugs, vaccines, and surgical procedures.[29] Unlike crude measures such as amputations, these medical advances functioned in ways and offered risks and benefits that were not obvious to the lay public.[30] The doctrine of informed consent developed to enable patients to understand their choices and make voluntary, informed decisions,[31] and courts began to recognize a patient's right to refuse even life-saving treatment.[32] George Annas championed the rights of patients and earned the honorific of Father of Patient Rights.[33]

The rights of patients opened new pathways to apply civil rights to other areas previously dominated by the medical profession or public health officialdom, such as civil commitment laws and the Americans

[21] *See, e.g.*, John A. Lapp & Dorothy Ketcham, Hospital Law (1926); Emanuel Hayt & Lillian R. Hayt, Legal Guide for American Hospitals (1940); James C. Mohr, Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America (1993).

[22] *See* Charles E. Rosenberg, The Care of Strangers: The Rise of America's Hospital System (1987).

[23] Leonard Berlin, *Medical Errors, Malpractice, and Defensive Medicine: An Ill-Fated Triad*, 4 Diagnosis 133, 133-34 (2017).

[24] *See* William J. Curran & E. Donald Shapiro, Law, Medicine and Forensic Science (3d ed. 1982).

[25] William J. Curran, *The Confusion of Titles in the Medicolegal Field: An Historical Analysis and a Proposal for Reform*, 15 Med. Sci. and L. 270 (1975). The American Society of Law and Medicine first published its journal, titled Medico-Legal News, in 1973; it continues today under the name Journal of Law, Medicine and Ethics. The Society published its first issue of the American Journal of Law and Medicine in 1975. *About Us*, Am. Soc'y of L., Med. & Ethics, https://aslme.org/about-us/ [https://perma.cc/9G3X-DP5H].

[26] *See* The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation (George J. Annas & Michael A. Grodin eds., 1992) [hereinafter The Nazi Doctors and the Nuremberg Code].

[27] *See* George J. Annas, *Medical Remedies and Human Rights: Why Civil Rights Lawyers Must Become Involved in Medical Decision-Making*, 2 Hum. Rts. 151 (1972); Vanessa Burrows & Barbara Berney, *Creating Equal Health Opportunity: How the Medical Civil Rights Movement and the Johnson Administration Desegregated U.S. Hospitals*, 105 J. Am. Hist. 885 (2019).

[28] Rand E. Rosenblatt, *The Four Ages of Health Law*, 14 Health Matrix 155, 155 (2004) (describing laws governing medical practice from about 1880 to 1960 as deferring to physicians' expertise in the context of private practice).

[29] *See* Paul Starr, The Social Transformation of American Medicine 338, 378 (updated ed. 2017) (describing the rise and fall of the medical profession's power, influence, and autonomy).

[30] Wendy K. Mariner, *Informed Consent in the Post-Modern Era*, 13 L. & Soc. Inquiry 385, 391-92 (1988).

[31] Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957); Canterbury v. Spence, 464 F.2d 772, 794 (D.C. Cir. 1972); Cobbs v. Grant, 502 P.2d 1, 13-17 (Cal. 1972); Jay Katz, The Silent World of Doctor and Patient (1984); Ruth R. Faden & Tom L. Beauchamp in collaboration with Nancy M. P. King, A History and Theory of Informed Consent 142 (1986).

[32] Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977); *In re* Quinlan, 355 A.2d 647, 663-64 (N.J. 1976); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 262 (1990).

[33] George J. Annas, *Health Care Reform in America: Beyond Ideology*, 5 Ind. Health L. Rev. 441, 441 (2008) (biographical note); Wendy K. Mariner, *Standards of Care and Standard Form Contracts: Distinguishing Patient Rights and Consumer Rights in Managed Care*, 15 J. Contemp. Health L. & Pol'y 1, 1 (1998); *see generally* George J. Annas, The Rights of Hospital Patients (1975); George J. Annas, The Rights of Patients (2d ed., 1989); George J. Annas, The Rights of Patients (3d ed., 2004); George J. Annas et al., The Rights of Doctors, Nurses, and Allied Health Professionals (1981).

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with Disabilities Act.[34] The Nuremberg Code provided a foundation for insisting that people could not be used as objects of experimentation without their voluntary consent.[35] In the United States, federal regulations to protect human subjects stimulated an entire field of practice in institutional review of research. Today, law schools offer courses and certificates in research compliance.

The rights of patients, and human rights more broadly, are guiding principles of justice for many scholars navigating the health law field.[36] They mean that in all or most circumstances, justice requires that patients and other individuals in contact with the health care system have rights that should be enforceable. Laws and structures that violate that principle forfeit any legitimacy. Of course, the precise substance of and enforcement mechanisms for those rights can be debated. But the emergence of "health" law as a legal specialty began with patient rights.[37]

More recently, the idea that all Americans should be treated equally under law and enjoy the same rights has been challenged, ironically, as a special privilege. Many of those in power who took their privilege for granted claim (and may believe) that allowing others to enjoy the same privileges somehow deprives them of their own rights. The result has been a reexamination of which rights merit constitutional or statutory protection.[38] Successful challenges to civil rights began to accumulate in the twenty-first century. The Supreme Court expanded the reach of rights protected by the First and Second Amendments.[39] It overturned *Roe v. Wade* – taking away a constitutional right for the first time in history.[40] Anti-discrimination laws and regulations continue to be challenged, posing threats to population health and laws governing health care.[41]

Federal v. State v. Private Sector: Money Matters in Health Politics

Advances in science and medicine expanded the social role of medicine and, with it, new applications of the law.[42] After World War II, the federal government offered grants and loans to fund new hospital facilities under the Hill-Burton Act – with regulatory strings attached.[43] One goal was to expand access to care for those who could not otherwise afford it. Funding recipients were obligated to provide some free

[34]Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

[35]*See generally* The Nazi Doctors and the Nuremberg Code, *supra* note 26; George J. Annas et al., Informed Consent to Human Experimentation: The Subject's Dilemma (1977).

[36]*See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Sofia Gruskin & Daniel Tarantola, *Health and Human Rights in Development*, *in* Perspectives on Health and Human Rights 3, 6-8 (Sofia Gruskin et al. eds., 2005).

[37]Of course, law had influenced health long before it found a niche in academia. Before the development of most vaccines, prescription medications, and modern hospitals, public health officials relied on federal and state legislation and municipal ordinances for authority to carry out measures to control infectious diseases. For histories of public health, *see*, e.g., John Duffy, The Sanitarians: A History of American Public Health (1992); Dorothy Porter, Health, Civilization and the State: A History of Public Health from Ancient to Modern Times (1999); George Rosen, A History of Public Health (Johns Hopkins Univ. Press rev. expanded ed. 2015) (1958). Given the breadth of factors affecting health status, public health law has also struggled to define its boundaries, *see*, Wendy K. Mariner, George J. Annas, Nicole Huberfeld & Michael R. Ulrich, Public Health Law 17-20 (3d ed., Carolina Acad. Press 2019).

[38]*See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (ending the Voting Rights Act's preclearance for changes in certain states' voting law); 303 Creative v. Elenis LLC, 600 U.S. 570 (2023) (state anti-discrimination law violated free speech of a business).

[39]Tandon v. Newsom, 593 U.S. 61 (2021) (free exercise of religion); District of Columbia v. Heller, 554 U.S. 570 (2008) (firearm ownership and possession).

[40]Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[41]*See* Sara Rosenbaum & Marybeth Musumeci, *Civil Rights, Health Care, and the Struggle for the Soul of Medicine*, Milbank Q. (July 22, 2024), https://www.milbank.org/quarterly/opinions/civil-rights-health-care-and-the-struggle-for-the-soul-of-medicine/ [https://perma.cc/FD62-JMTV].

[42]Barry R. Furrow, *From the Doctor to the System: The New Demands of Health Law*, 14 Health Matrix 67, 71-72 (2004).

[43]Hospital Survey and Construction (Hill-Burton) Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946) (codified, as amended, at 42 U.S.C. §§ 291–291(o) (1982)). Hill-Burton ended its funding program in 1997, but some facilities still have free/low-cost care obligations. *Hill-Burton Free and Reduced-Cost Health Care*, Health Res. & Serv. Admin., https://www.hrsa.gov/get-health-care/affordable/hill-burton [https://perma.cc/YX77-UYK9] (last updated Sept. 2023).

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or low-cost care.[44] A growing post-war economy in the 1960s enabled Congress to enact Medicare, Medicaid and, later, CHIP, to provide more people with health benefits coverage.[45] Thus began a new era of federal health care financing and influence over state and private health care regulation. However, this was not socialized medicine. Politics played an outsized role in rejecting any structure that would grant the federal government control over the provision of care. Providers chose what to provide, and payers, both public and private, initially paid almost anything the professionals asked for their services. Apart from the Veterans Affairs health program and certain Department of Defense programs, the federal government left it to the private sector to provide medical services of all kinds.

As the supply of health care products and services increased, so did the cost of health care.[46] Health care organizations could now offer a glittering array of sophisticated diagnostic tools and treatments, as well as vaccines, thanks in part to federal funding of scientific research. Insurers found a lucrative market for coverage.[47] Corporations began to acquire hospitals and other health care facilities, and ultimately private medical practices.[48]

Ironically, without direct control over pricing and how much care was delivered by the private sector, government needed more complicated forms of regulation to achieve its goals of increasing access to care, ensuring the quality of care, and keeping costs affordable for the population and within budgetary boundaries for government. Administrative agencies began producing increasingly detailed rules for participating in Medicare, Medicaid, CHIP and other programs, as well as mergers and acquisitions, and the legal profession produced specialists in response.

The health law field took off as health care consumed a growing percentage of the economy. National health expenditures reached 10.7% of GDP in 1985.[49] As Fran Miller has noted for decades, a legal specialty focused on a field that accounts for such a large share of the economy cannot be ignored.[50] But growth exacerbated political divisions among those advocating expanded access to care, those concerned with the growth of federal expenditures, and those opposed to federal involvement in health matters traditionally governed by the states. The compromises produced a complicated patchwork structure attempting to simultaneously preserve state regulation of professional and insurer licensure in a field increasingly dependent on federal dollars. Meanwhile, expanded coverage enabled more people to seek medical care and created a new private health insurance market. Providers were now subject not only to federal and state regulations, but also health insurers' rules, as the supply of new treatments and their costs grew.

By the 1980s, rising costs for health care were widely viewed as unsustainable.[51] That view was not new then, and it persists today. Yet prices continue to rise. National health expenditures are estimated to be 17.7% of GDP in 2024 and 19.7% by 2032.[52] Without public or private control over the price of

[44]42 C.F.R. § 124.501 (2024).

[45]*See* H.R. Rep. No. 89-213, pt. 1 (1965).

[46]*See* Barry R. Furrow, *Cost Control and the Affordable Care Act: CRAMPing Our Health Care Appetite*, 13 Nev. L.J. 822, 828, 832-33 (2013).

[47]For histories of health insurance, see Robert Cunningham III & Robert Cunningham, Jr., The Blues: A History of the Blue Cross and Blue Shield System (1997); John E. Murray, Origins of American Health Insurance: A History of Industrial Sickness Funds (2007).

[48]*See* M. Gregg Bloche, *Corporate Takeover of Teaching Hospitals*, 65 S. Cal. L. Rev. 1035, 1039 & n.11 (1992); David M. Cutler, *The Next Wave of Corporate Medicine—How We All Might Benefit*, 361 New Eng. J. Med. 549, 549-50 (2009).

[49]Daniel R. Waldo et al., *National Health Expenditures, 1985*, Health Care Fin. Rev., Fall 1986, at 1, 13.

[50]Frances H. Miller, *Foreword: Following the Money*, 36 Am. J.L. & Med. 288, 288 (2010).

[51]*See* Mark S. Freeland & Carol E. Schendler, *Health Spending in the 1980's: Integration of Clinical Practice Patterns with Management*, Health Care Fin. Rev., Spring 1984, at 1. The term "costs" is often used generically to mean "prices" as well as costs. Prices are what a buyer, such as an insurer or individual, pays providers for care. Costs are what sellers, like hospitals and insurers, incur to produce a product or service to sell. Vineet Arora et al., *The Challenge of Understanding Health Care Costs and Charges*, 17 Am. Med. Ass'n J. Ethics 1046, 1046 (2015).

[52]Jacqueline A. Fiore et al., *National Health Expenditure Projections, 2023-32: Payer Trends Diverge as Pandemic-Related Policies Fade*, 43 Health Affs. 910, 911 (2024). In 2023, projected Medicare spending was $1.023 trillion, Medicaid spending was $851.9 billion; and private health insurance spending was $1.433 trillion. The government's share of total national health

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services, expenditures keep rising faster than the consumer price index. In the late 1980s and 1990s, managed care or managed competition was touted as the answer.[53] But insurers had relatively few levers to keep costs down. They either paid providers less (successfully resisted by hospitals that consolidated to gain bargaining power), limited patient benefit coverage or increased patient out-of-pocket payments. Insurers rarely decreased their own administrative costs, especially as government regulations increased. Attempts to "manage" care have had some success, but also significant pushback from patients and physicians.[54]

The Affordable Care Act succeeded in increasing health insurance coverage. About 93.1% of the population is projected to have public or private health coverage in 2023.[55] But it did not directly address the cost problem. Nor did it alter reliance on the private sector to provide care. Political resistance to government price controls continued unabated. The result was another complicated statute patched onto an already complex structure of laws.

Today's financing of medical practice and health care facilities has challenged the beneficence goal of the medical profession. Relatively recent entrants in the financing mix are private equity companies that buy hospitals and medical practices, negotiate contracts with reduced payments to providers, replace physicians with lower-cost practitioners, and often sell the acquisition at a profit.[56] The goal of decreasing costs (or increasing profits) pressures physicians to spend as little time as possible with patients, risking misdiagnoses. Financial pressures also incentivize physicians to code their visits with the most remunerative diagnoses and procedures. Physicians, who long sought to retain their independence, have lost much of it in today's private market.[57] Health law scholars warned that the influence of money could undermine the quality of care.[58] And in many places, it is doing just that.[59]

Politics and Health Law

The oversimplified summary above merely highlights several ways in which our political institutions have shaped the scope of health law. Health lawyers must deal with an increasingly complicated, rule-ridden legal domain. This is not surprising, given the historical shifts in public attitudes back and forth between favoring access to care and private provision of health care services.[60] A federal system of providing care or national health insurance might achieve near-universal access and be administratively simpler to understand and operate, and possibly less, or no more, expensive than

expenditures is expected to decline from a high of 51% in 2020 to about 49% in 2032. Private health insurance spending is expected to increase at a higher rate (11.1%) than Medicare (8.4%) and Medicaid (5.7%), but all three are expected to grow at slower rates after 2023. Some of this is likely because of declines in Medicaid enrollment as states disenroll beneficiaries covered by expiring COVID eligibility rules. *Id.* at 913.

[53] *See* Clark C. Havighurst, Deregulating the Health Care Industry: Planning for Competition 87-88 (1982).

[54] *See, e.g.*, Marc A. Rodwin, *Exit and Voice in American Health Care*, 32 U. Mich. J.L. Reform 1041 (1999).

[55] Fiore et al., *supra* note 52, at 910.

[56] Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 Stan. L. Rev. 527 (2024); Robert Field, Anthony Orlando & Arnold J. Rosoff, *The Government Built It, and the Private Sector Came*, 51 Am. J.L. & Med. (forthcoming 2025).

[57] Allison K. Hoffman, *How Power Undermined the Medical Profession*, *in* Rethinking the Lawyer's Monopoly: Access to Justice and the Future of Legal Services (David Freeman Engstrom & Nora Freeman Engstrom eds., forthcoming 2024), https://ssrn.com/abstract=4836348 (summarizing the trajectory).

[58] *See, e.g.*, Ryan Crowley et al., *Financial Profit in Medicine: A Position Paper from the American College of Physicians*, 174 Annals Internal Med. 1447 (2021).

[59] *See* Eyal Press, *The Moral Crisis of America's Doctors*, N.Y. Times (July 14, 2023), https://www.nytimes.com/2023/06/15/magazine/doctors-moral-crises.html.

[60] *See* William Kissick, Medicine's Dilemmas: Infinite Needs Versus Finite Resources 4-5 (1994) (arguing that the "Iron Triangle" of access, cost, and quality cannot be achieved simultaneously, because improving one often undermines another).

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the multiple sources of insurance and service providers we have.[61] But Americans have resisted many forms of government control throughout history, even when they like what the government provides.[62]

Most Americans do seem to want access to care. They are unlikely to tolerate a return to the era of entirely private risk-based health insurance, which was often unavailable or unaffordable to people with or without pre-existing conditions.[63] To preserve the private market while enabling everyone to obtain affordable coverage, however, entails imposing requirements on insurers that are inconsistent with traditional insurance principles.[64] In other words, it is complicated to use private actors to achieve national goals that conflict with the normal functioning of the private market. So, it is likely that future efforts to achieve the goals of access, quality, and affordability will be incremental and produce more complications and more jobs for health lawyers.

What future changes should be adopted? Ideally, changes that would benefit the goals of justice and improving health. This is where awareness of the structural determinants of health come in. Without understanding how laws affect health and how politics and elections determine what laws we have, health lawyers miss important contexts for the work we do.

Health can be affected by existing laws and by political paralysis that stymies better laws. Poverty itself may be the most powerful predictor of poor health.[65] Recent research reports that the earnings of adults born (between 1978 and 1992) into high-income families increased, while those born into low-income families decreased, widening the gap between income classes, while the gap between White and Black adults decreased slightly.[66] Economic policies, such as tax benefits for the very wealthy, tend to enlarge the gap between rich and poor, and healthy and unhealthy.[67] Housing policies governing the real estate market and public housing can create geographic pockets of income-disadvantaged people.[68]

Strong predictors of lack of access to positive social determinants of health are race, ethnicity, national origin, sexual orientation, and gender identity.[69] Black, indigenous, and people of color continue to be disproportionately represented in disadvantaged communities, with less access to financing, land, housing, jobs, and good schools.[70] Whether deliberate or enacted without consideration of real world

[61] *See* Liran Einav & Amy Finkelstein, We've Got You Covered: Rebooting American Health Care (2023) (arguing for such a system).

[62] Examples include Social Security, Medicare, and even the Affordable Care Act. *See, e.g.*, John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, Soc. Sec. Bull., 2005/2006, at 1.

[63] *See* Wendy K. Mariner, *Health Reform: What's Insurance Got to Do with It? Recognizing Health Insurance as a Separate Species of Insurance*, 36 Am. J.L. & Med. 436, 450 (2010).

[64] Wendy K. Mariner, *Health Insurance Is Dead; Long Live Health Insurance*, 40 Am. J.L. & Med. 195, 195-96, 214 (2014).

[65] Michael Marmot, The Health Gap: The Challenge of an Unequal World 26-28 (2015); *see also* Anne Case & Angus Deaton, *False Trials: Poverty, Income, and the Great Recession*, *in* Deaths of Despair and the Future of Capitalism 133 (2020).

[66] Raj Chetty et al., *Changing Opportunity: Sociological Mechanisms Underlying Growing Class Gaps and Shrinking Race Gaps in Economic Mobility* 1-2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32697, 2024), https://opportunityinsights.org/wp-content/uploads/2024/07/ChangingOpportunity_Paper.pdf.

[67] *See* William G. Gale & Semra Vignaux, *The Difference in How the Wealthy Make Money – and Pay Taxes*, Brookings (Sept. 7, 2023), https://www.brookings.edu/articles/the-difference-in-how-the-wealthy-make-money-and-pay-taxes/ [https://perma.cc/7AQ4-JBRH]; *see also* Dorothy A. Brown, The Whiteness of Wealth: How the Tax System Impoverishes Black Americans – and How We Can Fix It (2021) (discussing the black-white wealth gap in America and how the tax system perpetuates the inequalities).

[68] Dorothy A. Brown, *supra* note 67, at 46; Emily A. Benfer, *Housing is Health: Prioritizing Health Justice and Equity in the U.S. Eviction System*, 22(2) Yale J. Health Pol'y & Ethics 49 (2024).

[69] Ana Penman-Aguilar et al., *Measurement of Health Disparities, Health Inequities, and Social Determinants of Health to Support the Advancement of Health Equity*, 22 J. Pub. Health Mgmt. Prac. S33, S34 (2016).

[70] *See* Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q. J. Econ. 711, 711, 752 (2020).

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consequences, laws governing those determinants have left too many people without the opportunities available to the rest of the population.[71]

States limiting Medicaid eligibility and coverage tend to have higher rates of chronic illness, as well as maternal and infant mortality and morbidity, especially among Black patients.[72] Laws allowing credit agencies to report medical debt to lending institutions, prospective employers and landlords can deprive people of loans, transportation, jobs, and housing.[73] Limited access to education and poor quality schools stymie opportunities to achieve a comfortable living.[74] The failure of attempts to address the existential threat of climate change leave the population at increasing risk of disasters that will cost lives and huge expenditures to salvage livable space.[75]

Judicial decisions are also altering the legal landscape in health law. Longstanding precedent has been overturned in several recent cases. The *Dobbs* decision has thrown reproductive care into turmoil.[76] Clinics are closing in states that ban or restrict abortion.[77] Physicians fear criminal prosecution or losing their licenses for providing emergency pregnancy terminations or helping women with miscarriages.[78] Providers in states where abortion is still lawful worry that providing information to women from states that restrict abortion may subject them to the same threats, while lawyers worry over which state's law applies and how to interpret it.[79]

With the U.S. Supreme Court's decisions following *District of Columbia v. Heller*,[80] the proliferation of firearms poses increased risks throughout the country.[81] Despite arguments that the Court should take the public health and safety consequences of constitutional doctrine into account,[82] it seems to be moving in the opposite direction. The cases overturning the Chevron doctrine[83] and establishing the "major questions" doctrine[84] suggest that agencies like the Environmental Protection Agency and the Occupational Safety and Health Administration will face more challenges to their efforts to protect the public and may be reluctant to try.

Of course, not all judicial decisions impede protecting health and safety. But there are too many examples that do to ignore their effects. The infusion of polarized politics into health laws puts health

[71] *See generally* Mary Crossley, Embodied Injustice: Race, Disability, and Health (2022); Dayna Bowen Matthew, Just Health: Treating Structural Racism to Heal America (2022); Ruqaiijah Yearby et al., *Structural Racism in Historical and Modern US Health Care Policy*, 41 Health Affs. 187 (2022).

[72] *See* Gabriel A. Benavidez et al., *Chronic Disease Prevalence in the US: Sociodemographic and Geographic Variations by Zip Code Tabulation Area*, Preventing Chronic Disease, Feb. 2024, at 1 (showing that communities with high socioeconomic disadvantages and barriers to health care access had higher prevalences of chronic diseases); Eugene Declercq & Laurie C. Zephyrin, *Maternal Mortality in the United States: A Primer*, The Commonwealth Fund (Dec. 16, 2020), https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer [https://perma.cc/5MHM-6E28]; *see also* Ruqaiijah Yearby et al., *supra* note 71.

[73] Consumer Fin. Prot. Bureau, Medical Debt Burden in the United States 4 (2022).

[74] *See* The Price We Pay: Economic and Social Consequences of Inadequate Education (Clive R. Belfield & Henry M. Levin eds., 2007); *see also* Anne Case & Angus Deaton, *Life Expectancy in Adulthood Is Falling for Those Without a BA Degree, but as Educational Gaps Have Widened, Racial Gaps Have Narrowed*, 118 Proc. Nat'l Acad. Scis. art no. e2024777118 (2021).

[75] Intergovernmental Panel on Climate Change, Climate Change 2023: Synthesis Report 51 (Hoesung Lee et al. eds., 2023).

[76] Nicole Huberfeld, *Confusion, Chaos, and Conflict in U.S. Law and Health Care after Dobbs*, 55 ILCEA 1, 1 (2024).

[77] Allison McCann & Amy Schoenfeld Walker, *One Year, 61 Clinics: How Dobbs Changed the Abortion Landscape*, N.Y. Times (June 22, 2023), https://www.nytimes.com/interactive/2023/06/22/us/abortion-clinics-dobbs-roe-wade.html [https://perma.cc/W7M4-NU3T].

[78] Huberfeld, *supra* note 76, at 2.

[79] *Id.* at 7-9.

[80] District of Columbia v. Heller, 554 U.S. 570 (2008); *see also, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (holding New York violated the Second Amendment of the Constitution when granting public-carry licenses only when the applicant could show a special need for self-defense).

[81] Michael Ulrich, Foreword, *Finding the Balance in the Fight Against Gun Violence*, 51 J.L. Med. & Ethics 7 (2023).

[82] *See* Wendy E. Parmet, Populations, Public Health, and the Law 100-04 (2009).

[83] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[84] West Virginia v. EPA, 597 U.S. 697, 722-24 (2022); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 122 (2022).

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lawyers in a quandary. How can we teach legal principles in the absence of the political context? Are we then teaching political science instead of law?

In some areas, the political climate is inescapable. For example, the old debate over whether the federal or state government should have primary jurisdiction over health matters is pervasive in health law. Advocacy for so-called "states' rights" began with the country's establishment, in the Articles of Confederation and the Constitutional Convention of 1787.[85] The concept was originally presented not simply to preserve states' from a new form of national control, but also to support states retention of enslavement, which made their agricultural economic system profitable.[86] The argument for state primacy has persisted throughout our history, often as a means to limit Black and Brown Americans and other politically disfavored groups from exercising the franchise.[87] Today's debates over which level of government should control which institutions in a federal structure have deep roots in American history.

Another example of the encroachment of politics is the U.S. Supreme Court's shift toward analyzing constitutional powers and rights in terms of their pedigree in history and tradition. Lawyers and judges are not historians.[88] Debating the persuasiveness of the Court's opinions can devolve into arguments over whether the historical evidence has been cherry-picked to support a preferred outcome. Judicial philosophies are not necessarily political allegiances, but they often rhyme.[89]

Moving Forward

How does one manage amidst what seems to be intransigent political polarization in the United States? There is good evidence that the general population is less polarized than elected officials.[90] Yet, while many people agree on many ideological issues, they elect politicians who are very polarized.[91] Voters may have little choice, since primary elections tend to bring out the most ideologically extreme constituents, so that general elections offer candidates that represent their parties' extreme wings. If elected, candidates push the parties to the extreme, ultimately dissolving any ideological overlap between the parties.[92] Gerrymandering and rules that restrict disfavored voters' access to the ballot add to the skepticism that elected officials represent the views of their constituents. There is good reason, therefore, to pay attention to voting rights and elections. It is quite possible that the majority of the voting public would agree on better laws governing the health field.

[85] Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 3-4 (2000).

[86] *Id.*

[87] *See generally* Heather Cox Richardson, To Make Men Free: A History of the Republican Party (2014); Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution (2019).

[88] *See* Richard A. Posner, *In Defense of Looseness*, The New Republic (Aug. 27, 2008), https://newrepublic.com/article/62124/defense-looseness [https://perma.cc/X7LE-6X9J] ("[They were] engaged in what is derisively referred to—the derision is richly deserved—as 'law office history.' … [I]t is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position."); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 Ohio St. L.J. 625, 639 (2008) ("The goals of the historian and judge are different.").

[89] Mark Tushnet, In the Balance: Law and Politics on the Roberts Court 164 (2013). The maxim "history doesn't repeat itself but it often rhymes" has been attributed to Mark Twain, although without credible evidence. *Quote Origin: History Does Not Repeat Itself, But It Rhymes*, Quote Investigator (Jan. 12, 2014), https://quoteinvestigator.com/2014/01/12/history-rhymes/ [https://perma.cc/GGT5-WRHY]. *See also* Angela Onwuachi-Willig, *Robert's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 Harv. L. Rev. 192 (2023).

[90] Rachel Kleinfeld, Polarization, Democracy, and Political Violence in the United States: What the Research Says 1-3 (Sept. 2023) (unpublished working paper), https://carnegie-production-assets.s3.amazonaws.com/static/files/Kleinfeld_Polarization_final_3.pdf.

[91] *Id.*; *see also* Upending American Politics: Polarizing Parties, Ideological Elites, and Citizen Activists from the Tea Party to the Anti-Trump Resistance 3-4 (Theda Skocpol & Caroline Tervo eds., 2020).

[92] Klein, *supra* note 19, at 25.

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One caveat is that Americans' trust in our political institutions has declined dramatically. A telling indicator is the number of lawsuits challenging voting and election results – 158 during the run-up to the 2024 elections, as of mid-July 2024.[93] Until 2020, the vast majority of such lawsuits were filed to protect citizens' right to cast a legitimate ballot and have it accurately counted.[94] In 2024, most sought to curtail access to the ballot or subject election administration to control by the political party in power.[95] Distrust in government undermines faith in the rule of law itself. Disturbingly, countries that have lost faith in elections and courts are more likely to fall prey to autocrats and demagogues who promise to solve everyone's problems if they just turn over power to the leader.[96]

We may be approaching a political realignment that moves us toward either protecting or eliminating legal rights, preserving or destroying our environment, narrowing or widening the gaps in wealth, education, and health among the population. Realignments happened after the Civil War, World War II, the Great Depression, the civil rights movement, and the Reagan "revolution." Jon Meacham has argued that history shows that our "better angels" can find a way for us to survive crises.[97] I certainly hope so. But we will need lawyers to stand up for democracy.

Conclusion

The field of health law has grown dramatically over the past half century in response to advances in science and medicine, social and cultural changes, and economic shifts. Major changes do have one thing in common: changes in who holds political power–Congress and state legislatures, governors, presidents, judges, and agency officials. The laws that structure our financial, economic, educational, and health care systems, environmental conditions, and civil society are primarily the product of elections that populate our political institutions. These structural determinants of health in turn create laws that affect the distribution of social determinants of health – income and wealth, education, occupation, housing, transportation, and environment.

Current political divisions are destabilizing existing laws affecting the health field. Attention to elections and their consequences for the structure of our legal, economic, and social systems can broaden our understanding of the law's effects on health. Changes in health law may, in turn, reveal structural changes in the legal system and threats to the rule of law. This means that we should think carefully about whether and how laws that constrain opportunities for health and safety are also shifting the legal system away from principles of justice. Lawyers have a duty to call attention to threats to the rule of law. Health lawyers should have a special responsibility to do so, because we often see more of the bigger picture.

[93]Matt Cohen, *The Right is Doubling Down on Election Litigation, but Isn't Winning*, Democracy Docket (Sept. 6, 2024), https://www.democracydocket.com/analysis/the-right-is-doubling-down-on-election-litigation-but-they-arent-winning/ [https://perma.cc/UX6J-U9Z9].

[94]*See* Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. Rev. 123, 125 (2021) (explaining that the "paucity of successful reform litigation coupled with the multitude of obstructionist lawsuits during the pandemic" indicated a major shift in voting rights lawyering).

[95]*See* William Roberts, *The US Election Litigation Battlefield*, Int'l Bar Ass'n (July 24, 2024), https://www.ibanet.org/The-US-election-litigation-battlefield [https://perma.cc/ZAM6-GHNV].

[96]*See* Kleinfeld, *supra* note 90, at 20; Levitsky & Ziblatt, *supra* note 8, at 196; Appelbaum, Twilight of Democracy, *supra* note 7.

[97]Jon Meacham, The Soul of America: The Battle for Our Better Angels 3-19 (2018).

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