

Britney's Prerogative: A Critical, Constitutional View of Conservatorships¹

I. Introduction

In 2022, Britney Spears marked her first year of freedom from a conservatorship² that has lasted for over a decade.³ Over the course of those years, outrage has mounted over the pop star's fate.⁴ The explosive

1. This Comment does not use slurs to refer to people who have mental or intellectual disabilities and encourages readers to be mindful about language in the context of mental health. See generally *The Effects of the R-Word*, SPREAD THE WORD, <https://www.spreadtheword.global/resource-archive/r-word-effects> (last visited Feb. 2, 2023) (discussing the importance of mindful language usage). Where possible, this Comment omits and replaces outdated and offensive language within quotations, as indicated by brackets. Because this Comment discusses one part of what people who have mental health disabilities experience, identity-first language may be used, although this Comment strives to use person-first language where possible. See Jevon Okundaye, *Ask a Self-Advocate: The Pros and Cons of Person-First and Identity-First Language*, MASS. ADVOC. FOR CHILD. (Apr. 23, 2021), <https://www.massadvocates.org/news/ask-a-self-advocate-the-pros-and-cons-of-person-first-and-identity-first-language> (“When you want to emphasize something specific to disabled people, you can use identity-first language.”). Because the author is not disabled, critical instruction on language is welcomed from people more familiar with mental health disabilities.

2. This Comment uses “conservatorship” to refer to legal relationships of responsibility for adults because that term is most closely associated with the Free Britney movement; it nonetheless encapsulates other such relationships called “guardianships.” Also, this Comment will use Britney’s first name to address her: first, to avoid confusion with other members of the Spears family; and second, because it consistent with the popular usage of “Britney” as a recognizable mononym. See, e.g., Tag W.R. Hartman-Simkins, *Every Britney Spears Album Cover, Reimagined*, MEDIUM (Apr. 2, 2018), <https://medium.com/@BillRoyce/every-britney-spears-album-cover-reimagined-44e6ada8ec72> (discussing Britney as a mononym); Joz Norris (@JozNorris), TWITTER (Feb. 17, 2022, 9:00 AM), <https://mobile.twitter.com/JozNorris/status/1494325966180532225> (providing a link to the author’s twitter thread with an interesting proposal of rules on mononym usage based on celebrity status, which would include Britney). No disrespect is intended by this departure from the ordinary rule that formal writing should address persons by their last name.

3. Stephanie K. Baer, *A Judge Terminated Britney Spears’ Conservatorship, Giving the Pop Star Control over Her Life*, BUZZFEED NEWS (Nov. 12, 2021, 6:06 PM), <https://www.buzzfeednews.com/article/skbaer/britney-spears-free-conservatorship-ends>.

4. Bianca Betancourt, *Why Longtime Britney Spears Fans Are Demanding to #FreeBritney*, HARPER’S BAZAAR (Nov. 12, 2021), <https://www.harpersbazaar.com/celebrity/latest/a34113034/why-longtime-britney-spears-fans-are-demanding-to-freebritney/>.

allegations of abuse,⁵ which framed her legal efforts to terminate the conservatorship, brought into public scrutiny a branch of law otherwise obscured by arcane procedure, precedent, and practices. The “Free Britney” movement, launched in 2019 by dedicated fans of the star, burgeoned into a growing campaign to reform the existing law of conservatorships.⁶

Also in 2022, *Buck v. Bell*⁷ marked its ninety fifth year as the law of the land determining the reproductive rights of people with disabilities in the United States. When asked by Carrie Buck to deny the petition of a Virginia official to sterilize her, the Court refused.⁸ The case was decided in a three-page opinion written by Justice Oliver Wendell Holmes, Jr., with one dissent, Justice Pierce Butler, who did not write a separate opinion.⁹ It has since been roundly condemned and rigorously distinguished by subsequent jurisprudence.¹⁰ *Buck* nonetheless has never been overturned, and its legacy casts a dark shadow on efforts to advance the social, legal, and political condition of people with disabilities.¹¹

2022 likewise marked the Supreme Court’s overturning of nearly fifty years of precedent protecting the people’s right to an abortion.¹² The Court’s decision in *Dobbs v. Jackson Women’s Health Organization* sent tremors throughout America’s legal institutions.¹³ The fundamental reshaping of constitutional jurisprudence in *Dobbs* has had and will continue to have a devastating effect on the exercise of reproductive

5. Laura Snapes, *Britney Spears Shares New Allegations About Conservatorship: ‘My Family Threw Me Away’*, THE GUARDIAN (Aug. 29, 2022, 5:52 EDT), <https://www.theguardian.com/music/2022/aug/29/britney-spears-shares-new-allegations-about-conservatorship-my-family-threw-me-away>.

6. Dani Anguiano, *The #FreeBritney Movement Finds Its Moment: ‘All the Hard Work Was Worth It’*, THE GUARDIAN (Nov. 14, 2021, 4:00 EST), <https://www.theguardian.com/music/2021/nov/14/freebritney-movement-britney-spears-conservatorship>.

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

8. *Id.* at 205, 208.

9. *Id.*

10. See, e.g., Alessandra Suuberg, *Buck v. Bell, American Eugenics, and the Bad Man Test: Putting Limits on Newgenics in the 21st Century*, LAW & INEQ., Winter 2020, at 115, 117.

11. *Id.* at 117, 126.

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

13. See, e.g., Jane S. Schacter, *A Constitutional Earthquake: Stanford’s Jane Schacter on SCOTUS Decision to Overturn Roe v. Wade, Ending Constitutional Right to an Abortion*, STAN. L. SCH.: LEGAL AGGREGATE (June 24, 2022), <https://law.stanford.edu/2022/06/24/a-constitutional-earthquake-stanfords-jane-schacter-on-scotus-decision-to-overturn-roe-v-wade-ending-constitutional-right-to-an-abortion/>.

freedom in the United States,¹⁴ and opened the country to global embarrassment.¹⁵

This Comment examines the intersection of these threads of dispute as a vehicle to analyze the legal status of disability rights today. Britney's request to remove a contraceptive intrauterine device ("IUD") and its alleged denial by the conservator directly implicates the issue presented to the Court in *Buck v. Bell*: the reproductive rights of people with disabilities. By tracing a line of inquiry from the early history of conservatorships to *Buck*, to *Skinner v. Oklahoma ex rel. Williamson*, and through the Americans with Disabilities Act ("ADA"), this Comment confirms the contours of a constitutional right to reproductive autonomy for people with disabilities. The aged menace of paternalism, however, simultaneously haunts the full realization of this right.

Part II of this Comment briefly reviews the factual record that led to the Free Britney movement. Beginning with the launch of the pop era and following Britney's personal moments in the public eye, this Part discusses how law, both in practice and academically, can respond to a crisis as it unfolds. It further concludes that the Free Britney movement teaches important lessons about what the "serious" study of law can learn from the rhythms of public, popular life.

Part III surveys the procedural and historical characteristics of conservatorships. Closely following the early history of conservatorships reveals the principally economic role conservatorships have played as a vehicle for safeguarding and obtaining assets. With these conclusions in view, this Comment argues that the medical justification for the institution of conservatorships should be viewed skeptically.

Part IV turns to the issue of constitutional argument. After surveying key constitutional landmarks as guideposts, this Part evaluates the Fourteenth Amendment's two doctrines of procedural and substantive due process as

14. Elizabeth B. Harned & Liza Fuentes, *Abortion Out of Reach: Exacerbation of Wealth Disparities After Dobbs v. Jackson Women's Health Organization*, AM. BAR ASS'N: HUM. RTS. MAGAZINE (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/abortion-out-of-reach/.

15. See Risa Kaufman et al., *Global Impacts of Dobbs v. Jackson Women's Health Organization and Abortion Regression in the United States*, 30 SEXUAL & REPROD. HEALTH MATTERS 22, 24 (2022) ("Directly following the Court's issuance of the decision in *Dobbs v. Jackson Women's Health Organization*, UN High Commissioner for Human Rights Michelle Bachelet reiterated human rights protections for abortion and the impact that the decision will have on the fundamental rights of millions within the United States, particularly people with low incomes and those belonging to racial and ethnic minorities.").

sources of law in reproductive and disability rights. Where due process procedural requirements fall short, however, this Part argues that substantive due process can prove protective of the reproductive rights of people with disabilities. This Part will also discuss and distinguish the Court's decision in *Dobbs*.¹⁶ This Part concludes that substantive due process remains an important vehicle for constitutional litigation in this area, even though significant obstacles may arise in confronting the history of conservatorship jurisdiction in the United States.

Part V reviews statutory opportunities for relief in this area. The ADA, promising at first glance in its breadth and historical legacy, has been gnawed at from the bottom.¹⁷ Lower courts have added additional hurdles to access remedies under the ADA's Integration Mandate.¹⁸ Further congressional action is necessary to achieve the ends sought, and most currently proposed legislation falls short of providing the national standard of substance and process that conservatorships so desperately need.

Part VI concludes by reviewing the conservatorships of yesterday and today, and envisioning the status of conservatorships tomorrow: a limited solution of last resort for mental health systems, if it is to be a solution at all. A Comment at this level of breadth and generality cannot provide all the answers to the questions that may be raised here. Nor can any scholar provide a rich accounting of conservatorships where data collection has been so woefully mismanaged and neglected. But with the tools and time provided, this Comment adds to the distinctly American notion of dignity upon which our confidence in law and justice rests.

II. Britney Spears: A Freedom Fable

Three minutes and fifty-seven seconds defined a generation. First, a Catholic schoolgirl, hair done up in braided pigtails and pink fluffy hair ties, midriff exposed by a scandalously tied shirt, swaggers through school halls. Then, a dance troupe of high-school-aged teenagers breaks into choreography, interspersed with shots of the same girl warbling from atop the ultimate symbol of teenage freedom: her car. Finally, the last session of dance and song on the basketball court is interrupted by the bell, as the

16. *Dobbs*, 142 S. Ct. 2228.

17. See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010).

18. *Id.* at 206–18.

audience realizes it was all a daydream.¹⁹ In three scenes, the secret life of an American teenager, the sexual freedom of the modern woman, and the opulence of the late-twentieth century were made into a canonical text of American pop art. In those three minutes and fifty-seven seconds, Britney Spears became an icon.

The undeniably global effect of Britney and celebrities like her has been the object of fascination in media studies for decades. The science, art, and business of pop culture is a burgeoning source of research and scholarship.²⁰ The Free Britney movement is itself evidence of pop culture's import. In launching a wave of fan-driven advocacy, Britney Spears galvanized a new moment in disability rights advocacy, and drew attention to an under-discussed aspect of mental health law. In this way, Britney's actions both mirror and illuminate the legal landscape of disability law. Her experience demonstrates the inadequacy of the status quo while cultivating a normative vision of the future.²¹

The first decade of the early 2000s was a whirlwind of never-ending success for Britney Spears. Her image became associated with the extravagant gluttony of the turn of the century, right next to Lindsay Lohan and Paris Hilton.²² Record-breaking album sales and highly profitable merchandising made Britney Spears a global brand and a pillar of American music.²³ At the peak of her career, she earned the epithet "Princess of Pop,"

19. Britney Spears, *Britney Spears - ...Baby One More Time (Official Video)*, YOUTUBE (Oct. 25, 2009), <https://www.youtube.com/watch?v=C-u5WLJ9Yk4>.

20. See Michael Asimow, *The Mirror and the Lamp: The Law and Popular Culture Seminar*, 68 J. LEGAL EDUC. 115, 118–19 (2018) ("Such courses are found in nearly every department—not just in law schools or the film, television, or cultural studies departments, but also in history, politics, sociology, and many other disciplines.").

21. Cf. *id.* at 116 ("Thus the media of popular legal culture both *reflects* what people believe about law and lawyers (popular legal culture in the broad sense) and *constructs* those beliefs.").

22. Lohan, Hilton, and Spears were dubbed "The Holy Trinity" after their impromptu photo together in 2006. See Georgia Slater, *Paris Hilton Says It Was 'Awkward' When Lindsay Lohan Crashed Her 2006 Car Ride with Britney Spears*, PEOPLE (Mar. 15, 2021, 10:05 AM), <https://people.com/tv/paris-hilton-says-it-was-awkward-when-lindsay-lohan-crashed-car-ride-with-britney-spears/>.

23. Maura Johnston, *Britney Spears' Pop Legacy Goes Way Beyond Her Music*, TIME (July 21, 2021, 12:56 PM EDT), <https://time.com/6082333/britney-spears-legacy/>.

underscoring her contributions to American pop culture alongside idols like Madonna.²⁴

Towards the end of the decade, Britney battled with a variety of personal issues as the tumult of her private life increasingly diverged from the glitter of her public one. She faced public scrutiny for holding her child in her lap as she drove, and in the fall of 2006, she divorced her then-husband.²⁵ The death of her aunt immediately preceded a short stint at a drug rehabilitation center in early 2007 and an infamously photographed moment at a hair salon in Los Angeles.²⁶ A few short months later, in October 2007, Britney lost custody of her children.²⁷ In January 2008, she refused to relinquish custody of her sons to her ex-husband.²⁸ After an unusually turbulent police response at Britney's home, she was hospitalized and then involuntarily committed to a hospital psychiatric ward.²⁹ During the five days she spent in the ward, Jamie Spears, her father, and the court set up a permanent conservatorship.³⁰

For the next thirteen years, Britney Spears continued to work and live under the auspices of the conservatorship. Nothing out of the ordinary jumped out to observers. Little information about conservatorships had reached the public conscience, and many of her fans were entirely unaware of the existence of the conservatorship. Around 2019, however, devoted fans of Britney launched a movement to free her from her conservatorship after an alleged former member of her legal team reached out to a podcast run by Britney watchers, detailing explosive allegations of rampant abuse.³¹ Since then, voices from far-flung corners of the country coalesced into a

24. *See 13 Reasons Why Britney Spears Is Still the Princess of Pop*, MEDIUM (Feb. 14, 2020), <https://medium.com/@anonymous1026/11-reasons-why-britney-spears-is-still-the-princess-of-pop-fed2412064ac>.

25. *See Britney Spears' Biography*, FOX NEWS (Jan. 13, 2015, 11:17 PM EST), <https://www.foxnews.com/story/britney-spears-biography>.

26. *Spears' Sad Farewell to Dead Aunt*, FEMALE FIRST (Jan. 29, 2007), <https://www.femalefirst.co.uk/celebrity/Britney+Spears-13633.html>; *Britney Spears' Biography*, *supra* note 25; Adrian G. Uribarri, *Tarzana Salon Has a Close Shave with Britney*, L.A. TIMES (Feb. 18, 2007, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-2007-feb-18-me-britney18-story.html>.

27. *Britney Spears' Biography*, *supra* note 25.

28. *Id.*

29. *See id.*

30. *Id.*

31. Ronan Farrow & Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, NEW YORKER (July 3, 2021), <https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare>.

nationwide effort to “#FreeBritney.”³² This grassroots advocacy precipitated a rapid series of legal moves between Britney and her conservators, with disability rights advocates and Britney herself leading the charge. A drawn-out chess game between the star, her father, and the conservatorship became increasingly complex as advocates and Britney Spears herself asked the court to terminate the conservatorship.³³ Finally, on November 12, 2021, Judge Brenda Penny terminated Britney Spears’s conservatorship.³⁴

These successes, however, came only after Britney Spears herself revealed a shocking scene of conservatorship abuse to the court. In June, 2021, Spears had the opportunity to address the court herself, where she detailed dramatic and extensive allegations.³⁵ Among other concerns raised to the court’s attention, Spears accused her father of preventing her from marrying her boyfriend of five years, Sam Asghari.³⁶

In California, people under conservatorship retain the right to marry unless otherwise specifically ordered.³⁷ Nothing indicated that the conservatorship had specifically barred Britney from this right. Her father’s behavior thus demonstrated an abuse of power flowing from the conservator. The failure of the conservator to satisfy the duty to communicate with the conservatee what rights she retained also explains why the probate code, as it exists—or even if it is radically reformed—is not sufficient on its own to protect conservatees.³⁸ Where, as here, the conservatee is explicitly protected by statute, judicial failures to monitor and oversee the conservatorship make such protections ineffective.

32. Betancourt, *supra* note 4.

33. Jon Blistein, *Britney Spears’s Conservatorship: What’s Going On and What’s Coming Next?*, ROLLING STONE (Nov. 12, 2021), <https://www.rollingstone.com/music/music-news/britney-spears-conservatorship-timeline-1193156/>.

34. Baer, *supra* note 3.

35. Farrow & Tolentino, *supra* note 31.

36. Molli Mitchell, *What Sam Asghari Has Said About Marrying Britney Spears—‘It’s Surreal’*, NEWSWEEK (June 29, 2022, 11:29 AM EDT), <https://www.newsweek.com/britney-spears-husband-sam-asghari-marriage-1720311#:~:text=In%20June%202021%2C%20Spears%20asked,from%20marrying%20her%20partner%20Asghari.>

37. CAL. PROB. CODE § 1900 (2022).

38. For a nonetheless helpful discussion of probate code reform proposals, see generally Lisa Zammiello, Comment, *Don’t You Know That Your Law is Toxic? Britney Spears and Abusive Guardianship: A Revisionary Approach to the Uniform Probate Code, California Probate Code, and Texas Estates Code to Ensure Equitable Outcomes*, 13 ESTATE PLANNING & COMMUNITY PROPERTY L.J. 587 (2021).

Spears's most horrifying allegation, and the one scrutinized in this Comment, is her claim that her father refused her request to remove her intrauterine device ("IUD").³⁹ This claim is perhaps the most attention-grabbing and scandalous. It touches on the gravest concerns from disability rights advocates about the control conservators exercise over people's bodies and reproductive choices. Yet, California statutes are silent on this exact issue, addressing reproductive decision-making only in narrow circumstances.⁴⁰

From this vantage point, the frustration and outrage felt by observers of Britney's conservatorship was not only understandable but an inevitable consequence of conservatorship history. As the following parts of this Comment demonstrate, conservatorship law is marked by constitutional neglect that makes it particularly ripe for conservator abuse and overbroad governance. As long as judges fail to oversee conservatorships, substantive rights and federal guidelines abate unenforced and without normative guarantees. The silence of federal institutions as to the duties involved in conservatorships blunts the value of alternative paths to reform.⁴¹

Since Britney's conservatorship ended, her public saga has continued. Disputes over her father's financial mismanagement and his request for her to pay his attorney's fees remain live issues.⁴² She married her long-time partner, Sam Asghari.⁴³ She has also triggered a resurgence in worries about

39. Claudia Canavan, *Britney Spears Calls for Her Dad to Face Abuse Charges, in a New Court Appearance*, WOMEN'S HEALTH (July 15, 2021), <https://www.womenshealthmag.com/uk/health/a36898523/britney-spears-conservatorship-denied/#:~:text=Speaking%20to%20the%20court%20via,with%20her%20partner%2C%20Sam%20Asghari>; see Blistein, *supra* note 33.

40. See CAL. PROB. CODE § 1950 (2022). It is unclear if Britney's case met the statutory requirements of California law to permit sterilization.

41. See, e.g., Carter Barrett, *Britney Spears Left Her Guardianship, but Others Who Want Independence Remain Stuck*, NAT'L PUB. RADIO (Jan. 9, 2022, 7:00 AM ET), <https://www.npr.org/sections/health-shots/2022/01/09/1065301762/britney-spears-left-her-guardianship-but-others-who-want-independence-remain-stu> (detailing how reform efforts in Indiana and Ohio have failed to deliver on results sought by activists because of a "lack of enforcement").

42. Leyla Mohammed, *Britney Spears's Conservatorship Was Terminated a Year Ago, but She's Still Fighting Several Battles Against Her Parents, Exes, and Kids*, BUZZFEED NEWS (Nov. 12, 2022, 3:01 AM), <https://www.buzzfeednews.com/article/leylamohammed/britney-spears-conservatorship-terminated-a-year-ago-roundup> (noting live issues as of the time of authorship).

43. Katie O'Malley, *Britney Spears and Sam Asghari's Wedding: Everything You Need to Know*, ELLE (July 1, 2022), <https://www.elle.com/uk/life-and-culture/culture/a37702973/>

her health over her social media posts, which can border on the bizarre.⁴⁴ But leaving aside the fact that bizarre social media posts are really the norm for the modern Internet, the rhetoric surrounding Britney's post-conservatorship life raises concerns that the public remains generally unlearned about the inherent dangers of intrusive media coverage of private individuals, over-protective public responses, and in particular, forced medical care in conservatorships. Britney has shared that she remains committed to bettering her mental health on her own terms.⁴⁵ To sustain the victories of the Free Britney movement, it is vital to understand the modern practices and historical underpinnings that make conservatorships a suspect solution for mental health care.

III. Conservatorships: A Brief Legal History

A. Modern Procedural Practices

Approximately 1.3 million adults are currently under guardianship or conservatorship across the United States.⁴⁶ These legal relationships represent assets worth over \$50 billion, managed by an assortment of courts, conservators, and professionals.⁴⁷ Their exact terms and procedures

[britney-spears-sam-asghari-wedding/](#).

44. See, e.g., *Britney Spears Fans Are Concerned for Her Wellbeing After Her Recent Instagram Posts*, GRAZIA (Nov. 5, 2022), <https://graziadaily.co.uk/celebrity/news/britney-spears-instagram-posts-mental-health-concerns/>.

45. See Tomás Mier, *Britney Spears Says She 'Still Needs Lots of Healing' and Has the 'Intention to Do My Best'*, PEOPLE (Nov. 30, 2021, 3:30 PM), <https://people.com/music/britney-spears-says-she-still-needs-lots-of-healing/>. To the extent Britney does struggle with her mental health, that struggle is not hers alone. See *generally About Mental Health*, CTR. DISEASE CONTROL, <https://www.cdc.gov/mentalhealth/learn/index.htm> ("More than 1 in 5 US adults live with a mental illness.") (last reviewed Apr. 25, 2023). For people struggling with their mental health, the CDC suggests talks to people you trust, such as friends, family, or a trained professional. *Coping with Stress*, CTR. DISEASE CONTROL, <https://www.cdc.gov/mentalhealth/tools-resources/index.htm> (last reviewed Apr. 25, 2023). For an emergency, confidential crisis resources are available, including the suicide prevention lifeline at 988. *People Seeking Help*, CTR. DISEASE CONTROL, <https://www.cdc.gov/mentalhealth/tools-resources/individuals/index.htm> (last reviewed Apr. 27, 2023).

46. *Social Security's Representative Payee Program: Hearing Before the Subcomm. on Oversight & Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 115th Cong. 42 (2017) [hereinafter *Hearing*] (statement of Brenda K. Uekert, Principal Court Research Consultant, National Center for State Courts).

47. *Id.*; see also Laurel Wamsley, *Britney Spears Is Under Conservatorship. Here's How That's Supposed to Work*, NAT'L PUB. RADIO (Jun. 24, 2021, June 24, 2021 5:36 PM), <https://www.npr.org/2021/06/24/1009726455/britney-spears-conservatorship-how-thats->

vary across the nation. For example, in Nebraska, as in most states, ‘guardianship’ refers to the entire category of court-appointed decision-making on behalf of an incapacitated person, whereas ‘conservatorship’ refers to either the court’s direct participation in decision-making or an individual appointed to discharge fiduciary duties specifically.⁴⁸ California, on the other hand, appoints guardians for the benefit of children, while conservators are appointed for the general caretaking and decision-making responsibilities of incapacitated adults.⁴⁹ What remains the same in every state is that courts, whether by guardianship or conservatorship, may appoint a specified person to administer the medical, financial, and other major decisions on behalf of a person deemed unable to do so herself, for reasons related to disability or age.⁵⁰

The procedural requirements for establishing a conservatorship are broadly similar across the country, despite terminological differences. Nearly anyone can file a petition for a conservatorship in most states, although courts usually look for a nexus between the petitioner and the proposed conservatee.⁵¹ In fact, states that do limit standing for conservatorship petitions categorically exclude only one class of persons from filing a petition for the creation of a conservatorship: creditors of the proposed conservatee.⁵² Once the petition has been filed and a hearing date set, the court makes findings of fact as to the incapacity of the proposed conservatee.⁵³ Many states require that these findings be made upon a showing of clear and convincing evidence.⁵⁴ The court may require, based

supposed-to-work (explaining that Spears’ father exercised control over her \$60 million estate as conservator).

48. NEB. REV. STAT. §§ 30-2620, 30-2639 (2022); *see also* *Hearing, supra* note 46, at 42.

49. CAL. PROB. CODE §§ 1510, 1610 & 1800.3-1801 (2022).

50. *Hearing, supra* note 46, at 42.

51. *See, e.g.*, NEB. REV. STAT. § 30-2619 (permitting “[t]he person alleged to be incapacitated or any person interested in his or her welfare” to petition the court for the creation of a conservatorship); *see also* CAL. PROB. CODE § 1820 (2022) (listing spouses, relatives, interested state entities, or friends as persons who are eligible to file a petition for conservatorship).

52. *Compare* CAL. PROB. CODE § 1820(c) (excluding creditors, with narrow exceptions, from those who may file a petition for the creation of a conservatorship), *with* NEB. REV. STAT. § 30-2619(a) (excluding no one from the class of people who may file a petition for the creation of a conservatorship).

53. *See, e.g.*, NEB. REV. STAT. § 30-2619.

54. *See, e.g., id.* § 30-2620; 30 OKLA. STAT. § 3-111(A)(4) (2022) (applying clear and convincing standard for adult guardianships in a similar manner).

on its findings of incapacity, that the conservatorship be limited in scope, whether by restricting the duties and authority of the conservator or the duration of the conservatorship.⁵⁵

Terminating a conservatorship is more difficult than its creation. Many conservatorships will end upon the death of the conservatee or the conservator.⁵⁶ States retain statutory clauses that permit either the conservatee or any other person to petition the court for a re-adjudication of the question of incapacity in order to remove the conservator and end the conservatorship.⁵⁷ Termination of a conservatorship thus generally requires that the facts that originally justified the conservatorship either no longer exist or no longer justify its existence. Such a finding must be evaluated under the standard of clear and convincing evidence.⁵⁸ Conservatorships are steeped in procedural barriers that make it difficult to end them.⁵⁹

A traditional tool used by courts when suspicion of misconduct is raised is the appointment of a guardian or conservator ad litem.⁶⁰ Guardians ad litem are typically attorneys appointed to represent the best interests of the person under conservatorship or conservatee.⁶¹ When the court first orders a conservatorship, it usually appoints a guardian ad litem during the initial proceedings.⁶² The term “ad litem” literally means “for the suit,” and once a

55. See, e.g., *In re Guardianship & Conservatorship of Larson*, 708 N.W.2d 262, 275 (Neb. 2006) (applying Nebraska law and analyzing that a conservatorship may be limited in scope and duration).

56. See, e.g., NEB. REV. STAT. § 30-2622 (“The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in section 30-2623.”).

57. See, e.g., *id.* § 30-2623(b).

58. See, e.g., *id.* § 30-2623(c) (specifying that the same procedures apply for termination of conservator as appointment of conservator); *id.* § 30-2620 (applying clear and convincing standard for appointment of conservator).

59. See Jenica Cassidy, *Restoration of Rights for Adults Under Guardianship*, 36 BIFOCAL 63, 64 (2015).

60. Kelly Crowe, *Statutory Provisions for Guardians Ad Litem*, AM. BAR ASS'N (Aug. 1, 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol--39/issue-6--july-august-2018-/statutory-provisions-for-guardians-ad-litem/.

61. *Id.* Guardians ad litem are not advocates on *behalf* of the conservatee; instead they are charged with a duty to dispassionately evaluate and represent the best interests of the conservatee to the court. *Id.*

62. See, e.g., TEX. EST. CODE § 1101.053(a) (2022) (“Before a hearing may be held for the appointment of a guardian, current and relevant medical, psychological, and intellectual testing records of the proposed ward must be provided to the attorney ad litem appointed to represent the proposed ward”); N.D. CENT. CODE § 30.1-29-07 (2022).

permanent conservator is appointed, the role of the guardian ad litem typically ends.⁶³ Courts are empowered to reappoint guardians ad litem where they believe the best interests of the conservatee are no longer ably protected by the conservator.⁶⁴ But the court's ability to judge where such conditions are met depends on the conservator's annual filed report, rendering reappointment an infrequent and underutilized tool for the legal safeguarding of the conservatee.⁶⁵

The role of the guardian ad litem roughly mirrors that of the court visitor. Court visitors are not lawyers, but usually have a background in mental health, social work, or other relevant expertise.⁶⁶ They are generally appointed in tandem with guardians ad litem in order to investigate the incapacity of the conservatee, the relationship between the conservator and the conservatee, and any other relevant factors the court requires for its fact-finding.⁶⁷ Like guardians ad litem, court visitors are often utilized while the court weighs the petition for the creation of a conservatorship.⁶⁸ But also like guardians ad litem, their role may be diminished once the conservatorship is created.⁶⁹

Conservatorships are entangled in a confusing array of terminology that makes their study more than frustrating. States vary widely in the form and style given to these protective arrangements, but the underlying structure

63. *Ad Litem*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 163 (1997) ("The modern-day guardian ad litem is authorized only to represent the rights and interests of his ward in the proceeding that gave rise to his appointment, and his authority ends when the final judgment or decree resulting from those proceedings is rendered.").

64. See, e.g., CAL. PROB. CODE § 1003(a) (2022) ("The court may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding under this code to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate.").

65. See ERICA WOOD ET AL., AM. BAR ASS'N COMM'N ON L. & AGING, RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH & RECOMMENDATIONS 19 (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf ("Following appointment of a guardian, the court is to have continuing oversight under state law and receive regular reports and accountings. However, in practice, judicial monitoring varies widely, and often guardians have little supervision.").

66. Crowe, *supra* note 60.

67. *Id.*

68. *Id.*

69. See *id.*

remains the same. Across geographic and historical differences, the asserted legislative goal of conservatorships, the protection of the disabled, is in fundamental tension with the ethical dilemmas presented by the management of the conservatee's assets and property. One consistent, historical theme, however, is that the medical interests of the conservatee have often yielded to the property interests of the conservator.

B. Historical Practices

Evidently, the practice of placing the assets of people who are older or disabled in conservatorships began as early as the Ancient Greek civilizational period.⁷⁰ In that age, the fate of a potential conservatee rested on the notion of incapacity, a legal classification within which women, children, slaves, and the disabled fell.⁷¹ Capacity, at the highest level of generality, was composed of “the ability to hold rights and to be subject to duties,” and “the capacity to establish, exercise, transfer or renounce rights, namely to perform legal acts, such as contracts, wills, and claiming in courts.”⁷² As the broad category of legally incapable persons showcases, the ancient law of capacity was rarely concerned with the actual health of individuals as much as it was concerned with the concentration of wealth in the hands of relatively privileged, free, and abled men. Capacity, therefore, functioned as a social truth, rather than a medical one, and was used to satisfy the public good.⁷³ The established justification for much of property

70. See A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 8–10 (1997) (documenting the case of Sophocles and his son's unsuccessful attempt to have him declared incompetent).

71. Nili Cohen, *Modern Guardianship in Historical Perspective*, in ANCIENT GUARDIANSHIP: LEGAL INCAPACITIES IN THE ANCIENT WORLD 11, 15 (Uri Yiftach & Michele Faraguna eds., 2013). Cohen suggests that a distinction existed between “natural” incapacity, referring to women and children, and “legal” incapacity, referring to the disabled whose incapacity had to be decided and verified by a court of law; his assertion, however, relies on a distinction made in modern Israeli law generalized into an abstraction of Western notions of incapacity, and he provides no ancient historical record to support the claim that such a distinction existed in Ancient Greece, Egypt, or Rome. See *id.*

72. *Id.* at 13 (citing Andreas Heldrich & Anton F. Steiner, *Persons*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY §§ 2.1–2.10, 2.11–2.40 (Aleck Chloros et al., eds. 2004)).

73. Michele Faraguna, *Guardianship in Ancient Societies: Concluding Remarks*, in ANCIENT GUARDIANSHIP: LEGAL INCAPACITIES IN THE ANCIENT WORLD, *supra* note 71, at 273, 277.

law, the maximization of efficient use,⁷⁴ similarly justified the placement of an incapacitated individual in the hands of another.⁷⁵ In fact, this justification may explain the adversarial posture of ancient cases cited in the scholarship. The next of kin were viewed as inherently interested in their inheritance at stake in legal findings of incapacity, not the health and well-being of the disabled person.⁷⁶

Across the channel, the early law of England was hopelessly incapable of capturing and resolving the nuances presented by people with disabilities. Scholarly opinions as to the rationale for this omission range from conclusions that the law was too disjointed to properly care for disabled people, to blunt assessments that the law simply did not properly exist in this area.⁷⁷ There is near-unanimous consensus, however, that, to the extent the law was confronted with the interests of disabled people, it focused principally and almost exclusively on the interests in her assets and property, to the neglect of her best interests in health, personhood, or life generally.⁷⁸ Thus, in nearly all cases, it was the prevention of economic waste and inefficiency that motivated the structure of primitive conservatorship law.

The contours of modern-day conservatorship began to take shape in the late thirteenth century, as the common law started to coalesce around importations from the Continent, the canon law of the Church, and the ancient civil law of Rome.⁷⁹ Later, the Crown began to assume secular

74. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 81–85 (6th ed. 2016).

75. See Michele Faraguna, *Guardianship in Ancient Societies: Concluding Remarks*, in *ANCIENT GUARDIANSHIP: LEGAL INCAPACITIES IN THE ANCIENT WORLD*, *supra* note 71, at 273, 277.

76. See *id.*; see also Johns, *supra* note 70, at 8.

77. R.H. Helmholz, *The Roman Law of Guardianship in England, 1300–1600*, 52 *TUL. L. REV.* 223, 224 (1978); AM. BAR FOUND., *THE MENTALLY DISABLED AND THE LAW* 218 (Frank T. Lindman & Donald M. McIntyre eds., 1961) (“No institution for the care of the mentally disabled existed in England until long after the Norman Conquest.”).

78. Johns, *supra* note 70, at 18 (“Agencies or private citizens appointed as guardians . . . depleted the estate and discarded the person.”); see also AM. BAR FOUND., *supra* note 77, at 218; Paul L. G. Brereton, Just., Sup. Ct. New South Wales, *Lecture on Legal History to Sydney Law School: The Origins and Evolution of the Parens Patriae Jurisdiction* 2–3 (May 5, 2007), https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Brereton_050517.pdf (documenting the practice of auctioning off wardships as a “recognised revenue-raising method”); Helmholz, *supra* note 77, at 225 (noting that guardianships of heirs to feudal estates were treated by the common law “as a lucrative right rather than as a trust for the child’s benefit”).

79. See Johns, *supra* note 70, at 17–18.

responsibilities for orphans and the disabled.⁸⁰ While the precise basis for the Crown's increasing interest in the affairs of the less fortunate is unclear, the Crown attached significant financial value to the property of the disabled.⁸¹ The Crown's interest in the administration of these wards was soon codified in statute as a royal prerogative of the King, curtailing the dominance of the common law courts in this area of law.⁸² In the Tudor and Elizabethan periods, this constitutional shift reached its peak for two principal reasons.⁸³ First, as Henry VIII sought independence from the Roman Church, it became increasingly important to justify the unprecedented "omnipresence" of the King's power.⁸⁴ Second, the rise of England as a world power precipitated a shift in constitutional power.⁸⁵ Parliament's clumsy handling of the ever-growing swaths of empire demanded increasing deference to the Crown.⁸⁶ Under the imperial flag, the power of the King's prerogative required an expansive interpretation.

The consequence of these developments resulted in the establishment of the doctrine of *parens patriae*.⁸⁷ *Parens patriae* conceptualized the

80. Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195–96 (1978).

81. *Id.* at 196 ("The extent of the 'beneficial interest' involved is illustrative of how valuable this type of wardship could have been to the crown: partially as protection for the [person] and partially as compensation for the king's services, all transfers of property by the [person] were voided, and the profits of his land went to the crown."); see also ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 127 (11th ed. 2022) ("[A]ll income from rents in excess of the amount necessary for support belonged to the guardian personally. Thus guardianships, then known as wardships, were very profitable for the guardian.").

82. Custer, *supra* note 80, at 195.

83. See *id.* at 200.

84. *Id.*

85. See Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 575–78 (2018) (discussing the scholarly advocacy for an imperial sovereignty resting in the King, not Parliament).

86. *Id.*

87. See *Falkland v. Bertie* (1696) 23 Eng. Rep. 814, 818, <http://www.commonlii.org/uk/cases/EngR/1696/25.pdf>. As the court noted in the *Falkland* case:

In this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, [people with mental health disabilities] &c., afterwards such of them as were of profit and advantage to the King, were removed to the *Court of Wards* by the statute; but upon the dissolution of that court, came back again to the Chancery, where the interests of infants are so far regarded and taken care of, that no decree shall be made against an infant, without having a day given him to shew

government as “parent of the nation” and therefore a protector of the unprotected.⁸⁸ The doctrine arguably made an improvement over the prior practice. The figment of legal imagination that recast jurisdiction over disabled people as stemming from a paternal (now parental) concern meant that the “benefit of the ward” became the governing principle for administering their property and persons.⁸⁹ The novelty of this jurisdictional basis also insulated it from the potential ill effects of statutory and common law precedent, or lack thereof.⁹⁰ On the other hand, this paternalism of jurisdiction smuggled in insidious assumptions about disabled people, which continue to justify their mistreatment and oppression.⁹¹ The bald assertion that the disabled must be cared for by the state, as their parent, did nothing to alleviate the marginalization of disabled people from public fora. Instead, the very purpose and implementation of *parens patriae* further marginalized and exacerbated the procedural defects of the earlier regime; indeed, in some cases, it may have worsened these issues.⁹² For example, the fact that the conservatorship process was non-adversarial meant that the

cause after he comes of age.

Id.

88. Jean Strout et al., *Protecting Youth from Themselves: The Overcriminalization of Consensual Sexual Behavior Between Adolescents*, 40 CHILD. LEGAL RTS. J. 1, 4 (2020). See generally David Pimentel, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished*, 71 OKLA. L. REV. 885, 890 (2019) (discussing the development of *parens patriae* and its application to children in English common law).

89. Brereton, *supra* note 78, at 6.

90. *Id.* (quoting *Eyre v Shaftsbury* (1722) 24 Eng. Rep 659, 664).

91. See Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 824–25 (discussing the limits of paternalism in the context of sterilizing people with mental disabilities because it “unnecessarily restricts the individual’s interest in reproductive autonomy”). Paternalism is also, in itself, a form of oppression. SHANE CLIFTON, ROYAL COMM’N INTO VIOLENCE, ABUSE, NEGLECT & EXPLOITATION OF PEOPLE WITH DISABILITY, HIERARCHIES OF POWER: DISABILITY THEORIES AND MODELS AND THEIR IMPLICATIONS FOR VIOLENCE AGAINST, AND ABUSE, NEGLECT, AND EXPLOITATION OF, PEOPLE WITH DISABILITY 6 (2020), <https://perma.cc/W88W-3KK4> (“Paternalism is often subtle in that it casts the oppressor as benign, as protector, and enables people in power to express sincere sympathy for people with disability while keeping them socially and economically subordinate.” (quoting JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 53 (1998))).

92. See Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 221 (1975).

rigor of this process often fell far short of the otherwise lofty standards applicable elsewhere.⁹³

Parens patriae continues to form the constitutional basis of conservatorships today. The early history of American conservatorship law makes clear that its potential for abuse has long been recognized, and courts instruct that “[d]isabling statutes are to be construed strictly, because [they are] in derogation of private rights.”⁹⁴ But the power of the state to implement conservatorships has never been seriously challenged. By the time of the drafting of the U.S. Constitution, the *parens patriae* power of the equitable courts had been a well-settled exercise of jurisdiction. Once the states were established, “the ‘royal prerogative’ and the ‘parens patriae’ function of the King passed to the States.”⁹⁵ In this manner, *parens patriae* came to provide the constitutional authority for the states’ statutory schemes of conservatorship as an exercise of their reserved police powers.⁹⁶

Beyond legislative jurisdiction, *parens patriae* also forms the basis of adjudicative jurisdiction. In *In re C. D. M.*, the Supreme Court of Alaska held that a state court of general jurisdiction has subject matter jurisdiction over a petition to sterilize a disabled person *even in the absence of statutory authority to do so*.⁹⁷ The court reasoned that *parens patriae* jurisdiction inhered to the general jurisdiction of a lower court, as part and parcel of the tradition of equity that state courts inherited in the common law.⁹⁸ Thus,

93. *See id.*

94. *Hamilton v. Colwell*, 10 R.I. 39, 40 (1871).

95. *Hawaii v. Standard Oil. Co. of Cal.*, 405 U.S. 251, 257 (1972).

96. Margaret S. Thomas, *Parens Patriae and the States’ Historic Police Power*, 69 SMU L. REV. 759, 802–07 (2016). Thomas makes an emphatic argument against the *Hawaii* postulate that State governments possess authority to act as *parens patriae* outside of any legislative enactment. *Id.* at 770. Instead, Thomas claims *parens patriae* is a power coextensive with the States’ police power to legislate in the areas of “health, safety, and welfare.” *Id.* at 804 (citation omitted); *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.” (citing, *inter alia*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 1824)) (upholding vaccinations mandated by the state government). Thomas’ distinction plays an important role in the context of state-as-plaintiff cases, but also implicates this Comment’s discussion of conservatorships. For now, it is sufficient to say here that *parens patriae* provided a police power justification for state legislative authority to enact conservatorship statutes.

97. 627 P.2d 607, 612 (Alaska 1981).

98. *Id.* at 610–11 (quoting *Strunk v. Strunk*, 445 S.W.2d 145, 147 (Ky. App. 1969) (“It is a universal rule of equity that where a person is not equal to protecting himself in a

under the constitutional law of Alaska, it is for the courts, and not the legislature, to make medical policy for disabled people, a power that can only be transformed or abrogated by the express enactment of positive law.⁹⁹ This extraordinary 1981 decision was in fact the rebirth of the rationale of *Falkland v. Bertie*, where another court created its own jurisdiction and laid the original foundations of *parens patriae* in 1696.¹⁰⁰ Alaska is not alone in the establishment of such broad jurisdictional powers for its courts: Kentucky, Minnesota, Washington, and other states all have decisions or dicta supporting the result in *C. D. M.*¹⁰¹

IV. Constitutional Arguments: An Unfinished Battle

A. Key Constitutional Landmarks

Because of *Buck*, the phrase “[t]hree generations of imbeciles are enough” forms the touchstone of disability rights in the United States.¹⁰² These words “breathed new life into an otherwise fading public eugenics movement.”¹⁰³ The ideological premise of this movement sought to propagate the practice of selectively encouraging, discouraging, or preventing reproduction by certain members of society for the greater good.¹⁰⁴ Historically, eugenics was the product of progressive era ingenuity, with its most influential support coming from figures like Margaret Sanger, who viewed it as a cure for societal ills.¹⁰⁵ In the United States, the theory was particularly popular among mental health professionals, who oversaw

particular case, the court will protect him. As part of the inherent power of equity, a court of equity has full and complete jurisdiction over the persons of those who labor under any legal disability and also over their property . . .”).

99. *Id.* at 610 (“Where a court is one of general jurisdiction, such as the superior court in the case at bar, it has traditionally been regarded as having the power to hear all controversies which may be brought before a court within the legal bounds of rights or remedies, except insofar as has been expressly and unequivocally *denied* by the state’s constitution or statutes.”).

100. (1696) 23 Eng. Rep. 8148.

101. *C. D. M.*, 627 P.2d at 610 (collecting cases in support of the courts holding).

102. *Buck v. Bell*, 274 U.S. 200, 207 (1927). See generally Jasmine E. Harris, *Why Buck v. Bell Still Matters*, HARV. L. SCH., PETRIE-FLOM CTR.: BILL OF HEALTH (Oct. 14, 2020), <https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters/>.

103. Harris, *supra* note 102.

104. *Eugenics and Birth Control*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/pill-eugenics-and-birth-control/> (last visited Feb. 15, 2023).

105. *Id.*

vast numbers of sterilizations in the name of eugenics.¹⁰⁶ Eugenics was almost always accompanied by anti-Semitic and anti-Black racism, leading to its inextricable association with white supremacy and subsequent decline in popularity.¹⁰⁷ Nonetheless, its simple starting assumption—that some people are less worthy than others—continues to drive conversations about disabilities in the United States and the world. The movement’s long life is partially the result of *Buck*, which receives much of the credit for its continuity.¹⁰⁸

Buck’s factual and procedural origins are often derided as a “contrived” or “collu[ded]” case.¹⁰⁹ Carrie Buck was chosen as the unfortunate test plaintiff for the case.¹¹⁰ Born into poverty, Buck was separated from her mother at an early age and placed in foster care with the Dobbs family who withdrew her from school so she could be a houseworker for them.¹¹¹ Their nephew raped Buck when she was 17, and to preempt the embarrassment of a potential pregnancy, the Dobbs family sent her to the Virginia Colony for the Epileptic and the Feebleminded (“the Colony”).¹¹² There, she was selected to be forcefully sterilized under a new Virginia statute authorizing such procedures.¹¹³ The Colony appointed its own former director as counsel for her and launched their litigation into the Supreme Court to receive confirmation that their actions were lawful.¹¹⁴

The Court seemed only too happy to oblige. Eight Justices, led by Justice Holmes, disposed of the constitutional challenge by briefly dispensing with three core doctrines in quick succession: procedural due process, substantive due process, and equal protection.¹¹⁵ After surveying the medical and formal procedure of sterilization, the Court concluded that the “scrupulous” and “carefully considered” procedure of Virginia’s

106. Adonis Sfera, *Can Psychiatry Be Misused Again?*, FRONTIERS IN PSYCHIATRY, Sept. 2013, <https://www.frontiersin.org/articles/10.3389/fpsy.2013.00101/full> (“Between 1907 and 1940 a total of 18,552 insane individuals were sterilized in the United States.”).

107. See Caitlin Fendley, *Eugenics Is Trending. That’s a Problem*, WASH. POST (Feb. 17, 2020, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2020/02/17/eugenics-is-trending-thats-problem/>.

108. Harris, *supra* note 102.

109. Suuberg, *supra* note 10, at 117, 120.

110. Suuberg, *supra* note 10, at 121.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 122.

115. See *Buck v. Bell*, 274 U.S. 200, 207 (1927).

sterilization statute at issue in the case made it impossible to reproach under procedural due process.¹¹⁶ Next, the Court considered the claim's substantive due process protections.¹¹⁷ Here, Justice Holmes categorically endorsed the state's interest in "prevent[ing] our being swamped with incompetence."¹¹⁸ He analogized Buck's sterilization to the Court's *Jacobson v. Massachusetts* decision, which upheld mandatory vaccinations.¹¹⁹ The Court passed on the argument of Equal Protection without pause and ambivalently pointed out that the clause was "the usual last resort of constitutional arguments."¹²⁰ Concluding that "the law does all that is needed when it does all that it can," the Court dismissed the underinclusiveness of Virginia's statute.¹²¹ Once all was said, done, and written, the U.S. Reports published another addition to the anticanon of Supreme Court jurisprudence.¹²²

The Court's decision in *Buck* remains good law today, and conservatorships in particular have felt its impact. Most compelled sterilizations today appear to occur in the context of guardianships and conservatorships.¹²³ At a more abstract and general level, however, *Buck* set the outer limits of the Constitution's Due Process Clause. By essentially reading disabled people out of the Constitution, the Court abdicated

116. *Id.* at 207.

117. *See id.*

118. *Id.*

119. *Id.* (citing 197 U.S. 11 (1905)) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.")

120. *Id.* at 208.

121. *Id.*

122. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 389 (2011) (listing *Buck* as one of fifteen cases cited amongst all seventy-one scholarly articles discussing anticanon or "antiprecedential" cases). Professor Greene suggests that *Buck* is not antiprecedential to the same extent as cases like *Plessy v. Ferguson* because the opinion, high on rhetoric, is "sui generis" in its application, and that "reasonable opportunities for associating an opponent's position with these claims will presumably be rare." *Id.* at 462–63 n.554. This assertion overlooks the jurisprudence of disability rights injustice that stems from *Buck*, with specific implications in the context of conservatorships. Today, *Dredd Scott* has no formal application because of the Reconstruction Amendments – and yet, its functional legacy lives on. Just so with *Buck*.

123. Hilary Eisenberg, Note, *The Impact of Dicta in Buck v. Bell*, 30 J. CONTEMP. HEALTH L. & POL'Y 184, 192 n.64 (2013) ("Presently, sterilization procedures in an involuntary context are generally largely issues of guardianship and ability to consent." (first citing *In re Grady*, 426 A.2d 467, 474 (N.J. 1981); then citing *In re Guardianship of Hayes*, 608 P.2d 635, 641–42 (Wash. 1980) (en banc); and then citing *In re Terwilliger*, 450 A.2d 1376, 1378 (Pa. Super. Ct. 1982)).

oversight from the federal courts over the insidious practices prevalent in several states.¹²⁴ Because conservatorships are exclusively a creature of state law, the constitutionality of conservatorship practices or procedures are rarely decided by federal courts. But *Buck* established a novel, if less than legal, standard of deference to states when they act under their police power in the area of mental health. This deference essentially insulates conservatorships from the kind of constitutional review it so desperately needs.

A more than sufficient theoretical starting point to view the potential impact of these constitutional requirements is *Skinner v. Oklahoma ex rel. Williamson*,¹²⁵ which amply demonstrates the effect of both the Due Process and Equal Protection Clauses in the context of prisons. In *Skinner*, the Court took a radically different approach to sterilization. The Oklahoma Legislature adopted a forced sterilization policy for people convicted on multiple crimes on the purported premise that certain criminal traits were genetic, and therefore sterilization would prevent their inheritance.¹²⁶ Oklahoma believed sterilization would encourage progressively more law-abiding conduct by newer generations over time.¹²⁷ The Court held unanimously in favor of *Skinner*, pointing out that the law determined the “inheritability” of criminal traits differently for different crimes without further justification.¹²⁸ This distinction failed to treat similarly situated criminal offenders in the same way, thus subjecting some offenders to the exacting sentence of sterilization on a potentially arbitrary basis. “The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.”¹²⁹

The Court’s opinion, written by Justice William Douglas, went to great pains to distinguish *Skinner* from *Buck*,¹³⁰ but the grounds for this distinction are not readily apparent. The majority differentiated *Skinner* because it involved “one of the basic civil rights of man,” even though the

124. *See id.* at 197 (“Challenges to sterilization provisions addressing substantive issues arising from the content or intent of the statutes, as addressed to some extent in *Buck v. Bell*, have not since been addressed on a federal level.”).

125. 316 U.S. 535 (1942).

126. *See id.* at 536.

127. *See id.* at 536–39.

128. *Id.* at 541–42.

129. *Id.* at 542. Only two differences emerge facially: Jack Skinner was a prisoner and Carrie Buck was a mental health ward; Jack Skinner was a man and Carrie Buck was a woman. *Compare* *Buck v. Bell*, 274 U.S. 200, 205 (1927) *with* *Skinner*, 316 U.S. at 537.

130. *Skinner*, 316 U.S. at 541–42.

very same right was at issue in *Buck*.¹³¹ In any event, Douglas's line is dicta, because the Court made no finding as to the status of this right under the Due Process Clause. Instead, later in the opinion, the Court reasoned that in *Skinner*, unlike *Buck*, the state had not provided sufficient evidence that the criminal traits it sought to prevent from passing on were, in fact, inheritable, or that criminal traits were not inheritable for crimes not punished with sterilization (a classic over and underinclusive issue).¹³² The Court in *Skinner* thus adopted an analysis quite distinct from that of the Court in *Buck*; namely, by shifting its focus from the Due Process Clause to the Equal Protection Clause.

The Court, however, was not united in this approach. In a separate concurrence, Chief Justice Stone turned directly to due process.¹³³ The concurrence seemed uncertain that resorting to the Equal Protection Clause could actually provide the constitutional protection sought by the Court's majority.¹³⁴ This opinion questioned the nuances of genetic inheritability as too susceptible to mischief, particularly for something the Court's majority opinion regarded as a "basic civil right[] of man."¹³⁵ Chief Justice Harlan Stone preferred instead that sterilization of any person not be permitted "without giving him a hearing and opportunity to challenge...the only facts which could justify so drastic a measure."¹³⁶ Chief Justice Stone reasoned that the state had "no permissible end" in denying such a process. This language foreshadowed the still evolving nature of substantive and procedural due process under the Fourteenth Amendment.¹³⁷

The Court's majority opinion impacted sterilization laws generally, for although it was narrowly tailored to the facts before the Court at the time, it signaled a lack of enthusiasm on the Court for sterilization.¹³⁸ *Skinner*

131. *See id.* at 541.

132. *See id.* at 542.

133. *Id.* at 543–44 (Stone, C.J., concurring).

134. *Id.* ("If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none.")

135. *Id.* at 541 (majority opinion).

136. *Id.* (Stone, C.J., concurring).

137. *See id.* at 545 (Stone, C.J., concurring).

138. BRUCE KAPPEL, MINN. DEP'T OF ADMIN., MORAL AND ETHICAL ISSUES SPECIFIC TO DEVELOPMENTAL DISABILITIES: GUARDIANSHIP, INVOLUNTARY SERVITUDE, STERILIZATION, BABY DOE, EUTHANASIA 20 (2009), https://mn.gov/mnddc/honoring-choices/cnnReports/Moral_and_Ethical_Issues-Kappel.pdf ("Although *Skinner v. Oklahoma* did not apply to

chilled forced sterilization, especially as legislatures amended their statutes to include evidence of inheritability.¹³⁹ But the Court left untouched the constitutionality of forced sterilization itself, and in the realm of mental health, sterilization continued to find favor.¹⁴⁰ Across the country, states shifted the rationale for sterilization statutes from the inheritability of particularly undesirable genetic traits to an assertion that disabled people were themselves a burden on society as unfit parents.¹⁴¹ Under this justification, sterilization statutes eluded the holding of *Skinner* and continued to offer a legal method to curtail the population growth of undesirable groups, such as Black Americans or Mexican Americans.¹⁴² For example, in Nebraska, the sterilization statute was amended to *broaden* its scope, requiring only that a person be found “mentally deficient” and “physically capable of bearing or begetting offspring” in order to be sterilized as a condition for release from a mental institution.¹⁴³ The Nebraska Supreme Court upheld the statute and quoted *Buck* extensively in reply to the due process claims of the challenger.¹⁴⁴ The court wrote: “The order does not require her sterilization. It does provide, in accordance with the statute, that she shall not be released unless she is sterilized. *The choice is hers.*”¹⁴⁵

B. Procedural Due Process

What and when process is in fact due to a person are questions that remain to be developed by the courts and vary extensively by context specific distinctions.¹⁴⁶ For a state to constitutionally authorize a conservatorship for a disabled person, there is no doubt that due process

people with disabilities, it raised the anxiety level surrounding the issue of forced sterilization.”).

139. *Id.*

140. *See id.* at 20–21.

141. *Id.* at 20.

142. *See id.*

143. *See id.* at 21 (citing NEB. REV. STAT. § 83-501–508 (repealed 1969)).

144. *In re Cavitt*, 159 N.W.2d 566, 568 (Neb. 1968). One year after *Cavitt*, the Nebraska Legislature repealed the sterilization statute at issue in the case.

145. *Id.*

146. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (rejecting a “technical conception” of due process in favor of a triple factor analysis balancing the private interest, the government interest, and the risk of erroneous deprivation through status quo procedures and the value of additional procedural safeguards).

requires some floor of procedural protections.¹⁴⁷ But aside from the imposition of the conservatorship itself, which may (or may not) alone satisfy the requirements of due process, this Comment interrogates conservatorship law to determine the procedural protections needed for discrete decisions made within the conservatorship. That is, the Constitution may require additional processes, beyond the initial procedure for a conservatorship's formation when significant liberty interests are at stake, such as in the context of sterilization or contraception or other reproductive decisions.

The chief difficulty in discerning the process due to conservatees is that the vast majority of courts that evaluate the Constitution's role in conservatorships are state courts. Very few federal courts have ruled on the constitutional matters implicit in the imposition and administration of conservatorships. This conspicuous silence is the result of the *parens patriae* power of the states; conservatorships are a creature purely of state law, and thus principally and almost exclusively subject to the jurisdiction of state courts.¹⁴⁸ Furthermore, the very structure of conservatorships makes it difficult for conservatees to allege constitutional wrongdoing on the part of their conservator, for their legal representation is often in the hands of the conservatorship. These aspects of conservatorship law mean that state courts retain a monopoly on the jurisprudence of conservatorships, with disparate results that rarely, if ever, meet the rigorous standards of due process.¹⁴⁹

147. See, e.g., *In re Guardianship of Deere*, 1985 OK 86, ¶ 7, 708 P.2d 1123, 1125–26 (“This Court held in *D.B.W. . . .*, a case involving involuntary commitment for treatment of mental illness, that individual fundamental freedom cannot be abridged without compliance with due process of law. The same rationale underpins the finding that guardianship proceedings must comport with constitutional notions of substantial justice and fair play.” (citation omitted)); *State ex rel. Shamblin v. Collier*, 445 S.E.2d 736, 739 (W. Va. 1994) (“It is axiomatic that a declaration of incompetency and the resulting appointment of a committee, guardian, or conservator to oversee an individual's affairs may affect constitutionally-guaranteed liberty interests . . .”).

148. Letter from Sens. Elizabeth Warren and Robert B. Casey to Secretary Xavier Becerra and Attorney General Merrick Garland 2 (July 1, 2021) [hereinafter *Warren-Casey Letter*], <https://www.warren.senate.gov/imo/media/doc/2021.07.01%20Letter%20to%20DOJ%20and%20HHS%20re%20Conservatorship.pdf> (conceding that “guardianship decisions lie exclusively within the authority of state courts”).

149. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS 7–8 (2010) (“[The study noted that]: (1) state courts failed to adequately screen potential guardians, appointing individuals with criminal convictions and/or significant financial problems to manage estates worth

The failure of federal courts to inquire into the procedural requirements of due process should not be taken for granted.¹⁵⁰ Applying the test outlined in *Mathews v. Eldridge* reveals the strength of constitutional arguments that federal courts should oversee the practice of states in the arena of mental health.¹⁵¹ Without a doubt, conservatorships impinge on liberty interests well recognized by the constitution; *Skinner* recognized nothing less than a fundamental liberty interest in the right to procreate, a right implicated by conservatorship decisions. Further decisions have only cemented the conclusion that the right to procreate is one that lies at the core of procedural protection.¹⁵²

The intrinsic invasiveness of contraceptive procedures strengthens the argument for procedural protection. IUDs, such as the one used by Britney, involve significant pain or discomfort upon insertion into the uterus, often likened to a particularly harsh menstrual cramp.¹⁵³ The aftermath can be equally severe, with an increase in menstrual bleeding associated with copper IUDs and other side effects including headaches, nausea, and ovarian cysts.¹⁵⁴ Tubal ligation, which is the obstruction of the fallopian

hundreds of thousands or millions of dollars; (2) state courts failed to adequately oversee guardians after their appointment, allowing the abuse of vulnerable seniors and their assets to continue; and (3) state courts failed to communicate with federal agencies about abusive guardians once the court became aware of the abuse, which in some cases enabled the guardians to continue to receive and manage federal benefits.”).

150. Aside from the constitutional arguments, there is some indication that the federal courts’ ignorance of conservatorships and other family law issues is grounded in willful misogyny. See DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 55 (5th ed. 2019); see also *Marshall v. Marshall*, 547 U.S. 293, 298 (2006) (discussing the almost inexplicable doctrine of the probate and domestic relations exception to federal subject matter jurisdiction, which divests federal courts of jurisdiction over narrow matters relating to domestic relations).

151. 424 U.S. 319, 335 (1976) (assessing procedural due process requires balancing the private interest, the public interest, and the risk of error as well as the value of additional safeguards).

152. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

153. Caroline Kitchener, *Patients Are Warned That IUDs Can Be ‘Uncomfortable.’ But Many Say The Pain Is Excruciating*, *THE LILY* (July 19, 2021), <https://www.thelily.com/patients-are-warned-that-iuds-can-be-uncomfortable-but-many-say-the-pain-is-excruciating/>.

154. Julia Hardeman & Barry D. Weiss, *Intrauterine Devices: An Update*, 89 *AM. FAM. PHYSICIAN* 445, 445 (2014).

tubes to prevent conception, is a permanent surgical procedure.¹⁵⁵ Hysterectomies, the removal of the female reproductive system partially or entirely, is also permanent and far more invasive.¹⁵⁶ These procedures are all medically complex and require careful consideration by the person undergoing the procedure before a doctor can ethically perform them.

The idea of a right to be free from unconsented, invasive medical procedures is not new to the law, derived as it is from the common law's view of bodily integrity.¹⁵⁷ According to many courts, in the context of medical procedures, bodily integrity is the basis of a right to refuse treatment, and so inheres to the liberty of persons protected by the Constitution.¹⁵⁸ People under conservatorships therefore have a liberty interest in being free from medically invasive procedures without their consent; this interest is thus the closest to a foregone conclusion one can achieve under the Constitution.¹⁵⁹

The constitutional framework therefore reveals at least two liberty interests at stake in conservatorships: a general interest to be free from bodily invasion and a more specific interest in reproductive freedom, i.e., to procreate. The former very likely includes the latter, but each protects a slightly different notion of liberty. The interest in bodily integrity is sourced from the deep well of the common law and protects people from unauthorized, i.e., unconsented touching. The interest in reproductive freedom is sourced from the more recent vintage of cases like *Skinner*, which suggested or held that implicit in liberty is a right to make choices with respect to sex and reproduction.

155. *Tubal Ligation*, MAYO CLINIC (Jan. 9, 2021), <https://www.mayoclinic.org/tests-procedures/tubal-ligation/about/pac-20388360>.

156. Melissa Conrad Stöppler, *Birth Control: Surgical Sterilization*, MEDICINET, https://www.medicinenet.com/surgical_sterilization/article.htm (last visited Feb. 20, 2023).

157. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (Chicago, Callaghan & Co. 1879) (“The right to one’s person may be said to be a right of complete immunity: to be let alone.”).

158. See, e.g., *In re Conroy*, 486 A.2d 1209, 1222 (N.J. 1985) (“The patient’s ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal.”); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017, 1021 (1991) (“We have declared that individuals have a common law right to determine for themselves whether to allow a physical invasion of their bodies.”).

159. See *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”).

As Britney's own case demonstrates, the existing procedures that supervise contraception and sterilization in the context of conservatorships are inadequate to protect disabled people from the erroneous deprivation of the twin rights to procreate and control bodily integrity. Record-keeping of conservatorships is also notoriously deficient. Anecdotal evidence from activists and advocates suggests that Britney's case is far from isolated.¹⁶⁰ In fact, some evidence asserts that women placed under conservatorships face contraception and (in extreme cases) sterilization *routinely*.¹⁶¹ These assertions are devoid of any statistical metric, but that deficiency is itself a result of the hands-off approach of the federal government. The failure to supervise protective mental health procedures in the several states has led to a dearth of data about conservatorships and their function.¹⁶² Regardless, in at least Britney's case and possibly more, the risk of deprivation of these twin rights was substantial and could have been remedied by formal, judicial oversight.

Another risk comes from the assessment of a conservatee's mental health status itself. Courts should be cautious in granting too much credence to the state's asserted interest when it seeks to authorize the sterilization of conservatees. While the potential harms of pregnancy are an established ground for the state to intrude into bodily autonomy, it may also smuggle in conceptions of mental health that are not only outdated, but medically ill-advised or incorrect.¹⁶³ In some cases, the state's interest in the mental health of a conservatee may be best served by abstaining from sterilization

160. Sara Luterman, *For Women Under Conservatorship, Forced Birth Control Is Routine*, THE NATION (July 15, 2021), <https://www.thenation.com/article/society/conservatorship-iud-britney-spears/>.

161. *Id.* ("No one with knowledge of conservatorship interviewed for this piece was surprised by any of Spears's allegations, including the ones around reproductive choice. Advocates say forced birth control and sterilization are still routine in the United States for women under conservatorship.")

162. Warren-Casey Letter, *supra* note 148, at 1 ("[C]omprehensive data regarding guardianship (referred to as conservatorship in some states) in the United States are substantially lacking—hindering policymakers and advocates' efforts to understand gaps and abuses in the system and find ways to address them.")

163. *See, e.g., In re C. D. M.*, 627 P.2d 607, 608 (Alaska 1981) ("Down's Syndrome individuals are characteristically highly susceptible to being sexually victimized by virtue of their very innocent, trusting and loving nature."); *cf. Sexuality & Down Syndrome*, NAT'L DOWN SYNDROME SOC'Y, <https://www.ndss.org/resources/sexuality/> (illustrating misconceptions about sexuality and Down Syndrome) (last visited Feb. 17, 2023).

procedures.¹⁶⁴ Mental health is a branch of medicine particularly susceptible to nuance and radical changes in short spans of time, thus making it imperative that courts keep abreast not only of the science but also of the accuracy in the factual record.

The Due Process Clause does not contemplate the “routine” deprivation of a protected liberty interest. It would require at least a maximally strong state interest to deprive it at all. The state’s *parens patriae* capacity likely supplies that interest. The state’s interest in the contraception of disabled people ostensibly flows from the state’s parental interest in their well-being. The effects of a potential pregnancy on a disabled person can indeed be substantial, ranging from complications in the pregnancy itself¹⁶⁵ to the physiological and psychological effects of pregnancy and childbirth.¹⁶⁶ But the strength of a disabled person’s interest in her procreative ability and her freedom from invasive medical procedures is *so* great that the risk of deprivation of these rights is impermissibly high. Hence, the state’s interest in sterilizing disabled conservatees cannot fairly be regarded as an interest outweighing those of the conservatee. In any case, the state’s asserted interest, as *parens patriae*, is the protection of disabled people from the effects of pregnancy and childbirth. This interest is diminished by its reliance on several contingencies; for example, vaginal sexual intercourse and successful conception. The chain of hypotheticals needed to assert the state’s interest make the possibility of the interest being disturbed at least presumptively distant. In other contexts, we ask the state to demonstrate the likelihood and imminence of its interest being violated before sanctioning an invasion of a protected liberty interest.¹⁶⁷

Pains must be taken to distinguish sterilizations performed on disabled conservatees from medical procedures discussed in similar contexts by the

164. See *In re Guardianship of Hayes*, 608 P.2d 635, 640 (Wash. 1980) (acknowledging new scientific findings that undercut prior assumptions about disabled people).

165. See generally Berit Höglund et al., *Pregnancy and Birth Outcomes of Women with Intellectual Disability in Sweden: A National Register Study*, 91 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVIA 1381 (2012).

166. See generally Alessia D’Angelo et al., *Pregnancy in Women with Physical and Intellectual Disability: Psychiatric Implications*, 55 RIVISTA DI PSICHIATRA 331 (2020) (detailing psychological effects of pregnancy on disabled people).

167. For example, when a state prosecutes someone for incitement. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.” (emphasis added)).

Court. In *Cruzan v. Director, Missouri Department of Health*, the Court held that Missouri was not required to accept the substituted judgment of close family members to refuse lifesaving treatment for an “incompetent” person.¹⁶⁸ The patient, Nancy Cruzan, had been rendered unresponsive by severe injuries sustained by an automobile accident.¹⁶⁹ She remained in the hospital under a persistent vegetative state when the hospital’s medical employees refused her family’s request to terminate life-sustaining treatment without court approval.¹⁷⁰ A trial court granted the sought-after approval, but the Missouri Supreme Court reversed, holding by clear and convincing evidence “that an incompetent patient would refuse treatment under the circumstances were he able to do so” and required a conservator to exercise substituted judgment to refuse treatment.¹⁷¹

The Supreme Court affirmed and, in an opinion written by Chief Justice William Rehnquist, held that Missouri was entitled to establish clear and convincing evidence as the standard of proof for discerning the wishes of a patient.¹⁷² The Court’s reasoning did not, as the author of this Comment would seek to do, *require* Missouri to impose a high burden of proof upon Cruzan’s family. Instead, the Court assumed, without deciding as such, that Cruzan had a liberty interest protected by the Due Process Clause in refusing the forced sustenance of life.¹⁷³ On the other hand, the Court recognized the state’s interest in “the protection and preservation of human life” as well as its particularized interest in protecting the patient’s choice against potential abuses or error.¹⁷⁴ Balancing these interests, Justice Rehnquist wrote that it was perfectly reasonable and legitimate for Missouri to seek more exacting evidence of a patient’s choice before terminating life-sustaining treatment.¹⁷⁵ The Court further rejected the view that in the absence of clear and convincing evidence, the substituted judgment of a patient’s close friends and family must suffice.¹⁷⁶

168. 497 U.S. 261, 286–87 (1990).

169. *Id.* at 265.

170. *Id.* at 266–68.

171. *Cruzan v. Harmon*, 760 S.W.2d 408, 410, 415 & 227 (Mo. 1988) *aff’d*, *Cruzan*, 497 U.S. 261 (1990).

172. *Cruzan*, 497 U.S. at 284.

173. *Id.* at 279.

174. *Id.* at 280–82.

175. *Id.* at 282.

176. *Id.* at 286 (“But there is no automatic assurance that the view of close family members will necessarily be the same as the patient’s would have been had she been confronted with the prospect of her situation while competent.”).

The principal dissent, authored by Justice William Brennan and joined by Justices Thurgood Marshall and Harry Blackmun, framed the right at issue as the “right to evaluate the potential benefit of treatment and its possible consequences according to one’s own values and to make a personal decision whether to subject oneself to the intrusion.”¹⁷⁷ Justice Brennan’s legal reasoning foreshadowed the caselaw still to emerge on the issue of the “right to die,” as the Court’s own opinion acknowledged.¹⁷⁸ He argued that previous caselaw requiring an exacting evidentiary burden to protect the exercise of a constitutional right did not support the use of the same standard as an *obstacle* to such a right.¹⁷⁹ Instead, the dissent would have held that the Constitution merely imposes a framework that requires states to seek accurate determinations of a patient’s will in good faith.¹⁸⁰ Ultimately, Justice Brennan vigorously disagreed with the proposition that “where it is not possible to determine what choice an incompetent patient would make, a State’s role as *parens patriae* permits the State automatically to make that choice itself.”¹⁸¹

Justice Brennan’s dissent mischaracterized the majority court’s opinion. For one, the majority opinion did not hold that a State is entitled to make a choice for disabled people, but rather, that the Constitution does not require “the State to repose judgment on these matters with anyone but the patient herself.”¹⁸² This language does not strengthen the *parens patriae* power of the state. Quite the opposite, the majority’s language demonstrates that the Constitution does not require the exercise of the *parens patriae* power to “protect” individuals. Justice Brennan’s dissent contains admirable language rejecting the state’s power to “appropriat[e]” decision-making power from a patient.¹⁸³ His great misstep, however, is his trust that conservators, friends, or family members can do so in a manner that does

177. *Id.* at 309 (Brennan, J., dissenting).

178. *Id.* at 277 (majority opinion) (“This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a ‘right to die.’”).

179. *Id.* at 319–20 (Brennan, J., dissenting).

180. *Id.* at 326 (“In contrast, nothing in the Constitution prevents States from reviewing the advisability of a family decision, by requiring a court proceeding or by appointing an impartial guardian ad litem.”).

181. *Id.* at 327.

182. *Id.* at 286 (majority opinion).

183. *Id.* at 327 (Brennan, J., dissenting) (“A State’s legitimate interest in safeguarding a patient’s choice cannot be furthered by simply appropriating it.”).

less harm than the state's exercise of power.¹⁸⁴ That trust runs flat against the historical evidence that conservatorships are an arm of state interests and susceptible to abuse—one need only ask Britney.

In other ways, however, Justice Brennan caught the majority out. While the Court did not broaden the state's power, it did not trim it back either. Chief Justice Rehnquist wrote merely that the Due Process Clause *permits* but does not *require* a heightened evidentiary standard for the protection of asserted constitutional rights. In this nuance, the government's power finds its apex; a legal grey zone where the state's discretion determines the outcome.¹⁸⁵

Sterilization of disabled conservatees, however, presents a very different context for the discussion of procedural rights. The history of the law in this area is a history of trespass, with states trampling on the otherwise sanctified integrity of the body. Sterilization of conservatees does not present a two-way street the way *Cruzan* did, where the right to choose the termination of life and the right to life itself were fundamentally in equal tension. Instead, the sterilization of a conservatee is a one-way street, where the possibility of pregnancy and its ill effects are a distant justification for the abridgment, indeed the domination, of more immediate and constant rights to procreate and bodily integrity which are sometimes irreversibly lost, whereas the state's interest can be met post hoc.¹⁸⁶ In this context, the person under conservatorship possesses clearly superior interests that tip the balance of procedural due process in her favor.

This conclusion is not new, just poorly cultivated in the caselaw. In *Vaughn v. Ruoff*,¹⁸⁷ the Eighth Circuit cited *Buck* to prevent the forced sterilization of a woman without the “careful” procedural guardrails present

184. *See id.* at 328.

185. At least in part, the tentative incompleteness of *Cruzan* may have been because the issue was one of first impression in an area of still emerging controversy, and thus the Court may have wished to tread lightly. *See generally* Sarah Childress, *The Evolution of America's Right-to-Die Movement*, FRONTLINE (Nov. 13, 2012), <https://www.pbs.org/wgbh/frontline/article/the-evolution-of-americas-right-to-die-movement/> (providing background of significant events in the right-to-die movement).

186. *See* Conservatorship of Valerie N. v. Valerie N., 707 P.2d 760, 771 (Cal. 1985) (en banc) (“As means of avoiding the severe psychological harm which assertedly would result from pregnancy, they may choose abortion . . . ; they may arrange for any child Valerie might bear to be removed from her custody; and they may impose on her *other methods of contraception*, including isolation from members of the opposite sex.” (emphasis added)).

187. 253 F.3d 1124 (8th Cir. 2001).

in *Buck*.¹⁸⁸ In *Vaughn*, Missouri state officials took custody of a child whose mother, Margaret Vaughn, was deemed disabled.¹⁸⁹ The same day that Vaughn gave birth to a second child, the state told her that if she consented to sterilization, she would have her parental rights restored.¹⁹⁰ Three months after she underwent tubal ligation, the state indicated that they would move forward with terminating both her and her husband's parental rights anyway.¹⁹¹

The Eighth Circuit affirmed the denial of qualified immunity for state officials sued by Vaughn for violations of the United States Constitution.¹⁹² The court found that Vaughn had a protected liberty interest under the Fourteenth Amendment "because a personal decision relating to procreation or contraception is a protected liberty interest," that applies to all people.¹⁹³ On the issue of procedural due process, the court wrote that "[s]terilization results in the irreversible loss of one of a person's most fundamental rights, a loss that must be preceded by procedural protections."¹⁹⁴ The court conceded that under *Buck*, "involuntary sterilization is not always unconstitutional,"¹⁹⁵ which is a gross understatement. The court nonetheless interpreted *Buck* to require procedural guardrails for compelled sterilization.¹⁹⁶ Although not an unreasonable reading of *Buck*, it is certainly generous. *Buck* did not reach the question of whether procedural or substantive due process or equal protection were actually implicated by Virginia's statute. Instead, that case assumed *arguendo* that constitutional concerns were implicated to assuage fears from eugenicists that their project was in legal jeopardy.¹⁹⁷ That Court thus neglected to truly apply the rigor of due process or equal protection.

In *Vaughn*, however, the court imported a far more modern standard of judicial review. The Eighth Circuit held that, even under *Buck*, involuntary

188. *Id.* at 1129 (quoting *Buck v. Bell*, 274 U.S. 200, 206 (1927)).

189. *Id.* at 1127.

190. *Id.*

191. *Id.* at 1128.

192. *Id.* at 1131.

193. *Id.* at 1128 (first citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); and then citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985)).

194. *Id.* at 1129.

195. *Id.*

196. *Id.*

197. Suuberg, *supra* note 10, at 117 ("Another reason was that critics saw the case as contrived: it was strategically designed to validate a particular Virginia law and ensure the success of American eugenics, rather than resolve a true controversy.").

sterilization had to be “a narrowly tailored means to achieve a compelling government interest.”¹⁹⁸

In citing *Buck*, the court perhaps drew its water from the wrong well. *Skinner* and its lineage of cases protecting the procreative right are likely better suited to crafting procedure under the Due Process Clause. In fact, if Chief Justice Stone’s view had won in *Skinner*, the story of Britney Spears’s conservatorship might have been quite different. Justice Douglas’s opinion, however, narrowly confined the Court’s decision to the facts before it, namely the sterilization of criminal inmates.¹⁹⁹ But Chief Justice Stone’s opinion established a constitutional standard for the application of sterilization procedures across a wide range of contexts, including conservatorships. That standard, if adopted, would have had far-reaching implications for the statutes of most states and required federal judicial oversight of state practices in their mental health law. As in *Skinner*, the Eighth Circuit in *Vaughn* failed to move against the tide of forced sterilization. While it decisively concluded that procedural due process was not met, it failed to utilize the rulemaking power vested in the judiciary by the Due Process Clause to prevent future forced sterilizations.²⁰⁰

In determining what process is in fact due to a conservatee whose conservator seeks to sterilize her, federal courts have much to learn from state courts. One of the most positively cited cases in this area is *In re Guardianship of Hayes* from Washington.²⁰¹ In *Hayes*, the Supreme Court of Washington confronted an appeal from the dismissal of a conservator’s petition to authorize the sterilization of the conservator’s daughter.²⁰² Two issues were presented to the court, the first of which was its jurisdiction.²⁰³ Here, the court looked to the Washington constitution and held that courts

198. *Vaughn*, 253 F.3d at 1129.

199. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942).

200. See *Vaughn*, 253 F.3d at 1129. *Vaughn* likely fell into the category of facts whose severity is so strong, the court felt little need to go further than a ruling in her favor. See, e.g., *Rochin v. California*, 342 U.S. 165, 173 (1952) (“Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend ‘a sense of justice.’” (citation omitted)). The procedural posture of the case, an appeal on the denial of qualified immunity, may also have precluded rulemaking on the Eighth Circuit. See *Vaughn*, 253 F.3d at 1127.

201. 608 P.2d 635 (Wash. 1980).

202. *Id.* at 636–37.

203. *Id.* at 637.

have equity jurisdiction to order forced sterilization.²⁰⁴ The Alaska Supreme Court, just one year before in *In re C. D. M.*, laid the foundation for *parens patriae* jurisdiction over sterilization petitions in exactly the same manner.²⁰⁵ In the next section of the opinion, the Washington court pulled back from its potentially enormous grant of power to the judiciary.²⁰⁶ The court considered various factors that affected its analysis of due process, including the conservatee's "age and educability," her potential as a parent, and "the degree to which sterilization is medically indicated as the last and best resort for the individual."²⁰⁷ These factors led to the court's conclusion that while sterilizations may be permitted when in the best interest of the individual, procedural protections are necessary to protect her right to privacy.²⁰⁸

The court required its lower state courts to embark on three separate steps of inquiry, each step possessing further subsidiary elements.²⁰⁹ At the threshold of sterilization, the lower court must first appoint a "disinterested" guardian ad litem to represent the conservatee.²¹⁰ Then, the court must receive independent advice on the "medical, psychological, and social evaluation" of the conservatee, and, finally, the court must, "to the greatest extent possible," ascertain the views of the individual herself.²¹¹ At this initial stage, the lower court must also find by "clear, cogent and convincing evidence" that the individual is incapable of making a decision about sterilization either now or in the foreseeable future.²¹² These requirements satisfy a number of objectives that due process concerns itself

204. *Id.* at 638 ("We hold the Superior Court of the State of Washington has authority under the state constitution to entertain and act upon a petition for an order authorizing sterilization of a mentally incompetent person, and in the absence of legislation restricting the exercise of that power, the court has authority to grant such a petition.").

205. *In re C. D. M.*, 627 P.2d 607, 612 (Alaska 1981) ("We hold that the superior court, as a court of general jurisdiction, does have, as part of its inherent *parens patriae* authority, the power to entertain and act upon a petition seeking an order authorizing the sterilization of a mental incompetent.").

206. *Hayes*, 608 P.2d at 639 ("Our conclusion that superior courts have the power to grant a petition for sterilization does not mean that power must be exercised.").

207. *Id.* at 640–41.

208. *Id.* at 640. It's unclear whether the right as recognized in *Hayes* was a state constitutional right or a federal one, although the court cited a string of federal cases to support its recognition of the right. *See id.* at 639.

209. *Id.* at 641.

210. *Id.*

211. *Id.*

212. *Id.*

with. Most importantly, it appoints counsel to represent the interests of the person facing sterilization, a key requirement of due process.²¹³

At the next stage of inquiry, Washington's lower court

must find that the individual is (1) physically capable of procreation, and (2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, and must find in addition that (3) the nature and extent of the individual's disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.²¹⁴

Finally:

The judge must find that by clear, cogent and convincing evidence (1) all less drastic contraceptive methods, including supervision, education and training, have been proved unworkable or inapplicable, . . . (2) the proposed method of sterilization entails the least invasion of the body of the individual . . . [and] that (3) the current state of scientific and medical knowledge does not suggest either (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advance in the treatment of the individual's disability.²¹⁵

These second and third stage requirements strengthen the presumption against sterilization that the Supreme Court of Washington adopted.²¹⁶ The court in *Hayes* adopted an extremely high standard with sterilizations being a particularly difficult procedure for conservators to obtain.²¹⁷ The first stage roughly maps onto the first factor of the *Eldridge* test, attempting to

213. See *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

214. *Hayes*, 608 P.2d at 641. Note that one of the elements of the test is likelihood, which as discussed *supra* note 167 is something states should have to show to assert their interest.

215. *Id.*

216. *Id.* (“There is a heavy presumption against sterilization of an individual incapable of informed consent that must be overcome by the person or entity requesting sterilization.”).

217. See Ari Ne’eman, *Washington State May Make It Easier to Sterilize People with Disabilities*, ACLU (Jan. 29, 2018), <https://www.aclu.org/blog/disability-rights/integration-and-autonomy-people-disabilities/washington-state-may-make-it> (“Currently, state law fortunately prohibits guardians from authorizing sterilization without court approval . . .”).

determine with accuracy the private interest of the individual. The second stage elicits from the state evidence that its interest is actually at risk, roughly reflecting the second factor of the *Eldridge* test. Finally, the third stage attempts to balance those interests in light of the risk of error and available alternatives—a near complete application of the third *Eldridge* factor.

But the value of federal judicial oversight cannot be overstated. The procedural requirements from *Hayes* are not universal. Furthermore, as the examples of *parens patriae* jurisdictional cases demonstrate, state courts cannot be trusted to police themselves and refrain from acting. The watchful eyes of the U.S. Constitution and federal courts are necessary to ensure that the power to sterilize does not accrue to one locus, unchecked and unsupervised.

Procedural due process goes far, when correctly applied, in delineating the proper division of labor in state-sanctioned sterilizations. But key defects underly this approach as the sole arm for reforming conservatorship law. Procedural protections do not catch all possible errors in the law because they elide narrow prohibitions in favor of broad regulations at a certain level of generality.²¹⁸ Their goal is to ultimately permit the sought-after end if the means comply with standardized process. This result, of course, means that procedural due process tolerates a permissible level of unfairness or injustice, however small.

On a related but separate ground, procedural due process cannot catch all the instances of impermissible conduct, for some may escape judicial imagination or the very structure of court-based proceedings. As Britney's own case demonstrates, denying a conservatee the right to remove contraception can have the *effect* of sterilizing her by presenting a continuing invasion of bodily autonomy, which implicates all the same Fourteenth Amendment interests as forced sterilization may. But the unique factual circumstances of Britney's case were such that the burden of seeking judicial remedy remained with the victim *wronged* rather than the burden of seeking judicial authorization placed on the conservator.

This problem of who bears the burden of coming to court is not remedied by requiring conservators to notify judges of all reproductive health decisions made on behalf of conservatees, or medical decisions broadly, as

218. See *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”).

part of their routine reporting requirements. Reporting requirements suffer from an essential structural defect in that they are retrospective. Thus, there is no eye on the conduct of conservators prior to the submission of their reports.²¹⁹ Furthermore, this solution entrusts too much to conservators. The reliability of this method depends on accurate and faithful truth telling by the very actor whose potential for abusive conduct requires reporting in the first instance. This conundrum makes it difficult, if not impossible, for a court to be sure that reports are true. Even when courts do notice inconsistencies in annual reports or other indications of abuse, their recourse is limited. State courts do not appoint standing guardians ad litem to monitor the conduct of conservators across the board but appoint them when they notice particular irregularities or an issue is raised before the court.²²⁰ Under this regime of oversight, courts are rendered unable to *prevent* abuse before it happens and unable to *remedy* abuse after it happens. Procedural due process accepts these faults as incidents to the larger project of protective police power, making alternative doctrinal considerations vital to repair mental health legal administration fully.

C. Substantive Due Process

Substantive due process provides an alternative vehicle for the protection of disabled people from the abuse of conservatorships. The origins of substantive due process as a tool to advance a constitutional view of economic policy has since been eclipsed by its more popularly known

219. See, e.g., Chip Baltimore, Inst. on Guardianship & Conservatorship, Guidance for New and Existing Conservators Compliance with the Requirements of HF 610, at 176 (Oct. 8, 2019) (CLE conference presentation outline), https://nhlp.law.uiowa.edu/sites/nhlp.law.uiowa.edu/files/cb_presentation_outline.pdf (“Because of the retrospective nature of reporting to the court by the conservators, the court is usually not in a position to prevent misfeasance or malfeasance by conservators before it happens. By the time misfeasance or malfeasance is discovered, if at all, the assets all too often have disappeared or dissipated with no chance for their recovery.”). Some states, such as Iowa, have responded to this problem by requiring conservators to report initial financial management plans at the onset of conservatorship. See *id.* at 175, 176–78. While this response remedies to some extent the inability to prevent abuse, it retains the fundamental structural reliance on conservators to self-report abuse.

220. See generally Donna S. Harkness, “Whenever Justice Requires”: Examining the Elusive Role of Guardian Ad Litem for Adults with Diminished Capacity, 8 MARQ. ELDER’S ADVISOR 1, 9–13 (2006) (noting uncertainties in when a guardian ad litem ought to be appointed).

status as a vehicle for civil rights litigation.²²¹ The doctrine's controversial application came to define the jurisprudential divide between Justices on the Supreme Court. This divide made it incredibly difficult to achieve civil rights victories in federal court.²²² But the vigorous attention Britney's case received may make a narrowly tailored argument for the invocation of substantive due process sufficiently persuasive. Where procedural due process is principally a balancing exercise, substantive due process is principally a historical one.²²³ Despite ongoing controversy and an uncertain future, it is well recognized today that a liberty interest may be transformed into a fundamental right, protected substantively, if it is so entrenched in historical tradition as to be "implicit in the concept of ordered liberty."²²⁴

It is vital for any substantive due process claim to outline the impact a conservatorship has on the legal status of people with disabilities and how they can be excluded from the democratic process.²²⁵ Being placed under

221. Justice Oliver Wendell Holmes authored one of the earliest critiques of substantive due process and economics in his noted dissent in *Lochner v. New York*. See 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."). Following the *Lochner* era, the Court adopted Holmes' view and avoided economic substantive due process arguments. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'" (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932))); see also Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1504–06 (1999) (describing the Court's early jurisprudence protecting fundamental rights outside of the economic context).

222. Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 *N.Y.U. L. REV.* 1902, 1903–04 (2021) (describing the conservative-liberal divide on the issue of substantive due process); Chemerinsky, *supra* note 221, at 1514 ("The plurality opinion in *Michael H. v. Gerald D.* shows there are several Justices on the Court who are likely to reject any substantive due process claim.").

223. See Chemerinsky, *supra* note 221, at 1501–02.

224. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

225. See NeJaime & Siegel, *supra* note 222, at 1906, 1915–18 (discussing the representation-reinforcing view of the *Carolene Products* framework).

conservatorship may strip a person with a disability of the right to vote.²²⁶ People with disabilities placed under conservatorship may be stripped of the right to retain counsel of their own choosing.²²⁷ People with disabilities placed under conservatorship can have their freedom of movement curtailed to the point of home confinement.²²⁸ These potentials for abuse are grave issues that affect the ability of people with disabilities to participate in the democracy of which they are a fundamental part. Through the legislative process, people with disabilities achieve extraordinary gains—that benefit all citizens.²²⁹ Conservatorship, however, locks people with disabilities outside the ordinary process of voice and change, requiring judicial oversight of the procedure and substance of rights within conservatorships.

To the extent these deprivations are justified on the basis of the state's *parens patriae* role as medical guarantor, that justification is undermined by the historical record of economic exploitation.²³⁰ In Oklahoma, Native Americans were routinely declared incompetent under the state probate code in the early 1900s in order to grant non-Native American conservators access to mineral-rich lands.²³¹ This architecture of injustice served the economic interests of the state and its appointed elite—the white settlers seeking enrichment in the West—just as the earliest forms of conservatorships served the economic interests of the Crown. The historical record and the theoretical underpinnings of conservatorship make it an indisputable arm of colonial violence, not merely because it has had a disproportionate historical effect on racial minorities including Native Americans, but because it's very *purpose* is one of denigration, control, and

226. Charles P. Sabatino, *Guardianship and the Right to Vote*, AM. BAR ASS'N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/guardianship-and-the-right-to-vote/.

227. See Serge F. Kovalski & Joe Coscarelli, *Is Britney Spears Ready to Stand on Her Own?*, N.Y. TIMES (May 4, 2016), <https://www.nytimes.com/2016/05/08/arts/music/is-britney-spears-ready-to-stand-on-her-own.html> (“The judge, though, citing a recent medical evaluation, said the singer was not capable of hiring her own counsel.”).

228. See Spenser Mestel, *Is Britney Spears Allowed to Vote?*, THE GUARDIAN (July 29, 2020), <https://www.theguardian.com/us-news/2020/jul/29/britney-spears-voting-law-conservatorship>.

229. See Julia Carmel, *‘Nothing About Us Without Us’: 16 Moments in the Fight for Disability Rights*, N.Y. TIMES (July 29, 2020), <https://www.nytimes.com/2020/07/22/us/ada-disabilities-act-history.html>.

230. See *supra* Section II.B.

231. Brief of *Amici Curiae* Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner at 29, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

seizure.²³² That historical record is not academic; it throws doubt on claims made by government that they seek to legislate a compelling medical interest, when this institution was never meant to serve medical interests from the outset. The form it takes is one designed against the medical and social needs of disabled people, and for the material interests of a ruling class.²³³

While sterilization as a medical procedure is a relatively recent medical innovation, making it impossible to trace a specific history of anti-sterilization all the way back to the Framing Era or before, there remains a long history of protecting, generally, the fundamental reproductive right. A core and often overlooked impetus for the abolitionist movement that drove the Civil War was the reproductive rights of Black women, whose routine rape formed the backbone of the Southern slave-industrial complex.²³⁴ The resistance of Black women to forced sexual conduct has a long and sordid history, with some women put to death for such resistance.²³⁵ The emancipation of Black women thus formed a key justification for the ratification of the Reconstruction Amendments, including the Fourteenth Amendment from which substantive due process is derived.²³⁶ The struggle for reproductive justice did not end there. Native American women fought

232. Andrea Seielstad, *The Disturbing History of How Conservatorships Were Used to Exploit, Swindle Native Americans*, THE CONVERSATION (Aug. 13, 2021, 9:58 AM EDT), <https://theconversation.com/the-disturbing-history-of-how-conservatorships-were-used-to-exploit-swindle-native-americans-165140>; see also Emily J. Hutcheon & Bonnie Lashewicz, *Tracing and Troubling Continuities Between Ableism and Colonialism in Canada*, 35 DISABILITY & SOC'Y 695, 704–06 (2020).

233. See *supra* Section II.B.

234. See JoAnn Wypijewski, *Reproductive Rights and the Long Hand of Slave Breeding*, THE NATION (Mar. 21, 2021), <https://www.thenation.com/article/archive/reproductive-rights-and-long-hand-slave-breeding/> (“Therefore, sexual and reproductive freedom is not simply a matter of privacy; it is fundamental to our and the law’s understanding of human autonomy and liberty.”).

235. See, e.g., *Welcome*, UNIV. MICH.: THE CELIA PROJECT, <https://sites.lsa.umich.edu/celiaproject/> (last visited Feb 18, 2023).

236. See Allison Lange, *The 14th and 15th Amendments*, NAT’L WOMEN’S HISTORY MUSEUM (2015), <https://www.womenshistory.org/resources/general/14th-and-15th-amendments> (“Black women who were enslaved before the war became free and gained new rights to control their labor, bodies, and time.”); see also Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> (“Justice Samuel Alito’s claim, that there is no enumeration and original meaning in the Constitution related to involuntary sexual subordination and reproduction, misreads and misunderstands American slavery, the social conditions of that enterprise and legal history.”).

vigorously throughout the 1970s to end forced sterilization practices in the Indian Health Service and Medicaid programs, practices which likely affected twenty-five percent of Native American women.²³⁷

The corresponding right to procreate is a fundamental aspect of this reproductive right, and its anchor in historical tradition cannot be seriously contested. This conception of reproductive rights as a bundle of rights including the right to procreate is not at all novel and finds support in international law²³⁸ as well as domestic law. The Court itself has recognized it as such on many occasions.

In *Obergefell v. Hodges*,²³⁹ the Court did not hesitate to place aside the state's interest in encouraging procreative relations to deny marriages to same-sex couples.²⁴⁰ The Court nonetheless recognized that decisions related to procreation are "among the most intimate that an individual can make."²⁴¹ The principal dissent, authored by Chief Justice John Roberts, took this approach even further, and detailed the historical reverence Anglo-American law has held for procreative rights.²⁴² Though in

237. Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME (Nov. 28, 2019, 11:47 AM ET), <https://time.com/5737080/native-american-sterilization-history/>.

238. Tomris Türmin, *Reproductive Rights: How to Move Forward?*, 4 HEALTH & HUM. RIGHTS, no. 2, 2000, at 31, 35 (analyzing that reproductive rights are composed as a bundle of four interrelated rights, including "the right to found a family"); see also WORLD HEALTH ORG., ELIMINATING FORCED, COERCIVE, AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT 6 (2014) (detailing reproductive rights discrimination against people with disabilities).

239. 576 U.S. 644 (2015) (recognizing a substantive right to same-sex marriage).

240. *Id.* at 669 ("An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate.").

241. See *id.* at 666; see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.").

242. *Obergefell*, 576 U.S. at 690 (Roberts, C.J., dissenting) ("Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between 'husband and wife' as one of the 'great relations in private life,' and philosophers like John Locke, who described marriage as 'a voluntary compact between man and woman' centered on 'its chief end, procreation' and the 'nourishment and support' of children." (first quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *410; and then quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 78–79, at 39 (J.W. Gough ed., Basil, Blackwell & Mott Ltd. 1948) (1690))); see also *id.* at 691 ("We later described marriage as 'fundamental to our

Obergefell the Justices disagreed about whether to frame procreative rights as legitimate state interests or fundamental rights, the dispute confirms the well-settled consensus developed over a century of caselaw that the right to procreate is a fundamental aspect of liberty.²⁴³ And of course, nowhere is this view better elucidated than the Court's foundational discussion in *Skinner*.²⁴⁴

Parens patriae has never totally immunized state conduct from the "searching judicial inquiry"²⁴⁵ of constitutional review under substantive due process.²⁴⁶ In the juvenile legal system, the Court has recognized limits to a government's asserted interests in the realm of *parens patriae*.²⁴⁷ And even more on point, the Court has recognized a substantive right to be free from involuntary confinement when the state can provide no evidence that the individual is dangerous or incapable of "surviving safely in freedom by himself or with the help of willing and responsible family members or friends."²⁴⁸

In *O'Connor v. Donaldson*, the Court found that "the State has a proper interest in providing care and assistance to the unfortunate."²⁴⁹ The Court nonetheless reasoned that "the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution,"²⁵⁰ essentially holding that in the context of confinement, the

very existence and survival,' an understanding that necessarily implies a procreative component." (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967))).

243. See, e.g., *Loving*, 388 U.S. 1; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Zablocki*, 434 U.S. 374.

244. *Skinner*, 316 U.S. at 541 ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

245. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

246. See, e.g., *Rogers v. Okins*, 634 F.2d 650 (1st Cir. 1980) (finding an assertion of *parens patriae* interests to be inadequate against claims of procedural due process), *rev'd sub nom. on other grounds*, *Mills v. Rogers*, 457 U.S. 291 (1982) (reversing so that the First Circuit could evaluate a Massachusetts Supreme Court decision decided after First Circuit decision).

247. *Kent v. United States*, 383 U.S. 541, 555 (1966) ("But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."). This case emerged relatively early in the Court's jurisprudence of due process, and so naturally, the Court did not discuss what substantive rights a child might be owed respect for in the juvenile justice system.

248. *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

249. *Id.* at 575.

250. *Id.*

state's *parens patriae* interest in caring for people with disabilities did not rise to such a compelling nature as to overcome the person's substantive right to be free from confinement. Interestingly, Chief Justice Warren Burger concurred separately to denounce the Court of Appeal's "right to treatment" approach to confinement²⁵¹ (a mirror of California's right to be sterilized, discussed below).²⁵² Justice Burger believed "few things would be more fraught with peril than to irrevocably condition a State's power to protect the mentally ill upon the providing of 'such treatment as will give [them] a realistic opportunity to be cured.'"²⁵³

In California, the state's Supreme Court readily confronted the question of due process for conservatees, arriving to a peculiar result. In *Conservatorship of Valerie N. v. Valerie N.*,²⁵⁴ the conservatee was an adult woman with Downs syndrome whose parents, her conservators, sought permission from the Santa Barbara probate court to authorize her tubal ligation.²⁵⁵ The probate court denied the parent's request.²⁵⁶ The California Supreme Court affirmed, but on surprising grounds.²⁵⁷ First, the court surveyed the long and troubled history of sterilization of disabled people in California.²⁵⁸ The court noted that in 1978, the legislature had repealed the previous statutory authority for probate courts to preside over requests to sterilize conservatees.²⁵⁹ The court further concluded that the simultaneously enacted Lanterman Developmental Disabilities Services Act ("LDDSA") did not replace the repealed jurisdiction, leaving probate courts without any statutory authority to condone sterilizing procedures.²⁶⁰

251. *Id.* at 581-83 (Burger, C.J., concurring).

252. *Conservatorship of Valerie N. v. Valerie N.*, 707 P.2d 760 (Cal. 1985).

253. *O'Connor*, 422 U.S. at 588 (Burger, C.J., concurring) (quoting *id.* at 572 (majority opinion)).

254. 707 P.2d 760.

255. *Id.* at 763-64.

256. *Id.* at 764.

257. *Id.* at 778 ("Here there was neither a finding that sterilization is "required" nor evidence that would support such a finding. Under these circumstances the order of the trial court denying appellants' petition was proper.").

258. *See id.* at 764-66.

259. *Id.* at 767 ("The intent of the Legislature is clear. Neither the probate court, nor state hospital personnel were to retain authority to permit a nontherapeutic sterilization of a conservatee who is unable to personally consent to the procedure.").

260. *Id.* at 771 ("We conclude therefore that this legislation [the LDDSA] does not presently afford a mechanism by which sterilization of Valerie may be authorized.").

At this point, the court's analysis could have concluded; certainly, the result suggests so. But the court next turned to the constitutional question raised by the conservators.²⁶¹ Here, they cited *Skinner*, inter alia, for the proposition that "[t]he right to marriage and procreation are now recognized as fundamental, constitutionally protected interests."²⁶² The court then cited *Roe v. Wade*, inter alia, to identify a constitutional right in the opposite direction: "the right of a woman to choose not to bear children, and to implement that choice by use of contraceptive devices or medication, and, subject to reasonable restrictions, to terminate a pregnancy."²⁶³ Confronted with the tension of these two precedents, the Court lurched to the latter, writing that women with disabilities have a constitutional right to be free from unwanted pregnancy.²⁶⁴ On this reasoning, then, the Court required that restrictions on the right to be sterilized be necessary to a compelling state interest.²⁶⁵

The court concluded that California's legislative scheme did not satisfy strict scrutiny. The court did not view the state's interest "in safeguarding the right of an incompetent *not* to be sterilized" favorably.²⁶⁶ In fact, the court viewed the asserted state interest as intruding on other, equally important rights, such as the right to be free of unwanted pregnancy.²⁶⁷ The state, representing the conservatee's interest, argued "that when the power to authorize sterilization of incompetents has been conferred on the judiciary it has been subject to abuse," but the court did not agree that an outright ban on sterilization was therefore necessary.²⁶⁸ Instead, the court said that California should have implemented the strict procedural requirements adopted in other states, such as Washington, Massachusetts, or New Jersey.²⁶⁹ These procedures were cited for their ability to protect the state's interest without sacrificing the right of the disabled person to obtain sterilization procedures, and therefore as "less drastic alternatives" to the state's legislative scheme.²⁷⁰ The result of the court, then, was to identify

261. *Id.*

262. *Id.* at 772.

263. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 154 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)).

264. *Id.* at 773.

265. *Id.* at 773–74.

266. *See id.* at 774–75.

267. *Id.* at 773–74.

268. *Id.* at 774–75.

269. *See id.* at 775–76.

270. *Id.* at 776.

independent jurisdictional authority for probate courts to grant permission to sterilize disabled people, so long as they satisfy a factor-based procedural requirement and have evidentiary support that is clear and convincing.²⁷¹

The California Supreme Court's decision ended on an unusual note. After requiring the state to demonstrate necessity for its legislative conduct, it turned around and required the conservator to demonstrate, understandably, the necessity of sterilization.²⁷² Because Valerie's conservators had not done so, the denial of their request to sterilize her was affirmed.²⁷³ In this manner, the court sought to balance the competing constitutional interests of *Skinner* and *Roe*.

In *Conservatorship of Valerie N.*, one can also see the tension between two important goals of disability rights advocacy. On the one hand, policymakers are rightly concerned with the actual health of disabled people, including their reproductive and psychological health. On the other hand, advocates are concerned, also rightly, with the autonomous decision-making of the disabled person. These two interests are well-established points of contention in disability rights conversations.²⁷⁴ Reconciling the two interests has proven a tricky endeavor for courts across the country.

But the California Supreme Court made a category error in *Valerie N.* The court wrote: "An incompetent developmentally disabled woman has no less interest in a satisfying or fulfilling life free from the burdens of an unwanted pregnancy than does her competent sister."²⁷⁵ In doing so, the California Supreme Court misconstrued the underlying right, and made real what is fundamentally fictitious.²⁷⁶ The language stretches the legal fiction

271. *See id.* at 777 ("In ruling on such applications the court should consider the criteria developed by the Washington Supreme Court in *In Matter of Guardianship of Hayes*, . . . as well as any other relevant factors brought to the attention of the court by the parties and give approval only if the findings enumerated by that court have been made on the basis of clear and convincing evidence.").

272. *Id.* at 778 ("Inasmuch as there was neither evidence of necessity for contraception, nor sufficient evidence that less intrusive means of contraception are not presently available to Valerie, the judgment is affirmed.").

273. *Id.*

274. *See generally* Lisa Waddington & Matthew Diller, *Tensions and Coherence in Disability Policy*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/news/publications/disability-rights-law-and-policy/tensions-and-coherence-in-disability-policy/> (last visited Feb. 18, 2023).

275. *Valerie N.*, 707 P.2d at 773.

276. *See* Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgement*, 100 YALE L.J. 1, 61 (1990) ("The doctrine of substituted judgment

of substituted judgement to extremity to say that Valerie N. has a constitutionally protected right to obtain sterilization, or any medical procedure, when the imposition of conservatorship necessarily concluded that she lacked the capacity to consent to sterilization (or any medical procedure). Valerie N. is not similarly situated as to her “competent sisters” in the exercise of her right to be “free from the burdens of an unwanted pregnancy” *because it is fundamentally not her who is exercising that right*. Instead, it is her conservator, authorized to do so by the State of California pursuant to its *parens patriae* authority.²⁷⁷ The court also unwarrantedly deemed all disabled people’s pregnancies unwanted within the meaning of its rule. Three dissenters decried the majority’s creation of a “constitutional right to ‘substituted judgement,’” a seemingly contradictory phrase.²⁷⁸ In particular, Justice Lucas found the historical record and the procedural record of the case before them dispositive as to the state’s need to eradicate exploitive, intrusive abuse in the state’s judiciary.²⁷⁹ The result of *Conservatorship of Valerie N.* has been that, in California, conservators have a *constitutionally protected* right to sterilize their wards.

Comparing California’s approach with others instructively demonstrates the intrinsic fallacy of its logic. In *E. v. Eve*, the Canadian Supreme Court heard the appeal of Eve, brought by her guardian ad litem, who was the adult daughter of her conservator.²⁸⁰ Eve’s mother had petitioned a lower court for authorization to perform a hysterectomy on Eve, who “suffered from a condition making it extremely difficult to communicate with others” and therefore caused her mother to fear Eve might innocently become pregnant.²⁸¹ In analyzing Eve’s appeal from the court’s grant of her mother’s petition, the court conceded that *parens patriae* jurisdiction gave the lower court “unlimited” jurisdiction.²⁸² It nonetheless warned that the

allows the state to invade the bodily integrity of the incompetent without having to justify the invasion.”).

277. See *Valerie N.*, 707 P.2d at 781–82 (Bird, C.J., dissenting) (“Yet precisely because choice and consent are meaningless concepts when applied to such a person, the majority’s invocation of the theory of procreative choice and the fiction of substituted consent cannot withstand constitutional scrutiny.”).

278. *Id.* at 779 (Lucas, J., concurring in part and dissenting in part) (“I find fundamentally problematic my colleagues’ conclusion that there is a constitutional right to ‘substituted consent’ in this context.”).

279. *Id.* at 779–80.

280. [1986] 2 S.C.R. 388, 394–95 (Can.).

281. *Id.* at 393.

282. *Id.* at 414, 427.

jurisdiction “must be exercised in accordance with its underlying principle” and for the benefit of the person in need of protection and not for the benefit of others.²⁸³ On these principles, the court held that sterilization could *never* be authorized for non-therapeutic purposes.²⁸⁴ Most crucially, the court reasoned that in the absence of the affected person’s consent, “*it can never be safely determined that such a procedure is for the benefit of that person.*”²⁸⁵ Finally, the court acknowledged that a medical procedure when performed without consent is legally a battery, adding a note of gravity to its decision.²⁸⁶

The *Eve* decision is fascinating for its short disposition of a complex question, but its holding contains a kernel of law that transcends the forty-ninth parallel. The Canadian Supreme Court, close in tradition to America’s for its reliance on common law principles and history, provides the most persuasive answer to the question of balancing individual rights with the interests of the state. In substantive due process terms, the Canadians artfully captured the argument of this Comment; that the principles of fairness and freedom contained in the U.S. Constitution require, as a matter of law, something more than a bald assertion of medical treatment. In fact, states should accept—as an incident to the liberty the United States has committed itself to—the potential negative consequences of such a commitment. As in the First Amendment, the Fourth Amendment, and all the rest; that is the price of rule of law. There is no room for government-sanctioned sterilization of people, disabled or not, in a society committed to the rights to procreate and bodily integrity.

The urgent question that presses itself, however, is whether we remain a society committed to those rights. In 2021, the answer was relatively straightforward. A long line of decisions has made clear that rights may be

283. *Id.* at 427.

284. *Id.* at 431. The qualification that sterilization can nonetheless be authorized for therapeutic purposes is not a concession that there may be some circumstances where it is an appropriate remedy, but an acknowledgment that hysterectomies (the procedure discussed in *Eve*) are often performed for purposes other than sterilization. See Daniel Morgan, *Plotting the Downward Trend in Traditional Hysterectomy*, UNIV. MICH. INST. FOR HEALTHCARE POL’Y & INNOVATION (Jan. 23, 2018), <https://ihpi.umich.edu/news/plotting-downward-trend-traditional-hysterectomy> (“More than 400,000 hysterectomies are performed in the U.S. each year with nearly 68 percent done for benign conditions that involve abnormal uterine bleeding, uterine fibroids and endometriosis.”).

285. *Eve*, 2 S.C.R. at 431 (emphasis added).

286. *Id.* at 406.

implicitly protected by the Fourteenth Amendment's Due Process Clause.²⁸⁷ Another storied line of decisions had made clear that these implicit rights include the reproductive rights.²⁸⁸ In 2022, however, the answer became much more complicated when the Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*.²⁸⁹ In that case, a deeply divided Court overturned almost a half-century of precedent that had constitutionally protected the right to an abortion as implicit in the concept of liberty.²⁹⁰

The Court's decision in *Dobbs* was almost overshadowed by the manner in which it came to public light. The draft opinion of the Supreme Court's decision in *Dobbs* was leaked on May 2, 2022, which revealed that Justice Alito had drafted the anti-abortion opinion as early as February 10, 2022.²⁹¹ For context, this Comment's final draft was submitted on February 13, 2022, and approved for publication in March. It is an unhappy irony that even as this Comment on constitutional reproductive rights was being drafted, five Members of the Court were conspiring to bring the era of reproductive rights to an end.

Without a doubt, the Court's reasoning comes close to accomplishing that aim. The Court's road to overturning *Roe* ran dangerously off the well-trodden path. A full catalogue of *Dobbs* missteps are outside the scope of this Comment, but it bears reviewing a few. First, *Dobbs*' analysis placed great emphasis on the number of states that criminalized abortion at the

287. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing implied right to raise and rear family); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (same); *Rochin v. California*, 342 U.S. 165 (1952) (recognizing implied right to be free from government activity that shocks the conscience); *BMW of N.A., Inc., v. Gore*, 517 U.S. 559 (1996) (recognizing implied Due Process Clause right limiting punitive damage awards).

288. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *United States v. Vuitch*, 402 U.S. 62 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Bellotti v. Baird*, 443 U.S. 622 (1979); *City of Akron v. Akron Ctr. for Reprod. Health* (1983); *Thornburgh v. Am. College of Obstetricians & Gynecologists* (1986); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Ayotte v. Planned Parenthood of N. New Engl.* 546 U.S. 320 (2006). In *Dobbs*, the Court overturned nine of the decisions cited above starting with *Roe* onward recognizing and defining the fundamental right to abortion.

289. 142 S. Ct. 2228 (2022).

290. *Id.* at 2284.

291. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM EDT), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

time of *Roe*²⁹²—a mathematical exercise that is dubiously probative of the content of liberty.²⁹³ Second, *Dobbs* uncritically accepted the views of “the ‘eminent common-law authorities’”²⁹⁴ on the matter of abortion despite the fact that they wrote in a time where women could not generally consent to much of anything and therefore, they had no occasion to consider the question of a woman’s right to consent to abortion.²⁹⁵ Third, *Dobbs* left the doctrine of *stare decisis* alarmingly weak by overturning an opinion reaffirmed expressly or implicitly several times over.²⁹⁶ Fourth and most relevant to this Comment, the majority opinion in *Dobbs* was carefully

292. See *Dobbs*, 142 S. Ct. at 2236, 2242–43, 2248, 2253, 2267 (“*Roe*’s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking . . .”).

293. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 199 (1985) (Blackmun, J., dissenting) (casting significant doubt on the process of counting up states to determine liberty interests), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

294. *Dobbs*, 142 S. Ct. at 2249 (quoting *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020)) (citing Blackstone, Coke, and Matthew Hale as illustrative examples of common law authorities).

295. See Joseph F. English, *Married Women and Their Property Rights: A Comparative View*, 10 CATH. U. L. REV. 75, 81–83 (1961) (detailing limits on married women’s capacity at common law). Note also that limits on a married woman’s capacity to perform legal actions were justified as an incident of her husband’s “exaggerated guardianship” over her—another emblem of the demeaning origins of conservatorships and guardianships. *Id.* at 82 (citation omitted). To clarify, what is meant in the accompanying text to this footnote is that in a world where women had no capacity to consent to medical procedures in the first place, the common law authorities would not have even reached the question of whether a *right* to consent could exist. There is therefore very little meaning to be gleaned from their views that can be helpful for the new and different world—a world where women *can* and indeed *must* consent to medical procedures. And that premise is why early laws that criminalized abortion made the person who performed the abortion a wrongdoer, not the person who sought it. See *Dobbs*, 142 S. Ct. at 2249 (“Henry de Bracton’s 13th-century treatise explained that if a person has ‘struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide.’” (citations omitted)). We might also express some doubts in accepting as quasi-law the words of Matthew Hale, who devoted so much of his time to the discussion and prosecution of witchcraft. See, e.g., Nathan Dorn, *Sir Matthew Hale and Evidence of Witchcraft*, LIBR. OF CONG.: BLOGS (Oct. 30, 2021), <https://blogs.loc.gov/law/2021/10/sir-matthew-hale-and-evidence-of-witchcraft/>.

296. *Dobbs*, 142 S. Ct. at 2316 (Robert, C.J., concurring) (“The Court’s decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases.”); *id.* at 2333–48 (Breyer, Sotomayor, Kagan, JJ., dissenting) (“The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.”).

written so as to be consistent with Justice Thomas's concurrence, which announced a full-throated attack on the idea of implicitly protected constitutional rights.²⁹⁷ The Court made clear that its decision should be viewed as narrowly targeting the right to abortion and no other right.²⁹⁸ Justice Kavanaugh concurred separately in an attempt to clarify ambiguity on this point.²⁹⁹ But no one can read *Dobbs*, or indeed Justice Thomas's concurrence, without experiencing an upshot in anxiety for the future sway of cases that protected the right to be gay,³⁰⁰ the right to same-sex marriage,³⁰¹ or even the right of a grandmother to care for her motherless grandson.³⁰² The dissenting Justices, with their unparalleled insight into their colleagues' thinking, warned that they could not "understand how anyone can be confident that today's opinion will be the last of its kind."³⁰³ Careful litigators are therefore well-advised to avoid hanging their hat on the Court's word, and should take pains to distinguish the reproductive rights of people under conservatorships from *Dobbs*. For three reasons, this approach is not only possible but plausible.

First, abortion arises in a categorically different posture from other reproductive rights or reproductive justice generally. *Dobbs* has some language in support of this notion, identifying abortion as special in some way.³⁰⁴ But a more elaborated distinction accepts that abortion is a contested right because the state believes the fetus is a living thing; in cases like Britney's, however, where a person under conservatorship seeks the

297. See *id.* at 2300–04 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”); see also *id.* at 2257–58 (majority opinion) (carefully discussing substantive due process cases so as to neither cast doubt on nor reaffirm them).

298. *Id.* at 2258 (“They [prior substantive due process cases] do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.”).

299. *Id.* at 2309 (Kavanaugh, J., concurring) (“I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.”).

300. *Lawrence v. Texas*, 539 U.S. 558 (2003).

301. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

302. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

303. *Dobbs*, 142 S. Ct. at 2332 (Breyer, Sotomayor, Kagan, JJ., dissenting).

304. *Id.* at 2258 (majority opinion) (“What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’” (citations omitted)).

end contraception, the only interest of the state is in the person herself. To say it another way, for abortion outside of a conservatorship, the state asserts an interest in the fetus as a living entity that invokes its police powers separate from the person herself. But for contraception inside a conservatorship, the state has no interest to assert except as to the person in the conservatorship. Therefore, when a state regulates reproductive choices via conservatorships, its power overlaps with and supersedes the right of the individual under conservatorship in a way that (ostensibly) does not occur when regulating abortions generally, because there, state power overlaps and *conflicts* with the right of individuals.³⁰⁵

This distinction is not tied to any particularly negative characteristic of abortion, but attributable to the special character of reproductive freedom, whose touchstone is *consent*. That is why reproductive freedom includes not only the right to terminate one's pregnancy, but also the right to continue one's pregnancy. That is also why, where reproductive freedom has been infringed with respect to people with disabilities, it has sometimes come in the form of forced abortions.³⁰⁶

Second, in some states, conservatorships are jurisdictionally distinct. For example, both California and Alaska have at one point or another ruled that conservatorships are constitutionally required.³⁰⁷ In these states, the courts have usurped jurisdiction to exercise unprecedented, unlimited power over the affairs of people with disabilities. In California, at least, that power was in fact *specifically repealed because of rampant abuse* prior to *Valerie N.*³⁰⁸ This process is a far cry from the democratic method that was so greatly praised in *Dobbs* as the proper forum for discussions about reproductive freedom.³⁰⁹ When reviewing the constitutionality of states' infringement of

305. I accept the risk that this reasoning may, to some extent, reify *Dobbs*. The risk is worth accepting when (a) the Court has already eliminated the right to an abortion and is unlikely to revisit it and (b) other aspects of reproductive freedom can yet be saved.

306. Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PENN. L. REV. 1851, 1867–72 (2022) (detailing horrific instances where judges and conservators have forced medical procedures including abortions, sterilization, hormone treatments and more upon people with disabilities under conservatorships).

307. See *Conservatorship of Valerie N. v. Valerie N.*, 707 P.2d 760 (Cal. 1985); *In re C. D. M.*, 627 P.2d 607 (Alaska 1981).

308. *Valerie N.*, 707 P.2d at 767 (“The intent of the Legislature is clear. Neither the probate court, nor state hospital personnel were to retain authority to permit a nontherapeutic sterilization of a conservatee who is unable to personally consent to the procedure.”).

309. *Dobbs*, 142 S. Ct. at 2284 (“We now . . . return that authority [to regulate abortion] to the people and their elected representatives.”).

reproductive freedom inside conservatorships, federal courts should identify the jurisdictional source of the conservatorship. If it is not sourced from positive law, the court should view such conservatorships and their internal behavior with deep suspicion for its lack of democratic accountability and subject them to more searching inquiry.

Third, finally, and relatedly, a legal process argument: people with disabilities and under conservatorship have far less access to tools for advocacy than able-bodied people outside of conservatorships. As discussed earlier, they have fewer opportunities to affect democratic change in a governmental system designed without any particular regard for them. People in conservatorships are denied the right to counsel.³¹⁰ People in conservatorships are denied the right to vote.³¹¹ Without these core rights, neither the judicial nor legislative processes are truly available as pathways of self-help for people with disabilities in conservatorships. For this reason, reproductive freedom in the conservatorship context should be viewed differently from that of people outside of conservatorships who are generally in a better position to advocate for themselves; conservatorships systematically lock people outside of democracy.

It is because of the operation of this democratic process, however, that I remain optimistic that we remain a society committed to reproductive rights. After the Court's decision in *Dobbs*, a nationwide shift in priorities upset expectations that the midterm elections would favor the Republican Party.³¹² State supreme courts, which are much more often subject to some

310. See John Pollock & Megan Rusciano, *Right to Counsel in Restoration of Rights Cases*, AM. BAR ASS'N (Mar. 11, 2021), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-42/vol-42-issue-4-march-april-2021/right-to-counsel-in-restoration-of-rights-cases/ (explaining that only 27 states + D.C. require appointment of counsel in restoration proceedings related to guardianships or conservatorships).

311. Charles P. Sabatino, *Guardianship and the Right to Vote*, AM. BAR ASS'N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/guardianship-and-the-right-to-vote/.

312. See, e.g., Ashley Kirzinger et al., *How the Supreme Court's Dobbs Decision Played in 2022 Midterm Election: KFF/AP VoteCast Analysis*, KAISER FAM. FOUND. (Nov. 11, 2022), <https://www.kff.org/report-section/how-the-supreme-courts-dobbs-decision-played-in-2022-midterm-election-kff-ap-votecast-analysis-findings/> ("But in certain states with competitive races, like Pennsylvania and Arizona, one in five of these *Roe*-focused Republican voters voted for the Democratic Senate candidate."). Zack Beauchamp, *The Supreme Court Lost Republicans the Midterms*, VOX (Nov. 10, 2022, 12:40 PM), <https://www.vox.com/policy-and-politics/23451103/2022-midterms-results-data-analysis-abortion-dobbs-shor>.

form of electoral accountability,³¹³ have largely balked at invitations to follow *Dobbs*'s lead over a cliff of controversy.³¹⁴ In Kansas, voters rejected an attempt to strip people of the state constitutional right to an abortion.³¹⁵ Even the painfully paralyzed Congress has reacted disapprovingly,³¹⁶ with limited success³¹⁷ And it is therefore to Congress that this Comment now turns.³¹⁸

V. Congress

A. *The Americans with Disabilities Act & the Integration Mandate*

Statutes play an enormous role in the character of civil rights law in the United States and must be considered when evaluating modern disability law. Congress's activity in civil rights has been proliferous.³¹⁹ The effect of

313. Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1644–49 (2010) (detailing each state's method of judicial selection and retention).

314. See, e.g., *Okla. Call for Reprod. Just. v. Drummond*, 2023 OK 24, ¶¶ 8–11, 526 P.3d 1123, 1130 (“The law in Oklahoma has long recognized a woman’s right to obtain an abortion in order to preserve her life”); see also *State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker> (last updated Apr. 13, 2023); Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html> (“In North Dakota, Utah, Wyoming and Indiana, the courts blocked abortion restrictions temporarily, saying that the abortion rights cases had a likelihood of success at trial.”).

315. Dylan Lysen et al., *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NAT’L PUB. RADIO (Aug. 3, 2022, 2:18 AM ET), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment>.

316. Jacob Fischler, *Congress Roiled by U.S. Supreme Court Decision Revoking Abortion Rights*, N.J. MONITOR (June 24, 2022, 1:29 PM), <https://newjerseymonitor.com/2022/06/24/congress-roiled-by-u-s-supreme-court-decision-revoking-abortion-rights/>.

317. See, e.g., *Respect for Marriage Act*, Pub. L. No. 117-228, 136 Stat. 2305 (2022) (affirming protections of same sex marriage under federal law in the wake of *Dobbs*). But see Annie Karni, *Bill to Guarantee Abortion Rights Fails in Senate*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/11/us/abortion-bill-blocked-senate.html> (explaining that Senate filibuster killed abortion bill in the time period after *Dobbs* was leaked but before *Dobbs* was officially decided).

318. For an explanation of how Congress, when it works well, can fundamentally reshape the life of the law, see generally William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 Yale L.J. 1215 (2001).

319. See generally JODY FEDER, CONG. RSCH. SERV., RL33386, FEDERAL CIVIL RIGHTS STATUTES: A PRIMER (2012).

this activity has likewise had a proportionally dramatic effect on the civil rights issues at stake.³²⁰ The patchwork of civil rights statutes enacted by Congress ultimately contributes to the mosaic of law that governs this Comment's area of concern. This mosaic, alongside the decisions of the courts and the long-standing tradition of ever-progressive reform towards liberty and equality, define the landscape of disability rights today.³²¹ Yet, most congressional activity can be attributed to the failure of courts to provide sought-after relief.³²² This practice provides interested stakeholders with the opportunity to take victory from the jaws of defeat in the federal courts and achieve grand—though sometimes incremental and limited—victories in Congress.

In the context of disability rights, the Court has positively embraced the practice of turning towards Congress, instead of the courts, for civil rights relief. The formative case that tracks this development is *Olmstead v. L.C. ex rel Zimring*,³²³ where two women sought release from forced institutionalization.³²⁴ Justice Ruth Bader Ginsburg's opinion for the majority became known as a watershed moment in disability rights. Justice Ginsburg defined rights with an important, opening caveat: "This case, as it

320. See, e.g., Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424, 431–47 (2015) (detailing the extensive empirical and anecdotal effect of the Civil Rights Act of 1964 on race relations, economic inequality, and women's rights).

321. For an illustration of how Congress contributes to constitutional meaning, see, for example, Robert Post & Reva Siegel, *Democratic Constitutionalism*, NAT'L CONST. CTR.: INTERACTIVE CONST. <https://constitutioncenter.org/the-constitution/white-papers/democratic-constitutionalism> last visited (last visited Feb. 21, 2023) ("Writing a plurality opinion for the Court, Justice Brennan in *Frontiero v. Richardson* (1973) explicitly noted that the Court would change its interpretation of the Equal Protection Clause in part because 'over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications.'").

322. See Neal Devins, *Congressional Response to Judicial Decisions*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 400, 402 (Mark A. Graber et al. eds., 2008) ("Another way that Congress expresses its disagreement with the Supreme Court is to protect rights that the Court says it need not protect."). The issue of "punting" sensitive issues to Congress is a well-documented phenomena in constitutional civil rights litigation. See, e.g., Gilbert Paul Carrasco, Bivens in the End Zone: *The Court Punts to Congress to Make the Right (of Action) Play*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 56, 70–71 (2021) (criticizing the Court for declining to extend *Bivens* claims and leaving the issue to Congress).

323. 527 U.S. 581 (1999).

324. *Id.* at 593–94.

comes to us, presents no constitutional question.”³²⁵ Though the plaintiffs raised important constitutional questions in the lower courts, the Supreme Court declined to answer those questions, and turned instead to the plaintiff’s claims sounding in statutory rights.³²⁶ A variety of procedural and prudential doctrines explain the Court’s decision to pass on the constitutional question, chief among them the doctrine of constitutional avoidance.³²⁷ These doctrinal hurdles have drawn criticism for their inconsistency in application.³²⁸ The *Olmstead* Court ultimately confirmed its aged position on disability rights generally: the Court alone will not give people with disabilities a place in the constitutional tapestry and Congress is the appropriate vehicle for their civil rights claims.

Congressional action around disability rights, however, has not been meager. Congress in the 1970s passed a variety of statutes meant to extend benefits to people with disabilities and end ableist discrimination by recipients of federal funds, including the Rehabilitation Act of 1973,³²⁹ the

325. *Id.* at 588 (“This case, as it comes to us, presents no constitutional question. The complaints filed by plaintiffs-respondents L.C. and E.W. did include such an issue; L.C. and E.W. alleged that defendants-petitioners, Georgia health care officials, failed to afford them minimally adequate care and freedom from undue restraint, in violation of their rights under the Due Process Clause of the Fourteenth Amendment. But neither the District Court nor the Court of Appeals reached those Fourteenth Amendment claims.” (citations omitted)).

326. *Id.*

327. *See generally* ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 8–13 (2014) (outlining the development of constitutional avoidance doctrine since *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), and subsequent criticism of the doctrine). The Court’s decision to decline to weigh the constitutionality of the disputed state conduct may have been driven in large part by the fact that the lower courts had not developed an adequate record on the matter. But the decision of the lower courts to similarly decline was in turn likely driven by the constitutional avoidance doctrine.

328. *See id.* at 25–26 (summarizing scholarly criticism of the constitutional avoidance doctrine as to consistency); *see also* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1802 (1998) (“Minimalism has the advantage of leaving the unelected generalist courts out of many political disputes, but is problematic because it often offers no guidance to the other branches about what is and is not permissible.”).

329. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.) (antidiscrimination statute). The Rehabilitation Act continues to serve important antidiscrimination needs. *See Schrader v. Fred A. Ray, M.D., P.C.*, 296 F.3d 968, 974–75 (10th Cir. 2002) (holding that employers with less than fifteen employees, though exempt from the Americans with Disabilities Act, must nonetheless comport with the requirements of the Rehabilitation Act if they receive federal funds); *see also* Thomas B. Heywood, Comment, *State-Funded Discrimination: Section 504 of the*

Education for All Handicapped Children Act of 1975,³³⁰ and the Developmentally Disabled Assistance and Bill of Rights Act.³³¹ These acts were individually incremental, but their cumulative effect helped crystallize an emerging movement for people with disabilities.³³² This movement's growth and increasing visibility eventually culminated in the enactment of one of the greatest success stories of legislative civil rights in American history: the Americans with Disabilities Act.³³³ Passed in 1990 by President George H.W. Bush, the ADA is widely hailed as a milestone in disability rights specifically and civil rights broadly—though not flawlessly.³³⁴ The ADA is the unique culmination of years of negotiation and discussion with people with disabilities, family members, and other interested parties. The ADA set out “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and to “ensure that the Federal Government plays a central role” in the enforcement of disability rights.³³⁵

Its most sweeping and relevant provision is Title II, which “prohibits discrimination, by public entities, on the basis of disabilities.”³³⁶ Congress charged the Attorney General to promulgate the rules and regulations

Rehabilitation Act and Its Uneven Application to Independent Contractors and Other Workers, 60 CATH. U. L. REV. 1143, 1148–49 (2011) (“The ADA specifically contemplates the employer-employee relationship, while the Rehabilitation Act paints with a much broader brush, focusing on ‘otherwise qualified’ individuals in ‘any program or activity.’”).

330. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified in scattered sections of 20 U.S.C.) (requiring public schools to provide children with disabilities equal access to education).

331. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified in scattered sections of 42 U.S.C.) (establishing, inter alia, monitoring and rights protection requirements for state plans).

332. Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380, 391 (1989).

333. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in 42 U.S.C. §§ 12101–12103, 12111–12117, 12131–12134, 12141–12150, 12161–12165, 12181–12189, 12201–12213; 47 U.S.C. § 225).

334. *ADA@30: The Americans with Disabilities Act 1990-2020*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/ada30-americans-disabilities-act-1990-2020> (last visited Feb. 18, 2023); Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 62–63 (2019).

335. 42 U.S.C. § 12101(b)(1), (b)(3). The sweeping language of the ADA has drawn comparisons to the Civil Rights Act of 1964 and might generally be seen as part of a wave of civil rights legislation that succeeded that Civil Rights Act. See Hersch & Shinnal, *supra* note 320, at 447.

336. Warden, *supra* note 334, at 66 (citing 42 U.S.C. § 12132).

required to implement the ADA's prohibitions,³³⁷ which ultimately granted the Department of Justice wide discretion. This regulatory power led to what is known as the Integration Mandate, which requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified Individuals with disabilities."³³⁸ The Attorney General further required that public entities make "reasonable modifications," unless they would "fundamentally alter" the entity's services.³³⁹ These two regulations, however, construct dueling principles within the ADA: the state is required to avoid unnecessary institutionalization unless such avoidance would cost the entity its ability to provide its services.³⁴⁰ Congress's command to integrate is thus balanced carefully against the allowance for breach of this command where reasonable.

Returning to *Olmstead*, that case's plaintiffs brought these two dueling principles into stark relief. In 1995, two women in Georgia, one diagnosed with schizophrenia and the other with a personality disorder, brought suit against the state which operated the hospital where they were institutionalized.³⁴¹ Both were initially voluntarily admitted before being transferred to a psychiatric ward, from which they were not permitted to leave.³⁴² Both had received medical opinions that confirmed their eligibility for community-based treatment programs.³⁴³ Yet, both remained institutionalized nonetheless.³⁴⁴ Together, they presented a novel argument of first impression to the Court, that the recent regulations promulgated, by the Attorney General pursuant to the ADA, required the state of Georgia to "place her in a community care residential program" and provide "treatment with the ultimate goal of integrating her into the mainstream of society."³⁴⁵

337. See 42 U.S.C. § 12134(a).

338. 28 C.F.R. § 35.130(d) (2022).

339. *Id.* § 35.130(b)(7)(i).

340. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 596–97 (1999).

341. *Id.* at 593.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 593–94. In response to a question from Justice Sandra Day O'Connor during oral argument, the attorney for the petitioner noted that their argument was not facially challenging the Attorney General's power to craft the Integration Mandate. See Oral Argument at 6:19–6:32, *Olmstead v. L.C.*, 527 U.S. 581 (No. 98-536), <https://www.oyez.org/cases/1998/98-536> (statement of Beverly P. Downing).

Georgia's defense relied heavily on the caveat included in the Integration Mandate, which permitted states to "resist modifications that 'would fundamentally alter the nature of the service, program, or activity.'"³⁴⁶ The state claimed that complying with the Integration Mandate in the manner petitioned by the plaintiffs would impose an insurmountable burden on the state.³⁴⁷ Ultimately, the state responded to the plaintiff's requests by claiming, "it was already using all available funds to provide services to other persons with disabilities."³⁴⁸ Thus, requiring anything else from the state would simply not be financially sustainable.³⁴⁹

The Supreme Court largely affirmed the district court's decision to grant summary judgement to the plaintiffs.³⁵⁰ The Court decided first that the "concept of discrimination" targeted by the ADA was far broader than mere unequal treatment.³⁵¹ Instead, its reach was meant to extend to the isolation of people with disabilities from general society.³⁵² In doing so, the Court discerned that Congress had identified two underlying bases for its determination that such isolation should end. First, isolation furthered "unwarranted assumptions" about people with disabilities; and second, that isolation forced people to give up important, "everyday life activities."³⁵³ With these common understandings in mind, Congress intended the ADA to cover the very case before the Court, and so the Court held that it did.

The Court's decision in *Olmstead* reflected two policy norms crafted by the Court on the issue of disability rights. First and most obviously, the Court signaled it was prepared to embrace a broader vision of equality than it previously delivered, so long as this vision was sourced from the wells of Congress. But secondly, and perhaps just as importantly, *Olmstead* reflected a continuation of the uneasiness in the federal courts to apply a reasonableness standard to disability rights. The Integration Mandate's fundamental alteration clause is, at base, a test of reasonableness and only

346. *Olmstead*, 527 U.S. at 597 (quoting 28 C.F.R. § 35.130(b)(7) (1998)).

347. *Id.* at 594.

348. *Id.*

349. *See id.*

350. *See id.* at 594–97.

351. *Id.* at 598 ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.").

352. *Id.* at 599–601.

353. *Id.* at 600–01.

somewhat deferential to the state, as articulated by the Court.³⁵⁴ But the portion of Justice Ginsburg's opinion that contained this definition only commanded the support of a *plurality* of justices. On procedural grounds, Justice John Stevens did not share the Court's opinion.³⁵⁵ Even if Justice Stevens had joined the Court in discussing the fundamental alteration caveat, the *specificity* with which the plurality opinion outlined the requirements for a state plan that would satisfy a reasonable costs-analysis is an indication the Court will apply reasonableness to disability rights with some finesse.³⁵⁶ The fact that Justice Anthony Kennedy felt the need to write separately to emphasize his opinion on the considerable deference owed to the states underscores the fact that his forgiving view of the fundamental alteration caveat was unable to command a majority.³⁵⁷

Applying the ADA, and the Court's wide view of it, to conservatorships is a necessary next step for disability rights advocacy.³⁵⁸ The far-reaching and often ambiguous language of the ADA does not necessarily reach conservatorships, but nor does it necessarily preclude application to them. The ADA does not limit itself by its own terms to the institutional context presented to the Court in *Olmstead*.³⁵⁹ Nor does *Olmstead* itself support

354. *See id.* at 605 (“To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow.”).

355. *Id.* at 607–08 (Stevens, J., concurring).

356. *See id.* at 605–06 (majority opinion) (“If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.”).

357. *Id.* at 608–10 (Kennedy, J., concurring). Comparing *Olmstead* and *Cleburne* cannot be avoided, and viewing both those cases in that context reveals that the “rational-basis-plus” test applied in *Cleburne* may well be at play in ADA cases.

358. *See generally* Jayne Ponder, Note, *The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny*, 53 HARV. C.R.-C.L. L. REV. 709, 710 (2018) (“[T]he ADA remains the centerpiece of the modern disability rights struggle. But this is by necessity, not choice.”).

359. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (“First, there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized.”); *see also* Leslie Salzman, *supra* note 17, at 209 (“Rather, these cases can be read to go beyond the paradigm of physical isolation in an institution to support the general requirement of the integration mandate that public programs, services, and activities be provided in a manner that enables individuals with disabilities to interact with others to the greatest extent possible.”).

such an outcome.³⁶⁰ Instead, as the National Council on Disability has asserted, the ADA, with all its sweeping language, is properly viewed as applying to and governing conservatorships.³⁶¹ And of course, conservatorships are a public service within the meaning of the Integration Mandate, for they stem from the judicial branch's authority, inherent or statutorily granted, to provide mental health services.³⁶² More than two decades after *Olmstead*, there can be no doubt that both the Court and Congress intended the ADA to have impact in a wide variety of contexts.

The failure of states to adequately police the reproductive healthcare decisions made by their conservators may violate the Integration Mandate of the ADA. To explore this legal conclusion, courts should consider the two Congressional judgments outlined in *Olmstead*. These judgments guide the application of the Integration Mandate in its varied settings, because they form the “national mandate” Congress spoke of in the enactment of the ADA.³⁶³ In considering the assumptions advanced by reproductive healthcare decisions of conservators and the practical exclusionary effect of such decisions, courts demonstrate fidelity to the egalitarian instinct Congress sought to implement.³⁶⁴

Decisions made by conservators that restrict the reproductive freedom of people with disabilities advance “unwarranted assumptions” about the sexuality of people with disabilities. Mental health practice is rife with

360. *Fisher*, 335 F.3d at 1181 (“[N]othing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA’s integration requirements.”).

361. NAT’L COUNCIL ON DISABILITY, TURNING RIGHTS INTO REALITY: HOW GUARDIANSHIP AND ALTERNATIVES IMPACT THE AUTONOMY OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 33 (2019), https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf (“As the 2018 NCD report found, guardianship must be seen as subject to the Americans with Disabilities Act (ADA), which has been interpreted by the U.S. Supreme Court in the 1999 *Olmstead* decision to give rise to an obligation to provide services to people in the least restrictive environment that will meet their needs.”). The National Council on Disability is an independent advisory body within the U.S. government. *About Us*, NAT’L COUNCIL ON DISABILITY, <https://www.ncd.gov/about> (last visited Feb. 18, 2023).

362. *See* Salzman, *supra* note 17, at 209 (reasoning that after *Olmstead* the ADA “can be applied with equal force to the court-ordered, constructive isolation of guardianship”).

363. *See* 42 U.S.C. § 12101(b)(1).

364. *See generally* Note, *The Rise of Purposivism and the Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1245–46 (2017) (discussing the rise of purposivism in recent Supreme Court administrative law decisions as an attempt to respect Congress).

misconceptions as to the sexuality of people with disabilities, often resulting in devastating consequences for people under the supervision of mental health professionals.³⁶⁵ For example, young people with disabilities are often denied sex education and the ability to express their sexuality, which directly contributes to higher rates of sexual violence against them, which, in turn, cyclically “justifies” their exclusion from the sexual world altogether.³⁶⁶ These misconceptions are the natural descendants of the two menaces of disability rights generally: eugenics and paternalism.³⁶⁷ The reality for people with disabilities is quite the opposite of these assumptions. People with disabilities can usually express sexual desires in a manner that is both competent and valuable.³⁶⁸ Nonetheless, as one scholar wrote, the older view prevails:

Society tends to infantilize the sexual urges, desires, and needs of the mentally disabled. Alternatively, they are regarded as possessing an animalistic hypersexuality, which warrants the imposition of special protections and limitations on their sexual

365. See, e.g., Natalie M. Chin, *Group Homes as Sex Police and the Role of the Olmstead Integration Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 394 (2018) (“In 1917, Dr. Lewis Terman, a respected Stanford psychologist and pioneer of the IQ test, wrote ‘[t]hat every feeble-minded woman is a potential prostitute.’” (quoting LEWIS M. TERMAN, *THE MEASUREMENT OF INTELLIGENCE* 11 (1916))).

366. Sonali Shah, “*Disabled People Are Sexual Citizens Too*”: *Supporting Sexual Identity, Well-Being, and Safety for Disabled Young People*, FRONTIERS EDUC., Sept. 4, 2017, article 46, <https://www.frontiersin.org/articles/10.3389/feduc.2017.00046/pdf> (“The invisibility and oppression of disabled people’s sexual lives in public spaces contributes to disabled young people’s low levels [of] sexual knowledge and inadequate sex education compared to their non-disabled peers.”).

367. Chin, *supra* note 365, at 393 (“Historically, states regulated the sexuality of individuals with intellectual disabilities through the implementation of policies that served two primary purposes: to protect society by containing the ‘defective strain’ that gave ‘rise to feeble-mindedness and sexual promiscuity’ and as a form of paternalism aimed at ‘rescu[ing] women from becoming victims of men’s lust and their own ‘weakness of self-control.’” (first quoting PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES* 5 (2010); and then quoting JAMES W. TRENT, JR., *INVENTING THE FEEBLE MIND: A HISTORY OF INTELLECTUAL DISABILITY IN THE UNITED STATES* 103 (1995))).

368. Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 532 (1993–1994) (“However, many institutional mental health professionals and behaviorists now recognize that patients ‘are and wish to be sexually active,’ and that sexual freedom often has therapeutic value.” (quoting Steven Welch et al., *Sexual Behavior of Hospitalized Chronic Psychiatric Patients*, 42 HOSP. & CMTY. PSYCHIATRY 855, 855 (1991))).

behavior to stop them from acting on these “primitive” urges. By focusing on alleged “differentness,” we deny their basic humanity and their shared physical, emotional, and spiritual needs. By asserting that theirs is a primitive morality, we allow ourselves to censor their feelings and their actions. By denying their ability to show love and affection, we justify this disparate treatment.³⁶⁹

In the context of conservatorships, the structural advantage of conservators in policing the movement of people with disabilities is supported by a legal framework that does not yet recognize the sexuality that people with disabilities express.³⁷⁰ These decisions restricting the reproductive freedom of people with disabilities also further their isolation from “everyday life activities.”³⁷¹ In many ways, this conclusion is a natural corollary of the misconception of the cyclical supposed justification of isolation above. On the other hand, independently analyzing this factor may allow for a discussion of policies that, while based on assumptions that *are* warranted, are nonetheless unduly restrictive as a *constitutional* matter. The Court has on at least one occasion found the ADA’s Title II (though not necessarily the Integration Mandate) a proper mechanism for the prophylactic enforcement of due process rights.³⁷²

The ADA is not a completely reliable answer to the problem presented by Britney’s case. Scholarship that discusses the ADA’s application to conservatorships has identified three discrete elements of a successful ADA Integration Mandate action: (1) the person seeking relief must be a “qualified individual with a disability,”³⁷³ (2) the conduct challenged must

369. *Id.* at 537.

370. Chin, *supra* note 365, at 415 (“Compounding this issue of structural power are the overprotective policies that limit or restrict sexuality, which are driven by a presumption of incapacity based on ableist and paternalistic notions that individuals with intellectual disabilities are innately incapable of engaging in sex and intimacy and, thus, must be protected from themselves and others.”). The same pattern can be inferred in the context of conservatorships.

371. *See id.* at 421.

372. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (“Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ § 5 authority to enforce the guarantees of the Fourteenth Amendment.”).

373. 42 U.S.C. § 12131(2); *see Salzman, supra* note 17, at 197; Chin, *supra* note 365, at 424. The qualified-individual element is not discussed in depth in this Comment because Salzman provides a more than adequate accounting of why conservatee-plaintiffs satisfy this element generally. *See Salzman, supra* note 17, at 197–98.

be a “public ‘service, program, or activity,’”³⁷⁴ and (3) the conduct must be discriminatory within the meaning of the ADA.³⁷⁵ This third element requires, according to *Olmstead*, that individuals seek a more integrated setting *within* existing services, rather than demanding the creation of new services.³⁷⁶ This element means that the ADA cannot function by itself to impose a standard of care. Other scholars have made clear their well-founded belief that changes made to conservatorships are not requests for new services, but requests for a more integrated setting within an existing service, and this Comment agrees.³⁷⁷ At even a narrow level of generality, an Integration Mandate claim that requires the state to more rigorously police reproductive healthcare decisions in conservatorships must meet the existing service requirement. Most states do, in fact, formally prohibit involuntary sterilization of conservatees with narrow exceptions; that is, plaintiffs would be making a claim for “a different, integrated form of the services *being provided* by the state in a more restrictive setting.”³⁷⁸ It is the view of this Comment, however, that one of the key reasons states *have* to more rigorously enforce reproductive rights in their own conservatorship laws is that there are no nationwide standards of care and procedure. In this regard, the ADA is rendered insufficient, alone, as an answer to problems inherent in conservatorships.

374. See Salzman, *supra* note 17, at 201.

375. See *id.* at 206.

376. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999) (“We do not in this opinion hold that the ADA imposes on the States a ‘standard of care’ for whatever medical services they render, or that the ADA requires States to ‘provide a certain level of benefits to individuals with disabilities.’ We do hold, however, that States must adhere to the ADA’s nondiscrimination requirement with regard to the services they in fact provide.”). Although *Olmstead* did not by its own terms preclude such a holding, lower courts have since found this footnote to be determinative in requiring the plaintiff to limit herself to existing services. See Salzman, *supra* note 17, at 210 n.170 (citing *Townsend v. Quasim*, 328 F.3d 511, 518–19 (9th Cir. 2003)).

377. See Salzman, *supra* note 17, at 215–16 (“[A] court’s determination of whether or not a requested service in the community should be deemed to be a ‘new service’ or simply a service already provided by the state in a more segregated setting generally turns on the court’s willingness to take a broad view of the substance of the services being requested and to view the content of those requested services at a ‘high level of generality.’”).

378. *Id.* at 216 (emphasis added). To underscore this point: most states already purport to provide the integrated setting requested, and the fact that they do not means they are actually providing a restrictive setting of the same essential service; requiring them to provide a more integrated setting of the service does not require a new service.

Congress knows how to legislate nationwide standards of care and procedure with respect to vulnerable populations. A core and close example of this is the Federal Nursing Home Reform Act (“FNHRA”).³⁷⁹ There, Congress responded to allegations of rampant abuse in nursing homes by legislating a Residents’ Bill of Rights for recipients of Medicaid.³⁸⁰ The Supreme Court recently held that the FNHRA does confer justiciable rights on recipients of Medicaid whose rights have been violated by a nursing home, confirming Congress’s ability to legislate in this manner with respect to a variety of civil rights issues.³⁸¹ We know, therefore, that Congress is capable of providing targeted relief in the form of standardized care and procedure. It remains for Congress to seize the moment to exercise its capabilities in favor of people in conservatorships.

B. Proposed Legislation: The FREE Act

To overcome the ADA’s insufficiency, Congress has attempted to develop some nationwide standards of procedures. Congress has been as disturbed as the rest of the nation by the developments in Britney’s case. In the House, two representatives co-sponsored a bill that would condition certain expenditures on states’ assurance that every conservatee will be provided with a state-employed caseworker to oversee the conservatorship.³⁸² The bill, titled the FREE Act,³⁸³ represents Congress’s first attempt to address the lack of nationwide standards of care and procedure. The bill conditions \$260 million in grants on two principal requirements.³⁸⁴ First, the bill requires states that receive federal grant money as part of the legislation to appoint a publicly funded caseworker with complete communicative access to the conservatee.³⁸⁵ Second, the bill

379. Federal Nursing Home Reform Act, 42 U.S.C. § 1396r [hereinafter FNHRA].

380. *Id.* § 1396r(c); *see also* Talevski v. Health & Hosp. Corp. of Marion Cnty., 6 F.4th 713, 719 (7th Cir. 2021) (“Congress enacted FNHRA as an amendment to the Medicaid statute in response to widespread abuses among government-certified nursing facilities.”), *aff’d*, No. 21–806 (U.S. decided June 8, 2023) (slip op.).

381. *Talevski*, slip op. at 23.

382. *See* Chris Willman, *Bipartisan ‘Britney Bill’ Introduced in Congress—and Some in the ‘Free Britney’ Movement Oppose It*, VARIETY (July 20, 2021, 1:23 PM PT), <https://variety.com/2021/music/news/britney-bill-introduced-congress-conservatorships-1235024037/>.

383. Freedom and Right to Emancipate from Exploitation (FREE) Act, H.R. 4545, 117th Cong. § 1 (2021).

384. *Id.* § 2(f)(1).

385. *Id.* § 2(b)(2).

requires states to permit a conservatee to petition the court to replace her conservator with a publicly funded conservator.³⁸⁶ The bill also creates a cause of action for conservatees who are denied either the right to communicate with a public caseworker or the right to petition the court.³⁸⁷

Free Britney advocates reacted to the proposed legislation with lackluster enthusiasm, to say the least.³⁸⁸ The FREE Act attempts to shift the responsibilities of caretaking for disabled people to the public arena, essentially requiring states to increase the number of conservatorships that are managed by state employees rather than court appointed private individuals. The possibility of abuse in the proposed public system, however, has been completely omitted from the legislation. Data on public conservatorships, like conservatorships generally, is scarce.³⁸⁹ But data that does exist confirms that the possibility of abuse in public conservatorships is far from nonexistent. Research in this area points to a dearth of oversight and accountability mechanisms that replicate the same problems of private conservatorships.³⁹⁰ In states that implement public conservatorship programs, they are almost always underfunded, understaffed, and overloaded by cases (a system that mirrors eerily the chronic issues plaguing public defender systems).³⁹¹ Furthermore, the bill requires the conservatee to petition for a shift from private to public caretaking. But in cases where a conservatee is unable to voice such an interest, but nonetheless requires it, a caseworker employed under the auspices of the

386. *Id.*

387. *Id.* § 3(c).

388. See Willman, *supra* note 382; see also Free Britney L.A. (@freebritneyla), TWITTER (July 20, 2021, 2:00 PM), <https://twitter.com/freebritneyla/status/1417559979486187521?s=20&t=O1ZLgT4J0UCJmOo7g4MHnA>. (“While we are heartened by the bipartisan effort to reform conservatorships and guardianship at the federal level, we do NOT support the FREE Act as proposed.”).

389. PAMELA B. TEASTER ET AL., PUBLIC GUARDIANSHIP: IN THE BEST INTERESTS OF INCAPACITATED PEOPLE? 131 (2010) (“Without uniform, consistent data collection, without evidence-based practice as exists in other fields, such as medicine, policymakers and practitioners are working in the dark.”).

390. *Id.* at 132 (“Most interview respondents found no difference in court monitoring of public and private guardians, frequently pointing out the need for stronger monitoring of both.”).

391. See *id.* at 59. In many states, conservatees may be represented by the public defender’s office itself. See, e.g., S.F. Dep’t of Aging & Adult Servs., *Overview of Mental Health Conservatorship*, S.F. DEP’T OF AGING & ADULT SERVS. (Nov. 2019), https://www.sfdph.org/dph/files/housingconserv/Public_Conservatorship_Overview.pdf (outlining California’s process of appointing public defenders and public conservatees).

FREE Act can do nothing but bring it to an administrative agency's attention. The caseworker herself is thus not empowered to petition the court on her own accord for a change in conservatorship.

These two flaws undermine the effectiveness of the legislation as to its targeted goal of increasing conservatees' access to justice. Other aspects of the bill, such as the much-touted financial disclosure requirement,³⁹² are so heavily limited as to be rendered meaningless in federal law. First, disclosures are limited to the public conservators and caseworkers who participate in the public system.³⁹³ Second, the bill only requires these public employees to "meet such financial disclosure requirements as the State may establish."³⁹⁴ In delegating the rulemaking authority for such disclosure requirements to the several states, the bill abdicates responsibility for the very harm reduction it claims as its goal.

Even the federal cause of action created by the FREE Act is difficult to practically conceptualize. The FREE Act cites the Due Process Clause of the Fourteenth Amendment as part of its congressional findings section before it establishes a cause of action.³⁹⁵ On its face, it therefore appears that Congress believes that the Due Process Clause requires the cause of action the FREE Act creates. But the cause of action itself is extremely limited; it includes rights, like a right to petition, that are often already safeguarded but otherwise ineffective without more substantive protections.³⁹⁶ People in Britney Spears's situation are unlikely to be able to make use of the provisions of the cause of action because the provision's meaning depends so much on variables outside of their control. Perhaps the only meaningful provision of the FREE Act is the data collection and reporting requirements, which would go far in remedying the well-acknowledged scarcity of data in conservatorship law generally and perhaps lay the Congressional groundwork for more comprehensive legislation in the future.

392. The bill itself references the need for financial disclosure requirements. Freedom and Right to Emancipate from Exploitation (FREE) Act, H.R. 4545, 117th Cong. § 3(a)(3) (2021) ("Private guardians are at risk for financial conflicts of interest, because a ward's assets, which they usually control, are used to pay the guardian for their services.").

393. *Id.* § 2(b)(4).

394. *Id.*

395. *Id.* § 3(a)(8), (10) & 3(c).

396. *See id.* § 3(b) (including the right to communicate with caseworker or right to petition the court for a change in conservator in certain circumstances).

The primary congressional proposal therefore falls far short of the national standards of procedure and substance of care demanded by the moment. This failure is not excused by a lack of scholarship in this area. The American Bar Association commissioned research that produced a Model Public Guardianship Act, which Congress can incentivize states to adopt.³⁹⁷ A more preferable solution would reduce the use of conservatorships altogether, perhaps by employing alternatives like supported decision-making.³⁹⁸ Professor Leslie Salzman pioneered research on the value of supported decision-making as a more integrated setting for the provision of mental health services under the Integration Mandate of the ADA.³⁹⁹ However, she acknowledges that existing law surrounding the ADA, such as the federal courts' abstinence from the imposition of new services, "creates a certain analytical challenge" for disputing conservatorships under the ADA.⁴⁰⁰ Congress might best serve the interests of people under conservatorship if it were to amend the ADA so as to expressly reject the approach taken by the lower courts that precludes any request for new or alternative services. This approach by lower courts, with no foundation in text or precedent,⁴⁰¹ should be overturned to clear the way for federal regulations that promote the use of supported decision-making.

397. TEASTER ET AL., *supra* note 389, at 133-57.

398. Supported decision-making as an alternative to the substituted decision-making of conservatorships has been well-researched by scholarship elsewhere. *See* Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313, 316-19 (2021) ("Supported decision-making is an umbrella term for processes by which an individual who might otherwise be unable to make his or her own decisions becomes able to do so through support from other people."). In particular, this Comment owes a distinct debt of gratitude to the work of Professor Leslie Salzman, whose work on conservatorships and in particular supported decision-making has proven an invaluable resource in challenging existing paradigms of mental health law. *See* Salzman, *supra* note 17, at 235-39 (outlining the Swedish and Canadian models of supported decision making as preferable and more integrated alternatives to conservatorship). Though this Comment's analysis of the ADA's Integration Mandate models her own closely, her approach targets conservatorships broadly where this Comment targets discrete decisions made by conservators. These are not mutually exclusive arguments.

399. Salzman, *supra* note 17.

400. *Id.* at 219.

401. *See* Radaszewski *ex rel.* Radaszewski v. Maram, 383 F.3d 599, 611 (7th Cir. 2004) ("Nothing in the regulations promulgated under the ADA . . . or in the Court's decision in *Olmstead* conditions the viability of a Title II . . . claim on proof that the services a plaintiff wishes to receive in a community-integrated setting already exist in exactly the same form in the institutional setting.").

C. Proposed Legislation: The Guardianship Bill of Rights Act

More recently, another bill has been introduced in the Senate that would go much further than the FREE Act in making tangible changes.⁴⁰² The bill does two things different from the FREE Act that make it a much more preferable solution to the problem of abuse in conservatorships. First, the bill creates a much better scheme of enforcement. Section 5 of the bill delegates rulemaking authority to the Attorney General and the Assistant Attorney General for Civil Rights to develop standards to protect due process rights, the rights encoded in the Bill of Rights, as explained below, as well as rights relating to, among other things, voting, communication, and travel.⁴⁰³ Section 6 of the Bill charges those officers with developing standards for the establishment, modification, and termination of all types of “protective arrangements.”⁴⁰⁴ Once the standards are promulgated, the Department of Justice “*shall*” withhold certain federal funds for violations of Section 5 standards and States must submit a plan for implementing most of the Section 5 and Section 6 standards to apply for funds under a host of other federal spending statutes.⁴⁰⁵ Separately, the bill would create a “Protection and Advocacy Program” to organize oversight, information gathering, and even legal representation.⁴⁰⁶

Second, the bill specifically outlines a series of rights that are both specific enough to be meaningful and broad enough to be open to litigation.⁴⁰⁷ These rights are characterized by the bill as “fundamental” and “inherent,” an important indicator that Congress believes these rights to be preexisting as implicit in liberty. The Bill of Rights includes the right to effective counsel and many iterations of a right to “the least restrictive arrangement.”⁴⁰⁸ This codification of rights, combined with the strongarm enforcement mechanisms outlined above, would be a vast overhaul of existing conservatorship law with meaningful potential to protect and

402. Guardianship Bill of Rights Act, S. 1148, 118th Cong. (2023).

403. *Id.* § 5(a)–(b).

404. *Id.* § 6.

405. *Id.* §§ 5(c)(2) (emphasis added) (indicating that the Department of Justice *must* withhold funds when the State violates federal laws and regulations under this bill). But notice that, for some reason, States are not obliged to show implementation of standards related to transitioning out of conservatorships into other arrangements or periodic review of protective arrangements). *Id.* § 5(d), 6(f).

406. *Id.* § 7.

407. *See id.* § 2(a)(5), § 5(a)(1).

408. *Id.* §§ 2(a)(5)(C), 2(a)(5)(A), (B), (G).

respect people with disabilities. The bill, most importantly, would enact a right to supported decision-making, which would be a radical, vital, and important change from existing practice.⁴⁰⁹

Supported decision-making incorporates a far less intrusive means of helping people who need help by focusing on the idea of informed consent.⁴¹⁰ Through variously structured arrangements, supported decision-making empowers people to make their own decisions while inviting supporters to help ensure that decision is informed, considered, and deliberate.⁴¹¹ This alternative to conservatorships has been vigorously championed by disability rights advocates,⁴¹² and their efforts helped codify an endorsement of supported decision-making in the United Nations Convention on the Rights of Persons with Disabilities.⁴¹³ The leadership of people with disabilities in pioneering this legal reform demonstrates first, the power of the disability rights movement, and second, that the voices of people with disabilities must be the central starting point of any legislative motion.

Deep consultation with disability rights advocates is therefore needed to ensure the full, complete success of the draft Guardianship Bill of Rights Act. But under their stewardship, this piece of legislation can be a vital step towards justice on the years-long road to get there. It is too early in the life of the bill to unequivocally guarantee that it measures up to the moment. But of all proposals, this one is the most promising. This Comment strongly urges Congress to move quickly in its consideration of this bill as a top priority amidst the appalling lack of accountability that plagues conservatorships and guardianships.

409. *Id.* § 2(a)(5)(B)(ii).

410. See Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. LEGIS. 313, 316–19 (2021).

411. *Id.* at 316.

412. See, e.g., *Supported Decision-Making*, CTR. PUB. REPRESENTATION, <https://www.centerforpublicrep.org/initiative/supported-decision-making/> (last visited Apr. 1, 2023). The Center for Public Representation is a disability rights advocacy and litigation organization. *Center for Public Representation*, CTR. PUB. REPRESENTATION, <https://www.centerforpublicrep.org> (last visited Apr. 1, 2023).

413. Convention on the Rights of Persons with Disabilities art. 12(3), 2515 U.N.T.S. 3 (2006).

VI. Conclusion

Britney Spears's saga of abuse in plain sight has properly incurred the outrage of people across the world. Her allegation that she was rendered unable to procreate because her conservator refused to let her remove her IUD has received substantial scrutiny for the fundamental question of reproductive and disability rights at issue. But at base, these practices of economic and reproductive exploitation are not new to conservatorship law: they are baked into the institutional origin. From the Ancient Greeks to the English jurists to the California coast, the underlying thread of bodily trespass remains the same.

It is with this historical context that interested stakeholders should approach the issue of conservatorship law. Understanding the double insulation of conservatorships from legal oversight leads to the conclusion that an equally two-pronged attack on the structure is necessary to overcome its resistance to claims of right and remedy. First, federal courts must reverse the trend since *Buck* and adopt strict procedural and substantive due process protections for the rights of the disabled subject to conservatorships. As Justice Amy Coney Barrett remarked before her ascension to the bench, the Constitution, and in particular the Due Process Clauses, is fundamentally a question of "who decides."⁴¹⁴ Where Justice Barrett views the answers to this question as a binary between the federal or state government, this Comment takes the ternary view that some decisions are placed by the Constitution beyond the control of either and any government, resting squarely within the prerogative of the individual. As the history of conservatorship demonstrates, these relationships are intimately tied to monarchical and imperial sources of power and originate in exploitative practices. Countering this unsavory and undemocratic institution requires oversight from the chief anti-monarchical document of our age: the U.S. Constitution. The tools of procedural and substantive due process are well calibrated to meet the challenge of disability rights advocacy.

Second, Congress must enact federal legislation that requires states to narrow the scope of conservatorships as an instrument of public health administration. Legislative victory has been a tried-and-true method of achieving what cannot be achieved in the courts. The ADA's Integration

414. Jacksonville University, *Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute*, YOUTUBE, at 32:24 (Nov. 3, 2016), <https://www.youtube.com/watch?v=7yjTEdZ81II>.

Mandate has been a fruitful source of litigation and innovation around disability rights generally, but lower courts have struggled to apply the law with its full purpose. Proposed legislation, so far, fails to establish what is so desperately needed: a national standard of substance and process for conservatorships. In this regard, legislation suffers from innate difficulties (such as delay, incrementalism, and compromise) that make congressional action alone an unsatisfying answer to the call for disability rights.

These two steps respond directly to the practices of state courts and state legislatures, but joint efforts to maximize the comparative advantages of each forum are key to the full realization of the goal of equality and dignity for people with disabilities. The adoption of this approach by national level litigation and policy experts working together will go far in preventing injury inflicted by conservatorships. While a Comment written at this level of generality does not have the resources to direct specific advocacy goals, outlining these two steps can certainly prompt targeted discussion in the legal academy of conservatorship law's future. Britney Spears's conservatorship dispute presents a novel opportunity to question the methods and madness of our existing conservatorship laws.⁴¹⁵ It is vital to the legitimacy of the law that the opportunity is not squandered.

Devraat Awasthi

415. Others have already latched onto the success of Britney's legal efforts to make real their own struggle for freedom. See Mandalit del Barco, *Former Child Star Amanda Bynes Is Freed from Conservatorship*, NAT'L PUB. RADIO (Mar. 22, 2022, 5:18 PM), <https://www.npr.org/2022/03/22/1088091387/amanda-bynes-conservatorship-ended>.