

REPRODUCTIVE FEDERALISM & DISABLED CITIZENSHIP

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I. Introduction

Justice Alito’s majority opinion in *Dobbs v. Jackson Women’s Health Organization*¹ highlighted the democratic consequences of deciding abortion policy through the federal judiciary, arguing that the Supreme Court in *Roe* and *Casey* had “short-circuited the democratic process.”² Justice Kavanaugh’s concurring opinion further explained that by deciding in favor of abortion rights, the Supreme Court had wrongly taken away the “people’s authority to resolve the issue of abortion through democratic self-government.”³ Both Justices drew upon Justice Brandeis’s idea that states can be “laboratories for democracy.” In *New State Ice Co. v. Liebmann*,⁴ Brandeis argued that “[t]here must be power in the States and the nation to remould, through experimentation, our economic practices to meet changing social and economic needs.”⁵ However, less attention is paid to the caveat Justice Brandeis gave after this proclamation—that such social experiments ought not proceed when they restrict substantive due process.⁶ Justice Brandeis stressed that the Court may (and should) strike down measures that are “arbitrary, capricious, or unreasonable” because “the due process clause” applies to “substantive law as well as to matters of procedure.”⁷ Notably, Justice Alito’s and Justice Kavanaugh’s opinions seemed unconcerned with the second factor Brandeis discussed—the consequences of eliminating substantive due process rights, specifically eliminating *Roe* and *Casey*’s balancing tests and opening the door for states to give “potential life” primacy.⁸

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1. See 597 U.S. 215 (2022).
2. *Id.* at 269.
3. *Id.* at 347 (Kavanaugh, J. concurring).
4. 285 U.S. 262 (1932).
5. *Id.* at 311.
6. *Id.*
7. *Id.*
8. *Dobbs*, 597 U.S. at 256; see also *id.* at 350 (Kavanaugh, J. concurring).

The devolution of the power to regulate abortion to the states is a phenomenon that this Article refers to as “reproductive federalism.” I claim that reproductive federalism is a form of “structured governance” that creates consequences for disabled people’s reproductive citizenship. Specifically, I build upon political scientist Suzanne Mettler’s insight that institutional and administrative arrangements have civic and social implications.⁹ I argue that *Dobbs* exacerbated what I call divided reproductive citizenship for people with disabilities.¹⁰ Citizenship is “divided” when one group of people can claim rights on a federal level that are relegated to state or local-level administration for another group—subjecting those who are left without federal rights to a highly variable postcode lottery that determines their rights or the services they receive.¹¹

I suggest that reproductive citizenship was divided for people with disabilities¹² prior to *Dobbs*; however, *Dobbs* has exacerbated the control that states may exercise over the reproductive decisions of disabled people while blocking federal recourse. State governments have adopted different rules governing fetal personhood and abortion that have consequences for disabled people’s abilities to make reproductive decisions and to access teratogenic medications over the course of their pregnancies.¹³ Additionally, state governments have developed radically different rules regarding Medicaid reimbursement for abortion care, leaving the reproductive decisions of many disabled Medicaid beneficiaries subject to state rules, or worse, the whims of

9. SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* 4 (1998). Mettler discusses “structured governance” in the context of the New Deal and its gendered implications. *Id.* at 5. However, her analysis fundamentally asks how the level at which policies are administered, who administers policies, and what accountability mechanisms exist shape people’s lived relationships with the state. Therefore, her analysis is pertinent to studying federalism as a social arrangement more generally.

10. *Cf.* METTLER, *supra* note 9, at 5-6 (arguing that “divided” citizenship emerged as white men were granted more access to mechanisms of claiming national economic and social rights, while women and nonwhite men’s rights were “left under the auspices of the states, subject to highly variable forms of citizenship inherently tied to the politics of place”).

11. *See id.* (arguing that divided citizenship subjects people to a variable politics of place).

12. This Article shifts between person-first and identity-first language to acknowledge differing preferences within the disability community. Although this author prefers identity-first language, along with much of the disability community, language is a personal decision that often varies by subset of the disability community. *See generally* Erin E. Andrews, Robyn M. Powell & Kara Ayers, *The Evolution of Disability Language: Choosing Terms to Describe Disability*, 15 *DISABILITY & HEALTH J.*, article no. 101328, July 2022, https://aahd.us/wp-content/uploads/2022/05/EvolutionDisabilityLanguage_ChoosingTermsDescribeDisability.pdf.

13. *See infra* Section III.A and accompanying notes.

individual provider systems, which often condition state-funded care on their own religious beliefs.¹⁴ Yet *Dobbs* also left several regimes that divided disabled reproductive citizenship in place—such as guardianship—that create more variations in a context that does not value reproductive rights generally.¹⁵

This Article begins by articulating a framework for understanding reproductive federalism and divided citizenship in Part II. The Article then applies that framework in Parts III and IV. Part III focuses on the formal state institutions that sanction differential treatment across state lines, and Part IV focuses on actors like government-contracted healthcare providers and guardians, both of whom are given profound legal authority over disabled people yet are not traditionally associated with citizenship. Part V concludes by introducing some ways to realize more equitable and inclusive forms of disabled citizenship despite reproductive federalism’s more pernicious effects.

II. Citizenship, Reproductive Federalism, and Disability

This Part sets out the rationale for understanding reproductive federalism through a citizenship framework and then transitions to discussing reproductive citizenship.

A. Legal Civic Orders and Lived Experiences of Citizenship

At first glance, one might question the utility of approaching abortion issues from a citizenship framework. Why citizenship and not merely rights? Furthermore, what is citizenship? For present purposes, I use the term citizenship capaciously to refer to a person’s broader relationships with the state and their political communities.¹⁶ Citizenship scholar Rogers Smith describes citizenship as having a stake in the political life of one’s country and a say over the political conditions under which one lives.¹⁷ However, citizenship also entails “material privileges and obligations” and “confers an identity that may have deep personal and psychological dimensions at the

14. See *infra* Sections III.B, IV.A, and accompanying notes.

15. See *infra* Section IV.B and accompanying notes. Family law is similarly variable but is beyond the scope of this Article.

16. Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440, 1440 (1998); see also ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 14 (1997) (“[T]he term citizenship has always carried more demanding connotations than courts and other American political leaders have often also endorsed.”).

17. SMITH, *supra* note 16, at 14.

same time that it expresses belonging.”¹⁸ Here, I am not only concerned with rights as they exist on paper but also with what Medicaid scholar Jamila Michener has called the “political lives” of people.¹⁹ Political life includes not only traditional political participation but also the ways that people “understand and respond” to political systems.²⁰

Citizenship therefore is not a binary or monolithic category—one cannot measure a person’s citizenship status solely through possession of a U.S. passport, for example.²¹ An entire field of “citizenship studies” has emerged around the idea that citizenship is complex and multifaceted.²² Even when defined legally, citizenship is a pluralistic concept that varies across time, place, jurisdiction, person, and enforcer—at multiple levels of government.²³ Citizenship is a vital concept, much for the same reason that rights are. My own arguments for studying citizenship as a concept echo Mari Matsuda’s arguments against critical legal studies’ denigration of rights:

How could anyone believe both of the following statements?

(1) I have a right to participate equally in society with any other person; (2) Rights are whatever people in power say they are. One of the primary lessons [critical legal studies] can learn from the experience of the bottom is that one can believe in both of those

18. Cott, *supra* note 16, at 1440.

19. JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 7-8 (2018) (“Folks who cannot recall participating in any political activity at all nonetheless have political lives worth recognizing,” and “political life is also about how a person experiences democratic citizenship.”).

20. *Id.*

21. SMITH, *supra* note 16, at 14; *see also* Cott, *supra* note 16, at 1441-42 (“Does this historical difference in the relation between marriage and citizenship for women and men mean that there is something peculiar—more tenuous or vulnerable—about women’s (or perhaps married women’s) citizenship in the United States? To answer ‘yes’ would suggest that citizenship can be delivered in different degrees of permanence or strength. It would suggest that citizenship is not a definitive either/or proposition—you are or you are not—but a compromisable one, and if so for women, perhaps for some men.”).

22. *See generally* MICHENER, *supra* note 19; SMITH, *supra* note 16; JOANNA WUEST, BORN THIS WAY: SCIENCE, CITIZENSHIP, AND INEQUALITY IN THE AMERICAN LGBTQ+ MOVEMENT (2023); Bryan S. Turner, *Citizen Studies: A General Theory*, 1 CITIZENSHIP STUD. 5 (1997).

23. *See* Rogers M. Smith, *Legal Civic Orders and Equitable Lived Citizenships*, 116 AM. POL. SCI. REV. 101, 109-10 (2022) (saying that the U.S. civic order “recognizes persons as simultaneously citizens of local governments—towns, cities, school districts, and counties; as citizens of states or territories or indigenous tribes; and as citizens of the United States, which in turn has placed its citizens under the limited governance of some international organizations and which now accepts dual national citizenships”).

statements simultaneously, and that it may well be necessary to do so.

. . . .

. . . It is important to understand how claims to equality, procedural fairness, and political participation prove so compelling that human beings are willing to die for them.”²⁴

Citizenship is a capacious concept that encompasses people’s formal relationships to the state and lived experiences, as well as a concept that is fundamental to the American experience. Understanding how disabled people are experiencing their political lives in light of reproductive federalism is vital to imagining inclusive reproductive futures.

One of the central difficulties facing citizenship scholars is how to reconcile the centrality of legal and state recognition of citizenship while leaving room for the idea that people also experience their citizenship differently as members of a broader political community.²⁵ Many political scientists think citizenship is a state-centered concept—citizenship can be conflated with state recognition, and studying citizenship is a function of bringing back a “sense of the state.”²⁶ However, other scholars argue that citizenship is more complicated. These scholars claim that it encompasses people’s experiences, as well as “the embodied performance of citizenship, and how people negotiate rights, responsibilities and belonging through interactions with others in the course of daily life.”²⁷

24. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 63, 66 (Kimberlé Crenshaw et al. eds., 1995), *quoted in* Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 *OHIO STATE L.J.* 391, 397-98 (2001).

25. *See* Smith, *supra* note 23, at 101 (discussing debates between “lived citizenship” scholars and scholars of legal citizenship).

26. *See* METTLER, *supra* note 9, at 8 (“Citizenship is, fundamentally a relationship between citizens and government.”); *see also* Stephen M. Engel, *Developmental Perspectives on Lesbian and Gay Politics: Fragmented Citizenship in a Fragmented State*, 13 *PERSPECTIVES ON POL.* 287, 288 (2015) (“Citizenship is then a status by which the state acknowledges an individual to fall within its responsibility to protect and regulate through key sites, e.g., market, military, family, immigration, etc. . . . A citizen is included in and acknowledged by the body politic. She can make a claim on the public attention and concern.”).

27. Kirsi Pauliina Kallio, Bronwyn Elisabeth Wood & Jouni Häkli, *Lived Citizenship: Conceptualizing an Emerging Field*, 24 *CITIZENSHIP STUD.* 713, 713 (2020).

Rogers Smith suggests that these approaches to studying citizenship might not be as incommensurable as many think—indeed, laws structure “lived citizenships.”²⁸ Smith suggests studying the ways in which legal provisions can alter the distribution of the resources that contribute to lived citizenships: political representation, material resources, and social recognition.²⁹ He suggests that by studying legal civic orders, we can better understand the distributions and fault lines that “contribute[] to equitable lived citizenships.”³⁰

Key to Smith’s analysis is that citizenship is not monolithic: it is differentiated across persons and multiple jurisdictions determine people’s lived experiences of citizenship. Smith identifies eleven modes of acquiring U.S. citizenship, four modes of losing U.S. citizenship, and at least thirteen categories that qualify for differentiated civil, political, and social rights on a federal level, as well as more than twelve religious groups.³¹ In addition, people are citizens of their local governments—their “towns, cities, school districts, and counties.”³² People are also citizens of states, which have their own categories of differentiated citizenships and divisions of resources.³³ For example, Massachusetts spends almost four times as much on their lowest-income residents as Georgia.³⁴ Therefore, to understand the most basic elements of citizenship—people’s legal, political, civil, and economic rights—one must look to a myriad of policies and administrative structures. In Parts III and IV, I consider the ways in which reproductive citizenship is constituted differently at different levels of government, as well as via formal and informal actors.

B. Reproductive Citizenship

Citizenship is sexed³⁵ and intimately tied to reproduction.³⁶ Membership in the polity is conditioned on being a certain type of reproductive person and

28. Smith, *supra* note 23, at 101.

29. *Id.*

30. *Id.*

31. *See id.* at 106-07.

32. *Id.* at 109.

33. *Id.*

34. *Id.*

35. Brenda Cossman, *Sexual Citizens: Freedom, Vibrators, and Belonging*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* 289, 290 (Linda C. McClain & Joanna L. Grossman eds., 2009).

36. Rosemary Nossiff, *Gendered Citizenship: Women, Equality, and Abortion Policy*, 29 *NEW POL. SCI.* 61, 61-62 (2007) (“Restrictive abortion laws . . . are also shaped by . . . two interrelated assumptions. . . . The second is that once a woman is pregnant, her citizenship can

on being a certain type of sexed person.³⁷ Like sexual citizenship, reproductive citizenship is also a relationship between deviancy and conformity (people who operate within the norm versus people who are “unbecoming, or outlaws”).³⁸ By allowing total abortion restrictions without giving pregnant persons any corresponding rights against fetuses, pregnant people’s citizenship is “on pause” in states where abortion is illegal; they have no rights against another legal person who has every right against them.³⁹ Therefore, the condition of pregnancy, unique in its requirement that one person sustain another, gives one party unlimited claims while giving the other no defenses.⁴⁰

Oftentimes when people mention disability in abortion debates, they do so to invoke disability-selective abortions and argue that abortion is a tool of eugenics. Yet disabled people and the organizations that represent them are rarely consulted.⁴¹ Disability advocacy organizations, even those against

be abridged and her rights to privacy and equality, shared with her physician, the State, and the fetus she is supporting. She is a patient and a future mother first, and an individual with constitutional rights second.”).

37. *Cf.* Cossman, *supra* note 35, at 291 (“Membership in the public sphere, whether envisioned as rights, political participation, or broader practices of belonging, have been conditional upon a set of sexual norms and practices circumscribed within the private sphere.”).

38. *Cf. id.* at 292 (“What kind of sexual norms, practices, and representations affirm our belonging, and what kind of belonging to these norms, practices, and representations is affirmed? How does crossing the border from outlaw to citizen, and how does the process of becoming a citizen, reconstitute the subject in the discourses of belonging? Conversely, how do certain sexual practices, norms, and representations operate to produce other citizens as unbecoming or outlaws?”).

39. As discussed in Kimberly Mutcherson’s rewritten opinion in *Roe v. Wade*,
Pregnancy is a unique human condition. There are few, if any, other instances in which one human being sustains existence by drawing consistently on the bodily resources of another human being. . . . [T]he pregnant woman gives sustenance to the fetus, but the fetus does not give such sustenance to her. Instead, it takes from her. It is her blood, her heart, and her body that will experience the wear and tear that comes from pregnancy. Even the best of pregnancies bring physical consequences and potential indignities.

Kimberly Mutcherson, *Roe v. Wade*, 410 U.S. 113 (1973), in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 151, 154-55 (Kathryn M. Stanchi et al. eds., 2016).

40. *Cf. id.*

41. See Heather A. Swadley & Maeve Keeley-Mehrad, “Deeply Rooted”: *Abortion Federalism, Divided Citizenship, and Disability Reproductive (In)justice*, 45 J. WOMEN, POL. & POL’Y 59 (2024) (arguing that eugenics as a form of reproductive control is the key feature of disabled people’s experiences and that disability-selective abortions are often less salient

disability-selective abortions, generally do not oppose abortion rights.⁴² Disability scholars routinely note that the uneven distribution of care labor in families, as well as the individualization of care responsibilities to the individual family unit in a society that does not provide universal healthcare, makes the question of bringing a child with a disability into the world fraught for many pregnant people.⁴³ People are expected to function in atomistic ways, as opposed to the government having responsibility for families, welfare, or child-raising.⁴⁴

The extent and character of state control over people's bodies affects not only their formal rights and obligations⁴⁵ but also affects their financial futures and lived experiences.⁴⁶ Political scientist Rosemary Nossiff argues: "[F]ew issues affect women's right to self-determination more directly than access to abortion, and for that reason restrictions to it raise significant questions regarding their standing as citizens."⁴⁷ A precondition to social rights is the ability to exercise them without discrimination or domination.⁴⁸ Moreover, abortion is fundamental to bodily integrity and the legal personhood of pregnant people, as it gives them the ability to direct their own futures absent external constraints.⁴⁹ Finally, as Nossiff argues, contemporary abortion restrictions impede women's abilities to enter the workforce and participate more robustly in government; indeed, abortion

to disability advocacy organizations). Moreover, even advocacy organizations that argue against disability-selective abortions do not tend to advocate for abortion *restrictions*.

42. *See id.* (finding that most prominent disability organizations wrote statements opposing *Dobbs* based on its potential to undermine bodily autonomy and create poor health outcomes).

43. *See generally* AMBER KNIGHT & JOSHUA MILLER, *PRENATAL GENETIC TESTING, ABORTION, AND DISABILITY JUSTICE* (2023) (arguing that a singular focus on disability-selective abortions is not politically-productive in a world that individualizes care responsibilities onto families and fails to address the sexual division of labor); Claire McKinney, *Selective Abortion as a Moral Failure? Reevaluation of the Feminist Case for Reproductive Rights in a Disability Context*, *DISABILITY STUD. Q.* (Winter 2016), <https://dsq-sds.org/index.php/dsq/article/view/3885/4213> (arguing that women make abortion decisions with a variety of familial and life goals in mind and that women ought not be bound by an "ethic of unconditional welcome" prior to giving birth).

44. Cossman, *supra* note 35, at 292.

45. *See supra* notes 36-40 and accompanying text.

46. *See* Nossiff, *supra* note 36.

47. *Id.* at 62.

48. *See id.*

49. *Id.*

restrictions “support the assumption that [pregnant people’s] roles as future mothers should take precedence over their rights as citizens.”⁵⁰

Reproduction and bodily integrity are therefore inexorably tied to citizenship, as are the laws and policies that administer them. The shifts in citizenship seen by *Dobbs* have marked some non-persons as members of the polity and put other people’s rights on hold.⁵¹ However, reproductive federalism creates further difficulties for disabled people, who already face difficulties accessing reproductive care.⁵²

C. Divided Citizenship

Political scientist Suzanne Mettler introduced the concept of “divided citizenship” after analyzing New Deal policies that created federal rights and entitlements for white men but left the administration of similar benefits and rights of women and non-white men to the states.⁵³ Mettler suggests that by granting white men access to the federal “workfare” state, New Deal governance created a uniform system of duties, benefits, and entitlements on the part of white men.⁵⁴ Bifurcating citizenship in this way creates structures that produce disparate effects between people whose rights are uniform and people whose rights are not, as well as between citizens of different states.⁵⁵ Mettler argues that the ways in which citizens are incorporated into political institutions affect their status as members of the political community; affects the organization of the citizenry, including levels of inequality, hierarchy, and stratification; and affects the form that political participation takes.⁵⁶ Understanding how American federalism divides and stratifies citizens is a critical legal and political question given federalism’s profound effects on multiple dimensions of people’s social, civil, political, and economic rights.

50. *Id.* at 75.

51. At the time of writing, four states have used fetal personhood provisions to imprison women. *See 4 States Are Using Fetal Personhood to Put Women Behind Bars*, NPR: MORNING ED. (Aug. 11, 2023, 5:17 AM), <https://www.npr.org/2023/08/11/1193393737/4-states-are-using-fetal-personhood-to-put-women-behind-bars>.

52. *See infra* Part III.

53. *See generally* METTLER, *supra* note 9.

54. *See id.* at 5-6 (discussing how white men’s citizenship was nationalized, whereas women’s and nonwhite men’s rights were “left under the auspices of the states”).

55. *Id.* at 12 (“But although decentralized governing arrangements may provide multiple points of access for the participatory dimensions of citizenship, the incorporation of citizens in the context of American federalism has tended to undercut possibilities for full inclusion, in turn curtailing more complete opportunities for participation in public life.”).

56. *Id.* at 10-11.

I argue that reproductive federalism affects all of these areas for people with disabilities, producing forms of divided reproductive citizenship. At this point, it is worth stating that although reproductive federalism was exacerbated by *Dobbs*, it predates that case. Prior to *Dobbs*, pregnant people with disabilities faced numerous difficulties accessing adequate reproductive care. Many facilities were and still are inaccessible to people with disabilities.⁵⁷ Medicaid beneficiaries in most states struggled to access abortion care.⁵⁸ People under guardianship either underwent forcible medical procedures or could not access reproductive care.⁵⁹ Nonetheless, this Article argues that a world without constitutional abortion protections is less safe for people with disabilities, both because of state laws restricting abortions and also because they have lost access to an important means of recourse when state or private actors deny them reproductive rights. The rest of this Article discusses how reproductive federalism produces divided patterns of citizenship for disabled people and suggests how to overcome these disparities.

III. Governmental Authority and Reproductive Federalism

This Part outlines how explicit laws and policies from federal and state governments have produced patterns of divided citizenship. Part IV discusses patterns that are often state-sanctioned yet performed by private actors.

A. *The Expressive Consequences of Delegating Reproductive Regulation to the States*⁶⁰

Dobbs denied that the Fourteenth Amendment guarantees a fundamental right to abortion, returning the authority to regulate pre-viability abortions to state governments. This Section argues that by selectively distinguishing *Skinner* from *Roe* and *Casey*, *Dobbs* revealed the Court's expressive values. Alito's majority opinion in *Dobbs* did not deny that a constitutional right to bodily integrity exists. Nor did Alito even say that reproductive rights were beyond the scope of the Constitution. Instead, Alito's opinion explicitly distinguishes *Roe* and *Casey* from *Skinner v. Oklahoma*.⁶¹ Once read as an equal protection case, *Skinner* is now read to assert a fundamental right to

57. See *infra* notes 118-25 and accompanying text.

58. See *infra* note 98 and accompanying text.

59. See *infra* Section IV.B and accompanying text.

60. Large portions of this Section's argument are also advanced in Swadley & Keeley-Mehrad, *supra* note 41.

61. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022) (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

marry and procreate.⁶² In *Dobbs*, the selective preservation of *Skinner* does not seem incidental, as it is expressly distinguished from *Roe* and *Casey*.⁶³ *Skinner* is also missing from the laundry list of fundamental rights/substantive due-process cases that Justice Thomas would overturn.⁶⁴ The law has expressive consequences that send messages about whom and what society values.⁶⁵ Here, the majority's decision to distinguish *Skinner* from *Roe* and *Casey*, which itself was distinguished from *Buck v. Bell*, has both gendered and ableist consequences.

Skinner was a case brought about by an incarcerated *man*.⁶⁶ An Oklahoma statute authorized the forcible sterilization of "habitual criminals" who were convicted of two or more felonies "involving moral turpitude."⁶⁷ *Skinner*'s crimes included theft of a chicken and two acts of armed robbery.⁶⁸ Because he had committed three offences, the Oklahoma Attorney General authorized an involuntary vasectomy on *Skinner*.⁶⁹ The majority invoked the Fourteenth Amendment's Equal Protection Clause, as the state sterilized only certain classes of felonies, and did so arbitrarily.⁷⁰ However, *Skinner* is widely understood today, even by the Court, as an authority that supports not only the fundamental right to be free from forcible sterilization but also the fundamental rights to marry and to have a family.⁷¹ This Article does not

62. See *Skinner*, 316 U.S. at 536 ("This case touches a sensitive and important area of human rights," and "Oklahoma deprive[d] certain individuals of a right which is basic to the perpetuation of a race the right to have offspring."). In *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015), Justice Anthony Kennedy used *Skinner* to support the premise that "the right to marry is fundamental under the Due Process Clause." Kennedy also used the case to draw a relationship between liberty and equality later in the opinion.

63. *Dobbs*, 597 U.S. at 256.

64. See *id.* at 331-33 (Thomas J., concurring) (suggesting a list of "substantive due process" cases the Court should revisit, omitting *Skinner*).

65. See, e.g., Cass Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021, 2024 (2001) (suggesting that one of law's primary functions is "making statements" about social values); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503, 1566 (2000) (articulating a theory of expressive harm and suggesting that it is implicated by the equal-protection doctrine, using the example of race and its role in decision-making processes).

66. *Skinner*, 316 U.S. at 537.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 541.

71. The case is often referred to as implicating a "fundamental right." See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (grounding the fundamental right to marry in *Skinner*'s fundamental right to procreate); see also *Dobbs v. Jackson Women's Health Org.*, 597 U.S.

dispute *Skinner*'s conclusion, which was almost certainly correct, but rather considers the expressive consequences of a legal system that simultaneously retains both *Skinner* and *Buck v. Bell*, while overturning *Roe* and *Casey*. *Dobbs*'s treatment of *Skinner* is a poignant counterpoint to its treatment of *Roe* and *Casey*. It is difficult to escape the gendered consequences of a majority consisting of mostly men taking care to preserve cisgender men's reproductive liberties while they overturned *Roe* and *Casey*. Whatever the reason for preserving *Skinner*, it may send an expressive message that while reproductive rights for cisgender men warrant protection by the federal government, women, trans men, and nonbinary people have no such protection.⁷²

Turning to disability, *Skinner*'s relationship with disability rights is even more fraught. Legal historian Mary Ziegler noted that many anticipated that *Skinner* might be "the beginning of the end of the movement for eugenic reform."⁷³ At this point, Nazism and eugenics were linked in the American psyche, meaning that the American public had little appetite for overt eugenic policies like forced sterilization.⁷⁴ Against this backdrop, *Skinner* suggested that procreation was "one of the basic civil rights of man."⁷⁵ However, mere sentences later, the *Skinner* Court distinguished its opinion from what it perceived to be a reasonable decision in *Buck v. Bell*.⁷⁶ *Buck v. Bell* upheld states' authority to forcibly sterilize "feebleminded" and "promiscuous" women as part of broader eugenic policy programs.⁷⁷ In *Buck*, the Court upheld a Virginia law permitting the sterilization of women and other persons deemed to be "unfit."⁷⁸ Writing a three-page opinion for the majority, Justice Holmes reasoned that public welfare requires sacrifice on the part of the "best" citizens and that "[i]t would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices."⁷⁹ His

215, 256 (2022) (wherein the majority includes *Skinner* in a list of cases that concern fundamental rights).

72. Cf. Anderson & Pildes, *supra* note 65, at 1557 (arguing that what the law focuses on and to what extent it focuses its attention can have expressive consequences).

73. Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 *CARDOZO J.L. & GENDER* 319, 319 (2008).

74. *Id.*

75. *Skinner*, 316 U.S. at 541.

76. 274 U.S. 200 (1927).

77. *Id.* at 205.

78. *Id.*

79. *Id.* at 207.

opinion drew a now infamous conclusion: “Three generations of imbeciles is enough.”⁸⁰

The *Skinner* Court distinguished its narrow holding from *Buck v. Bell*.⁸¹ The Court emphasized the gravity of sterilization and its relation to the fundamental rights to marry and procreate.⁸² The central holding was that Oklahoma violated equal protection by arbitrarily applying its sterilization law.⁸³ The Court reasoned that someone who commits larceny does not necessarily have “biologically inheritable traits which he who commits embezzlement lacks.”⁸⁴ The Court also suggested that *Skinner* did not have a chance to prove that he did not possess such traits—whereas Carrie Buck did.⁸⁵ Justice *Stone*’s concurrence reaffirms states’ interests in eugenic goals, stating: “Undoubtedly, a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies.”⁸⁶ *Skinner* is now read as a fundamental rights case and cited as such by the *Dobbs* majority. Yet *Skinner* expressly held that the fundamental right to procreate did not extend to Carrie Buck and others the state categorized as “feble-minded.”⁸⁷

The law creates authority; however, it also expresses who and what society values.⁸⁸ Distinguishing *Skinner* from *Roe* and *Casey* expresses that cis men’s right to procreate is a constitutional right; however, the reproductive freedoms of women, trans men, and nonbinary people may be decided by the states. Where some people’s reproductive liberties are privileged, others are

80. *Id.*

81. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (suggesting that the legislature could not know whether “the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals”).

82. *Id.* at 541 (“Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches.”).

83. *Id.*

84. *Id.* at 535.

85. The idea that Carrie Buck was given chance to refute the claims against her is ironic, given the procedural deficiencies identified by Paul Lombardo. Evidence suggests that Carrie Buck’s attorney did not mount a defense on her behalf, and the state orchestrated her sterilization, in part, to earn the Supreme Court’s approval for its eugenic policies. PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (updated ed. 2022).

86. *Skinner*, 316 U.S. at 544 (Stone, J., concurring).

87. *Id.* at 535.

88. See *supra* note 65 and accompanying text for a more thorough discussion on the expressive consequences of law.

subjected to a politics of place. A pattern of divided citizenship emerges, wherein some people have access to federal constitutional protections and the federal courts, while others do not. However, upholding *Skinner* in a world where *Buck v. Bell* remains good law bifurcates disabled reproductive citizenship even further. More than thirty states still allow the forced sterilization of disabled people,⁸⁹ rendering their reproductive citizenship entirely a function of place. The localization of disabled people's reproductive rights serves an expressive function that also has material consequences for people's relationships with the state. It is impossible to know the full extent of forced sterilizations, given that many sterilizations happen to people under guardianship and that the records are not public.⁹⁰ However, weakening reproductive rights further stands to produce material harms to disabled people, who already struggle to access adequate reproductive care.

B. Federal-State Programs and State Medicaid Policies

Medicaid policy is one area in which the politics of place manifest plainly. Medicaid is jointly financed between the federal government and states and provides comprehensive healthcare and long-term services coverage to more than ninety million low-income persons in the United States.⁹¹ Medicaid's complex rules and administrative processes not only shape social identities and civic statuses but also ferment social divisions within communities.⁹² The federalized structure of Medicaid, in particular, results in an inequitable and

89. NAT'L WOMEN'S L. CTR., FORCED STERILIZATION OF DISABLED PEOPLE IN THE UNITED STATES 5 (2021), https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_Sterilization_Report_2021.pdf.

90. *See id.* at 16; *The Forced Sterilization of Disabled People in the United States: An Interview with Ma'ayan Anafi, Senior Counsel for Health Equity and Justice at the National Women's Law Center*, ASS'N OF MATERNAL & CHILD HEALTH PROGRAMS (Mar. 2022), <https://amchp.org/2022/03/17/the-forced-sterilization-of-disabled-people-in-the-united-states-an-interview-with-maayan-anafi-senior-counsel-for-health-equity-and-justice-at-the-national-womens-law-center/>.

91. Robin Rudowitz, Alice Burns, Elizabeth Hinton & Maiss Mohamed, *10 Things to Know About Medicaid*, KAISER FAM. FOUND. (June 30, 2023), <https://www.kff.org/mental-health/issue-brief/10-things-to-know-about-medicaid/>.

92. METTLER, *supra* note 9, at 4 (“The structural arrangements through which policies are administered shape the character and experience of citizenship for those covered by the policies.”); MICHENER, *supra* note 19, at 10-11 (suggesting that federalism is key to understanding the political consequences of Medicaid policy on people's political lives and that federalism leaves most beneficiaries “disempowered in the face of polarized, pivotal public debates that may literally determine whether they live or die”).

highly fragmented system of service delivery.⁹³ Specifically, service delivery, funding, and requirements differ between states, meaning that care is often contingent on location—which in turn means that people experience the program differently.⁹⁴ The differentiated and dividing effects of Medicaid policy is evident in abortion funding, where federal Medicaid funding may not be used for abortion care but state Medicaid programs sometimes fund the procedure.⁹⁵

Medicaid is particularly significant for disabled people, as it is one of the primary ways that many disabled people access healthcare. Medicaid eligibility is linked to Supplemental Security Income (“SSI”), a means-tested disability benefit.⁹⁶ According to the Centers for Medicare & Medicaid Services, in 2018 and 2019, 17.2% of non-institutionalized Medicaid beneficiaries had a disability, and 37.3% had functional limitations that restricted their ability to work due to health reasons.⁹⁷ Because so many disabled people rely on Medicaid for their health insurance, the services they receive are often contingent on what Medicaid will cover—and many state Medicaid programs will not cover abortion care.

Studies have shown that one in four Medicaid beneficiaries seeking an abortion were unable to access one because of funding restrictions, even prior to *Dobbs*.⁹⁸ Oftentimes, low-income Medicaid beneficiaries will exert tremendous effort to gather funds for an abortion, only to discover that the

93. See generally MICHENER, *supra* note 19 (arguing that federalism produces fragmented and unequal outcomes in Medicaid policy).

94. See *id.* at 13 (“It has always been the case that what it means to live in poverty in Maine is very different from what it means in Michigan. . . . Medicaid is an especially arresting case, epitomizing how federalism generates inequity by creating geographic variation in access to vital resources.”).

95. See FABIOLA CARRIÓN ET AL., NAT’L HEALTH L. PROGRAM, ABORTION CARE UNDER MEDICAID (2022), <https://healthlaw.org/wp-content/uploads/2022/04/FINAL-Abortion-Coverage-Under-Medicaid.pdf> (outlining different state policies on Medicaid coverage of abortion care).

96. See Rudowitz et al., *supra* note 91.

97. CTRS. FOR MEDICARE & MEDICAID SERVS., 2020 MEDICAID AND CHIP BENEFICIARY PROFILE: CHARACTERISTICS, HEALTH STATUS, ACCESS, UTILIZATION, EXPENDITURES, AND EXPERIENCE 25 (Aug. 2021), <https://www.medicaid.gov/medicaid/quality-of-care/downloads/beneficiary-profile-2021.pdf>.

98. Heather D. Boonstra, *Insurance Coverage of Abortion: Beyond the Exceptions for Life Endangerment, Rape, and Incest*, GUTTMACHER POL’Y REV., Summer 2013, at 2, 5, https://www.guttmacher.org/sites/default/files/article_files/gpr160302.pdf.

cost has increased because their pregnancies have progressed.⁹⁹ Although the Hyde Amendment contains carve-outs for rape and incest, many doctors are not properly reimbursed for care provided and are frequently denied coverage; these doctors turn to the nonprofit sector to help fund Medicaid beneficiaries' abortion care.¹⁰⁰ Moreover, before *Dobbs*, numerous states banned abortion coverage on Affordable Care Act marketplace exchange plans, and eight states prohibited private insurers from offering plans that would cover abortion care.¹⁰¹ The state-centric nature of Medicaid therefore creates hurdles for many people seeking abortions.

However, there are pockets of the country that have liberalized abortion funding under Medicaid in response to *Dobbs*. Washington, Oregon, New York, and California now provide Medicaid funding for all abortions, without requiring significant medical documentation or a police report.¹⁰² Other states provide more expansive coverage than the federal standards; however, they frequently demand a court order, proof of medical necessity, or a police report.¹⁰³ Some states have also become more proactive in supporting out-of-state citizens who are seeking abortions by funding abortions for out-of-state patients or sending money to private abortion funds.¹⁰⁴ Finally, many states are shielding providers who care for out-of-state patients from legal liability in other states.¹⁰⁵

While some of this news is not entirely discouraging, it highlights the variability of reproductive rights. Whether Medicaid beneficiaries can access abortion care in the status quo is largely up to a politics of place, which disproportionately harms pregnant people with disabilities. In Jamila Michener's terms, Medicaid beneficiaries' "political lives" (and actual lives) may be determined entirely by where they live.¹⁰⁶

99. Amanda Dennis & Kelly Blanchard, *Abortion Providers' Experiences with Medicaid Abortion Coverage Policies: A Qualitative Multistate Study*, 48 HEALTH SERVS. RSCH. 236, 248 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3589964/pdf/hesr0048-0236.pdf>.

100. *Id.*

101. Boonstra, *supra* note 98, at 4.

102. CARRIÓN ET AL., *supra* note 95.

103. *Id.*

104. David S. Cohen, Greer Donley & Rachel Rebouché, Essay, *Rethinking Strategy After Dobbs*, 75 STANFORD L. REV. ONLINE 1, 4 (2022), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2022/08/Cohen-et-al.-75-Stan.-L.-Rev.-Online-1.pdf>.

105. *Id.* at 8.

106. MICHENER, *supra* note 19, at 7.

C. State Bans on Abortion and Access to Ongoing Reproductive Support

In the best of circumstances, pregnancy poses unforeseen health risks, and chronically ill disabled people are more likely to find themselves in need of longer timeframes within which to make abortion decisions.¹⁰⁷ However, new abortion bans that restrict abortions to the beginning weeks of pregnancy do not afford such flexibility. Not only must people with chronic illnesses consider the effects of pregnancy on their disability, they must also consider the possibility that pregnancy will constitute a “further disabling event.”¹⁰⁸ Risks during pregnancy are not necessarily knowable before pregnancy, so ongoing, comprehensive, medically accurate counseling was the standard of care before *Dobbs*.¹⁰⁹ Yet patients and providers may be left without a way to safely and effectively navigate a post-*Dobbs* legal landscape.

For example, changes that the body undergoes during pregnancy can either exacerbate existing conditions or create new ones.¹¹⁰ Medication that worked during one part of a pregnancy may not work for the entirety of a pregnancy, given that many people who become pregnant are given less effective alternatives that are safer for pregnancy.¹¹¹ Health is not “fixed” and can evolve throughout pregnancy; however, state abortion restrictions do not acknowledge such complexity.¹¹² Doctors’ inability to counsel patients puts their lives at risk.

Moreover, many drugs that are commonly prescribed for chronic illnesses are coming under fire because of state abortion restrictions.¹¹³ For example, methotrexate is a highly effective treatment for lupus, but it also induces

107. Cf. Asha Hassan et al., Commentary, *Dobbs and Disability: Implications of Abortion Restrictions for People with Chronic Health Conditions*, 58 HEALTH SERVS. RSCH. 197, 198 (2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9836943/pdf/HESR-58-197.pdf>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. See Jen Christensen, *Women with Chronic Conditions Struggle to Find Medications After Abortion Laws Limit Access*, CNN (July 22, 2022, 7:11 AM), <https://www.cnn.com/2022/07/22/health/abortion-law-medications-methotrexate/index.html>; Victoria Forster, *Arthritis Patients Are Being Denied Methotrexate Post-Dobbs. Are People with Cancer Next?*, FORBES (July 18, 2022, 8:39 AM), <https://www.forbes.com/sites/victoriaforster/2022/07/18/arthritis-patients-are-being-denied-methotrexate-post-roe-are-people-with-cancer-next/?sh=4f054d5b450c>; Katie Shepherd & Frances Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, WASH. POST (Aug. 8, 2022, 11:10 AM), <https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/>.

abortions (an abortifacient) or congenital birth defects (as it is teratogenic) in many cases.¹¹⁴ People taking methotrexate are advised not to become pregnant, and if they become pregnant, they are often counseled that abortion is the appropriate course of action.¹¹⁵ However, given that abortion is no longer an option in many states, providers now face complicated ethical dilemmas related to prescribing medications that they know will cause fetal anomalies when their patients cannot legally obtain an abortion.¹¹⁶ Abortion bans will therefore have significant consequences for people with chronic illnesses, including denying access to life-saving treatment.

IV. Arms of the State: Private Actors Who Control Disabled Reproduction

Not only can the state control disabled people's reproduction, but private actors acting at the behest of the state can create profound consequences for disabled people's reproductive rights. The government sanctions intrusions into disabled people's reproductive health decisions by private actors who are either paid by the state or act at the state's behest. This Part discusses the ways in which disabled people's encounters with informal state power can constrain their reproductive citizenship.

A. Individual Medical Providers as Arms of the State

Medicaid beneficiaries must not only find a state in which abortion is legal—they must also find an accessible provider who is willing to take their insurance. Unfortunately, many providers refuse to accept Medicaid, leaving disabled people subject to the whims and facilities of the providers who will.¹¹⁷

A fundamental problem that people with disabilities face when accessing reproductive care is the inaccessibility of many medical facilities. According to a report from the Center for American Progress, people with disabilities routinely face access barriers at medical facilities, including inaccessible infrastructure, like narrow doorways, or inaccessible equipment, like examination tables, scales, and x-ray and mammography machines.¹¹⁸

114. Shepherd & Sellers, *supra* note 113.

115. *Id.*

116. *See id.*

117. *See* Rudowitz et al., *supra* note 91 (“In 2021, MACPAC found physicians were less likely to accept new Medicaid patients (74%) than those with Medicare (88%) or private insurance (96%) . . .”).

118. Emily DiMatteo, Osub Ahmed & Vilissa Thompson, *Reproductive Justice for Disabled Women: Ending Systemic Discrimination*, CTR. FOR AM. PROGRESS (Apr. 13, 2022),

Additionally, medical providers do not always communicate in accessible modalities and may fail to provide plain-language materials, Braille materials, or ASL interpreters.¹¹⁹ As a result, women with disabilities are less likely to receive cancer screenings, like pap smears or mammograms, and they are often diagnosed with cancer at later stages than nondisabled women.¹²⁰ Women with disabilities are less likely to survive breast cancer simply because they cannot access treatment on an equal basis.¹²¹

Inaccessible facilities also limit people's ability to procure abortion care. For example, a New York woman, Roxanne Schiebergen was refused service at a Planned Parenthood in New York City because of her physical disability.¹²² She scheduled an appointment to have an abortion, only to be told on the day of her appointment that "[w]e don't do procedures for people in a wheelchair."¹²³ She had to undergo the procedure at a clinic that charged her four times as much.¹²⁴ Although New York actively protects reproductive rights, Schiebergen was refused care because of her disability.¹²⁵ Therefore, Medicaid beneficiaries, who already may struggle to find providers, may face additional hurdles when trying to find an *accessible* provider for abortion care.

Additionally, the choices available to individuals with disabilities may be limited by the religious preferences of their providers. Medicaid frequently contracts with religious providers, and one in six hospital beds nationwide are in Catholic hospital networks.¹²⁶ Catholic hospitals therefore receive substantial Medicaid funding but are not required to provide abortion care or

<https://www.americanprogress.org/article/reproductive-justice-for-disabled-women-ending-systemic-discrimination/>.

119. *Id.*

120. *Id.*; C. Brooke Steele et al., *Prevalence of Cancer Screening Among Adults With Disabilities, United States, 2013*, 14 PREVENTING CHRONIC DISEASE, article no. E09, March 2017, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5268742/pdf/PCD-14-E09.pdf>.

121. Ellen P. McCarthy et al., *Disparities in Breast Cancer Treatment and Survival for Women with Disabilities*, 145 ANNALS OF INTERNAL MED. 637, 637, 642 (2006).

122. Katherine Rosman, *For a Woman in a Wheelchair, Abortion Access Was One More Challenge*, N.Y. TIMES (July 7, 2022), <https://www.nytimes.com/2022/07/14/style/abortion-accessibility-planned-parenthood.html>.

123. *Id.*

124. *Id.*

125. *Id.*

126. Joanna Wuest & Briana Last, *Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy, and the Administrative State* 9 (Jan. 3, 2023), <https://papers.ssrn.com/abstract=4306283> (forthcoming in the *Journal of Law, Medicine & Ethics*).

other types of reproductive care.¹²⁷ These hospitals often refuse to perform reproductive and gender-affirming healthcare procedures, sometimes under any circumstance.¹²⁸ The Supreme Court's rigid stance on religious freedom has emboldened religious healthcare providers to dictate the types of care available to Medicaid recipients under their care.¹²⁹ Therefore, Medicaid providers can control disabled people's lived experiences of reproductive citizenship via the ways that Medicaid care is administrated. Therefore, Medicaid reliance may compound preexisting inequalities in a post-*Dobbs* world, especially as the Supreme Court takes a more aggressive stance on organizational religious liberties in public accommodations.

The above factors will likely exacerbate existing health inequalities and compound harms for numerous marginalized people within the disability community. A study that modeled the effects of *Dobbs* based on abortion surveillance data in Georgia found that Georgia's post-*Dobbs* abortion statute would have precluded almost ninety percent of the abortions studied from taking place between 2007 and 2017.¹³⁰ The ban would have disproportionately prevented Black patients, less-educated patients, and younger patients from receiving abortion care. Another study found that Black pregnant people regularly experience adverse birth outcomes because of restrictive abortion policies.¹³¹ The effects of abortion bans will not be borne equally throughout the disability community, and exercising solidarity will become increasingly necessary.

B. Guardians as De Facto State Actors

In 2021, there was widespread shock and attention when Britney Spears's father, acting as her conservator, denied her the request to remove her IUD for further childbearing, leading to the rise of the #FreeBritney movement.¹³² However, the treatment Britney Spears received is reminiscent of how many disabled individuals across the country are treated. National Women's Law

127. *Id.*

128. *See id.*

129. *Id.* at 3.

130. Sara K. Redd et al., *Estimation of Multiyear Consequences for Abortion Access in Georgia Under a Law Limiting Abortion to Early Pregnancy*, 6 JAMA NETWORK OPEN, article no. e231598 (Mar. 6, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2802001>.

131. Sara K. Redd et al., *Racial/Ethnic and Educational Inequities in Restrictive Abortion Policy Variation and Adverse Birth Outcomes in the United States*, 21 BMC HEALTH SERVS. RSCH. 1139 (2021).

132. Devraat Awasthi, Comment, *Britney's Prerogative: A Critical, Constitutional View of Conservatorships*, 75 OKLA. L. REV. 551-57 (2023).

Center attorney Ma'ayan Anafi noted: “What’s different is that Spears has a platform to share it with the world.”¹³³ Approximately 1.3 million Americans are under court-ordered guardianships conferring plenary powers on guardians to make decisions for their wards.¹³⁴ For this reason, the National Council on Disability and others refer to legal guardianship as a form of “civil death.”¹³⁵

One reason guardians are enabled to make such decisions is that society views disabled people as nonsexual. People with intellectual and developmental disabilities are frequently treated as “perpetual children.”¹³⁶ Therefore, people with intellectual or developmental disabilities are denied the ability to engage in age-appropriate activities due to outdated conceptions of “mental age.”¹³⁷ Therefore, disabled people under guardianship frequently lack outlets to express their sexuality.¹³⁸ Social narratives suggest disabled people lack sexual desire, and nondisabled people experience discomfort when people with disabilities express themselves sexually.¹³⁹ The law denies disabled people sexual and reproductive agency.¹⁴⁰ Yet, as Michael Gill observes, disabled people are “already doing it” but are not legally empowered to engage in sex and reproduction on equal terms with their fellow citizens.¹⁴¹

133. Emily Shugerman, *Shocked by Britney’s Forced IUD? Here’s Why You Shouldn’t Be*, DAILY BEAST (June 24, 2021, 2:55 PM), <https://www.thedailybeast.com/britney-spears-forced-iud-is-common-in-conservatorships>.

134. See NAT’L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 88 (2018) [hereinafter BEYOND GUARDIANSHIP].

135. *Id.*

136. See generally Carlyn O. Mueller, “I Didn’t Know People with Disabilities Could Grow Up to Be Adults”: *Disability History, Curriculum, and Identity in Special Education*, 44 TEACHER ED. & SPECIAL ED. 189 (2021); MICHAEL GILL, ALREADY DOING IT: INTELLECTUAL DISABILITY AND SEXUAL AGENCY (2015).

137. GILL, *supra* note 136, at 2.

138. See generally *id.*; 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 (2018); Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARVARD L. REV. 1307 (2009).

139. Michael L. Perlin & Alison J. Lynch, *All His Sexless Patients: Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 259 (2014) (“[D]iscussions of the question of whether persons with mental disabilities have a right to voluntary sexual interaction often touches a raw nerve in conversations about mental disability law.”).

140. See Emens, *supra* note 138, at 1330.

141. See generally Gill, *supra* note 136.

For example, in congregate settings, Natalie Chin finds that group home staff regularly police residents' sexual behavior.¹⁴² In some institutional settings, masturbation is the grounds for disciplinary infraction.¹⁴³ Even when people's needs and desires are acknowledged in congregate settings, their sex, sexuality, and reproduction are strictly controlled.¹⁴⁴ Guardians have just as much control, if not more, over their wards' sexuality and reproduction. Specifically, they can dictate whom a person sees and whom a person associates with.¹⁴⁵ They can also commit a person to a facility or an institution that would have control over the person's sexuality.¹⁴⁶ Moreover, in many states, guardians are given the power to make medical decisions for the person under guardianship, meaning that people under guardianship will likely lack the right to make decisions about their own reproduction.¹⁴⁷

Some authors have suggested that the Americans with Disabilities Act ("ADA") prohibits restrictive guardianship arrangements.¹⁴⁸ However, federal courts have generally declined to hear cases resulting from deprivations of civil liberties or due process rights in state guardianship proceedings. For example, courts have found that guardianship proceedings are so intertwined with state law questions that they cannot be removed to federal courts despite due process violations.¹⁴⁹ Courts addressing the ADA in guardianship proceedings have also declined to intervene or exercise jurisdiction over state probate court proceedings.¹⁵⁰ Therefore, probate courts are relatively insulated from claims that they have violated federal civil rights laws.

142. Chin, *supra* note 138, at 383.

143. Perlin & Lynch, *supra* note 139, at 266.

144. *Id.*

145. See BEYOND GUARDIANSHIP, *supra* note 134, at 29.

146. *See id.*

147. *See id.* at 36.

148. 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, 160 (2010) (arguing that substituted decision-making violates the integration mandate of Title II of the ADA).

149. See, e.g., *Gromer v. Mack*, 799 F. Supp. 2d 704, 709 (N.D. Tex. 2011).

150. See, e.g., *Disability Rights New York v. New York*, 916 F.3d 129, 136-37 (2d Cir. 2019); *Wilson v. Shumway*, No. Civ. 97-099, 2000 WL 1499469, at *3 (D.N.H. May 8, 2000); *Geller v. Michigan*, Civ. Action No. 17-13233, 2019 WL 2150393, at *1 (E.D. Mich. Apr. 26, 2019).

Meanwhile, the process afforded to people during guardianship proceedings is frequently inadequate. According to the American Bar Association, many states are revising their laws to require guardianships to be the least restrictive arrangements.¹⁵¹ However, state rules are variable,¹⁵² and data on guardianship hearings suggest that the process afforded to defendants is inadequate. Most guardianship hearings last less than fifteen minutes and twenty-five percent last less than five minutes.¹⁵³ Most of these arrangements are difficult to appeal, risking permanency.¹⁵⁴ Only one-third of people are represented by attorneys in guardianship hearings. Some states do not recognize a person's right to counsel in guardianship hearings.¹⁵⁵ Even when they do, attorneys' ethical rules often preclude them from zealously defending disabled clients' interests, as these rules allow the attorneys to substitute their own judgments for their clients' wishes.¹⁵⁶

Guardianship can entail absolute deprivations of freedom, or "civil death,"¹⁵⁷ without proper process. Guardians are permitted to dictate people's social interactions. They can also make major medical decisions for wards in many states, opening the door for deprivations of reproductive rights, including forcible sterilization or abortion. Therefore, guardianship is an area of law that bears an understudied relationship to citizenship, as it (often permanently) strips persons of the rights and duties formally associated with citizenship.

V. Conclusion

This Article has suggested that the law shapes how people experience their relationships with "the state," and perhaps nowhere is this truer than with reproductive citizenship. This Article has also identified three levels at which

151. *Guardianship Reform: 2021 Adult Guardianship Legislation Summary*, ABA COMM'N ON L. & AGING, 1-2, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2021-guardianship-leg-summry.pdf (last visited May 15, 2024).

152. *Id.*

153. BEYOND GUARDIANSHIP, *supra* note 134, at 85.

154. *See Statutory Appeals Provisions in Adult Guardianship (2019)*, ABA COMM'N ON LAW & AGING (2019), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-chart-of-guardianship-appeals.pdf (detailing state provisions for appealing adult guardianships, with many states failing to mention appeals or subjecting them to heightened judicial scrutiny).

155. BEYOND GUARDIANSHIP, *supra* note 134, at 85.

156. *See generally* Heather Swadley, *How #FreeBritney Exposes the Need to Disable the Model Rules of Professional Conduct*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC., no. 1, 2022, at 1 (discussing ethical landmines when representing clients with diminished capacity).

157. BEYOND GUARDIANSHIP, *supra* note 134, at 17.

norms surrounding medical autonomy limit disabled people's reproductive citizenship. These levels may be subject to further abuse in a post-*Dobbs* legal landscape. First, disabled people's reproductive citizenship may be limited by statutes that impede their access to lifesaving medication, their ability to make ongoing decisions about their care, or their ability to simply make decisions about their reproductive lives on an equal basis with other citizens. Second, disabled people's reproductive citizenship may be limited because they are beneficiaries of federal programs that proscribe certain forms of care. Finally, even when state laws and program rules are permissive on paper, disabled people often encounter additional "arms of the state," people empowered to carry out state programs or control disabled people's decision-making. These actors may further circumscribe the medical autonomy of disabled people.

This Article has also identified the role that federalism plays in producing legal inequities. *Dobbs*, as I have argued, exacerbates "divided citizenships" by taking away the federal courts as a means of recourse for those who have been denied abortion rights. However, disabled people were already disproportionately subjected to divided forms of governance, as they were more likely to be beneficiaries of "dual federalist" programs like Medicaid or to be under guardianship. Looking at the plurality of ways in which law and governance structure people's experiences of programs is therefore essential.

This is not to say that federalism can play no legitimate purpose. To quote Jamila Michener:

Federalism is a multivalent, dynamic institution that sometimes works at cross-purposes with the principles of democratic self-governance and other times strengthens them. Cultivating the latter outcome requires a focus on securing the well-being of those who are most vulnerable, ensuring geographic equity, reviving struggling communities, and valuing state and local flexibility contingently, only to the extent that they serve higher ideals.¹⁵⁸

Reproductive-justice advocates who wish to "rewrite the script" about reproductive federalism should harness the democratic potential of federalism. While doing so, advocates should ensure greater equity for beneficiaries of programs like Medicaid and pass uniform laws like the Uniform Guardianship, Conservatorship, and Other Protective Arrangements

158. MICHENER, *supra* note 19, at 15.

Act (UGCOPAA),¹⁵⁹ which update and equalize guardianship standards. By leveraging the innovative potential of reproductive federalism and working to mitigate its worst effects, we can work toward greater reproductive autonomy and justice for disabled people.

159. *The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act: A Summary*, UNIF. LAW COMM'N, <https://www.guardianship.org/wp-content/uploads/2018/04/UGCOPAA-Summary-Oct-2017.pdf> (last visited May 15, 2024).