

Privatizing the Creation of Equity in Women's Health

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13.1 INTRODUCTION

Examining the role of private law in health care systems and delivery requires some consideration of the corporation and private ordering's impact on US health affairs.¹ Corporate law's structure allows individuals with shared interests to pool resources and share governance through formal agreements recognized by the state.² The individuals forming entities can further negotiate internal contractual relationships through bylaws, shareholder agreements, indemnifications, and other instruments. Entities can also enter into contractual relationships with individuals and other organizations – creating networks of physicians, integrating health care systems, or forming binding relationships with pharmaceutical companies through contract. In recent years, corporate form has provided the foundation for the creation of a wide range of companies focused on tech-based health care interventions.

Ida Tin, a serial entrepreneur, coined the term “FemTech” in 2016.³ Since then, the market has grown at a staggering clip, and it appears that it will continue to at a similar rate.⁴ Tin used FemTech to refer to a wide range of products and

¹ Inst. of Med., Committee on Implications of For-Profit Enterprise in Health Care, *For-Profit Enterprise in Health Care* (Bradford H. Gray ed., 1986).

² Asaf Raz, *Why Corporate Law Is Private Law*, 25 U. Pa. J. Bus. L. 981 (2023) (arguing that despite reliance on statutes for formation, corporate law belongs squarely under the umbrella of private law).

³ Hannah Ward-Glenton, *Meet the Woman Who Invented a Whole New Subsection of Tech Set to Be Worth \$1 Trillion Dollars*, CNBC (Mar. 6, 2023), <https://www.cnbc.com/2023/03/06/meet-the-woman-who-invented-a-whole-new-subsection-of-tech-set-to-be-worth-1-trillion.html#:~:text=Ida%20Tin%20created%20the%20term%20%E2%80%9CFemTech%E2%80%9D%20in%202016.&text=Clue-,Ida%20Tin%20wanted%20to%20study%20art%20at%20college%20when%20she,worth%20more%20than%20%241%20trillion>.

⁴ Emma Kemble et al., *The Dawn of the FemTech Revolution*, McKinsey & Co. (Feb. 2021), <https://www.mckinsey.com/industries/healthcare/our-insights/the-dawn-of-the-femtech-revolution> (estimating a market size of FemTech at over one trillion dollars by 2030).

technologies “designed to support and advance women’s health care.”⁵ Under this umbrella, she includes “fertility solutions, period and fertility tracking apps, reproductive system health care, women’s sexual wellness products, pregnancy and nursing care [products], period care goods, as well as at-home fertility monitoring devices and general healthcare [products].”⁶ When she coined the term, she was founder and CEO of Clue, a Berlin-based start-up. Creating the term was strategic; it was an effort to focus investors on this private market aimed at correcting for the lack of consumer goods and services devoted to women’s health needs.

FemTech is a form of tech-enabled private enterprise that is centered on private entities’ ability to create innovative solutions to problems. The market has led to broad expansion of private funding and research in women’s health through entities focused on the overlooked needs of women.⁷ Most FemTech firms are focused on the reproductive health needs of women during their prime reproductive years. Products and services include period tracking apps, such as Clue,⁸ fertility apps, and focused telehealth solutions.⁹ Opportunities for the expansion of the FemTech market include products focused on menopause and nonreproductive health care needs of these consumers.

This essay proceeds in three parts. Section 13.2 will focus on the rationale behind the creation of FemTech as a market and its intersection with limited investment in women’s health care research. Section 13.3 will consider the difficulties associated with the multiple-purpose private entities. Section 13.4 will discuss the limitations private ordering faces as a response to health care inequities with a focus on (Section 13.4.1) how funding impacts private ordering and (Section 13.4.2) how the value of consumer data and, in some cases, state laws undermine privacy goals, and the ways both can dilute private law efforts to remedy health care resource gaps.

13.2 FEMTECH RATIONALE

In women’s health, FemTech has emerged as a private ordering-based solution for women’s unmet health needs. The term “FemTech” refers to a subset of companies focused on “technology-enabled, consumer-centric products and solutions.”¹⁰ Like other markets, FemTech companies rely on basic corporate law as the foundation for introducing market-based solutions to consumers. The consumers they target

⁵ About Clue, Clue, <https://helloclue.com/about-clue> (last accessed 2023).

⁶ *Id.*

⁷ Kemble et al., *supra* note 4.

⁸ Tin founded Clue; their Period Tracking Plus product provides services including broad menstrual tracking and analysis. Clue Period Tracking Plus Explained, Clue, helloclue.com/articles/how-to-use-clue/clue-period-tracking-plus-explained (last accessed 2023).

⁹ According to its website, Maven claims to provide “[o]ne inclusive integrated benefit platform supporting every path to parenthood.” Get a Personalized Demo, Maven Clinic, <https://www.mavenclinic.com/contact/us-for-a-personalized-demo> (last accessed 2023).

¹⁰ Kemble et al., *supra* note 4.

have been seeking reliable health-related products traditional markets have overlooked or devalued for decades.¹¹ Because of this FemTech is unique. A large number of FemTech firms attempt to balance goals that are generally considered in tension with one another – maximizing profits and returns for investors while at the same time creating and/or maximizing social good.¹² Despite developments in corporate law that attempt to ease these tensions, they remain in play for many FemTech companies. Relatively recent adoption of new corporate forms¹³ and emerging legal scholarship¹⁴ are pushing toward structures that ensure firms' ability to maintain multiple purposes. But FemTech firms must look to private law more generally to ensure firms balance profit and corporate social responsibility goals.

Private markets rely on public law and related public policy decisions. In their work, *Private Actors in Public Markets*, Robert Hockett and Saule Omarova explore the link between private markets and public law noting that “. . . states and markets are not ‘separate but equal’ – they are inseparable and deeply interconnected parts of the nation’s economic organism.”¹⁵ FemTech companies extract value from gaps in existing markets serving women’s health needs.¹⁶ These gaps are often in part due to policy choices made by government and policymakers. Examples include funding and research priorities.¹⁷ Public law and public health’s concern with disparate allocation of limited health care resources initially focused on racial inequities.¹⁸ A focus on similar inequities related to sex and gender followed soon after.¹⁹

The long-standing failure to prioritize research into basic questions related to women’s health has left our understanding of it decades behind that of men’s health.²⁰ Basic questions overlooked in women’s health include areas in which differentials in diagnostics and outcomes continue. Reproductive health is one area

¹¹ Chloe E. Bird, *Underfunding of Research in Women’s Health Issues Is the Biggest Missed Opportunity in Health Care*, RAND Corp. (Feb. 11, 2022), <https://www.rand.org/pubs/commentary/2022/02/underfunding-of-research-in-womens-health-issues-is.html>.

¹² Min Yan, *Corporate Social Responsibility versus Shareholder Value Maximization: Through the Lens of Hard and Soft Law*, 40 *Nw. J. Int’l. L. & Bus.* 47 (2019).

¹³ Del. General Corporation Law Title 8, Ch. 1 § 362.

¹⁴ Emilie Aguirre, *Beyond Profit*, 54 *U.C. Davis L. Rev.* 2077 (2021) (making the claim that for dual-purpose entities further constriction on profit maximization is required at the point of incorporation to allow them to retain that dual purpose over the long term).

¹⁵ Robert C. Hockett & Saule T. Omarova, *Public Actors in Private Markets: Toward a Developmental Finance State*, 93 *Wash. U. L. Rev.* 103 (2015).

¹⁶ See Michael Silverstein & Kate Sayre, *The Female Economy*, *Harv. Bus. Rev.* (Sept. 2009), <hbr.org/2009/09/the-female-economy>.

¹⁷ Bird, *supra* note 11.

¹⁸ About the Office of Minority Health, *Off. of Minority Health* (2022), minorityhealth.hhs.gov/about-office-minority-health.

¹⁹ The Office of Research on Women’s Health: A History of Fostering Diversity and Inclusion in Biomedical Research, *Office of Research on Women’s Health*, Nat’l Inst. of Health (Dec. 5, 2023), orwh.od.nih.gov/about/mission-history/office-research-womens-health-history-fostering-diversity-and-inclusion.

²⁰ Paula A. Johnson et al., *Sex-Specific Medical Research: Why Women’s Health Can’t Wait: A Report of the Mary Horrigan Connors Center for Women’s Health & Gender Biology at*

in which there have been relatively few attempts to understand medical science as it applies to women. Health research institutions tasked, at least in part, with ensuring Americans' health and disseminating information to the public too often avoided research involving women in order to avoid the complexity presented by hormonal cycles²¹ and to avoid research in women of childbearing age. Public health education campaigns then used the results of research excluding women, further entrenching problems for female patients.

To better understand where we need private ordering to fill gaps created by public law, look to those areas in which disparate investment in health care research and communication continues to impact women. Cardiac events are the number one cause of death for men and women in the United States. Cardiac arrest, however, presents differently in the two sexes.²² While both men and women are likely to experience chest pain during events, women also commonly experience symptoms that occur less frequently in men. Had such symptomatology been (1) understood and (2) its indications been more widely disseminated, physicians and women would have been better equipped to recognize and treat those symptoms early, mitigating deaths attributable to cardiac arrest. Notable gender disparities exist across a number of other nonreproductive ailments, including Alzheimer's, lung cancer, and depression.²³

Within reproductive health, similar trends are present. Only recently have medical recommendations acknowledged the role the fallopian tubes likely play in the development of advanced ovarian cancers.²⁴ Gaps in understanding the function and character of the placenta are also attributable to this lack of focus on research related to women's health.²⁵ Public understanding and dissemination of information

Brigham and Women's Hospital, Brigham and Women's Hosp. (2014), <https://www.brighamandwomens.org/assets/bwh/womens-health/pdfs/connorsreportfinal.pdf>.

²¹ Deborah Netburn, Researchers Avoid "Messy" Hormonal Female Mice. And That Hurts Women, *L.A. Times* (May 30, 2019), <https://www.latimes.com/science/la-sci-emotional-stereo-types-about-women-20190530-story.html#:~:text=Scientists%20justified%20this%20exclusion%20by,women%2C%20like%20depression%20and%20PTSD>.

²² Johnson et al., *supra* note 20. But see Lori Mosca et al., Sex/Gender Differences in Cardiovascular Disease Prevention; What a Difference a Decade Makes, *Circulation* (Nov. 2019), <https://pubmed.ncbi.nlm.nih.gov/22064958/> (detailing positive developments in rates of death from cardiovascular disease).

²³ Johnson et al., *supra* note 20.

²⁴ Zeina Mohammed, More Physicians Are Calling for Fallopian Tube Removal to Prevent Ovarian Cancer, *Bos. Globe* (Feb. 23, 2023), <https://www.statnews.com/2023/02/23/ovarian-cancer-tube-removal/>. See also Nat'l Cancer Inst., Many Ovarian Cancers May Start in Fallopian Tubes, Study Finds, *Cancer Current Blogs* (Nov. 15, 2017), <http://www.cancer.gov/news-events/cancer-currents-blog/2017/ovarian-cancer-fallopian-tube-origins>.

²⁵ Jocelyn Kaiser, NIH Sets Aside More Than \$40 Million for Study of Human Placenta, *Sci. Insider* (Feb. 27, 2015), <https://www.science.org/content/article/nih-sets-aside-more-40-million-study-human-placenta> (documenting the funding that eventually provided for the Human Placenta Project).

related to menopause is another.²⁶ This is but a partial list; when considered in totality, it represents a hollowed-out middle in the collective women's health knowledge.

Such gender-based gaps in research and public understanding of women's health have received more attention in the past several decades. Despite this attention, those gaps remain frustratingly salient.²⁷ Identifying and correcting for gaps in women's health require women's participation as research subjects and placing women at the center of male-dominated scientific institutions. When women are engaged in these ways within science, research that can change diagnosis and treatment emerges.

13.3 THE MULTIPLE PURPOSE CORPORATE CONUNDRUM

Elevating engagement with problems in women's health should not be limited to machinations of public law and health policy. Private law enabled through corporate structure creates a nimble infrastructure through which to understand and respond to the health needs of groups marginalized by medical research and existing health care infrastructures, including women.

Many FemTech companies seek to achieve dual, or more, purposes.²⁸ Those purposes include (1) bettering the overall picture of women's health and (2) ensuring that the company itself remains a fiscally viable going concern. In the post-*Dobbs* era of women's health care, many FemTech companies have also made a public commitment to ensuring that women they serve in the United States are assured that the confidentiality of sensitive reproductive health data of consumers is protected.²⁹ Tin and the company she founded have noted the necessity of privacy as being central to the creation of the market.³⁰

²⁶ Susan Dominus, Women Have Been Misled about Menopause, N.Y. Times (Feb. 1, 2023), www.nytimes.com/2023/02/01/magazine/menopause-hot-flashes-hormone-therapy.html (highlighting the broad misunderstanding of menopause among women).

²⁷ Cat Bohannon, Eve: How the Female Body Drove 200 Million Years of Human Evolution (2023) (providing a general analysis of the ways in which medical science has failed to center the female body in research).

²⁸ William Bratton, Framing a Purpose for Corporate Law, 39 J. Corp L. 713 (2014) (explaining the idea of dual purpose and going on to examine the tensions between social welfare and shareholder maximization).

²⁹ Despite assurances, a 2022 review of popular period tracking apps found that "18 out of 25 reproductive health apps and wearable devices that Mozilla investigated for privacy and security practices received a *Privacy Not Included warning label. These findings raise concerns in the post-Roe landscape that data could be used by authorities to determine if users are pregnant, seeking abortion information or services, or crossing state lines to obtain an abortion." Post *Roe v. Wade* Era, Mozilla Labels 18 of 25 Popular Period and Pregnancy Tracking Tech with *Privacy Not Included Warning, Mozilla (Aug. 17, 2022), <https://foundation.mozilla.org/en/blog/in-post-roe-v-wade-era-mozilla-labels-18-of-25-popular-period-and-pregnancy-tracking-tech-with-privacy-not-included-warning/>.

³⁰ Clue, *supra* note 5.

Private ordering uses public law foundations to create stable relationships among groups of individuals with a shared purpose through various organizational forms. Following an organization's creation, private law paradigms begin to govern the relationships between owners of organizations and/or those in control of decision-making, such as boards or managing members. For example, corporate actors use contract law to create governance structures through documents that are often outside the purview of the general public. Stockholder agreements, LLC membership agreements, and similar documents often limit the ability and power of individual owners to sell their ownership interests through binding agreements, often including a right of first refusal. Controlling the ownership structure through these contractual agreements ensures owners are committed to the same goals. Firms also use contract law to mitigate risks associated with tort liability, limit or ensure employee rights, and protect trade secrets and other valuable information from disclosure. Tort liability also informs corporate governance, employee training and oversight, and entry into new markets.

Despite the ways in which private ordering allows individuals with shared interests to coalesce around a unifying idea or mission, commitment to that mission may evolve over time. Often, changes emerge from concerns regarding liquidity and capital access. In the context of entrepreneurship, access to sufficient capital is critical to success.³¹ The recent collapse of Silicon Valley Bank laid bare how much small tech firms rely on ongoing capital access.³² Capital access is also entangled with questions of governance, implicating organizational leadership's ability to adhere to multiple purposes. This can result in tension with additional purposes companies espouse, such as access to tools and services that better enable health equity, data privacy, or public benefit. Capital access also raises higher-level questions implicating race, gender, and class, notable among FemTech firms, given the large number that are female-owned.³³

Aside from some well-capitalized FemTech firms like Clue, FemTech founders face substantial challenges to raising capital.³⁴ When companies are able to raise capital and scale, growth may further challenge a firm's ability to focus on non-monetary purposes such as protecting consumer privacy. Commentators and legal

³¹ Access to Capital, U.S. Senate Comm. on Small Bus. & Entrepreneurship, www.sbc.senate.gov/public/index.cfm/accesstocapital (last accessed 2023).

³² Rohan Goswami & Ari Levy, Silicon Valley Bank's Struggles Spell Further Trouble for Beleaguered Tech Startup Market, CNBC (Mar. 9, 2023), www.cnbc.com/2023/03/09/silicon-valley-banks-struggles-signal-more-trouble-for-tech-startups.html.

³³ Robert W. Fairlie & Alicia M. Robb, Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs, Minority Bus. Dev. Agency (Jan. 2010), www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf.

³⁴ Melissa Houston, The Challenges of Raising Capital for Business Owners in the FemTech Industry, *Forbes Mag.* (Sept. 29, 2021), <https://www.forbes.com/sites/melissahouston/2021/09/29/the-challenges-of-raising-capital-for-business-owners-in-the-femtech-industry/>.

scholars have already made the argument that women using FemTech applications' privacy interests have been fundamentally undermined. Two scholars have gone so far as to argue that we are at the origin point of a FemTech-enabled dystopia.³⁵

13.4 THE LIMITS OF PRIVATE ORDERING SOLUTIONS

Questions related to the long-term durability of multiple purposes within organizations challenge the notion that FemTech, and other forms of private ordering, are an appropriate response to health care inequity.³⁶ This essay argues that FemTech steps in to mitigate a lack of attention to women's health in the public sphere. To do this, FemTech companies use public law to create privately ordered entities that can devote resources to such problems.³⁷ Asserting a reliance on private ordering to correct for a public law failure, however, also requires consideration of the risks it presents.

One risk, alluded to previously, relates to FemTech companies' for-profit status, despite more not-for-profit entities like Euki appearing on the market. Even when for-profit FemTech entities are dual purpose, focus on shareholder primacy and profit maximization may lead to the neglect of other named purposes. Scholars can point to many examples of multipurpose companies that lost their way, becoming solely or primarily interested in short-term return on investment as they grew.³⁸ For decades, these concerns have been raised as especially concerning within health care. Those concerns are becoming more urgent with private equity's increased investment in many areas of health care.³⁹ In segments of the industry where consumers face limited choices, which include women's health care, the concerns are arguably more pressing due to those limited choices.

When entrepreneurs secure funding, they often become beholden to the interests of investors or funders. Those interests almost always impact their governance structures. Funders' interests will sometimes be in tension with organizational values and principles, including those of FemTech companies that acknowledge multiple purposes.⁴⁰ At the same time, reasonable profits are important to ensuring a company's

³⁵ Leah Fowler & Michael Ulrich, *FemTech Dystopia*, 75 *Stan. L. Rev.* 1233 (2023).

³⁶ Jan-Willem Scheijgrond, *How Can the Private Sector Help Advance Health Equity?*, *World Econ. F.* (May 2, 2023), www.weforum.org/agenda/2023/05/how-can-the-private-sector-help-advance-health-equity/ (noting the need for health tech companies to play a role in the transformation of health care).

³⁷ Kemble et al., *supra* note 4.

³⁸ Aguirre, *supra* note 14.

³⁹ Erin Fuse Brown & Mark Hall, *Private Equity and the Corporatization of Health Care*, 76 *Stan L. Rev.* 527 (2024).

⁴⁰ Use of creative funding mechanisms that allow small firms to pick and choose investors can limit this impact. In spring 2023, Clue raised seven million euros through a call for community investment. About Clue, *Clue Launches First-Ever Community Investment Round*, Clue (Apr. 4, 2023), helloclue.com/articles/about-clue/clue-launches-first-ever-community-investment-round.

future and in FemTech, broader progress in women's health, even within a dual-purpose structure. Profits can be reinvested in research and other avenues that increase the value of the products and create broader benefits in the field.

Most funders' primary aim is either to recoup their investment or turn a profit. Banks seek to ensure that debt and interest are repaid, often securing their interests under UCC Article 9, which allows them to seize appropriately collateralized assets when a company's failure to pay principal and/or interest results in default. As a general rule, banks do not seek equity, but debt itself can impact governance.⁴¹ Venture capital firms, individual shareholders, and other equity investors exert more direct pressure on a company, often in an effort to maximize returns on their investments. It would be normal to expect these players to seek to limit costs and increase revenue in an effort to maximize their individual financial returns. This will not always be the case; in recent years more shareholder and management activity has focused on questions of corporate social responsibility which remains a focus in corporate law discourse.⁴²

Financial and governance obligations limit the choices of organizational leadership. These limits impact FemTech firms' ability to focus on non-fiscal purposes. Even firms primarily focused on social good require capital to meet basic needs. Capital is further required to scale activities of companies whose work creates a positive social impact. With respect to debt, obligations associated with funding are usually limited to liabilities that must be accounted for in cash flows and financial projections. Where investors are concerned, agreements create obligations that include equity ownership and/or creation of special classes of equity, which can redefine firm governance. Agreements often provide investors with Board seats, or other powers, which can impact organizational priorities. Ensuring liquidity and access to capital requires companies to meet those obligations as consideration for the capital provided.⁴³ These provisions give investors the opportunity to force the hands of cash-hungry entrepreneurs in ways that can contradict purposes of health equity-focused, dual-purpose organizations, including values important, if not critical, to many FemTech entrepreneurs and their companies and consumers.

13.4.1 *Privacy Concerns*

Another concern related to the tensions between financial interests and governance is tech-based entities' frequent reliance on unmitigated collection of consumer data

⁴¹ Tomer S. Stein, *Debt as Corporate Governance*, 74 *Hastings L.J.* 1281 (2023).

⁴² VC Funding: What to Expect, Silicon Valley Bank, <https://www.svb.com/startup-insights/ready-to-raise/VC-funding-things-you-lose/#:~:text=Key%20Takeaways,your%20say%20in%20key%20decisions> (last accessed 2023).

⁴³ Y Combinator, a well-known start-up accelerator provides for a five hundred-thousand-dollar investment in exchange for a 7 percent equity stake in the founders' company with incremental increases in equity stakes as the company raises additional money. Kristy Nathoo, *The Y Combinator Deal*, Y Combinator, <https://www.ycombinator.com/deal> (last accessed 2023).

to augment corporate value. As author Shoshana Zuboff notes in her 2018 book, a new paradigm has emerged in which consumer data has become the end product for major companies, including Google and Facebook.⁴⁴ Similar concerns also exist within FemTech – there is enormous money to be made in selling consumer data. As these companies grow, they will need more capital, and their ability to sell consumer data to access it can become central to those efforts.

More concerning than general data collection is the nascent industry's collection of reproductive health data of women of childbearing age. In *FemTech Dystopia*, authors Leah R. Fowler and Michael R. Ulrich extend Zuboff's thesis about economic concerns of such data collection to encompass fears of state action based on such data in the post-*Dobbs* era. The authors raise concerns regarding state use of reproductive health care data stored by FemTech companies in abortion-related prosecutions. Similar questions around seizure of individual data by state actors have previously been raised. At one time, whether Homeland Security had the ability to require individuals to unlock their phones to allow the agency to search their contents upon entry to the country was such a question. The answer – Homeland Security has the power to do so.⁴⁵

The concerns of Fowler and Ulrich are of critical import, but there are reasonable questions to raise in response to them. In recent cases brought in state court by prosecutors where abortion bans have been issued, they have used data from non-FemTech online platforms to prosecute women for obtaining abortions and those who assist them. In July 2023, a Nebraska court sentenced a forty-two-year-old woman guilty of “tampering with human remains, false reporting and providing an abortion after at least 20 weeks of gestation” under the state's abortion statute.⁴⁶ The prosecutions' case, however, relied not on data pulled from a period tracker or other FemTech-related consumer data but on messages the parties exchanged on the social media application Facebook Messenger. This is likely in part because it is easier to isolate cases for investigation where there is direct communication related to prohibited conduct. Information indicative of pregnancy status can also be sourced by the state through data seemingly unrelated to reproductive health, but that nonetheless provides highly predictive indicators of pregnancy status.⁴⁷

⁴⁴ Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (2019).

⁴⁵ Tatum Hunter, How to Prevent Customs Agents from Copying Your Phone's Content, *Wash. Post* (Sept. 18, 2022), www.washingtonpost.com/technology/2022/09/18/phone-data-privacy-customs/.

⁴⁶ Margery A. Beck, Nebraska Mother Sentenced to 2 Years in Prison for Giving Abortion Pills to Pregnant Daughter, *Associated Press* (Sept. 22, 2023), <https://apnews.com/article/abortion-charges-nebraska-sentence>.

⁴⁷ Manuela López Restrepo, Does Your Rewards Card Know If You're Pregnant? Privacy Experts Sound the Alarm, *NPR* (Aug. 13, 2022), www.npr.org/2022/08/13/115414467/consumer-data-abortion-roe-wade-pregnancy-test-rewards-card-target-walgreens.

Utilization of entire FemTech consumer data sets to seek out parties for prosecution would be more onerous than using explicit Facebook messages. Doing so would require the state to analyze enormous amounts of data held by companies, and, prior to being able to do so, access that data. In the future, quantum computing and advanced algorithmic programs will make analysis of such large data sets much easier. In the near term, however, it is easier to imagine FemTech tracked data's use in cases where individualized data is sought through court order and used to convince juries of intent to commit a crime, especially where questions of whether a woman knew she was pregnant exist. Many FemTech companies claim they already have strong data privacy protections in place, though those claims have been questioned.⁴⁸ Other companies, in response to privacy concerns, have taken measures they claim will better protect user data. One example of such measures involves US companies moving their operations to Europe, in an attempt to subject them to the more robust data privacy standards required under the General Data Protection Regulation, or the GDPR. The GDPR, however, fails to protect user data from subpoenas and other attempts to access records by US courts and law enforcement personnel, which is at the root of post-*Dobbs* concerns.⁴⁹

At the end of the day, companies control the ways in which they engage with consumer data – holding it, selling it to third parties, or using it internally to create better products. In the current era, companies do not enter into contractual agreements with consumers that require them to protect consumer data from unconsented releases, whether to law enforcement or third parties. Instead, companies request users to acknowledge privacy policies. Companies can be more aggressive in placing formal obligations on their organizations; they can create legally binding and enforceable contractual terms which serve consumers whose data they access and store for research and other purposes. At the same time, these companies can mitigate the risk of financial harms and reputational damage that might result in the event of a breach of their promises to keep user data confidential. Firms that want to put their money where their corporate purpose is can seek insurance and utilize internal policies and compliance mechanisms to mitigate the risks associated with adoption of such contractual obligations.

Consumers are increasingly concerned with questions of data security. In response, Apple has begun to bend its operations toward ensuring consumer data is protected, and they have paid special attention to health-related data. As is the case in many other areas, while there are minimal protections for consumers under state and federal law, companies can use contract law to legally constrain the ways in which they collect and use sensitive consumer data.

⁴⁸ Angela Petkovic, *The FemTech Problem: How Dobbs Shifted the Data Privacy Landscape for Period-Tracking Apps*, JTIP Blog (Apr. 19, 2023), jtip.law.northwestern.edu/2023/04/19/the-femtech-problem-how-dobbs-shifted-the-data-privacy-landscape-for-period-tracking-apps/.

⁴⁹ *Id.*

There is an obvious tension between FemTech firms' data collection practices and claims that they will ensure data privacy. A more nuanced tension exists between data privacy concerns and the necessity of large data sets to better understand many areas of women's health. Data is an essential element in elevating the science in the field. These intersecting tensions between data collection, privacy, and research are likely to leave mindful consumers and the FemTech companies seeking to serve them at an impasse. Providing an individual's data can, in addition to being a goldmine for companies, collectively advance our understanding of women's health.

There is a case to be made that the women most vulnerable, marginalized, and likely to be surveilled by law enforcement are also the most likely to need insights that existing research and health systems fail to provide. These individuals would seem to have no reasonable alternative to advance their health other than subjecting themselves to greater surveillance through FemTech usage in an effort to create better health outcomes for the whole until public law does a better job of ensuring that for them.

13.4.2 *Reconsidering Private Law Tools for FemTech Governance*

Until states begin adopting binding statutory structures to ensure entities fulfill multiple purpose obligations in perpetuity, private law provides viable routes to create long-term obligations that outlive founders and protect the interests of consumers. These private law tools can also be used to devise mechanisms that leave room for internal reordering through private law structures and internal organization to entrench dual and multiple-purpose regimes for women's health firms.

Shadow governance may provide an innovative means to ensure commitment to multiple purposes without further public law intervention. In their article *Shadow Governance*, authors Yaron Nili and Cathy Hwang define shadow governance as "non-charter, non-bylaw governance documents [that] express a corporation's commitment to and process on issues."⁵⁰ The shadow governance docket includes committee charters, governance guidelines, and codes of conduct. These more innovative and less tested mechanisms should be utilized by emerging FemTech firms to ensure a long-term commitment to their indicated corporate purposes. That being said, these types of assurances of purpose may be easily unwound after changes in Board and/or voting structure following investment. They do not require the same votes to nullify or change bylaws or other organizational governance documents, which can better entrench purpose.

Firms can also use basic contract law to entrench their multiple corporate purposes across their contracting activity and in their internal affairs. For example, companies can require Board members to agree to be bound by contractual terms at

⁵⁰ Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 Cal. L. Rev. 1097 (2020).

the start of their terms that require reconsideration of all purposes of the company in decision-making. One challenge with this approach is drafting language concretely defining something as amorphous as a “value.” Values shift with time, much like language, reflecting culture and other normative elements. Even explicit terms like data privacy will shift with time and public expectation. Establishing a contractual framework that aligns the concerns of FemTech companies with their obligations to consumers and third parties, and also provides some flexibility to meet the requirements of lenders and investors, is critical to cementing multiple purposes of emerging entities in the absence of statutory mechanisms. Where possible, these companies should be selective in choosing funding sources, with an eye toward ensuring alignment between corporate purposes and funder interests. Legally binding contractual agreements with funders can further entrench such alignment. In the absence of changes to public corporate law, FemTech entities must look to private law to both appropriately protect consumers and further women’s health.

FemTech is by no means a panacea. It will not correct all of the problems in women’s health. What FemTech has done, however, is to acknowledge the role private law and, by extension, private markets may need to play in correcting for extensive histories of government inaction to address the problems women face with respect to health care.

Acknowledging the limitations facing FemTech entities is a necessary step toward challenging public law and private markets to fill those gaps to create greater gender equity in accessing appropriate health care resources.

