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The Political Economy of Conservatorship

Jasmine E. Harris

ABSTRACT

Conservatorship, though viewed as a private law device, has always operated as a tool of public governance, social control, and resource extraction through the manipulation of the legal category of disability. This Article places a well-accepted Anglo-American history of conservatorship in probate law in conversation with its historical deployment by states, the federal government, and government-empowered private actors to control and extract resources from Native and Black Americans. By recognizing the inherent instability and malleability of disability as a legal concept, I unearth and interrogate its use in the United States in three key moments of political and economic subordination: (1) guardianship of Native Americans in colonial New England; (2) guardianship of free Black Americans in the South during the antebellum period; and (3) guardianship of Native Americans during the allotment period. In isolation, these histories may be familiar to some readers. This Article's contribution derives from linking them. Doing this shows how conservatorship was and continues to be a formidable legal tool of political and economic subordination, made possible because of how powerful actors have been able to manipulate the concept of disability.

To advance this argument, this Article mines legislation, cases, and original conservatorship petitions submitted to county probate courts during the relevant historical periods to show how the design of conservatorship laws offered a way to create economic indebtedness and servitude, while also shifting valuable resources out of conservatees' hands. This Article then turns to recent examples of conservatorship cases to show how elements from this institution's early history have shaped the design and operation of conservatorship law today. Seeing this throughline allows us to look upon conservatorship with fresh eyes and ask different questions—questions that may ultimately push us beyond reformist solutions and toward a more radical reimagining of this legal institution.



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INTRODUCTION

Conservatorship lives in the public imagination as a small-scale, technical legal device, meant for exceptional circumstances. Sometimes used interchangeably with “guardianship,” conservatorship is a legal device for substitute decisionmaking for a limited number of individuals deemed incapable of managing decisions about their finances or self-care.¹ This legal creation of state and local governments, despite ostensibly being a tool to protect people with disabilities,² is actually a method of governance, controlling and distributing property (including human labor) and, by extension, power and wealth in American society. In other words, the logic of

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1. Private and public actors may petition a state probate court for plenary authority over all decisions or a limited power to exercise specific enumerated decisions such as medical care. Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 511 (2015). The proposed conservatee has certain due process protections which, although they vary by state, generally include notice and an opportunity to appear before a judge with counsel. *Id.* at 509–11. Procedural baselines set by *Matthews v. Eldridge* and state laws have structured specific procedures in different ways. See *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that due process requires consideration of three factors: the private interest at stake; the risk of erroneous deprivation of this private interest through procedures used as well as likely value, if any, of substitute procedures; and the Government’s interest including fiscal and administrative burdens of additional or substitute procedures). For example, some states require the appearance of the proposed conservatee at the hearing, other states do not. See, e.g., Harris, *supra* note 1, at 506. Some states offer counsel as of right, others do not. *Id.* at 507. The standard of proof also varies but generally requires clear and convincing evidence of the respondent’s decisional incapacity. *Id.* at 508. Concerns about the individual’s dangerousness to others tends to fall within a separate but related system for civil commitment; conceptually, however, guardianship and civil commitment share similar ideological beliefs, structures, and risks of deprivation of core constitutional interests. *Id.*
 2. This Article recognizes the political nature of language and its importance to movements and identity. It uses person-first (“people with disabilities”) and identity-first (“disabled people”) language interchangeably to reflect contemporary linguistic, rhetorical, and epistemic debates. See, e.g., *Communicating About People With Disabilities*, NAT’L DISABILITY RTS. NETWORK, (Oct. 27, 2020), <https://www.ndrn.org/resource/communicating-about-people-with-disabilities/> [<https://perma.cc/LZT2-LSA4>] (offering guidance to the media on the importance of language); Valerie Novack, *Why Voting Matters for the Disability Community*, CTR. FOR AM. PROGRESS (Oct. 22, 2020), <https://www.americanprogress.org/article/voting-matters-disability-community/> [<https://perma.cc/EZN3-PFMX>] (making an introductory caveat on disability-related language); Lydia X.Z. Brown, *The Significance of Semantics: Person-First Language: Why It Matters*, AUTISTIC HOYA (Aug. 4, 2011), <https://www.autistichoya.com/2011/08/significance-of-semantics-person-first.html> [<https://perma.cc/S62T-EKZN>] (discussing the distinctions between person-first and identity-first language in the context of autism).

conservatorship rests on concerns about money and power, not about disability intrinsically.

Disability, though, has played a vital function in conservatorship's design and use. Rhetorically, invocations of disability have justified particular distributions of wealth and power, from the founding days of this nation. Conservatorship became a way of legally legitimating (and funding) state and private claims to property in the name of care and protection.

Disability proved so useful, I argue, because of its conceptual malleability and its ability to capture groups who were already understood to be other, less than, or marginal. Today, disability as a word, concept, or category, often serves as a proxy for medical diagnosis. Even for those who recognize its social construction, the medicalization of disability continues to predominate in legislation, courts, and the public imagination. Conservatorship strips legal personhood using disability as a consistent and readily accepted alibi. This makes the legal device an effective tool of disenfranchisement and economic extraction. In this sense, conservatorship, by design, became a central legal tool of racial subjugation and control. However, conservatorship's place in the history of race and the law remains either completely buried or reduced to an otherwise legitimate state institution used by bad actors for improper purposes. As a result, the connections between disability and race in political and economic subordination are obscured or bifurcated when, in fact, race and disability are intrinsically linked. Similarly, the history of conservatorship in probate, disability, and elder law largely omits discussions of its use as a tool of racial subordination made possible through legislative definitions and doctrinal interpretations of disability and incapacity.

This Article is the first to place the well-accepted Anglo-American history of conservatorship in probate law in conversation with its historical deployment by states and the federal government to control and extract resources from Native and Black Americans. By recognizing the inherent instability and malleability of disability as a legal concept, I unearth and interrogate the deep racial history of conservatorship through the lens of disability and its use in the United States in three key moments of political and economic subordination: (1) guardianship of Native Americans in colonial New England; (2) guardianship of free Black Americans in the South during the antebellum period; and (3) guardianship of Native Americans during the allotment period.³ In isolation, these histories may be familiar to some

3. See *infra* Part II.

readers. This Article's principal contribution derives from linking them. Doing this shows how conservatorship was and continues to be a formidable legal tool of political and economic subordination, made possible because of how powerful actors have been able to manipulate the concept of disability.

To advance this argument, this Article mines legislation, cases, and original conservatorship petitions submitted to county probate courts during the relevant historical periods to show how the design of conservatorship laws offered a way to create economic indebtedness and servitude. Furthermore, in the context of free Black Americans, conservatorship laws were intentionally (and unapologetically) designed to replicate the bonds of slavery. For example, without a court-appointed white guardian, Black Americans in some states could not enter into contracts, move freely in public, or access courts, even if they wanted to do so in order to challenge claims of white Americans to their free status.⁴ The identity of white Americans appointed as guardians—many of whom were wealthy, powerful slaveowners and supporters of slavery in the South—underscores the smoke and mirrors of legal process as states extracted taxes and fees linked to guardianship to ensure economic and political control.⁵ Conservatorship laws presaged the onslaught of Black Codes and Jim Crow laws that emerged both during and after Reconstruction, and offered a trial run for Southern states legislating de facto forms of slavery. Recent examples of conservatorship cases identify the elements from its early history that have shaped the design and operation of conservatorship laws today.⁶

This Article makes three main contributions. First, as mentioned above, this Article enriches our understanding of the legal institution of conservatorship, by underscoring not only its inherent ableism, but also its entanglement with racism. Conservatorship is “among the least-noticed, least-discussed institutions of the working legal system.”⁷ When we study

4. See *infra* Part II.

5. See *infra* Part II.

6. See *infra* Part III.

7. Lawrence M. Friedman, Joanna L. Grossman & Chris Guthrie, *Guardians: A Research Note*, 40 AM. J. LEGAL HIST. 146, 146 (1996). This is a descriptive, not normative, statement. The institution's highly targeted, individualized nature contributes to its presumed legitimacy (or perhaps its obscurity). By statute, it only applies to legally-categorized incapacitated, disabled people who need support or would be in danger. This limited picture of conservatorship exists for at least two reasons. First, discussions of disability and incapacity remove these proceedings from public scrutiny—public access to the hearings, filings, and aggregate data. See, e.g., Harris, *supra* note 1 (discussing state law's treatment of conservatorship hearings and related court documents as private). Second,

the legal device itself, we can better understand the role of states (and state actors such as legislators, judges, and lawyers), the federal government, and the relationship between federal and state actors in designing and executing these systems for controlling the distribution of wealth and power. Second, and consequently, this history directly challenges longstanding presumptions of conservatorship's institutional legitimacy. In turn, this Article reframes contemporary debates on the future of conservatorship beyond procedural reforms by raising urgent questions about the institution's continued viability. Third, and prescriptively, this Article introduces the possibility of abolition in the context of conservatorship. In doing so, this Article breaks new ground by connecting conservatorship with similar state legal devices and systems—including prisons, law enforcement, and child welfare—with deeply problematic histories of racial inequality, capitalism, and extraction. These insights demand attention by current reformers of guardianship/conservatorship systems and those in other areas who are looking at original sin/taint/extraction as plausible reasons for abolition of these institutions.⁸ This is not to discount the high stakes for people with significant disabilities who need assistance in the daily functions of life and decisionmaking. Rather, this Article offers more complete information to guide current debates towards a new set of possibilities.

National debates about conservatorship abuse—from pop star Britney Spears⁹ and, most recently, former NFL star Michael Oher,¹⁰ to older adults¹¹ and people with intellectual, developmental, and psychiatric disabilities—

and relatedly, the public's understanding of these proceedings largely comes from those exceptional cases that generate media attention because they involve a celebrity (such as Britney Spears) or concern egregious fraud, abuse and neglect (such as pillaging the savings of older adults).

8. See, e.g., W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1194–95 (2022) (“The persistence of an older policy’s operative core can manifest a ‘discriminatory taint’ that alone should impugn an otherwise facially legitimate policy.”).
9. See Joe Coscarelli, Julia Jacobs & Liz Day, *Judge Frees Spears From Father’s Control*, N.Y. TIMES (Nov. 13, 2021), <https://www.nytimes.com/2021/09/29/arts/music/britney-spears-court-decision-conservatorship.html> [<https://perma.cc/45K6-37HJ>].
10. See Esme Mazzeo, *‘Gullible’ and ‘Exploited’—Former NFL Star Michael Oher Filed Legal Paperwork This Week That May Change How the World Thinks of Sandra Bullock’s ‘The Blind Side’ Forever*, BUS. INSIDER (Aug. 19, 2023, 6:08 AM), <https://www.insider.com/the-blind-side-michael-ohr-conservatorship-adoption-controversy-2023-8> [<https://perma.cc/S3PV-Z33Y>].
11. See Ronnie Greene & Holly Barker, *Guardians’ Dark Side: Lax Rules Open the Vulnerable to Abuse*, BLOOMBERG L. (Mar. 6, 2023, 2:01 AM), <https://news.bloomberglaw.com/us-law-week/guardians-dark-side-lax-rules-open-the-vulnerable-to-abuse> [<https://perma.cc/HG8C-GKEW>].

make this intervention all the more important. To date, these debates have missed this critical racial history and, perhaps for that reason, have focused exclusively on reforming conservatorship.¹² Before investing in reforms (such as more rigorous due process protections, data collection, or transparency as possible means to address current abuses and improve conservatorship), scholars, legislators, practitioners, and advocates should engage with conservatorship's racial history, asking whether, in light of it, conservatorship, as a legal institution, may be unredeemable. Phrased differently, we should ask whether the features of conservatorship that some well-meaning people seek to reform (and thereby preserve in improved form) may be precisely those defining features of conservatorship that have operated successfully for hundreds of years: to extract resources, to control bodies, and to strip political rights. The possibility of abolishing conservatorship, while currently a rare position in both disability advocacy and legal scholarship,¹³ creates novel liberatory spaces for cross-pollination in theory and practice with, for example, carceral abolitionists.

The stakes for potential conservatees are concrete, current, and significant. First, anyone subject to a conservatorship risks losing fundamental privileges and duties of citizenship such as the right to make legally binding decisions about personal relationships, healthcare (including reproductive choices), residency, money, and property, as well as, in some states, the ability to serve on a jury and cast a vote. Second, while data on conservatorship are variable and likely underinclusive, over 1.3 million people and over

12. To the extent that meaningful debates exist. Absent the occasional high profile celebrity profile, conservatorship as a legal institution rarely garners sustained public attention, legal inquisition, or academic study despite its stakes, scope, and significance. *See, e.g.,* Winsor C. Schmidt, Jr., *The Evolution of a Public Guardianship Program*, 12 J. PSYCHIATRY & L. 349, 351 (1984) (“Guardianship is much more frequent than judicial utterances of acquittal by reason of insanity, yet scholarly and case law attention to guardianship does not even approach the mountain of literature and litigation on the insanity defense.”); *see also infra* Part IV.

13. *See, e.g.,* Sara Luterman, *Abolish Guardianship, Preserve the Rights of Disabled People, and Free Britney*, NATION (Mar. 6, 2021), <https://www.thenation.com/article/society/guardianship-britney-spears> [<https://perma.cc/F2FH-UBD2>] (“Guardianship is built on the patronizing assumption that people with certain disabilities are incapable of being full citizens and need a nondisabled person to act as their proxy in all things. While I do not discourage reform, what we ultimately need is abolition.”); *see also* Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246, 267 (2021) (noting more narrowly in the context of reproductive justice, “to achieve reproductive justice, legal and policy efforts must protect the autonomy and self-determination of people with disabilities, including ensuring that they receive the least restrictive supports and abolishing guardianship”).

\$50 billion in assets in the United States are under court-ordered conservatorship. To put this figure in perspective, this is roughly equivalent to the current Gross Domestic Product (GDP) of Libya, and more than twice the GDP of Armenia.¹⁴

This Article proceeds in four parts. Part I demonstrates our conventional view of conservatorship as a tool for private ordering: its necessity, narrow scope, individualization, and presumptively benevolent function. Historically, in this system, the care or protection of a person with disabilities, otherwise left to private actors (families or religious communities), demanded state involvement only when there was a tangible property interest at stake. The early Anglo-American probate court actors, as a result, were predominantly white men—judges, lawyers, petitioners, and respondents—those legally permitted to own property. Interestingly, and perhaps because the principal actors were white men, some of the early cases show a relatively more nuanced conception of legal incapacity than exists today; courts at this time adopted a disaggregated conception of legal capacity cognizant of the high stakes: namely, a person might experience functional incapacity in some domains but not others.¹⁵ The primary question for courts was whether the person could manage their money—judged by Anglo-American norms of prudential spending—to avoid squandering individual and familial wealth and, subsequently, creating dependency on the state. While conservatorship in American probate law developed in a similar vein to its progenitor in English common law, another form of conservatorship took shape in America based on a theory of collective incapacity of racialized groups—Native and Black Americans.

Part II argues that this parallel use of conservatorship operated not as a device for private ordering but as one for public governance. This collective use of conservatorship over populations rather than individuals drew from principles at work in probate, such as the language of incapacity and disability, but imposed these labels not upon individuals after adjudication but upon groups without process for purpose of legitimating economic and political subordination. This Part offers three key historical examples of the operation of conservatorship (conceptually and practically) as a means of regulating and distributing political and economic power. Drawing on

14. See *GDP (Current US\$)*, WORLD BANK (2023), <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> [<https://perma.cc/4HK6-99YN>] (reporting Libyan GDP in 2023 of approximately \$50 billion and Armenian GDP in 2023 of approximately \$24 billion).

15. “Liberty” not in the sense of Constitutional protections but in the sense of decisional liberty, control over one’s decisionmaking, individual agency.

legislative and doctrinal materials and original conservatorship petitions filed with county and state courts, Part II examines the players, designs, context, and consequences of using law and legal institutions to subordinate and extract resources from Indigenous communities in colonial New England, from free Black Americans in the antebellum south, and from Native peoples during the post-Dawes Act allotments. While scholars have identified these moments as pertinent to understanding subordination and racialized forms of resource extraction, the legal scholarship, to date, has not attended to one of the most important legal devices—conservatorship—that made this extraction possible.

Part III takes the two principal functions of conservatorship from Part II—social control and extraction—and offers contemporary examples of its continued operation today. These examples show that the foundation of conservatorship remains intact, including its strategic deployment to strip marginalized groups of valuable resources or otherwise control them. Part IV weaves together the prior three Parts of this Article and attends to the implications of this racial history of conservatorship as governance on contemporary reform proposals.

I. CONSERVATORSHIP AS PRIVATE ORDERING

Part I introduces the legal institution of conservatorship and helps explain why people see it within probate's protective arm: benign and tailored to the individual to act in their best interests. Though guardianship/conservatorship laws date back to ancient Rome and Greece, for purposes of understanding the evolution of guardianship in the United States, English law had the greatest influence on it. There are certain features which emerge from this early history that are especially sticky, do a lot of work, and persist over time; we can recognize elements of this early system in the operation of conservatorship today. Part I highlights this history with the goal of surfacing key elements of its institutional design, narratives surrounding its use and necessity, and the norms of disability that allowed this system to operate.

A. Property Protection Above All Else

The default rule underwriting the English probate system highlights the primacy given to property rights in both English common law and courts of

equity.¹⁶ The law generally left private actors to manage and regulate the use of private property unless an individual lacked legal capacity to hold title to an estate.¹⁷ When a concern arose about the management of a property, early English law entrusted the “Lord of the Manor” with the responsibility of “tutorship” for people with diminished capacity (those treated as legally disabled).¹⁸ Though the law stated that tutorship included control of both the property and the person, it chiefly existed for proprietary reasons.¹⁹ The first mention of guardianship in English law appears in the 1324 *De Prerogativa Regis* (“concerning the prerogatives of the King”).²⁰ *De Prerogativa Regis* vested in the King power over his subjects and their lands.²¹ More specifically, the law transferred (and consolidated) guardianship responsibility of two classes of individuals—referred to as “natural fools” and those “who formerly had memory and intellect but became *non compos mentis*”²²—from feudal lords to the King.²³ The purpose of the *De Praerogativa Regis* was to “vest[] the lands and goods of ideots [sic] and lunatics in the crown by statute, ... to protect them from waste and

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16. See PAUL McLAUGHLIN, *GUARDIANSHIP OF THE PERSON* 35 (1979) (citing RICHARD C. ALLEN, ELYCE ZENOFF FERSTER & HENRY WEIHOFEN, *MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY* IX–XI (1968)); Walter D. Navin, Jr., *Guardianship and Incompetency*, in *MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY* 95–96 (1968). The responsibilities of the property guardian were often stated specifically and concisely, whereas the duty of the personal guardian was broadly stated as caring for the general welfare of the adult. See Amie L. Bruggeman, *Guardianship of Adults With Mental Retardation: Towards a Presumption of Competence*, 14 AKRON L. REV. 321, 327 (1981).
 17. This content of this category shifted over across history and location but consistently has included children and certain people with disabilities.
 18. McLAUGHLIN, *supra* note 16, at 37.
 19. *Id.*
 20. See 17 Edw. 2, c. 9, 10 (1324). This law was materially based upon early Roman law dating back to 5 B.C., which granted nonjudicial guardianship to the paternal relatives of “fools” not under the care of anyone else. 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, 15 (1997) (citing AMERICAN BAR FOUNDATION REPORT ON THE RIGHTS OF THE MENTALLY ILL, *THE MENTALLY DISABLED AND THE LAW* (Samuel J. Brakel & Ronald S. Rock, eds., rev. 2d ed. 1971)); McLAUGHLIN, *supra* note 16, 38–39. The King exercised this prerogative before the official passage of *De Prerogativa Regis*. See ANTHONY HIGHMORE, *A TREATISE ON THE LAW OF IDIOCY AND LUNACY* 15 (1807).
 21. McLAUGHLIN, *supra* note 16, at 38.
 22. These two classes gradually became known as “idiots” and “lunatics,” respectively. See Comment, *Lunacy and Idiocy—The Old Law and Its Incubus*, 18 U. CHI. L. REV. 361, 361–62 (1951) [hereinafter *Comment on Lunacy*]. In the sixteenth-century decision *Frances’ Case*, the court quotes and applies *De Prerogativa Regis* but substitutes “idiot” and “lunatic.” *Id.* at 363.
 23. McLAUGHLIN, *supra* note 16, at 38.

destruction [and from becoming public charges], that they and their household, or family, may subsist and be competently maintained out of its profits”²⁴

The first class (“idiots”) included individuals who, from birth (though later statutes removed the birth requirement), retained the mental capacity of a child. The second class (“lunatics”) included those whose “wit and memory” and “right mind” deteriorated sometime after birth; in other words, people who were considered “sane” at one point and possessed the capacity to become “sane” again.²⁵

The law’s separation of these individuals into two classes affected the King’s custodial authority and the Crown’s funding streams: for those in the first class (deemed perpetually incapacitated), the King seized their land, took their profits, and, upon their death, would pass their land onto the rightful heir.²⁶ For those in the second class (deemed capable of regaining capacity), the King temporarily held their property, without retaining any profits, and was obligated to ensure “they and their household shall live and be maintained competently with the property of the same.”²⁷ If an individual

24. HIGHMORE, *supra* note 20, at 14.

25. McLAUGHLIN, *supra* note 16, at 39; *see also* T. Raleigh, *The Lunacy Laws*, 1 L.Q. REV. 150 (1885); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 302–04 (1807) (“An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any [In such case the common law writ *de idiota inquirendo* is issued] to inquire whether a man be an idiot or not: which must be tried by a jury of twelve men: and, if they find him *purus idiota*, the profits of his lands and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them [But a] lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives.”).

26. McLAUGHLIN, *supra* note 16, at 38. McLaughlin notes these individuals were treated as “non-persons.” *Id.* In *Beverley’s Case*, Lord Coke ruled the King also retained custody of the person as well as their goods and chattels. *Beverley’s Case* (1603) 76 Eng. Rep. 1118, 1124; 4 Co. Rep. 123 b, 126 a.

27. McLAUGHLIN, *supra* note 16, at 38. As Sarah Burningham explains, given the significant consequences of a finding of “idiocy,” English judges began substituting verdicts of “lunacy,” and the distinction ceased to be important when the Crown stopped seizing the lands of “idiots.” Sarah Burningham, *Developments in Canadian Adult Guardianship and Co-Decision-Making Law*, 18 DALHOUSIE J. LEGAL STUD. 119, 127 n.42 (2009); McLAUGHLIN, *supra* note 16, at 40; Raleigh, *supra* note 25, at 150–51; *see also* THE MENTALLY DISABLED AND THE LAW: THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL 8 (Frank T. Lindman & Donald M. McIntyre, Jr. eds., 1961) [hereinafter ABA REPORT] (“It

in the second class died while still considered to be a “lunatic,” their property did not pass to heirs (like that belonging to the legal classification of “idiots”), but instead was distributed by the King with the advice of ecclesiastical authorities.²⁸ In this sense, conservatorship operated as a legal device to “unfreeze property” and keep it in circulation in the agricultural and trade economies dependent on the active and productive use of that land.²⁹

The statute remained in effect in England for nearly six hundred years³⁰ until the promulgation of a series of nineteenth-century amendments, consolidated into the Lunacy Act of 1890.³¹ Like the *De Praerogativa Regis* before it, the Lunacy Act granted the courts “power to allow a relation or friend to take charge of a lunatic”³² and to make orders for the commitment of the adult’s estate.³³ The Lunacy Act, however, went further and explicitly allowed judges, without notice, to commit adults to workhouses³⁴ or

would appear . . . that [the king’s] protection of the person consisted of caring for his needs out of the proceeds from the lands.”).

28. McLAUGHLIN, *supra* note 16, at 39.

29. Cf. Friedman et al., *supra* note 7, at 147–50 (discussing the role of conservatorship law in California but applied to earlier economic structures dependent on the use of the land).

30. Some note a shift in early seventeenth-century English law, marked by Lord Coke’s opinion in *Beverley’s Case* (1603) 76 Eng. Rep. 1118; 4 Co. Rep. 123b. See, e.g., A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis With Procedural Safeguards and Due Process in Guardianship*, 7 ELDER L.J. 33, 49 (1999) (discussing the impact of *Beverley’s Case*); see also *Comment on Lunacy*, *supra* note 22. In *Beverley’s Case*, Lord Coke set up four classes of individuals deemed *non compos mentis*: lunatics, idiots, distracted persons (a term formerly included in the concept of the lunatic) and drunkards. Coke’s four-part classification retained its precedential value for several centuries. *Id.* at 364–65.

31. McLAUGHLIN, *supra* note 16, at 40; Lunacy Act 1890, 53 & 54 Vict. c. 5 (Eng.). To view an annotated version of the Lunacy Act of 1890, which includes a section-by-section description of how prior amendments were incorporated into the finished Act, see S.G. LUSHINGTON, *ARCHBOLD’S LUNACY; COMPRISING THE LUNACY ACT, 1890 AND 1891; THE LANCASHIRE COUNTY (LUNATIC ASYLUMS AND OTHER POWERS) ACT, 1891, AND ALL THE STATUTORY RULES, ORDERS, AND FORMS IN FORCE THEREUNDER* (4th ed. 1895). Over time, jurisdiction over conservatorship proceedings was transferred to the Lord Chancellor, who would issue a writ upon petition to try the issue of mental competence before a twelve-person jury. According to Blackstone, the practice was to make the heir of the individual with disabilities the manager of the estate, but not to give them custody of the person, “to prevent sinister practices.” BLACKSTONE, *supra* note 25, at 304. A series of nineteenth-century amendments, however, rid of jury proceedings and instead allowed a declaration of mental incompetency to be made on affidavit evidence, proving such incompetency beyond a reasonable doubt. McLAUGHLIN, *supra* note 16, at 40.

32. Lunacy Act 1890 § 22.

33. *Id.* § 108(3). Under the Act, the adult’s interest in property was not to be altered. *Id.* § 123.

34. *Id.* § 20. The Act also provided that the “lunatic” was not to remain in the workhouse unless “the accommodation in the workhouse [was] sufficient for his proper care and

asylums³⁵ on the basis of perceived disability. Notably, the primacy of property within the conservatorship scheme remained—the conservator was required to create an inventory of the adult’s property and ensure its proper management.³⁶

Given the time and costs associated with these proceedings, a petitioner would not bother to apply for conservatorship unless there was substantial property to be managed.³⁷ According to Blackstone, a person applied to the royal authority for lasting confinement “when the disorder [grew] permanent, and the circumstances of the party [would] bear such additional expense.”³⁸ This was due, at least in part, to the structure of the early laws that granted plenary authority over the individual’s property and person irrespective of the individual’s actual needs.³⁹ A separate order granting jurisdiction over the person “was likely superfluous” because there was often some informal care arrangement in place and, in any event, secondary to the property interest.⁴⁰

This system traveled across the Atlantic and became the bedrock of early guardianship/conservatorship laws for those presumed to be *sui juris*—those with property and legal personhood—and, thus, subject to the king’s protection should they be or become incapacitated by illness or vice. In the colonies, this meant chiefly white people (and, more specifically, white men).⁴¹ As Part II will discuss in greater detail, for groups of people deemed categorically disabled (incapacitated) on the basis of race, the state or group of actors acting in the interests of collective governance possessed presumptive authority as a conservator over these marginalized groups, the conservatees.⁴² No legal process was due to these individuals with respect to disputing their presumed incompetence because the law did not recognize them as legal persons. This Part offers a sketch of how conservatorship

treatment.” *Id.* § 24(1)(c). The Act is not clear as to how the workhouse was to provide proper care and treatment.

35. *Id.* § 27.

36. The Act considered guardians those who paid “for the care and maintenance of the lunatic or having the management of his property” or institutions under which the person with disabilities was “detained.” *Id.* § 50(1).

37. See Burningham, *supra* note 27, at 128.

38. ABA REPORT, *supra* note 27, at 9 (quoting BLACKSTONE, *supra* note 25, at 305).

39. See Burningham, *supra* note 27, at 128.

40. *Id.*

41. Though primarily men, this includes women who were treated as wards of their father and then, upon marriage, wards of their husbands. This also includes children, though an exploration of incapacity on the basis of infancy and childhood is beyond the scope of this paper.

42. See *infra* Part II.

statutes developed in the United States for individuals privileged with access to individual adjudication of incapacity.

The colony of Massachusetts had guardianship laws in place as early as 1641.⁴³ While the first colonial laws did not address or define people with disabilities specifically, several colonies had some provision that explicitly barred incapacitated people from owning or inheriting property.⁴⁴

Colonial laws concerning disabled people, like their English counterparts, focused on their estates long before focusing on their well-being.⁴⁵ Indeed, laws directed at the care of a person with disabilities only emphasized the damage such disorderly or unmanageable person inflicted on others by displaying non-normative behaviors (expressed in terms of financial costs and lost resources either to private property or, over time, to the state coffers).⁴⁶ The statutory standards for legal incapacity focused on the

43. See COLONY OF MASSACHUSETTS, THE GENERAL LAWS AND LIBERTIES OF THE MASSACHUSETTS COLONY, REVISED AND RE-PRINTED, BY ORDER OF THE GENERAL COURT HOLDEN AT BOSTON 1 (1672) ("It is Ordered by this Court and the Authority thereof; That the age for passing away Lands, or such kinde [sic] of Hereditaments, . . . shall be one and twenty years, but in chusing [sic] Guardians, fourteen years. And all persons of the age of one and twenty years, as aforesaid, *and of understanding & memory*, whether excommunicate, condemned, or other, shall have full power and liberty to make their Wills and Testaments, and other lawfull [sic] Alienations of their Lands and Estates.") (emphasis added); see also Friedman et al., *supra* note 7, at 146 n.2.

44. These states are Massachusetts, North Carolina, Virginia, New Hampshire, and Pennsylvania. See, e.g., PROVINCE OF NEW HAMPSHIRE, ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND WITH SUNDRY ACTS OF PARLIAMENT 36 (1771) ("[A]ny person to be naturally wanting of understanding, so as to be incapable to provide for him or her self; . . . shall fall into distraction, and become *non compos mentis*, . . . in such case or cases the select-men or overseers of the poor of the town . . . are hereby impowered, and enjoyned to take effectual care, and make necessary provision for the relief, support, and safety of such impotent or distracted person, . . . if the party hath not estate of his or her own . . ."); 23 NORTH CAROLINA GENERAL ASSEMBLY, ACTS OF THE NORTH CAROLINA GENERAL ASSEMBLY, 1715–1716, ch. 27, § 5 (1716), <https://docsouth.unc.edu/csr/index.php/document/csr23-0001> [<https://perma.cc/X3PH-TVK6>] ("[I]f any person or persons that is or hereafter shall be entitled to any Right or Claim of Lands, Tenements, Hereditaments, shall at the time [be] . . . *Non Compos mentis*, . . . then such person or persons shall & may . . . Commence his Suit . . . [once] Comeing [sic] of sound Mind . . ."); 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 522 (1823), <https://usgenwebsites.org/vagenweb/hening/vol03-29.htm> [<https://perma.cc/7QWV-48EV>]; JOHN PURDON & GEORGE M. STROUD, DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED, TO THE THIRTEENTH DAY OF OCTOBER, ONE THOUSAND EIGHT HUNDRED AND FORTY 711–22 (6th ed. 1841).

45. ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA 37 (2d ed. 1946).

46. See, e.g., *id.* at 40 ("Whereas, [t]here are distracted persons in some [towns], that are unruly, whereby not only the [families] wherein they are, but others suffer much damage by them, it is ordered by this Court and the [authority] thereof, that he

dangers posed by the proposed conservatee to self or others. Evidence of incapacity included testimony about personal decisions that threatened not the individual but the solvency and resources of the estate, those which, if left unchecked, could decimate private resources creating state dependency for care and protection.⁴⁷

One of the earliest American treatises on guardianship law illustrates this point very well, describing the state's interest in property as paramount to its regulation through conservatorship:

Neither children . . . , nor idiots (persons wholly destitute of the reasoning power), nor persons of unsound mind (*Non Compos Mentis*, *Insane Persons*, or *Lunatics*, having from any cause lost the use of their reasoning power), *possess that quality of will power which constitutes the essential element of property*. . . .

It is obvious, therefore, that the dispositive quality of mind lacking in these classes of persons must be supplied from without, to enable them in any wise to enjoy or be benefited by that which belongs to them. And since the enjoyment of property, as well as of life, is the inalienable right of human beings, it is the office of the State in all civilized countries to substitute, in vindication of the property rights of minors and persons of unsound mind, its own universal will for that of the incompetent owners, thus restoring the essential element of their property.⁴⁸

In other words, the law treated people in these classes—children, adults who were “non compos mentis,” “insane persons,” and “lunatics”⁴⁹—as fundamentally irrational, without the capacity to reason or to practice self-restraint, thus making them incapable of the privilege and benefits of property ownership. Yet unlike children deemed categorically incompetent under the law, the other categories of legal disability required individual

selectmen in all [towns] where such persons are . . . hereby [empowered and enjoined] to take care of all such persons, that they [do] not damnify others.”) (internal quotation marks and citation omitted).

47. See *id.* at 38–43; see also *In re Lindsley*, 44 N.J. Eq. 564, 566 (1888) (“Our first statute, after the Revolution, was ‘An act for supporting idiots and lunatics, and preserving their estates,’ passed November 21, 1794, (Patt. Laws, 125,) which was evidently an adaptation to our institutions of chapters 9 and 10 of 17 Edw. II., de Prerogative, Regis. (Shelf. Lun. 315.) Although this enactment, by its terms, includes only idiots and lunatics, yet, in construction, it no doubt should embrace those *non compos mentis*, or of unsound mind, to whom its prototype had been judicially extended.”) (emphasis added).

48. J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND 1–2 (1897) (emphasis added).

49. *Id.*

adjudication by the court. The rhetoric of conservatorship, therefore, depicted the institution, at core, as benevolent and protective; that is, despite the absence of these requisite qualities for enjoyment of property, the state offered individuals found to be incapacitated the ability to enjoy their property without the burden of directing and managing it.

B. State Dependency as a Marker of Deviance and Legal Incapacity

Mental disability, broadly defined, was understood to be a legitimate reason for state intervention in otherwise private matters. Though its content varied over time, the legal category of incapacitated and the judicial processes associated with assigning this label operated without major challenge. The creation of the first mental asylums in the late eighteenth century,⁵⁰ helped to pave the way for a flurry of guardianship and conservatorship laws that took shape in the years leading up to the Civil War and again garnered attention during Reconstruction.⁵¹ Similar to their English predecessors, American guardianship laws sought “to protect the property of a mentally incompetent person and to apply it primarily for his and his family’s benefit and enjoyment.”⁵²

As the Pennsylvania Supreme Court wrote in *Commonwealth v. Schneider*:

The protection of property is one, if not the main object of the [conservatorship] statute . . . the test of liability to a commission,

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50. Eastern State Hospital (also known as the Williamsburg hospital), built in Virginia in 1773, was the first public psychiatric hospital in the United States. *Eastern State Hospital History*, VA. DEP’T OF BEHAV. HEALTH AND DEV. SERVS., <https://dbhds.virginia.gov/facilities/esh/esh-history/#:~:text=Eastern%20State%20Hospital%20has%20the,basis%20and%20completed%20in%201970> [https://perma.cc/B5R5-YYWN]. Before psychiatric institutions were erected, poor people with disabilities and those perceived as disabled without families or friends became part of a group of “idle, dissolute, and disorderly” people committed by the state to “houses of correction” along with those charged with crimes. See 7 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 127–36 (Charles J. Hoadly ed., 1873) (promulgating “An Act for Suppressing and Punishing of Rogues, Vagabonds, Common Beggars, and other lewd, idle, dissolute and disorderly Persons, and for Setting them to Work”); 2 SAMUEL GREENE ARNOLD, HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 80 (1899).
 51. See WOERNER, *supra* note 48, at 376–77 (comparing U.S. state conservatorship laws); JOSEPH TATE, DIGEST OF THE LAWS OF VIRGINIA 489–97 (1823) (citing Acts of March 9–April 1, R. C. ch. 109 (1819)).
 52. WOERNER, *supra* note 48, at 376; see also DEUTSCH, *supra* note 45, at 37; Smith v. Burnham, 1826 WL 1171, 1 Aik. 84, at *6 (Vt. 1826) (stating that the return of an inquest of lunacy, which does not reference the specific mental conditions for guardianship in the statute, can still be sufficient); *In re McElroy*, 1843 WL 5177, 6 Watts & Serg. 451, at *2 (Pa. 1843) (noting “non compos mentis” as a generic term in legislative parlance encompassing all forms of mental unsoundness).

should depend greatly on that unsoundness of mind which discloses incompetency to its management, and the care and protection of it in a rational manner; and this is the rule in England.⁵³

By the dawn of the twentieth century, the test across most states for granting a petition for conservatorship was whether the person was mentally incapable of governing himself and managing his property, highly malleable concepts subject to interpretation by state and county court judges, who were often elected officers of the court and dependent on public approval for their positions.⁵⁴

Most states preserved, in name at least, the distinction between idiocy, lunacy, and insanity until the early twentieth century,⁵⁵ but the distinction for purposes of conservatorship retained no practical significance. Most state courts and statutes used “lunatic,” “idiot,” “*non compos mentis*,” and “unsound mind” interchangeably and grouped them under one proceeding.⁵⁶

53. Commonwealth *ex rel.* Euchenberg v. Schneider, 59 Pa. 328, 330 (1868). A treatise from 1822 on the topic described those who suffered from mental disabilities as follows:

The rational man provides for his necessities and has pleasure in this pursuit—he restrains the transient enjoyment of superfluities, that his laudable acquisitions may become the fruits of more permanent comforts; but the ideot and the maniac have necessities for which they know not how to provide, they have vague pursuits unaccompanied by means and undirected to an end; they can reap no fruit, for they have neither planted nor pruned the branches.

HIGHMORE, *supra* note 20, at vi–vii.

54. Schneider, 59 Pa. at 330–31; see also Grant H. Morris, *Conservatorship for the “Gravely Disabled”: California’s Nondeclaration of Nonindependence*, 15 SAN DIEGO L. REV. 201, 209 n.40 (1978) (describing the California law as it had been enacted in 1850). According to Woerner’s 1897 treatise, guardianship cases in U.S. states were decided either in chancery courts or probate courts. WOERNER, *supra* note 48, at 432–35.

55. WOERNER, *supra* note 48, at 432–35.

56. Comments, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341, 342–43 (1964) [hereinafter *Comments*]; see also Dribin v. Superior Court, 231 P.2d 809 (Cal. 1951); Beattie v. Bower, 287 N.W. 900 (Mich. 1939); Caple v. Drew, 78 P. 427, 427 (Kan. 1904) (“A finding of a jury in an inquest that the subject of the inquiry is feeble in mind, incapable of managing business affairs, and a typical imbecile, is not a finding of insanity within the statutory meaning of the term, and furnished the probate court no authority to appoint a guardian for such feeble-minded person”); Nailor’s Children v. Nailor, 34 Ky. (4 Dana) 339, 340, 345 (1836) (affirming a grant of a writ *de lunatico inquirendo* to those exhibiting “unsoundness of mind”); Overseers of Poor of Fairfield v. Gullifer, 49 Me. 360, 361 (1860) (“The words ‘insane person’ may include an idiotic, non compos, lunatic, or distracted person.”); Schneider, 59 Pa. at 328; Greenwade v. Greenwade, 43 Md. 313, 315 (1875) (“The terms *non compos mentis* used by the Code, embraces not only lunatics and idiots, but all persons of unsound mind.”); Shelby v. Farve, 33 Okla. 651, 651 (1912) (“The phrases ‘incompetent,’ ‘mentally incompetent,’

However, some courts struggled to interpret the law's treatment of an individual's capacity to care for themselves and manage their financial affairs, and whether the stakes of these proceedings might require separate factual findings and conclusions of law.⁵⁷

In considering a petition for guardianship (referred to in some cases as a *writ de lunatico inquirendo* or *writ de idiota inquirendo*), a chancery or probate court determined whether the alleged disabled person was mentally incapable of governing themselves and managing their property ("affairs").⁵⁸ However, tests for mental disability, defined by statutes and case law, generally did not delineate a standard by which to measure an individual's ability to manage their person or affairs.⁵⁹ Determination of incapacity depended almost entirely on the particular facts of each case, and judges relied primarily on external indicia of disability.⁶⁰ Specifically, the existence

and 'incapable,' as used in [the relevant statute], mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property . . .").

57. See, e.g., *In re Lindsley*, 44 N.J. Eq. 564, 567–68 (1888) ("[I]f the jury merely find the incapacity of the party to manage his affairs, and will not infer, from that and other circumstances, unsoundness of mind (which he said has the same effect as idiocy or lunacy), though the party may live where he is exposed to ruin every instant, yet, upon that finding, the commission cannot go on.").
58. WOERNER, *supra* note 48, at 376–77; AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW (David S. Garland & Charles Porterfield eds., 2d ed. 1908); *In re Lindsley*, 42 N.J. at 564 (holding that the proper question in determining lunacy is whether the person is incapable of managing their affairs and their person, not just affairs); *Francke v. His Wife*, 29 La. Ann. 302, 315 (1877) (holding that the incapacity to administer one's estate, without a finding of incapacity to care for one's person, insufficient to uphold interdiction of insanity); *Gullifer*, 49 Me. at 361 ("The appointment of a guardian over one as *non compos*, is not warranted by the fact that he was aged and had become wasteful of his property under the influence of profligate children.").
59. One court stated the alleged disabled person must appear to be normal "in the usual acceptance of that term." *In re Coburn*, 11 Cal. App. 604, 606 (1909), *aff'd*, 165 Cal. 202 (1913); *In re Gordon's Guardianship*, 56 Cal. App. 2d 523, 528–29, 132 P.2d 824, 827 (1943) (quoting *Ludwick v. Commonwealth*, 18 Pa. 172, 175 (1851)) ("A disposition of mind . . . which might lead to the wasting of an estate is sufficient to justify the appointment."); *Fiscus v. Turner*, 24 N.E. 662, 663 (Ind. 1890) ("But to permit the jury to make their verdict upon the appearance and conduct of the person charged with insanity would lead to the utmost confusion, and would render it impossible for this court to determine whether any case of the kind was or was not supported by the evidence.").
60. *Comments*, *supra* note 56, at 344. Some courts held that old age or other routine illness, by itself, was insufficient to rise to the level of incapacity to manage one's affairs. See, e.g., *In re Lindsley*, 44 N.J. Eq. at 564; *In re De Hart*, 51 N.J. Eq. 611, 611 (1894); *In re McElroy*, 1843 WL 5177, 6 Watts & Serg. 451, 457 (Pa. 1843) ("However much may have been written on the subject as a matter of science, the common sense of mankind is the best guide in deciding the question of sanity or insanity when presented in a practical form . . ."). The practice of using normatively determined markers of deviance as probative and

and extent of mental disability was primarily determined from direct evidence of the alleged disabled person's words, acts, appearance, and physical condition, as well as from opinions of laypeople and medical practitioners that were based on close association with or observation of the individual with disabilities.⁶¹ Courts privileged the fact finder's personal observation of the individual as a critical source of evidence of disability and incapacity.⁶²

The fact that a court focused on the ability of an alleged disabled person to manage their financial affairs, at times, led to the appointment of a guardian,⁶³ even in cases where the evidence did not strongly support a finding of incapacity. This demonstrates the ways in which conservatorship as a legal device—through statutory definitions of incapacity on the basis of disability—operated as a malleable means of enforcing socio-political norms of self-sufficiency and economic independence from the state. In *Calderon v. Martin*, for example, decided in 1898, the Louisiana Supreme Court upheld a judgment of interdiction against a man who, though not “in the strict sense of the word, absolutely insane . . . is none the less . . . as much in need of protection as if his case were one strictly of the most pronounced type of insanity.”⁶⁴ To support this finding, the court pointed to the defendant's expenditure of his patrimony, his timidity, his unwillingness to leave his home alone, and his inability to “correctly calculate or to multiply simple numbers.”⁶⁵ Concluding that the defendant was mentally infirm and a proper subject to place under the charge of a guardian, the court justified its holding

persuasive evidence of disability continues today. See, e.g., Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895 (2019) (discussing aesthetic markers deemed relevant and probative of disability and, by extension, capacity in U.S. courts).

61. Comments, *supra* note 56, at 344–45; see also *H. v. S.*, 4 N.H. 60, 67 (1827) (finding an inquisition of disability void where selectmen did not physically examine the alleged disabled person, question witnesses as to his state of mind, or make a specific legal finding of *non compos mentis* based on evidence.).

62. See Petitioner's Points, Argument, and Evidence, in Support of the Commission de Lunatico Inquirendo, Issued by the Supreme Court, on the 27th of December, 1861, *In re Gabriel Winter*, at ii (N.Y. App. Div. 1862) (“In what manner could the question as to the mental condition or soundness of the party be satisfactorily determined, except by inspection and examination before the commissioners and jury? In what other manner could his conduct, his words, his actions be investigated?”); see also Harris, *supra* note 60.

63. Some states provided for the appointment of a committee of people to manage the person's affairs. The committee operated like a guardian would in terms of fiduciary obligations.

64. *Calderon v. Martin*, 50 La. Ann. 1153, 1155 (1898).

65. *Id.* at 1154–55 (“His utterances are difficult, and not easily understood [He] is frequently abnormally nervous, and . . . is unable to earn a livelihood The Defendant cannot, in his present state of mental weakness, transact the customary business of life.”).

by explaining that the defendant's "sad condition" necessitated "protection" and "sympathy."⁶⁶

Although early cases discuss guardianship over the person and the property together, these decisions supported the need for guardianship in terms of threats to property interests of the state or private actors (family, creditors).⁶⁷ In cases such as these, the state's property interest represented, in effect, its interest in ensuring the person did not become a fiscal burden; thus, the appointment of a guardian sought to ensure proper management of property and assets to avoid the person's dependence on the state.⁶⁸ This helps explain why superintendents of poorhouses had explicit jurisdiction to petition chancery courts for guardianship.

Interestingly, courts, at times, did appear to struggle with line drawing—when it was appropriate to strip an individual of economic and political rights through guardianship. However, this level of nuanced reasoning, noticeably absent from later cases with demographically diverse respondents, may reflect a certain degree of self-preservation as it appears in cases presided over by older white male judges where the respondent is an older white male facing the loss of property and decisional agency. A New Jersey case from 1893, *In Re De Hart*, offers an example of judges cautiously drawing lines between legal capacity and incapacity in the context of age⁶⁹ although it is important to note judges have always had significant discretion in terms of shaping the meaning of due process protections for respondents.⁷⁰ The respondent, an older white man, with a healthy estate, found to be incapacitated by the lower court, appealed the decision, arguing

66. *Id.* at 1155.

67. *See, e.g.,* Matter of Clark, 57 A.D. 5, 6 (N.Y. App. Div. 1900) ("The real scheme and purpose of the statute is to provide for the appointment of a committee whenever the person is incompetent to manage his affairs, to the end that his property may be cared for and preserved."); *see also In re De Hart*, 51 N.J. Eq. 611, 614 (1894) (holding that, in the context of business partners and business interests, age alone and the natural loss of memory are insufficient to strip property and other rights).

68. *See Baker v. Searle*, 2 R.I. 115, 115 (1852) ("Petitions for the appointment of a guardian of the person and estate of one who is wasting his property, and is likely to become chargeable upon the town, may be preferred by any inhabitant of the town, and need not be signed by the overseer of the poor.").

69. *See In re De Hart*, 51 N.J. Eq. at 614.

70. *See, e.g., In re Wendell*, 1 Johns. Ch. 600, 602 (N.Y. Ch. Ann. 1815) ("The care and custody of idiots and lunatics being confided to this Court, the whole control of the inquisition, and the manner in which that control shall be exercised, would seem to depend entirely on the discretion of the Court."); *see also In re De Hart*, 51 N.J. Eq. at 613 (finding no constitutional or statutory error in having only twelve jurors decide incapacity nor the absence of one of the twelve in observing the respondent).

that he merely suffered from old age rather than mental incapacity as required by the statute. In reversing the lower court's finding of incapacity, the appellate court describes key evidence that raised doubts about the need for guardianship. Specifically, the court points to respondent's successful negotiation of the sale of his interest in his manufacturing business with his partners, and "that he had always, in his household and neighborhood, been treated as an intelligent person, quite capable of forming and expressing rational opinions on matters discussed in his presence."⁷¹

C. Due Process as a Signal of Institutional Legitimacy

English probate law justified the extraordinary step of stripping decisional authority from adults otherwise *sui juris* by enumerating certain procedural protections for the respondent with court oversight. The Chancery Court retained sole jurisdiction to oversee the statutorily defined process: a petition (from the King, the King's delegates, friends, family, or interested community members) to the Chancellor accompanied by affidavits explaining the circumstances and claims of idiocy or lunacy and "some medical opinion . . . tending to sh[ow], beyond a doubt, the insanity of the party" which prompted the Chancery Court to order the assembly of a commission to determine incapacity.⁷² Once a commission determined that an individual was an "idiot" or "lunatic," the court then received petitions from relatives and other interested parties to serve as guardian and, by law, the fiduciary of the ward's estate.

Early conservatorship laws in the United States incorporated similar legal rules and processes seeking, in theory, to protect the interests of the conservatee. For example, states once a part of the former Northwest Territory (Indiana, Illinois, Michigan, Ohio, Wisconsin, and the northeast part of Minnesota) had some of the most detailed early guardianship statutes on the books.⁷³ Probate judges exercised jurisdiction over these cases, and friends, relatives, and the equivalent of the local superintendent of the poorhouse "(any overseer of the poor in the town where such ideot [sic] non compos or lunatic lives or is an inhabitant)"⁷⁴ could petition the court for an

71. *In re De Hart*, 51 N.J. Eq. at 614.

72. HIGHMORE, *supra* note 20, at 21; *see also id.* at 28–30.

73. *See An Act Empowering the Judge of Probate to Appoint Guardians to Minors and Others, in LAWS PASSED IN THE TERRITORY OF THE UNITED STATES NORTH-WEST OF THE RIVER OHIO FROM JULY TO DECEMBER, ONE THOUSAND SEVEN HUNDRED AND NINETY-TWO, INCLUSIVE 41, 41 (1792).*

74. *Id.* at 42.

order of incapacity and appointment of guardian. After a petition was filed, the sheriff had the responsibility of assembling the equivalent of the “commission” in English law: twelve freeholder “good and discreet men” to determine, by a majority, whether “the person said to be an ideot [sic] lunatic or distracted person . . . be incapable to take care of him or herself.”⁷⁵ If the inquest concluded that the standard was met, the judge had discretion to appoint someone, who today would be called a plenary guardian, “to take care of the person and estate both real and personal of such person and to make a true and perfect inventory of the said estate to be returned into and filed in the probate office of such county.”⁷⁶

The statute described in detail the fiduciary duties of the guardian to protect the ward’s property interests, namely:

[To] improve frugally and without waste or destruction the estate of the ideot [sic] non compos lunatic or distracted person and apply the annual income and profits thereof for the comfortable maintenance and support of the said . . . person and also of his or her household or family (if any such there be).⁷⁷

To this end, guardians had the power to settle accounts and to sue on behalf of the ward to recover debts;⁷⁸ in turn, guardians received payment for carrying out these fiduciary duties.⁷⁹

The early guardianship statutes in the United States, like their English progenitors regulating property interests, granted broad standing to petitioners seeking a court-ordered determination of incapacity. While relatives or friends of an alleged disabled person petitioned for conservatorship in most cases, statutes and case law dating from the 1750s to the middle of the nineteenth century in several states permitted any interested person to petition for an inquiry into the state of mind of a person alleged to be incapable of managing their affairs. By extending standing in these matters to certain members of the public beyond directly interested parties, some states deputized these individuals (white men) to assess and challenge legal capacity through conservatorship,⁸⁰ while other states

75. *Id.*

76. *Id.* at 43.

77. *Id.*

78. *See id.*

79. *See id.* at 44 (“[T]he guardian or guardians having . . . such a reasonable allowance out of the same for their charge and trouble as the judge of probate shall order.”).

80. *See, e.g., Baker v. Searle*, 2 R.I. 115, 116 (1852) (“[A]ny person, and certainly any inhabitant of the town where the person complained of resides, is competent to bring the matter before the court by petition.”).

conditioned the public's general standing on the absence of relatives and friends.⁸¹

Thus, despite its frequent designation as part of the body of private law, conservatorship, this Article argues, should be understood as a tool of public governance and a part of our public law cannons, even in its early years.⁸² The statute for the Northwest Territories discussed in the previous section highlights the government's interest in protecting private property and resources to avoid propertied individuals squandering existing financial resources and, as a result, becoming dependent on the public fisc:

And whereas to the dishonor of human nature and the great injury of society individuals often times spend lessen [sic] and waste their estates by excessive drinking gaming idleness and debauchery and thereby involve themselves and families in distress misery and ruin and subject the town or county to which they belong to expense and charge for their maintenance and support.⁸³

Property ownership was a privilege; thus, the state had an interest in its proper management and prevention of its waste to such a degree that the individual would become a public charge for both those with property and those without.⁸⁴ For propertied persons, guardianship became means to mitigate perceived mismanagement of financial assets and prevent reliance on public resources; poor people who could work would be committed to poorhouses and receive housing and food in exchange for their labor.

Special provisions for poor individuals with disabilities were rare and chiefly confined to those who exhibited "violent" tendencies toward others;

81. See, e.g., *Hayden v. Smith*, 49 Conn. 83, 84 (1881) (noting that Smith, the defendant, "was not alleged to be and was not in fact a relative of Mrs. Miller, the statute giving the court jurisdiction to act in such a case only upon the application of a relative or of the selectmen of the town").

82. See *infra* Parts II, III, IV.

83. LAWS PASSED IN THE TERRITORY OF THE UNITED STATES NORTH-WEST OF THE RIVER OHIO, *supra* note 73, at 44.

84. The term "public charge" is a term of art most often identified with federal laws regulating immigration. See, e.g., Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214 (excluding from entry into the United States "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge"). However, federal deployment of the concept of public charge developed out of local and state practices reflecting concerns about the use of local government resources and assumption of responsibility for wandering poor, disabled, and deviant individuals. I use this term in the context of guardianship laws to deliberately connect the operation of this legal device as a way to manage access to public resources and associated deviance or undesirability with reliance or perceived potential reliance on state resources.

those who were poor, nonviolent, disabled, and without family or friends to care for them were classified and treated not as “disabled” or “mentally ill,” but as “paupers,” and were punished under early vagrancy laws.⁸⁵

Municipal involvement taxed public resources and came at a price paid out of the estate of property owners, the individual’s labor, or the municipality itself. For example, legislation in the Massachusetts Bay Colony required that any person “lunatic and so furiously mad as to render it dangerous to the peace or the safety of the good people for such lunatic person to go at large” be confined to jail.⁸⁶ Jailers received a fee for the confinement paid for by the person’s family or by the town responsible for that individual; in New York City, for example, the town marshal received two shillings six pence each week by the churchwardens “to subsist Robert Bullman, a Madman in prison.”⁸⁷ Poor people with disabilities, thus, by necessity wandered between towns, often “warned out” by local governing bodies seeking to avoid shouldering the costs for disabled people less likely to be laborers.⁸⁸ Beginning in the latter half of the seventeenth century, colonies (and eventually states) passed laws that required relatives within certain degrees of consanguinity to provide for a relative with “mental illness”; it was customary for towns to grant a lump sum to relatives (or sometimes the town marshal) to bear the expense of their care, and, in some cases, compensation was financed through a municipal tax.⁸⁹

85. DEUTSCH, *supra* note 45, at 41 (“[T]he first legislation respecting the poor were laws of settlement intended to exclude them from the several colonies and local communities.”).

86. E. FULLER TORREY ET AL., TREATMENT ADVOC. CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 9 (2014), https://www.tac.org/reports_publications/the-treatment-of-persons-with-mental-illness-in-prisons-and-jails-a-state-survey/ [<https://perma.cc/7HNH-KHUW>] (citation omitted).

87. *Id.* (citation omitted).

88. *See, e.g.*, DEUTSCH, *supra* note 44, at 42 (quoting 10 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 464 (Charles J. Hoadly ed., 1877)) (“There is now at Wallingford a strolling woman that has been sometime wandering from town to town . . . who is so disordered in her reason and understanding that she passeth from place to place naked, without any regard for the laws and rules of decency.”). To be clear, this account centers her mental incapacity as the reason for the wandering and as an official municipal record likely masks the ways in which municipal authorities pushed individuals like this “strolling woman” from its town borders to avoid the costs of care.

89. *Id.* at 45 (citing RECORDS OF THE TOWN OF BRAINTREE, 1640 TO 1793 41 (Samuel A. Bates ed., 1886)) (ordering a lump sum to a disabled girl’s father “provided he gives bond under his hand to cleare the Town for ever of saide girl[e] [sic]”); *see also* THE RECORD OF THE COURT AT UPLAND, IN PENNSYLVANIA, 1676 TO 1681, AND A MILITARY JOURNAL KEPT BY MAJOR E. DENNY, 1781 TO 1795 102 (J.B. Lippincott & Co. ed., 1860) (ordering three or four persons be hired “to build a little Blockhouse” at the house of a poor family to place their disabled son inside). Consider the parallels between the early nuisance laws regulating poor

II. CONSERVATORSHIP AS PUBLIC GOVERNANCE

To this point, this Article has focused on some key features of conservatorship as it developed in U.S. law: property and resource management; judicial discretion in setting norms of incapacity (including improper financial management as evidence of incapacity); due process protections as a way of signaling institutional legitimacy; and prevention of draining the public fisc as accepted rationale for state intervention. In doing so, I have also focused on the type of actors that were most commonly subject to conservatorship: propertied, white, adult men. Yet these features shaped the exercise of federal and state jurisdiction over subordinated populations such as women and nonwhite persons; the latter is the subject of Part II.

Conservatorship became a useful governance device to exercise jurisdiction over nonwhite people as colonists sought control of Indigenous land and resources and, in the South, to manage and maintain slavery. The exercise of jurisdiction over nonwhite people who lacked legal personhood unfolded not in courts through individual adjudication of incapacity but through cultural presumptions and legislative pronouncements of inherent unfitness to manage property and self-govern. Part II takes historically recognizable moments of racial subordination and argues that they were made possible, in part, by the strategic deployment of conservatorship and manipulability of the legal category of disability. By centering conservatorship, the legal institution at the heart of the analysis, I surface the public work it has done in history—managing populations seen as dangerous and disruptive, maintaining white supremacy and political and economic power, and doing so, at times, through this legal institution’s capacity for the extraction of labor and wealth. Race is the principal axis of subordination; however, disability, or more accurately mental incapacity, operates as the legal lever and conservatorship, the process and tool. Conceptions of disability here are not about an individual’s private status; instead, disability as a legal category is engaged in a bigger public project of managing nonwhite people who threatened the status quo. Free Black Americans threatened to disrupt slavery, the engine of the plantation economy, while Native American tribal land ownership concentrated resources and, by extension, power, outside of the control of white Americans. Culturally, Indigenous groups and Black Americans posed dangers to white racial supremacy.

disabled people in public spaces and contemporary manifestations of these laws such as the California CARE Courts. *See infra* Part III.B.

While history has denounced those moments as truly heinous examples of racial subordination, little attention has been paid to the role of disability as a legal category and the institution of conservatorship as the vehicle for that subordination. We lament the treatment of Native Americans and free Black Americans as legally and politically disabled when they were not actually disabled (as we understand this category today) and, thus, not proper subjects of this legal device. This is a familiar response to contemporary examples such as former NFL star, Michael Oher, or pop star, Britney Spears, or others labeled disabled and placed into the conservatorship system when they should not have been. Instead of a structural critique, however, we treat these cases as unfortunate mistakes indicative of holes in an otherwise legitimate system.

Part II offers fodder for a structural critique. It examines the use of conservatorship/guardianship as a tool of governance over racialized populations (Native Americans and Black Americans) and does so somewhat chronologically. It begins with the development and deployment of conservatorship in the early colonial period as a device of collective governance that emerged precisely as the settlers sought to assert claims to land and exert social control over a population regarded as inherently different from the white settlers on the basis of race and culture.

Next, I introduce the example of free Black Americans to show how conservatorship continued as a governance device when the population of free Black Americans rose. Southern states such as Georgia, Florida, and South Carolina passed legislation that required all free Black Americans to register with county courts and petition for a white guardian. Though this process unfolded through individual petitions, the collective imposition of guardianship on Black Americans mirrored many of the elements (and rhetoric) used in the earlier colonial period. Finally, I return to the Native American example during the period of federal guardianship and subsequent allotment. Local governments and states successfully deployed conservatorship as a governance tool and solidified its role in Anglo-American law and culture as both a practical legal device and rich metaphor. So much so, I argue, that the budding federal government adopted the guardianship playbook as a dual governance device: not only to reduce Indigenous tribal sovereignty through allotment, but also to exert authority over state and state actors who were wrestling to maintain jurisdiction over Native American resources against the federal government. I conclude this Part by surfacing key elements and lessons to draw from these examples and

connect them to the evolution of Anglo-American conservatorship for white, propertied individuals discussed in Part I.

A. Extraction: Native Americans in Colonial New England

For purposes of this Article, three features of guardianship⁹⁰ in colonial New England are most important: first, its deployment as a method of local, decentralized governance granting broad discretion to guardians in the daily lives of Indigenous communities without meaningful oversight; second, the utility and malleability of classifications, rhetoric, and norms of “incapacity” and “best interests” rooted in early English guardianship laws; and third, structural conflicts of interest and the illusion of choice. I will discuss each feature in turn and then reflect on the extractive effects.

1. Local Governance With Broad Discretion and Lax Oversight

Guardians were effective and efficient tools of localized governance who reduced administrative burdens of the general courts of the colonies related to managing white colonists’ access to Indigenous land precisely because guardians possessed broad discretionary authority without meaningful oversight or accountability. Each colony had a “General Court” that developed out of the “corporate structure of the trading companies . . . : the General Court of shareholders became the legislative body; the Governor of the Company became the colonial leader; the Assistants became the Council; the freemen became the citizens.”⁹¹ The General Courts in colonial New England did not have extensive governing authority or infrastructure and relied on publicly appointed guardians in the absence of “the tradition and bureaucracy of an active central government.”⁹²

Guardianship for Indigenous communities in colonial New England—such as the Punkapoag, Chappaquiddick, Mashpees, and Wampanoag

90. I will use the terms guardianship and conservatorship here interchangeably as they were used during this period and indicate where the definitions differ.

91. Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 944–45 (1997).

92. DANIEL R. MANDELL, BEHIND THE FRONTIER: INDIANS IN EIGHTEENTH-CENTURY EASTERN MASSACHUSETTS 145 (1996) (“Thus it had little real power to interfere with the will or actions of an entire community, particularly on behalf of an unpopular minority such as Indians. Its power also rested in large part on the town and county elite, who were often friends of those responsible [guardians], or were even themselves responsible, for the Indians’ problems.”).

people⁹³—was a local governance device to exert jurisdiction over Indigenous territories and affairs, at least for those matters that were not governed by specific treaties with tribes.⁹⁴ The colonial settlements in New England distinguished between groups of Indigenous people—independent tribes most often with large, communal lands; smaller communal landholdings (plantations or villages); and individuals living in colonial towns—each group with its own jurisdictional arrangement.⁹⁵

Initially, governors, appointed by the King of England, held primary responsibility for the oversight and management of the settlements and, in turn, appointed other officials to assist and advise them in their duties. For example, in 1694, the Massachusetts Commonwealth passed “An Act for the

93. The discussion in Part II includes several distinct Indigenous groups. I name the individual communities and people subjected to guardianship wherever possible to recognize their dignity and personhood. *See, e.g., id.* at vii–x (offering examples of Indigenous communities discussed in the book and mapping relevant areas); *see also* YASUHIKE KAWASHIMA, *PURITAN JUSTICE AND THE INDIAN: WHITE MAN’S LAW IN MASSACHUSETTS, 1630–1763* 10 (1986) (illustrating rough land boundaries for the “Indian Tribes in New England” in 1630). However, as the Massachusett Tribe at Punkapoag explains: “It is important to realize that the Indigenous bands of Massachusett along with the rest of the native population, took their names from the place where they dwelled and not the opposite. [For example, t]he people who dwelled at Neponset (the Neponsets) and forced to move to Ponkapoag, were now called Ponkapoags.” *Life of the Indigenous Massachusett at Ponkapoag Plantation*, MASSACHUSETT TRIBE AT PUNKAPOAG TRIBAL WEBSITE, <https://massachusetttribe.org/life-of-the-indigenous-massachusett-at-ponkapoag-plantation> [https://perma.cc/5AAR-KW93].

94. KAWASHIMA, *supra* note 93, at 39. This Subpart focuses on colonial New England with a particular emphasis on Massachusetts where the highest concentrations of colonial settlers and native communities existed at the time. As such, it offers a window into the use of guardianship as a political and regulatory device that was part of the colonial efforts to develop principles and practices of governance pre- and then post-Revolutionary War. Although beyond the scope of this paper, of note, the history of guardianship of Indigenous communities in colonial New England is conspicuously tied to religion and proselytization of Indigenous people. Guardianship as a legal device, at least in theory then, offered a guise of benevolence as seen in the “best interests” standard.

95. *Id.* at 38–39 (“The legal relations of colonial Massachusetts with the independent Indian tribes were in many respects similar to those with other foreign countries, yet there was one fundamental difference. The Massachusetts authorities consistently, though not always successfully, demanded the extension of colonial jurisdiction over the Indian territories, except for legal matters arising among the tribal Indians themselves The plantation Indians, who submitted themselves to the colonial authorities, had no choice but to accept the white men’s legal control entirely, even for problems among themselves.”). “Plantation Indians,” also known as “praying Indians,” are those who became Christian converts and lived together in communities still with some communal lands and with some contact with colonists, relatively more than independent tribes and relatively less than the third category of the village Indians who lived among the colonists by choice or force and had regular contact with them. *See id.* at 233–34.

Better Rule and Government of the Indians in Their Several Places and Plantations” empowering the governor to:

[A]ppoint and commissionate one or more discreet persons within several parts of this province, to have the inspection and more particular care and government of [Native Americans] in their respective plantations; and to have, use and exercise the power of a justice of the peace over them in all matters civil and criminal, . . . [and] also to nominate and appoint constables and other proper and necessary officers⁹⁶

The men appointed to the position of justice of the peace exercised general jurisdiction over Indigenous people in New England holding communal property with respect to debts, trespass, poaching in all “matters not exceeding the value of forty shillings, except the title of land” and had significant discretion (“extensive rights and duties, not confined to legal matters, cover[ing] all problems involving [Native peoples]”).⁹⁷ According to historian Yasuhide Kawashima, “[t]he colonists were in effect making the [Indigenous people] their wards. This management of legal matters by white justices of the peace soon became very effective.”⁹⁸ The Massachusetts Commonwealth thereafter consolidated legislative and adjudicatory authority in the General Court rather than the governor (codified in the mid-seventeenth century through three acts).⁹⁹ The General Court, pleased with the effectiveness of guardians,¹⁰⁰ in turn, truncated the guardian’s role from the existing responsibilities of the justices of the peace and appointed twenty-four guardians (later appointing more) distributed across the colonies’ Indigenous populations.¹⁰¹

96. An Act for the Better Rule and Government of the Indians in Their Several Places and Plantations, 1693–94 Mass. Acts 150, <https://archives.lib.state.ma.us/server/api/core/bitstreams/1aeec550-75d9-41da-b8f0-b9cb2dde8acd/content> [https://perma.cc/5AHA-PFN4].

97. KAWASHIMA, *supra* note 93, at 32.

98. *Id.* at 33.

99. *Id.*

100. Guardians were also appointed for Native American minors. For those on the reservation, parents or close relatives served as their guardians. After King Phillip’s War, the Assembly passed a law placing those Native Americans living in English families under guardianship “under the charge of their masters until the age of twenty-four or during the terms of their indenture Even children of free Indians in the settlers’ communities sometimes came under the guardianship of white men instead of their own parents.” *Id.* at 97–98.

101. *Id.* at 33 (“Twenty-four guardians were selected altogether, three each for Natick; Stoughton; Grafton; Yarmouth, Harwich, and Eastham; Mashpee, Barnstable, Sandwich, and Flamouth; Plymouth, Pembroke, and Middleboro; Martha’s Vineyard; and Nantucket.”).

Guardians performed highly localized surveillance, adjudicatory, as well as functionary/ministerial roles for the governors, and, by extension, for the Crown. In the seventeenth century, the governors and General Court, at least in the Commonwealth of Massachusetts, received requests from Indigenous communities for protection from white settlers who would manipulate the evolving legal systems through trespass, poaching, and fraud.¹⁰² Thus, Indigenous communities,¹⁰³ wishing to guard their sovereignty, were put in the position of asking for a form of protection (guardianship) that actually created opportunities for unwanted inference, discord, and division.¹⁰⁴ Specifically, as historian Daniel R. Mandell has demonstrated, “a subtle but destructive aspect of the guardianship system created by the General Court [was that] guardians could easily subvert the authority of [N]ative leaders and undermine community cohesion.”¹⁰⁵

Provincial officials found themselves inundated with complaints expressing concerns about the maintenance of title to the lands, keeping the peace diplomatically, and being torn between white settlers and Indigenous communities. The General Court in the Commonwealth of Massachusetts responded with legislation requiring Indigenous people to secure governmental permission before the sale of land, thereby inserting the General Court into otherwise private transactions. As result, the General Court found itself inundated by the number of petitions seeking approval to sell lands. In 1748, intending to reduce costs and time associated with the administrative approval process, the General Court tasked guardians with the first level of review of these petitions and granted them discretion to limit the scope of petitions, all of which effectively narrowed Native Americans’ ability to directly petition the General Court.¹⁰⁶ Despite this measure, Native Americans continued to lobby the General Court to deny individual Indigenous petitions to sell lands because, notwithstanding the involvement

102. See MANDELL, *supra* note 92, at 2.

103. Requests from Indigenous communities, like the Punkapoags, for example, continued into the eighteenth century. The Punkapoags explained the need for protection: “Incroach[ment] upon our timber and our wood, . . . we are necessitated to pray for ye juxtaposition [sic] and assistance of some English person, Impowered by this great and gentl [sic] Court to take the care of us.” *Id.* at 114. In some instances, Indigenous communities would petition the provincial courts or governor to appoint a specific person who they may have come to know such as the Punkapoags did when they requested John Quincy, a local lawyer who had become very powerful in the province. *Id.*

104. *Id.* at 115–16.

105. *Id.* at 156.

106. KAWASHIMA, *supra* note 9493, at 56 (“[This] certainly narrowed, in theory at least, the Indians’ opportunity to petition.”).

of guardians and a tiered review process, lands continued to be sold without good title and under market value, leaving Indigenous communities “into a dissolute way of living and reducing them to poverty.”¹⁰⁷ Historical records suggest that most petitions for sale were approved and judged to be “well intended and compelling.”¹⁰⁸ The General Court viewed guardians as an increasingly effective method of governance over Indigenous affairs and property. More guardians were appointed to control the resources of Native communities after 1740 and, relatedly, land dispossession also increased.¹⁰⁹

Guardians “held supreme political and legal power” subject only to the General Court; however, the General Court rarely intervened and when it did, “it was inevitably too late.”¹¹⁰ While Mandell states that not all guardians were bad actors,¹¹¹ “most . . . were either ineffective or corrupt.”¹¹² The imposition of guardianship, therefore, created formal authority for colonists to undercut and chip away at Native American sovereignty.

At times, the Indigenous communities went directly to the General Court to complain of abusive guardians; almost every Indigenous group in New England holding communal lands and supervised by a guardian by the latter half of the eighteenth century petitioned the General Court to abolish the guardianship.¹¹³ Yet, the General Court reduced complaints associated with guardianship to individual bad actors rather than recognize a problem with their emerging system or governance structure. Sometimes, the General Court dismissed guardians for misappropriation or misconduct, only to replace them with another guardian or set of guardians.¹¹⁴

Perhaps the General Court’s reluctance to identify and remedy systemic flaws was willful. Guardians were critical regulatory devices. The General Court chose to police bad apples who overstepped publicly. But guardians advanced the General Court’s systemic interests and thus the General Court permitted some victories for Indigenous communities to the extent that they did not conflict with governance philosophy or goals such as “the colonists’ endeavor to incorporate, if not to assimilate, [Indigenous people] into white

107. *Id.* at 57.

108. *Id.*

109. MANDELL, *supra* note 92, at 116.

110. *Id.* at 156.

111. *Id.* at 153 (“Not all guardians were frauds and cheats.”).

112. *Id.* at 4.

113. *See id.* at 145–46.

114. Yasuhide Kawashima, *Legal Origins of the Indian Reservation in Colonial Massachusetts*, 8 AM. J. LEGAL HIST. 42, 46–47 (1969).

society.”¹¹⁵ Importantly, guardianship was at least one major regulatory device to achieve this assimilationist goal.

2. Utility and Malleability of Incapacity and Best Interest Legal Standards from English Guardianship Law

The general courts in New England drew upon the well-established English principles of *parens patriae* discussed in Part I—such as the protection of property and the prevention of public dependency—to exert authority over Indigenous lands, resources, and people. Vague legal norms of “incapacity” and “best interests” made this possible. In colonial New England, the logic of categorical incapacity, similar to English law’s treatment of children, extended to Indigenous groups at least initially: “[Indigenous] groups under the sovereignty of colonial governments were . . . considered incompetent to handle the intricacies of English law.”¹¹⁶

Guardians (and colonists) reinforced narratives of Indigenous deficits and inferiority that justified acting in their purported “best interests.” A moral case against Indigenous people’s sovereignty claimed they were “disabled by their vices” and supported by the existence of widespread poverty, indebtedness, and alcoholism in Indigenous communities even though that evidence was often a direct product of English and colonial policies and practices.¹¹⁷ Consider, for example, John Quincy, appointed guardian at the request of some Indigenous communities. Quincy expressed his disgust to the General Court that he had the responsibility of paying for supplies for the Punkapoag community rather than the less onerous path of directly giving them interest payments from the collective account; he said such practice was necessary because “[Indigenous people] are often intoxicated” and “at once they would go no further than the nearest place where they could get drink for it, and not leave till twas all spent.”¹¹⁸ Guardians publicly shared racist narratives about Indigenous people’s “[i]ncapacity [and] also of [their] Indisposition to Act or contrive for their own benefit,” which only served to strengthen the public’s perception of Indigenous people’s decisional incapacity and, ultimately, strengthened the case for guardians.¹¹⁹

115. KAWASHIMA, *supra* note 93, at 41.

116. MANDELL, *supra* note 92, at 144.

117. *See id.* at 143–44.

118. *Id.* at 143.

119. *Id.* at 144.

In fact, these descriptions, at times, accompanied requests for greater jurisdictional power and authority over the Indigenous people. In 1743, guardians requested expanded jurisdiction to “bring both their persons Lands & Moneys under Some New & better Regulation.” The General Court granted this request for broader authority three years later when it passed the act for “Better Regulating the Indians”.¹²⁰ With this new Act, guardians gained the authority to seize Indigenous lands they believed were unused, unproductive, or “surplus” and lease these lands to white farmers or ranchers without oversight.¹²¹ However, these standards were highly normative such that “[w]hat was [considered a] surplus to the [guardians] was necessary to [Indigenous communities].”¹²² Indigenous communities used the land differently than the colonial settlers; for example, the end of a lease period to white settlers often meant the ruin of the land and depletion of Native American resources.

Narratives of Indigenous inferiority also offered guardians readily available justifications to disregard Indigenous customs of inheritance. The Chabanakongkomun people, for instance, reported to the Massachusetts General Court that their guardians took “the grass and fruit of our land” after the owner of the land, Jonathan Pagan, left to join the colonial militia and the guardians refused to recognize his relative, Joseph Pagan’s, control over the land.¹²³ Similarly, the Mashpee people denounced their guardian’s treatment of their inheritance traditions: “[I]f any [of] our near kindred dies they [guardians] takes their int[er]est and hires it out and the Nearest relation Cannot have it.”¹²⁴ The guardians’ deliberate disregard for the wishes of the Indigenous groups reflected, at least in part, their loyalty to and service as representatives of the General Court whose expressed goals were to “guid[e] [N]ative landholding into line with the provincial legal system.”¹²⁵ The General Court, however, according to historian Daniel Mandell, framed the decision to sell their land as a choice belonging to Native Americans: they could divide their common land in severalty with deeds that could be defended in Anglo-American courts represented by guardians (incidentally meaning the land could be easily sold to whites) or they could have the guardian lease pieces of the land and sell the resources of the land to white

120. *Id.*

121. *Id.* at 144, 146–47.

122. *Id.* at 146.

123. *Id.* at 148.

124. *Id.*

125. *Id.*

settlers when guardians found the land unused or considered it surplus.¹²⁶ The absence of a meaningful choice (or the reality of Sophie's choice) illustrates the deep structural role of extraction by design under the guise of benevolence, legal protection, and agency not unlike the English common law system and Anglo-American conservatorship developing on a parallel track for propertied, white individuals.¹²⁷

Guardianship's foundational classification of "incapacity" also had expressive value in service of reinforcing white supremacy and the relative human value of subordinated groups living in the colonies. Historian Yasuhide Kawashima notes that institutional design choices "strengthened the colonists' belief that the [Native peoples] ranked higher than [Black Americans] because it considered the [Indigenous] problems on higher levels with greater attention."¹²⁸ For example, colonial governors allocated public managers according to the perceived value to the governors of the populations to be managed. Black Americans living in colonial Massachusetts in 1750 outnumbered Indigenous people living on and off reservations. However, because governors believed Indigenous people had greater value to the colonies, they allocated a greater share of the colonies' limited manpower to their oversight: twenty-four guardians for 3000 Indigenous people relative to only a handful of "overseers of the poor" for more than 4000 Black Americans.¹²⁹ In addition to the number of people assigned to "oversee" Native and Black Americans, there was a qualitative difference in the wealth, education, and social status of the overseers which sent a message about the relative value of these two subordinated groups to the colonies.¹³⁰

3. Conflicts of Interest and Other Extractive Elements of Indigenous Guardianship

Power and access to Indigenous communal accounts and resources rather than a government salary likely drew men of status to accept the role of guardian in colonial New England. The structure of the guardianship position created notable conflicts of interest and opportunities for self-dealing. Appointed guardians, at first, unpaid by colonial governments, were

126. *Id.*

127. *See supra* Part I.

128. KAWASHIMA, *supra* note 93, at 123.

129. *See id.* at 122–23.

130. The governing authorities, according to historian Daniel Mandell, selected "Anglo-American men of good reputation, familiar with the dominant economy and legal system, and living nearby" as guardians. MANDELL, *supra* note 92, at 113.

secular officials with day jobs as merchants, lawyers, or farmers who sometimes also doubled as militia officers, justices of the peace, and General Court representatives.¹³¹ According to historian Yasuhide Kawashima, the role of guardian served as a springboard for higher public service offices for these men: “through [these positions], the colonial elite gradually emerged, its judicial officers, from the justices of the peace to the Superior Court justices, having familiarity with various kinds of [Indigenous] problems.”¹³² The colonies did allow unpaid guardians to recoup “expenses”¹³³ (including guardians’ time) out of Indigenous people’s communal accounts. Indigenous groups who had not requested guardianship oversight but nevertheless found themselves paying for them challenged the guardian’s authority directly and with the General Court.¹³⁴

Although billed to Native communities as unofficial legal advisers¹³⁵ and, at times, functionally serving as counsel for Native American litigants in colonial courts, guardians did not have formal fiduciary duties to Indigenous groups and certain design features, such as those described above, created conflicts of interest and opportunities for systematized extraction of Native American resources (e.g., land, money, natural resources, and labor). Conflicts of interest did exist, by design, with respect to guardians’ loyalties to the colony’s Governor and the Crown, white family and fellow settlers in the community, and their Indigenous wards. In addition, guardians themselves generated conflicts as they favored particular individuals or families (white or Indigenous) and made daily decisions that irreparably shaped the availability, use, and distribution of Indigenous resources.¹³⁶

One example of this conflict occurred in 1748 when John Quincy retired from guardianship service and the General Court replaced him with Samuel Miller and John Shepard, a local county judge. The Punkapoag people who, according to historian Daniel Mandell experienced “the worst abuse of power,”¹³⁷ complained to the General Court that Shepard allowed white colonists to deplete the resources of their land, for example, by cutting hundreds of valuable trees, and personally profiting from the Punkapoag’s

131. *Id.* at 144.

132. KAWASHIMA, *supra* note 93, at 233.

133. MANDELL, *supra* note 92, at 144–45.

134. *Id.* at 148.

135. *Id.* at 144–45.

136. DANIEL R. MANDELL, *TRIBE, RACE, HISTORY: NATIVE AMERICANS IN SOUTHERN NEW ENGLAND, 1780–1880* 60 (2007).

137. MANDELL, *supra* note 92, at 152.

“great wrong and damage” by pocketing the fees paid by the white colonists and also taking some of the best trees for himself.¹³⁸

Shepard also used his position as county judge to imprison complainants challenging his authority (and financial gain) as guardian. Two Punkapoag complainants, Samuel Mohoo and his wife, were illegally imprisoned for one month. While detained, several of their young children, alone and without any support or intervention, died.¹³⁹ In response to outcry over the death of the Mohoo children by the Punkapoag people, the General Court simply removed Shepard from his post as county judge and guardian and ordered Shepard to pay 100 pounds in damages for his abuses, including the loss of the Mohoo children. The money did not go to the family but went into the communal Punkapoag account to be managed by the next set of guardians appointed by the General Court.¹⁴⁰

The General Court charged guardians with the provision of care for Indigenous groups (access to medical professionals and medicine), but Indigenous groups themselves funded the care. Practically, payment for medical expenses and other necessities for Indigenous people came out of the communal accounts maintained by the guardians. To meet those expenses, guardians could lease land to white settlers (if, in their discretion, the land was not being used “productively”)¹⁴¹ and at prices that were below market value, could sell land held in severalty (which technically required General Court’s approval but was often rubber stamped), or could indenture Indigenous individuals and their families to local merchants as payment for debts.

Broad discretion coupled with the lack of meaningful oversight, ease of replacing individual bad actors, and attendant pressures from colonial settlements left Indigenous communal accounts vulnerable to fraud perpetrated by guardians. The Wampanoag Tribe of Gay Head, for example, reported that their guardians took lease payments which, in 1749, totaled 470 pounds annually and distributed a much smaller amount. Similarly, the guardian might report “very extraordinary expenses,” including, interestingly, “the huge sum (£ 133) charged by the guardians for their time.”¹⁴² Although the General Court in some instances recognized that the

138. *Id.* (citing MASS. GEN. CT. COMM., REPORT OF THE GENERAL COURT COMMITTEE APPOINTED TO CONSIDER THE PETITION OF SAMUEL MOHO AND OTHER PUNKAPOAG INDIANS (1754)).

139. *Id.* at 152–53.

140. *Id.* at 153.

141. *Id.* at 146–47.

142. *Id.* at 149.

guardians had misappropriated funds, the Court refused to reimburse 90 percent of the charges, instead reprimanding the guardians and removing them from their posts as the harshest form of punishment.¹⁴³ Though misappropriation of communal fund resources occurred (despite the requirement of an annual accounting),¹⁴⁴ “English abuse of [Indigenous natural] resources [was] the greater threat.”¹⁴⁵

Guardianship “proved a double-edged sword for [Indigenous] groups.”¹⁴⁶ While the General Court failed to enforce laws against land sales to outsiders and to respond to trespassing and poaching, their appointed guardians, in theory, could offer Indigenous groups protection in the form of linguistic skills, social connections, and knowledge about increasingly complex Anglo-American law. “[U]nfortunately,” according to Daniel Mandell, “many [guardians] were like the villains in gothic novels, committing fraud, theft, and squandering community resources, and in the process hastening the decline and dissolution of [N]ative enclaves.”¹⁴⁷

However, dispossession did not always stem from explicit fraud or self-dealing but reflected surrounding political and economic events. Poor management or negligence may have collided with economic downturns and inflation to reduce the communal accounts under the guardians’ control; some accounts were backed by bad bonds, for example, tied to bankrupt estates.¹⁴⁸ With the sale of communal lands and interests to severalty, Indigenous people increasingly found themselves in colonial villages and, by extension, embedded in colonial political, legal, and economic systems. Whereas communal landholding allowed for subsistence from the lands, severalty forced Indigenous people to rely on colonial settlers for life “necessities” including medical care; in turn, Indigenous people accumulated debts for these purchases.¹⁴⁹ “Only the enclaves orbiting farthest from the colonial economy and culture escaped these shattering conditions.”¹⁵⁰ Culturally, Indigenous communities had to contend with (and were not always in agreement) “accepting acquisition and profit as positive values.”¹⁵¹

143. *Id.*

144. *Id.* at 144–45 (describing that though the Act required an annual accounting, few were ever filed, let alone filed on time).

145. *Id.* at 149 (“Guardians were, of course, supposed to prevent this problem, but (at least in the eyes of some native groups) their powers made matters worse.”).

146. *Id.* at 145.

147. *Id.*

148. *Id.* at 146.

149. *Id.* at 118.

150. *Id.*

151. *Id.* at 4.

Economic conditions such as massive inflation during the 1740s produced high poverty rates among Indigenous people and white colonists as well as shortages of available land and wood. These conditions placed further wedges between Indigenous people and colonial settlers who chose to meet these shortages by trespassing on Indigenous land to feed their cattle, “stealing wood from [N]ative enclaves, or maneuvering to obtain [Indigenous] land by manipulating debts and lawsuits.”¹⁵² Many guardians, some of whom personally (or through friends and family) experienced the same economic challenges, aided and abetted largescale resource extraction schemes as “[a]ggressive whites . . . manipulated debts and deeds to obtain [Indigenous] land, or simply took advantage of border disputes to build homes on [N]ative reserves.”¹⁵³

Extractive practices of the seventeenth century reduced larger tribal, communally owned land to smaller individually owned tracts of land. The connection to political economy was clear for “[w]ithout the large tract of tribal land that would guarantee their source of [collective] subsistence/livelihood, [Indigenous communities] for various reasons found it necessary to sell their lands.”¹⁵⁴ Trespassing and poaching on Indigenous lands “[were] part and parcel of the racism, numbers, and poverty of their white neighbors.”¹⁵⁵

Guardians played a key role in this story.¹⁵⁶ Although charged to protect communal lands from sale, trespass, and poaching, guardians, in many cases, through fraud or neglect, contributed to the conditions for dispossession by approving sales of communal lands to pay for accumulated debts, failing to enforce or selectively enforcing existing laws about communal land holdings, or directly aiding and abetting those white settlers seeking to dispossess Indigenous communities by failing to exercise enforcement authority.¹⁵⁷

152. *Id.* at 5.

153. *Id.* at 118.

154. KAWASHIMA, *supra* note 93, at 55.

155. MANDELL, *supra* note 92, at 132.

156. *See* MANDELL, *supra* note 136, at 60 (“The presence and power of state and local authorities helped to reshape and maintain Indian boundaries. Anglo-American prejudice and coercive economic and legal power served as feedback in internal struggles, as described above, and to amplify or prevent those conflicts. More direct and powerful was the role played by the guardians appointed by colonies and states to manage Indian resources.”).

157. *Id.* at 132 (“[English settlers] took every advantage [of the Indians] that they could, under colour of legal authority, and without incurring its censure, to dishearten and depress them.”). Guardians had the authority to censure these actors but often did not do so. *Id.* at 144–46.

The shift from communal lands and greater incorporation into colonial settlements also directly shifted the center of power. Tribes who were able to hold onto communal land and its resources were able to retain some power over the colonial settlers,¹⁵⁸ at least the power to demand proper behavior and, if only at the margins, to replace egregiously bad acting guardians with those who could be more reasonable or, at least, less extractive. That said, over time, “labor rather than land was the key to competency in New England.”¹⁵⁹ Households without sufficient labor reserves (single families, for example) more significantly felt the economic effects of injury or disability on their livelihood when one member could not work. Daniel Mandell describes how “medical problems posed a particular trap for the [Indigenous] communities that depended on land for capital.”¹⁶⁰ To advance this point, Mandell tells the story of Joshua Ephraim, who sold his land to colonists to pay his debts.¹⁶¹ Ephraim served two years in the army, caught a fever that resulted in paralysis of an arm and subsequent amputation, all of which required medical care and costs he had to pay.¹⁶²

Governance through guardians, then, also produced conditions of disablement such as poverty or difficulties accessing medical care. Itinerant Indigenous people, almost all poor, were labeled “wandering [Native Americans]” by colonial leaders such as the Puritan Reverend Stephen Badger as Indigenous people moved from town to town in search of work and sustenance:

[Many of the Native people during this time were] strangely disposed and addicted to wander from place to place, and to make excursions into various parts of the country, and sometimes at no small distance from their proper homes.¹⁶³

Historian Daniel Mandell explains the dire consequences of Native American’s loss of land ownership aided by guardians’ decisionmaking:

Forced by debts to sell critical land, suffering from disease, facing an ever-increasing white majority, having recently lost political control, and subjected to the gall of racism, it is no wonder many [Native people] felt forced out of their towns Family bands now

158. MANDELL, *supra* note 136, at 60.

159. MANDELL, *supra* note 92, at 118.

160. *Id.* at 120.

161. *See id.* at 131.

162. *Id.*

163. *Id.* at 160 (expressing the reflections of Reverend Stephen Badger, in 1797, who arrived in Natick in 1752 to replace the outgoing head of church in Natick).

asked for food from Anglo-Americans who lived where [their] fields or fishing spots had existed.¹⁶⁴

The legal remedy of “warning-out,” where villages stopped providing assistance to the poor so that they would move onto another town, affected both poor whites and Indigenous people. However, because Indigenous people were technically the legal responsibility of their guardians and their provincial government (and came with their own funding streams, namely, the communal accounts managed by guardians), towns were more willing to take them in. Towns would send invoices to guardians seeking reimbursement for services provided from the communal funds.¹⁶⁵ Perhaps only in this narrow sense, poor Indigenous people were better situated than poor white people. This example also illustrates the roots of extractive care economies that develop in the twentieth century and extract resources from public benefit streams.¹⁶⁶

4. Due Process With Limited Power

Though guardians had the power to represent Indigenous interests in Anglo-American courts, contact with the legal system, more than a lack of representation, created Indigenous vulnerability to extraction.¹⁶⁷ Daniel Mandell notes that “many [Native people] found liquor greasing their descent into a nightmare of lawsuits” concerning land transactions, unpaid debts (related to alcohol, medical care, supplies), or behavioral infractions.¹⁶⁸ Local courts and justices of the peace seized and sold their land or enforced judgments against the property and resources of their families and communities. When no resources existed to settle the debt, the individual’s debts would still be the responsibility of the family and community who might be committed to indentured servitude to pay outstanding costs.¹⁶⁹ In this way, Indigenous communal land and labor served as collateral for individual debts.

164. *Id.* at 161.

165. *See id.* at 121, 162.

166. *See infra* Part III.

167. MANDELL, *supra* note 92 at 4–5 (“When rapid Anglo-American population growth caused an apparent shortage in land and wood, some colonists sought a solution to their problems by pasturing their cattle on Indian land, stealing wood from [N]ative enclaves, or maneuvering to obtain Indian land by manipulating debts and lawsuits.”).

168. *Id.* at 134.

169. *Id.* at 135.

Indigenous people actively challenged these practices and systems and sought legal remedies, at least in part, an attempt to rebuild their economic self-sufficiency through agricultural production.¹⁷⁰ Native Americans, however, recognized the structural challenges they faced in trying to remedy harms against their communities. For example, colonial encroachers on the Nantucket lands boasted that the Nantucket people “can have no Remedy,” a sentiment the Nantucket people discovered “true in Respect to any tryl [sic] by any of ye Courts on that place.”¹⁷¹

Sometimes Indigenous people petitioned local governments and courts through their guardians as complainants seeking to recover land, loans extended to colonists, or wages owed to them by whaling ship captains. Daniel Mandell explains that Indigenous people did seek legal remedies “but found the local courts dominated by the very men (or their relatives) causing their problems, and . . . asked for their disputes with whites to be tried in another county.”¹⁷² “The [Indigenous people’s] guardians [asked to investigate claims of fraud] . . . later told the General Court that, as always, they were unable to find a single instance of fraud.”¹⁷³ Guardians in these disputes, at times, advanced arguments on behalf of the colonial settlers couched in deference to tribal leaders. For example, guardians told the court that the colonists recognized the sachem’s traditional authority to land and its resources, implying that where the sachem decided to dilute communal holdings through sales or grants that it ought to be respected.¹⁷⁴ The guardians implied “that they did confiscate [resources such as] horses from those who they felt lacked such rights.”¹⁷⁵

In the years leading up to and post-Revolutionary War, Indigenous communities continued to exist in similar structures to those of the eighteenth century: autonomous villages with reserved lands, pockets or enclaves inside of English towns, and individual, dispersed households.¹⁷⁶ All three groups experienced the same political and social disenfranchisement: they did not pay taxes, could not vote, and guardians remained in charge of their financial and moral health.¹⁷⁷ They remained “wards of the

170. *Id.* at 142–43.

171. *Id.* at 142.

172. *Id.*

173. *Id.* at 141.

174. *Id.* at 142.

175. *Id.*

176. *Id.* at 205–07.

177. *Id.* at 207.

Commonwealth; the title in the lands occupied by their tribes was in the state, and could not be alienated by them without the consent of the legislature.”¹⁷⁸ Guardianship retained its rhetorical and practical role in Indigenous governance especially as change threatened Native American status and colonial protections of their lands. Connecticut and Massachusetts, for instance, viewed the deployment of guardians as “the best means for securing and improving Native groups . . . to ‘superintend the affairs of the said [individuals]’ and ensure ‘due improvement’ of their lands so that they would not become public charges.”¹⁷⁹

But guardianship also played an interesting role in political exclusion in the wake of budding democratic values. All people in the Commonwealth of Massachusetts, for example, were presumptively citizens “except for aliens, paupers, and persons under guardianship” and so, according to historian Deborah Rosen, “the only barrier to Mashpee citizenship was the fact that the state exercised guardianship over them,” a fact about which the “commissioners expressed regret.”¹⁸⁰ Public officials believed that the war had disrupted efforts to integrate and “civilize them” and that “irregular and lawless conduct was part of their charges’ natural behavior,” necessitating the retention of guardianship.¹⁸¹

Only after 1810, as state governments became more established and democratic politics and ideologies took shape, did Native American groups have greater consensus (though not full agreement) around the need for abolition of guardianship and restoration of their political autonomy. However, the tribes overall did not wish to obtain full citizenship; instead, they saw individualism as a threat to their cultures and understood that they were defending against powerful external economic forces trying to take their resources. Accordingly, “[t]heir ultimate goal was to regain autonomy and defend the tribe’s resources and integrity, not to tear down boundaries against the non-[Indigenous] world.”¹⁸² Some Indigenous groups seeking self-rule and the removal of guardianship constructed arguments that emphasized their historical self-sufficiency and the connection between self-governance and avoiding public dependency. The Gay Head Indigenous

178. DEBORAH A. ROSEN, *AMERICAN INDIANS AND STATE LAW* 164 (2007).

179. MANDELL, *supra* note 136, at 72–73.

180. ROSEN, *supra* note 178, at 165.

181. MANDELL, *supra* note 136, at 72; *see also id.* at 78 (articulating that Gideon Hawley, a Mashpee guardian, described his work with the Mashpees noting that his “authority was critical to keeping order and saving these irresponsible Indians from their ‘insidious’ natures”).

182. *Id.* at 102.

people, for example, noted, “we have acted as republicans . . . as proprietors nearly twenty years successfully, supported our own poor and schools and have not been chargeable to any town.”¹⁸³ Other Indigenous communities argued that they had lost no land until guardians were appointed or that guardians impeded their ability to compete in the colonial economies, for example, by having to bear the high costs of funding guardianship’s administration.¹⁸⁴

Three Massachusetts legislators investigated the charges levied against guardians and, in 1827, issued a report on the conditions of Native people in the Commonwealth. The report found that “guardians had exercised a ‘paternal, and almost despotic will,’ in direct opposition to ‘the popular will of the tribe’”¹⁸⁵ and proposed a reduction in guardians’ power, though, at the same time, granting guardians discretionary authority to police what we understand today to be quality of life or status crimes codified in public nuisance laws. Guardians would have the power to:

[R]emove strangers and intruders; bind out for service of up to three years ‘habitual drunkards, vagabonds, and idlers,’ their wages to be used for families or the group; and punish various sorts of violations by [Indigenous people] on the reserve, from the sale of liquor to ‘lewdness and lascivious behavior,’ with punishments including possible solitary confinement.¹⁸⁶

The timing of state investigations and publicity around bad acting guardians may be interesting here as it coincided with greater federal government oversight of Indigenous affairs (for example, the creation of the Bureau of Indian Affairs in 1824); states saw an opportunity to retain working relations with their Indigenous residents. Recall, however, that colonial government actors previously conducted investigations in response to individual and group complaints about guardians, found improper management of accounts, fraud, and, at times, abuse, and yet still reduced the problem to individual bad actors rather than address systemic flaws perhaps because of their self-interest in the continued use of this device. In this respect, Daniel Mandell concludes that “the relationships between [Indigenous communities] and their guardians reflected developments within the larger political and cultural milieu of the early republic,”¹⁸⁷ most

183. *Id.* at 88.

184. *See id.* at 101.

185. *Id.* at 97.

186. *Id.*

187. *Id.* at 72.

notably, “the tug-of-war over power between localities and central governments.”¹⁸⁸

B. Racial Subordination, Extraction, and Population Control: Free Black Americans in the Antebellum South

The operation of guardianship and conservatorship in the context of Black Americans’ property and bodily autonomy, at first blush, appears to have operated differently than it did in the context of Native Americans given their relative status in the colonies and post-Revolution.¹⁸⁹ Yet the design and operation of guardianship as a tool of governance over both subordinate groups did share certain core elements, namely, the importance of local governance and broad discretion to guardians and lax oversight; the utility of “incapacity” and “best interests” concepts from English guardianship laws; inherent conflicts of interest and other extractive features based on presumptions of guardianship as a benevolent legal device; and the guise of due process with limited remedial effect. In the early to mid-nineteenth century—the antebellum period—Black Americans in southern states who were not slaves were considered “free” to labor (with restrictions).¹⁹⁰

188. *Id.* at 89. In this sense, this is also a story about federalism and the tug of war between localities and developing state authorities and the federal government.

189. Popular narratives about differential treatment based on binary conceptions of freedom versus slavery lack the proper nuance to capture the lived realities of both Native and Black Americans working locally to successfully create extrajudicial and extralegal opportunities for advocacy. *See, e.g.,* SARAH L.H. GRONNINGSATER, *THE RISING GENERATION: GRADUAL ABOLITION, BLACK LEGAL CULTURE, AND THE MAKING OF NATIONAL FREEDOM 2* (2024) (“For decades, the everyday mechanics of gradual abolition produced ways of thinking, acting, and collaborating that subsequently affected how various influential cohorts of New Yorkers approached the problems of slavery in their state and in the United States.”). In some states, free Black Americans owned property and exercised the right to vote. In New York, for example, free Black men owned property and for a brief period of time exercised the right to vote. *Id.* at 4; *see also The African American Odyssey: A Quest for Full Citizenship: Free Blacks in the Antebellum Period*, LIBR. OF CONG., https://www.loc.gov/exhibits/african-american-odyssey/free-blacks-in-the-antebellum-period.html#skip_menu [<https://perma.cc/85YR-GXVK>].

190. *See* Ralph B. Flanders, *The Free Negro in Ante-Bellum Georgia*, 9 N.C. HIST. REV. 250, 251 (1932) (discussing the prohibitions placed on working as a “porter” included “[a]n elaborate system of licenses and badges was provided, the working day (from dawn to dark) defined, and the wages stipulated” because “the lack of such regulation was not only ‘Injurious to the Inhabitants in General but greatly detrimental to the trading Interest in Particular’”).

However, states proscribed both their wealth accumulation and their political participation, in large part, by means of guardianship statutes.¹⁹¹

This Subpart focuses on the operation and development of guardianship for free Black Americans during the antebellum period in three southern states: Georgia, Florida, and South Carolina. Their selection reflects limitations, namely, the absence of original and secondary sources for other southern states as well as the move by some southern states to ban free Black people from their borders by statutes in the 1830s. That said, Georgia and South Carolina were among the largest slaveholding states and those with the highest numbers of free Black Americans in the south¹⁹² through the antebellum period next to Virginia.¹⁹³ As such, these examples, offer insights into surrounding states with interests in maintenance of the institution of slavery and control over free Black Americans to maintain southern economies. Although Florida was not among the largest slaveholding states or a state with high numbers of free Black Americans (only 932 in 1860),¹⁹⁴ nevertheless, it offers an important window into a territory that has a complicated history of European occupation and chose to design and deploy guardianship as a governance tool. The largest populations of free Black Americans were indeed in fifteen “southern” states (Delaware, Kentucky, Maryland, Missouri, North Carolina, Tennessee, Virginia, Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina and Texas) according to the 1860 Census, roughly 261,918 or 53.7 percent.¹⁹⁵ Several of these

191. See *id.* (“[T]he Slave Code of 1755, under which [Black Americans] were tried, excepted ‘free [Native Americans] in amity with this government and [Black Americans and multiracial individuals] who are now free’”).

192. U.S. CENSUS BUREAU, 1860 U.S. CENSUS, at xiii (1860).

193. See *id.* (listing reported populations for enslaved people, free Black Americans, and those of mixed racial descent). Virginia (58,042) and Maryland (83,942) had the two largest free Black American populations with approximately 56.6 percent of the total population of free Black Americans in the southern states. *Id.* at 214, 518. This source is limited by official reports but offers some information on the relative populations at the time of the different groups.

194. *Id.* at 54.

195. *Id.* at vii–xii (reporting approximately 226,152 free Black Americans (or 46.3 percent), residing in the northern states). Note that the list of “southern” states includes states we understand to be part of the mid-Atlantic region now but were then part of the “upper southern states.” The four examples in this Article have consistently been understood as “southern states” or “lower southern states” at the heart of the Confederacy and are thereby instructive. See generally IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1975); Henry Louis Gates, Jr., *Free Blacks Lived in the North, Right?*, PBS, <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/free-blacks-lived-in-the-north-right/> [<https://perma.cc/NXC2-9R6V>]. The

southern states designed guardianship systems to drive out free Black Americans from their territorial borders or exert tight control over their movement inside state lines precisely because the existence of free Black Americans threatened the economic sustainability of plantation economies. The selected states had very similar systems of guardianship, but the available records offer an opportunity to highlight not only similarities but certain differences across these states.

During the antebellum period, free persons of color comprised a state-defined legal class rife with contradictions. Some southern states required free Black people to register with county courts and pay for the benefit of access to courts, but they could not offer testimony or direct legal process; they were also required paid taxes to support state governments that kept them in bondage under a new name; and in most southern states they could hold personal property but not realty.¹⁹⁶ Thus, while free Black Americans could engage in commerce and consumerism in the capitalist market, they could not choose where to shop and could not own land, which was considered to be the currency of economic and political power.

Guardianship, according to some early twentieth century historians, operated as a de facto form of enslavement.¹⁹⁷ Howell M. Henry writes in his

1860 Census, the last Census before the Civil War, counted approximately 490,000 free Black Americans (10 percent of the total Black population) spread across all states and approximately 4 million enslaved Black Americans. Damani Davis, *NARA Records Pertaining to Free Blacks in the Antebellum Period (1783–1861)*, HISTORY HUB (Sept. 27, 2021), <https://historyhub.history.gov/african-american-records/b/african-american-records-blog/posts/nara-records-pertaining-to-free-blacks-in-the-antebellum-period-1783-1861> [<https://perma.cc/PB8M-VE4K>].

196. See *Munroe v. Phillips*, 64 Ga. 32, 38–40 (1879).

197. Both Howell and Flanders advanced their historical observations and claims from a position of sympathy to southern slaveowners. Contemporary historians rightfully identify and critique the assumptions and ideological commitments underwriting their descriptive claims, most fundamentally perhaps, an acceptance of the biological and cultural inferiority of people of color. See, e.g., JOHN DAVID SMITH, *SLAVERY, RACE AND AMERICAN HISTORY: HISTORICAL CONFLICT, TRENDS AND METHOD: 1866–1953* 61–68 (2015) (contextualizing Howell Henry's work and noting both the racist ideology contained in the work but the historical utility of, for example, Henry's engagement with court records); and Edward F. Sweat, Book Review, *Ralph Betts Flanders, Plantation Slavery in Georgia*, 53 J. NEGRO HIST. 82, 82–83 (1968) ("By and large, the generalizations and notions of Flanders are notably sympathetic to those of the slaveholder."). I cite to Smith's and Flander's contextualization here and note that my engagement with their work, beyond their similar characterization of the operation of guardianship, focuses on the content of guardianship records largely independent of their interpretation of those records. Sometimes their interpretations of the records or historical conditions offer insights for exploration and critique today. Notably, there is no attempt to gloss over the goals and operation of guardianship laws as a parallel system of enslavement.

1914 dissertation that “[t]he guardian was to be to the free [Black American individual] what the master was to the slave[;] . . . the result of [an] effort to require every free [Black American] to have some white person who would vouch for, or be responsible for, the [individual].”¹⁹⁸ Similarly, writing in 1932, Ralph B. Flanders suggests that the law and legal practice made “[l]ittle [practical] distinction” between enslaved persons and free Black Americans; for example, laws often applied equally to enslaved persons and free Black Americans and they were tried in the same courts and often received the same punishments.¹⁹⁹

Public rhetoric about guardianship in these southern states, however, described guardianship as a particularly unique and benevolent device—similar to the language and framing surrounding guardians for Indigenous communities in colonial New England—designed to give meaning to the unique status of free Black person in American society.²⁰⁰ The public likely had a ready conception of the intended protective, almost charitable purpose and values of guardianship based on the English (and budding American) probate system and may have accepted its validity. Consider this characterization of guardianship by Howell M. Henry that, although previously comparing the goals and effects of guardianship to slavery, works to paint it as simultaneously liberating: “It was not intended that the guardian should in any way limit the freedom of [free Black Americans] to move about from place to place, or to trade or to hire [themselves].”²⁰¹ Rather, according to Henry, guardianship was truly about “protection”²⁰² (in particular, protection from kidnapping attempts to (re)enslave).²⁰³ The design and

198. HOWELL M. HENRY, POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA 179 (1914).

199. Flanders, *supra* note 190, at 251; see also Paul Finkelman, “*Let Justice Be Done, Though the Heavens May Fall*”: The Law of Freedom, 70 CHI.-KENT L. REV. 325, 332 (1994) (“Free blacks in the ante-bellum South were only slightly better off [than enslaved people]. They could generally marry other free blacks and their marriages were usually legally recognized. They could usually move from place to place within a slave state, but the southern states universally prohibited the in-migration of free blacks from other states. Free blacks could ‘make contracts, and dispose of their estates by will.’”) (internal citations omitted).

200. That said, justifications for slavery also rang of paternalism and benevolence as a thinly veiled attempt to mask racially motivated reasons.

201. HENRY, *supra* note 198, at 179.

202. See, e.g., *id.* at 61 (discussing the protective role of masters and guardians in the context of trials of slaves and freed Black persons that violated due process by not informing the masters and guardians so they could not defend their slaves or wards).

203. *Id.* at 116 (“[U]nless the free [Black individual’s] guardian or some white person interested himself in the case, [Black Americans were] left legally and practically without protection.”).

deployment of guardianship, as this Section will discuss, reveals a much more insidious intent to replicate the bonds of slavery through social control and economic extraction to the end of pushing free Black Americans out of slave holding states, re-enslavement, or, at a minimum, subordinating Black Americans.

1. Georgia

Georgia promulgated one of the earliest guardianship statutes. It required guardianship for any Black American, Native person, or person of mixed race to claim their freedom.²⁰⁴ The statute required all “free persons of color” to (1) register annually with the clerk of the inferior court (for which they paid an annual fee of fifty cents); (2) obtain “a certificate of freedom” (which had to be provided to those who asked, without which, the law presumed the person was a slave); (3) “select some white man as a guardian;” and (4) “labor on public works not over twenty days in one year.”²⁰⁵

A revision to Georgia’s guardianship statute in 1810 granted guardianship authority to “a [w]hite person resident” without assigning them actual personal liability, or responsibility as a fiduciary under existing Anglo-American guardianship law,²⁰⁶ a similar shield from liability enjoyed by white guardians of Native Americans.²⁰⁷ Interestingly, the assumption of risk by the guardian only attached if the ward was a free Black person who had been found to be “insane” under the law; in that case:

[I]t shall be the duty of the owner, or guardian, to take care of and confine him, if necessary; and such owner, or guardian, shall be responsible for any injury accruing to third persons from such insane slave or free person of color, in all cases where the owner or

204. Georgia also had the most available (and developed) doctrine of all southern states on free persons of color. See SAVANNAH REPUBLICAN & EVENING, Feb. 12, 1811 (on file with author) (announcing an act “for regulating and governing free persons of color coming into this state, or residing therein,” which includes a guardianship provision). “Free Black people” might be better understood to mean “free nonwhite people.” I use the terms “free Black American” and “free Black person” interchangeably to mean free, nonwhite person.

205. Flanders, *supra* note 190, at 260. Female free Black persons could meet the public service requirement by working in the city hospital. *Id.* at 260–61.

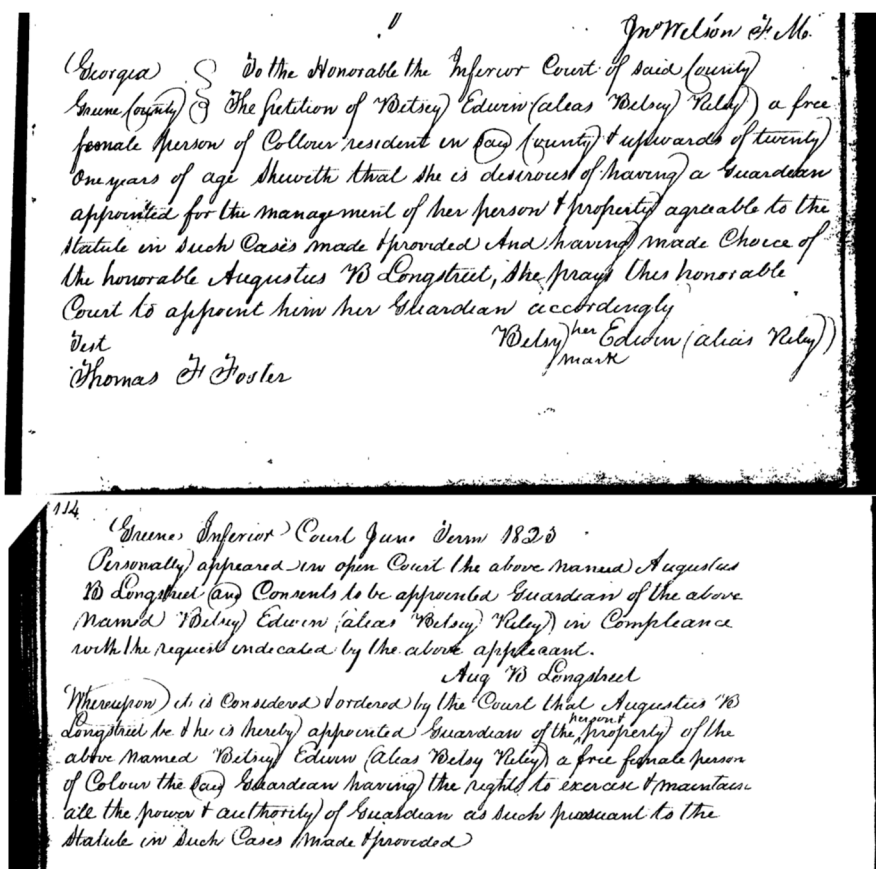
206. See *supra* Part I.

207. See *Guardians and Masters of Free Persons of Color*, in WILLIAM A. HOTCHKISS, CODIFICATION OF THE STATUTE LAW OF GEORGIA 824, 828–29 (1845) (“Provided, nevertheless, that the property of such guardian shall in no case be liable for the acts or debts of his ward.”).

guardian has willfully neglected or failed to take the proper steps for confining him.²⁰⁸

This signaled that the default, risk averse position would be institutionalization, and demonstrated the duality between guardians and slaveowners charged with controlling and suppressing Black Americans, whether free or enslaved.²⁰⁹

FIGURE 1. Example of Handwritten Guardianship Petition in Inferior Court, Green County, Georgia, 1823; Source: UNC Race and Slavery Petitions Project²¹⁰



208. GUARDIANS OF LUNATICS AND IDIOTS AND PERSONS NON COMPOS MENTIS, GA. CODE pt. 2, tit. 2, ch. 3, art. 2, § 1816 (1861).

209. See id.

210. Race and Slavery Petitions Project, DIGIT. LIBR. ON AM. SLAVERY, <http://dilas.uncg.edu/petitions> [https://perma.cc/5SFS-FBM3].

Betsy Edwin (alias Betsy Riley) was a twenty-one-year-old “free female of colour” who requests that “a Guardian [be] appointed for the management of her person & property”—appears that “property” was originally the only word there and someone handwrote “person.” The petition then asks the court to approve Augustus B. Longstreet.

Most notable here, perhaps, is the identity of the appointed guardian, Augustus B. Longhead, a staunchly pro-slavery, pro-states’ rights, politically connected individual who not only owned many slaves, but also served in several public service roles in higher education, including as president of the University of Mississippi, South Carolina College (today, the University of South Carolina), and Emory College (today, Emory University), and as an elected legislator and judge.²¹¹ His education and status remind us of the guardians in colonial New England and the ways in which this status brought with it a certain degree of presumptive credibility, trustworthiness, and, consequently, deference from governing officials.

Georgia’s recordkeeping suggests another reason for public registration by free Black people. It was a way to record the skill base or occupation of, as well as the labor performed by, free Black people, both of which were useful to guardians seeking to exploit that labor, either directly or through contracting the services of their wards to others for a fee. These records, demographically, also show the broad age range of free Black Americans—from teenagers to older adults—and the language/categories used to sort free persons by skin color—“Black,” “Mulatto,” or “Brown.”²¹²

211. David Rachels, *Augustus Baldwin Longstreet*, NEW GA. ENCYCLOPEDIA (Feb 20, 2018), <https://www.georgiaencyclopedia.org/articles/arts-culture/augustus-baldwin-longstreet-1790-1870> [https://perma.cc/3EMD-K5PP].

212. *Race and Slavery Petitions Project*, *supra* note 210.

FIGURE 2: Free People of Color Registered with the Richmond County Clerk's Office of the Court, Georgia, July Term, 1863²¹³

The following named persons have been registered in the Clerk's Office of this Court, as free persons of color, in accordance with law:

Name	Age	Parentage	Nativity	Residence	Occupation	Description
Sarah Harper	33	Caroline Boyer	Augusta	Richmond County	Seamstress	Mulatto
Elizabeth Payne	28	Emilia Green	"	"	"	"
Mary Eliza Kelly	21	Margaret Kelly	"	"	"	Brown
Mary Jane Sibbald	20	Jane Sibbald	"	"	Nurse	Mulatto
David Sibbald	21	Jane Sibbald	"	"	Bricklayer	"
Charles Sibbald	25	Jane Sibbald	"	"	Blacksmith	Brown
Joseph Sibbald	19	Jane Sibbald	"	"	Solmer	Mulatto
William Sibbald	18	Emilia Sibbald	"	"	Vannishes	Black
Ellen Sibbald	20	Emilia Sibbald	"	"	Nurse	Brown
David Johnson	21	Linda Johnson	"	"	Bricklayer	"
Betsy Keating	20	Jane Keating	"	"	Seamstress	Mulatto
David Williams	35	Lucy Williams	"	"	Washer & Diner	Brown
Susan Todd	54	Peggy Todd	"	"	"	Black
Thomas Kelly	23	Margaret Kelly	"	"	Barber	Mulatto
Ann Youngblood	45	Rebecca Youngblood	South Carolina	"	Washer & Diner	"
Palmer Smith	24	Rebecca Smith	"	"	House Servant	"
Jane Smith	33	Rebecca Smith	"	"	"	"
William Boyd	34	Kaziah Boyd	Richmond County	"	Solmer	"
Hensley Benning	22	Rosetta Benning	Columbia	"	Blacksmith	Black
Ursula Little	65	Jane Pison	North Carolina	"	Seamstress	Mulatto
Josephine Little	33	Ursula Little	Augusta	"	"	"
Martha Beall	44	Jenny Keating	"	"	Nurse	"
Edward Sibbald	35	Emilia Sibbald	"	"	Barber	Black
Charles Sadevege	33	Caroline Boyer	"	"	Cabinet Maker	Mulatto
Mary Jane Sadevege	30	Mary Demond	"	"	Dress Maker	"

July Term 1863.

List of Free Persons of Color Registered. Continued.

Name	Age	Parentage	Nativity	Residence	Occupation	Description
Peter Johnson	27	Sarah Johnson.	Augusta.	Richmond County	Blacksmith.	Mulatto.
William Setts.	43	Patsy Setts.	"	"	"	"
Elbert Lyons.	31	Anna Lyons.	Columbia County	"	Bricklayer.	"
Sarah Dent.	35	Christina Dent.	Augusta.	"	Seamstress.	"
Martina Setts.	52	Patsy Setts.	Hancock County.	"	Nurse.	"
Joseph Kelly	42	Patsy Kelly.	Augusta.	"	Blacksmith.	Black.
Patsy King.	69	Cheney King.	Greene County.	"	Seamstress.	Brown.
Henry Setts.	35	Martina Setts.	Augusta.	"	Blacksmith.	"
Vienna Carver	59	Sarah Carver.	"	"	Cook.	"
Sarah Carver.	36	Vienna Carver.	"	"	Seamstress.	"
Samuel Carver	38	Vienna Carver.	"	"	Brayman.	Mulatto.
David Carver	35	Vienna Carver.	"	"	"	"
Matthew Carver	30	Vienna Carver.	"	"	"	"
Royal Setts.	35	Patsy Setts.	"	"	Blacksmith.	"
John Carver	31	Rebecca Doctor.	"	"	Brayman.	Black.
Theresa Key.	38	Rebecca Doctor.	"	"	Baker.	"
John Harmon	39	Elizabeth Harmon.	Richmond County	"	Bricklayer.	Yellow.
Sarah Ruff.	38.	Wiley Ruff.	Warren.	"	Cook.	Brown.
James Williams.	43	Lucy Williams.	Augusta.	"	Store Steward.	"
Morris Russell	33	Phillis Russell.	Hancock County	"	Store Porter.	"
Rachel Brister	62	Nannie Selfair.	Savannah.	"	Washer.	"
Victoria Ruff.	32	Judy Ruff.	Salisbury County	"	Washer & Ironer.	Black.
Sarah Jane Tompkins	34	Aquilla Tompkins.	Augusta.	"	"	Brown.
Conelia Tompkins	26	Rebecca Tompkins.	South Carolina.	"	"	Mulatto.
Anna Kelly.	36	Judy Kelly.	Augusta.	"	"	Brown.
Aquilla Tompkins	39	Aquilla Tompkins.	"	"	Servant.	"
Margaret Pleasant	30	Sarah Johnson.	"	"	Seamstress.	Mulatto.
Hannah Todd.	60	Peggy Todd.	"	"	Cook.	Black.
Sarah Maria Dent	17	Hennietta Dent.	Richmond County	"	House Servant.	Mulatto.
William Johnson	16	Sarah Johnson.	Augusta.	"	Blacksmith.	"
Stephen Cleman	44	Vicky Cleman.	South Carolina.	"	Painter.	Black.
Anderson Tompkins	39	Quinn Tompkins.	"	"	Carpenter.	Mulatto.
James Norton Ruff	19	Siara Ruff.	Columbia County	"	Harness Maker.	"
Ann Brister.	39	Rachel Brister.	Augusta.	"	Seamstress.	Brown.
Mary Harmon	40	Barbara Harmon.	South Carolina.	"	"	Mulatto.
Caroline Tompkins	30	Rebecca Tompkins.	"	"	"	Brown.
James Parks	30	Patsy Parks.	Greene County.	"	Brayman.	Black.
John More	49	Winnny Still.	South Carolina.	"	"	Mulatto.
Isaac Hicks	35	Cittha Farn.	Columbia County	"	Seamstress.	"
Frederic Frazier	38	Violet Griffing.	Augusta.	"	Tailor.	"
Richard Farnar	78	Nancy Farnar.	Richmond County	"	Carpenter.	Brown.
Daniel Farnar	40	Fanny Farnar.	Augusta.	"	"	"
Melinda Farnar	36	Fanny Farnar.	"	"	Manure Maker.	Mulatto.

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July Term, 1863.

List of Free Persons of Color Registered. Continued.

Name	Age	Parentage	Nativity	Residence	Occupation	Description
William A. Sloger	27	Harriet Sloger	Augusta	Richmond County	Seamstress	Proven.
Mark Parker	35	Olly Parker	"	"	Washer & Dancer	"
Aurelia Dent	39	Rhoda Bennett	Warren County	"	"	Mulatto.
Chloe Ann Dent	35	Nancy Dent	Augusta	"	Seamstress	"
Sandra Dent	34	Nancy Dent	"	"	Washer & Dancer	"
Fanny Ann King	33	Elvira King	Greene County	"	"	"
Elizabeth King	40	Patey King	"	"	"	Black.
John King	17	Elizabeth King	"	"	Soldier	Proven.
Oliver Ruff	34	Fanny Ruff	Warren	"	Carpenter	Black.
Matilda Kelly	35	Unknown	Augusta	"	Seamstress	Mulatto.
Jane Poux	47	Betty Poux	"	"	"	"
John Barefield	26	Jane Poux	"	"	Cabinet Maker	"
Timely Barefield	30	Jane Poux	"	"	Seamstress	"
Caroline Snowden	19	Jane Poux	"	"	"	St.
Ernest Campbell	28	Jane Poux	"	"	"	"
Lewis Campbell	23	Jane Poux	"	"	Trimmer	"

Courts gave meaning to guardianship statutes like Georgia's, as well as to the role of the guardian. In 1853, for example, the Georgia Supreme Court decided *Bryan v. Walton*, a case concerning the legal rights of a freed Black American to own and convey slaves.²¹⁴ The administrator for the decedent, Joseph Nunez, a free Black American who died without descendants, brought this action to recover possession of enslaved Black Americans who were under the control of the defendant, Seaborn Bryan, a white man. Bryan claimed that Nunez had gifted the enslaved people to his white guardian who then sold them to Bryan.²¹⁵ The lower court instructed the jury that the relationship between a free Black American and a white guardian was "a more dependent nature, than that of ordinary Trustees and *cestui que trust*."²¹⁶ In response, Chief Justice Joseph Lumpkin, vehemently rejected the comparison of free Black Americans under guardianship to (white) infants through a racist tirade about the inherent, natural inferiority of Black people:

[T]he pupilage . . . is perpetual. The acts of an infant are voidable only, because at maturity, he may affirm or disaffirm them. The

214. *Bryan v. Walton*, 14 Ga. 185 (1853).

215. *Id.* at 192.

216. Emily Field Van Tassel, "Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War, 70 CHI.-KENT L. REV. 873, 887 (1995).

acts of a free person of color are void, because he never ceases to be a ward, though he attain to the age of Methuselah. His legal existence is forever merged in that of his guardian In no part of this country, whether North or South, East or West, does the free [Black American individual] stand erect and on a platform of equality with the white man. He does, and must necessarily feel this degradation. To him there is but little in prospect, but a life of poverty, of depression, of ignorance, and of decay. He lives amongst us without motive and without hope. His fancied freedom is all a delusion.²¹⁷

Justice Lumpkin concluded that guardianship was the sole form of personhood for Black people absent specific legislation.²¹⁸

Guardianship in southern states like Georgia became the *sine qua non* of status as a free person of color and the statutory, doctrinal, and rhetorical language invoked agency and choices available to free people of color. It required free people of color to register with the county court and, while it allowed for the free person of color to “select”²¹⁹ their guardian, it required such choice be expressed in writing to the court and signed by free Black people prevented from accessing education and, thus, less likely to be literate. Such enumerated due process protections in guardian statutes, therefore, lacked meaning and simply gave the appearance of a just legal system, one now available to free people of color through their guardians.

However, guardianship due process operated as a shield for structural subordination. In *Knight v. Hardeman*, for example, Chief Justice Lumpkin of the Georgia Supreme Court issued another revelatory decision with respect

217. *Bryan*, 14 Ga. at 205.

218. *Id.* at 198 (1853) (“Whereas, we maintain, that the *status* of the African [American person] in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed on him by Statute; that he can neither contract, nor be contracted with; that the free [Black American person] can act only by and through his guardian; that he is in a state of perpetual pupilage or wardship; and that this condition he can never change by his own volition. It can only be done by Legislation.”); see also *Hargrove v. Webb*, 27 Ga. 172, 173–74 (1859) (“[The] Act of 1833 . . . declares that it shall not be lawful for any person to give credit to any free person of color, but on a written order of a guardian. This Act was for the *protection* of free persons of color from the designs of men, by whose arts and persuasions, they might be seduced into contracts of waste and extravagance. It was intended to throw about them and their property, the guard of the better poised judgment of a discreet guardian. A free person of color, without property, would scarcely obtain credit on the written order of his guardian.”) (citations omitted). Note the case held that this law could not be used against free persons of color to deny them payment for services rendered if the guardian then ratified the contract after the fact and by suing for recovery of debt owed.

219. *Flanders*, *supra* note 190, at 260.

to the status of free Black persons in the state. The decedent's will, executed in Maryland, stated that the people he formerly enslaved would be free on a particular date as would other young Black people once they reached thirty years old. The complainant in this case was a young Black woman of age at the time the will was signed; however, she was sold to a citizen of Georgia and brought this action to restore her freedom. The court refused to recognize the will under Maryland law because no witnesses could travel from Maryland to Georgia and testify about the will's emancipation provision. As part of its reasoning, the court explained that county courts could in fact hear the petitions of guardians of free Black persons like the complainant, however, courts relied on the presumption that people of color were enslaved, and challengers faced a very high burden to prove otherwise.²²⁰

Beyond pure economic interests and constraints, guardianship offered a means of control over Black bodies, especially because states required guardians to monitor and control the movement of their freed Black American wards. Local ordinances throughout the South seeking greater community protection from agitators and "incendiaries" (meaning unknown people in the community including abolitionists) called upon guardians to control free Black Americans and "remove[] [them] from the community," as well as to revoke their general tickets (passes to move within public spaces).²²¹ The Supreme Court of Georgia, in a decision from 1850, stated that Georgia law regulated the movement of Black people (enslaved or free) in the same way: written permission from guardians, slave masters, or other person having legal control over Black bodies.²²² This tort case examined the question of liability of a railroad company for injuries sustained by an enslaved Black man traveling on a train without the consent of his owner. Though guardianship did not play a central role in the facts of this case, the Supreme Court of Georgia had occasion to mention the guardian's control

220. See *Knight v. Hardeman*, 17 Ga. 253, 257 (1855).

221. HENRY, *supra* note 198, at 160–61.

222. See *Macon & W. R.R. Co. v. Holt*, 8 Ga. 157, 158–59 (1850) ("By the Act of December, 1829, ... [i]t is therein enacted, 'that it shall be the duty of every owner, overseer, trustee, guardian or other person or persons, having control of any slave or slaves, or free persons of color, in granting or giving written permits to the same, to set forth the time allowed for their absence, and distinctly designate the place or places where such slaves or free persons of color desire to visit.'"); see also THE DAILY CONSTITUTIONALIST AND REPUBLIC, January 14, 1858 (on file with author) ("Acts Passed by the General Assembly and Signed by the Governor, 1857 ... To punish all owners of slaves and guardians of free persons of color in the counties of Warren and Taliaferro, for said owners and guardians allowing said slaves and free persons of color to live alone, and prevent the same.").

over the movement of free Black Americans in the same way as enslaved persons, that is, authorized only with express consent of the guardian or master, respectively.²²³

Using guardianship as a method of control over Black bodies worked in tandem with local nuisance laws in Georgia and relied on deputizing members of the public for surveillance and enforcement. “It was the South’s treatment of African Americans,” as legal historian Risa Goluboff, writes, “that most deeply embedded vagrancy law within a system of racial subordination. Free, rather than enslaved, Black Americans bore much of the brunt of vagrancy laws in the antebellum era.”²²⁴ Guardianship, this Article argues, was a key legal device that allowed vagrancy laws to do this work. Under Georgia law during this period, “any person” had standing to file complaints with a justice of the inferior courts, in which they could report that “a slave or free person of color is running at large, and is a public nuisance, or dangerous to the public.”²²⁵ Upon receiving such a complaint, a judge could issue an arrest warrant without being required to provide notice “to the master or guardian” if they lived in the same county.²²⁶ Georgia law also deputized ordinary white citizens to surveil free Black parents. It provided for court intervention, removal, and “binding out” of children of free persons of color (between ages five and twenty-one years old) if the court received evidence from two or three white citizens “that [such children] were ‘not being raised in a becoming and proper manner.’”²²⁷ This created avenues for abuse of the free Black person by white citizens and/or the guardian, whose willingness to defend against such claims was the only way the free person of color could challenge false claims and protect their children from removal and, in some cases, indentured servitude if the court chose to bind them out.

223. See *Macon & W. R.R. Co.*, 8 Ga. at 159.

224. RISA L. GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s* 115 (2016).

225. *Guardians of Lunatics and Idiots and Persons Non Compos Mentis* §§ 1811, 1817, 1861 Ga. Laws 360–61.

226. *Id.* § 1817.

227. Flanders, *supra* note 190, at 262 (internal citation omitted). These practices and standards call to mind the work of Dorothy Roberts and others on the origins of and the modern child welfare system. See, e.g., DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

2. Florida

Florida law offers another example of compulsory guardianship for Black Americans and individuals of mixed races, regardless of age and gender:

[F]ree negroes and free mulattoes of all ages and sexes, . . . shall be required to have a guardian, who may be selected by the free negro, or free mulatto [A]nd in all cases . . . the person chosen for guardian, shall go before the Judge of the County Court, to be approved of by said Judge as a proper and discreet person.²²⁸

Guardianship in Florida, by deliberate design, created another legally imposed system where noncompliance extracted fees and generated indebtedness, imprisonment, or threats of sale into slavery as a governance tool of racial subordination. Consider the 1856 statutory amendment that increased the extractive penalties for the refusal or failure of free people of color over age twelve to register with the county and secure a white guardian or be fined no less than ten dollars and, at the discretion of the county probate judge, be jailed until they can pay the arrears including all costs of the collection proceedings.²²⁹

Another interesting extractive feature in Florida that does not seem to have existed in the other states examined in this Article is that a guardian approved by the court received a fee upfront of one dollar for every certificate of guardianship they held with no limit on the number of certificates they could hold, thus creating a financial incentive for repeat players to assume responsibility, perhaps in name only, for many wards.²³⁰ For context, the value of one dollar in 1842 received as compensation would be roughly \$563.91 today.²³¹ Although the statute overall does not specify who is

228. 1842 Fla. Laws 34.

229. 1856 Fla. Laws 27 (“[They] shall be subject to a fine of not less than Ten Dollars, and it is hereby made the duty of the several Judges of Probate to see that this act is carried into effect, and the same judges of Probate shall have the power, and they are hereby authorized, where said fine is not, paid, or upon refusal to pay the same, to commit until paid, the same free [person of color], in the jail of the County, until paid, with all costs of the proceedings.”).

230. 1842 Fla. Laws 34 (“[It] shall be the duty of the Judge of the County Court to give a certificate under seal to the person so chosen as guardian, for which he shall receive as his fee the sum of one dollar for each and every certificate so given.”).

231. Estimations of equivalent value depend on a number of factors and vary. The Library of Congress recommends several sources to assist in the computation. *Frequently Asked Questions: Business*, LIBR. OF CONG. (Aug. 22, 2024), <https://ask.loc.gov/business/>

responsible for paying the guardian the one dollar upfront fee, a separate provision in the statute imposes a one dollar capitation (or poll) tax per year on the free person of color, suggesting that the free person of color, in effect, bore the financial costs of their own subordination. Failure to pay this tax required the county sheriff to detain the free person of color and provide notice of public sale of the person of color to the bidder who could pay the back taxes the most expediently.²³²

Like Georgia, Florida amended its guardianship laws in the years leading up to the Civil War to push people of color out of the state either through greater restrictions on movement, trade, livelihood, or actual physical removal if they entered the state after 1832. The Florida statute created financial incentives for the county sheriff to surveil and remove free people of color who entered the state in or after 1832. The sheriff would receive ten dollars plus the mileage for every free person of color he removed from the state;²³³ the statute also authorized the sheriff to jail and issue a public notice for the sale of free people of color refusing to leave the state, a task for which he would also receive one fourth of the proceeds of the sale “for his expense and trouble.”²³⁴ Similar to other states like Georgia, Florida guardianship laws incentivized third-party actors through fines and legal liability to exclusively communicate with the guardian as the only legal decisionmaker.²³⁵

faq/335350 [https://perma.cc/2WVL-NEYG]. After reviewing the options, I selected a source that would allow me to compare pre-Civil War amounts to today. See *Measuring Worth Is a Complicated Question*, MEASURING WORTH, https://www.measuringworth.com/ [https://perma.cc/QJ4R-TA7G]. The one dollar would best be characterized as compensation (the statute says it is a “fee”) and so I used the Production Workers Compensation Index rather than the index for commodities. *Purchasing Power Today of a US Dollar Transaction in the Past*, MEASURING WORTH, www.measuringworth.com/ppowerus [https://perma.cc/T666-4BQK].

232. 1842 Fla. Laws 34 (“[I]t shall be the duty of the Sheriff of the County, where such defaulter or defaulters live, to seize upon his, her, or their bodies, and give ten days notice, and sell at public auction, such defaulter or defaulters, to the person who bids the shortest time, so as to pay the taxes due for that purpose.”).

233. *Id.*

234. *Id.* (“[U]nder this act it shall be lawful for the Sheriff of the County in which said free [person of color] resides, to take him or them into his custody, and lodge him, her or them as the case may be, in the jail in said County, and if no jail to keep him, her or them under his guard, summoned for that purpose, and give ten days, and at the expiration of ten days notice the said sheriff shall proceed to sell at the Court House in said County, to the highest bidder for cash, the said free [person of color] for ninety-nine years, and give a bill of sale to the purchaser for the same, one fourth of the proceeds to go to the Sheriff for his expense and trouble.”).

235. See 1856 Fla. Laws 27.

Florida amended its guardianship statute to limit the ability of free Black Americans to trade and engage in commerce without the consent of their guardian, making it unlawful for any person “to buy of or sell to any free [Black American or biracial individual] in this State without the written consent of the guardian,” with a penalty for noncompliance “a fine not less than one hundred or more than five hundred dollars.”²³⁶ The ability of guardians to control free Black Americans’ commercial decisions mirrored that of Native Americans, especially postallotment.²³⁷ This authority managed third-party willingness to engage commercially with free Black Americans and paved the way for kickbacks to the guardian from private businesses.

In Florida, people of color could not sue, enter into contracts, own property, bear arms, buy and sell goods, or even pay statutorily mandated taxes²³⁸ without the consent and involvement of their guardians (much like the form and execution of guardianship imposed on Native Americans). White people could sue free people of color without enjoining their guardian, yet free people of color could only sue white people through a guardian and with the financial expenses and administrative burdens associated with due process.

Some northern states, engaged in political debates about the morality and efficacy of southern slave economies, took aim at the use of guardianship as *de facto* slavery. An opinion editorial in the *Vermont Telegraph*, for example, criticized Florida for imposing a parallel system of enslavement on free Black people through guardianship:

Florida must be a glorious place, and the people a generous set of fellows. We wonder if they have such a day in their calendar as the fourth of July, or whether they ever heard of such a document as the Declaration of American Independence. They have a law in that territory, which contains the following provisions

All free persons of color shall have a guardian.

. . . .

The guardians have the same power over free colored people as the slave-holder has over his slave. The guardian is to prevent any person from trading with free colored people. In all respects,

236. *Budd v. Long*, 13 Fla. 288, 311 (1869).

237. *See infra* Part II.C.

238. *See* 1842 Fla. Laws 34. *See generally* THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 314 (1858).

except as being property, free colored people are subjected to all laws and restrictions to which slaves are liable.

....

We are not at all surprised that the Seminoles rather be shot, than come under a power like that.²³⁹

Editorials such as this one reflected the ideological and political divide leading up to the Civil War. Moreso, the reference in the editorial to the Seminoles offers an important reminder of the concurrent efforts to regulate not only free Black Americans but also Native Americans by both newly formed states (like Florida) and the federal government who was actively negotiating with tribal nations in Florida. It is also a reminder that although this Article zooms in on particular moments for Native Americans and, separately, for free and enslaved Black persons over different time periods, these historical moments are not so easily cabined and were much more fluid and nuanced. For example, the reference to “Seminoles . . . be[ing] shot” in this 1843 editorial, more specifically, refers to what is often called the “Second Seminole War,” a period of resistance by both Indigenous and Black people in Florida to protect their land from federal encroachment (and state land grabs as Florida officially became a state in 1845).²⁴⁰ This land also offered a safe haven for enslaved people who escaped from their owners and, as such, was a part of the broader history of organized efforts by racially subordinated populations in the South towards abolition.²⁴¹ The white settlers called the Indigenous people in Florida “Seminoles” and referred to those enslaved “runaway” Black Americans as “Black Seminoles.”²⁴² Historian Joseph Opala notes that after the war, rather than enslave those Black Seminoles who participated in the Second Seminole War, U.S. Army officials “fear[ed] that these seasoned warriors, accustomed to their freedom, would wreak havoc on the Southern plantations. [Instead, i]n 1842, the Army forcibly removed them, along with their Indian comrades, to Indian Territory

239. Portland Am., *A Paradise*, 15 VT. TEL. 132 (1843) (emphasis omitted) (on file with author).

240. Then-General Andrew Jackson called the first war the “Indian and Negro War” during which Indigenous and Black people, according to historian Joseph Opala, “fought side-by-side in a desperate struggle to stop the American advance [on their land], but they were defeated and driven south into the more remote wilderness of central and southern Florida.” JOSEPH A. OPALA, *THE GULLAH: RICE, SLAVERY, AND THE SIERRA LEONE-AMERICAN CONNECTION* (1987), <https://glc.yale.edu/sites/default/files/files/Black%20Seminoles%20.pdf> [https://perma.cc/2Y9F-V98N]; see also *Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535, 546 (11th Cir. 2013) (describing the Second Seminole War).

241. OPALA, *supra* note 228.

242. *Id.*

(now Oklahoma) in the unsettled West.”²⁴³ On the heels of this war, Florida strengthened its guardianship statute in the ways described above to exert tighter control over the remaining free people of color in the state.

3. South Carolina

South Carolina’s guardianship statute required every free Black male over the age of fifteen to have a guardian, “who in law was a ‘next friend’ or ‘prochein ami.’”²⁴⁴ The guardian had to be “a respectable freeholder” (in other words, a white male) of the district where the free Black American resided, similar to the reputational requirements in colonial New England for Indigenous groups.²⁴⁵ To become a guardian, the individual had to appear before the clerk of court of that district and certify in writing that the free Black American “[wa]s of good character and correct habits”—once again encouraging private policing of Black bodies and behavior—and then, in a separate signed document, indicate his acceptance of the role of guardian as a due process protection.²⁴⁶

243. *Id.*

244. HENRY, *supra* note 198, at 178.

245. *Id.*

246. *Id.* at 178–79.

FIGURE 3. *Example of Guardianship Declarations in Support of Petitions for Guardianship of Free Black Americans, Sumter County, South Carolina in Dissertation of H.M. Henry.*²⁴⁷

GUARDIANSHIP OF FREE NEGRO

Record Book "Guardian of Free Negroes" Office of Clerk of Court
Sumter County. [One document of many taken at random.]

South Carolina }
Sumter District }

I do hereby certify that I have known James Gayman a free man of color for fifteen or twenty years, and that as far as has come within my knowledge or belief he is of a good character and correct habits, this 28th Sept., 1835.

J. N. Cantey.

South Carolina }
Sumter District }

Know all men by these presents, that I Jared N. Cantey, a free holder of the District and state aforesaid do hereby accept of the guardianship of James Gayman, a free man of color above the age of fifteen years and who now lives and resides in the district of Sumter. 28th Sept. 1835.

In presence of
Jas. M. Dargan.

J. N. Cantey,

Free people of color who were unable to secure a guardian in South Carolina, as in Florida and other southern states, were liable for an annual fee, here, of fifty dollars (five times the baseline fine enumerated in Florida's statute), in addition to any other consequences the court deemed appropriate.²⁴⁸ Adding context to this, in 1860, South Carolina reported just under 10,000 free Black Americans in the state compared to Florida's 932, creating the potential for a significant influx of fines for noncompliance.²⁴⁹ South Carolina, like Georgia, did not establish a fiduciary relationship between guardians and their wards (free people of color); accordingly, there was "no law holding the guardian in any way financially or otherwise responsible for the conduct of his ward[;] [although, according to Howell Henry, there may have been] pressure of public sentiment in that

247. *Id.* at 194.

248. *Id.* at 178.

249. See U.S. CENSUS BUREAU, *supra* note 192, at 452.

direction.”²⁵⁰ This distinguished guardianship as governance for racially subordinated populations from the more traditional guardianship in probate discussed in Part I which applied principally to white men.

The rise of adult guardianship²⁵¹ for free Black Americans coincided in many states with statutory proscriptions on manumission. For example, in 1800, South Carolina enacted a statute that imposed restrictions on and added legal process burdens to slaveowners’ ability to free their slaves. The preamble of the statute addressing manumission explains what motivated South Carolina lawmakers to enact it in this way tying the statutory amendments to a desire to avoid public dependency by poor and disabled people: “Whereas it has happened that many slaves of bad character or indigent or infirm have been set free.”²⁵² This tracks traditional probate law and guardianship’s goals in the context of Indigenous communities in colonial New England.²⁵³ Part of the legal process laid out in the statute required that the slaveowner and slave appear before a magistrate (plus five freeholders) to answer questions about “the slave’s ability to earn his own living and as to his character.”²⁵⁴ Questions such as those asked, which tied freedom and agency to economic value, productivity, and independence, have continued to underwrite public welfare law in the context not only of race but also of disability.

There are no comprehensive data for the numbers of free Black Americans with guardians throughout the antebellum period (in part because of the fluidity of that status and as in Florida, the operation of laws and policies designed to push free people of color out of slave holding states). However, some counties, like Sumter County in South Carolina, made early recordings that offer a rare window into this system. There was a record of guardianships in Sumter County from 1823–1842.²⁵⁵ In 1823, when the legislation first took effect, there were twenty guardianships recorded in the book; a separate book contained lists of children of free persons of color certified by the guardian.²⁵⁶ Today, South Carolina has forty-six counties, and

250. HENRY, *supra* note 198, at 180.

251. The Article does not focus on guardianship for minors, yet still recognizes the connections between the child welfare system and guardians for minors and adult guardianship/conservatorship and the need for further exploration.

252. HENRY, *supra* note 198, at 168 (citation omitted) (citing a South Carolina statute from 1800).

253. *See supra* Parts I and II.A.

254. HENRY, *supra* note 198, at 168.

255. *Id.* at 179.

256. *Id.* Based on Henry’s account, the county did not keep consistent records with respect to guardianship after that first year.

while their existence, makeup, and boundary lines have certainly shifted over time, this information helps contextualize the twenty recorded guardianships in one single county.

South Carolina, like other southern states discussed in this Article, billed guardianship as a positive, benevolent device that protected people's due process rights, among other benefits, a way for freed Black Americans to resolve questions related to their status as free persons. State legislators claimed the guardianship statute was emblematic of the state's intolerance of "any effort to reduce a free person of color to slavery when his title to freedom was unquestionable."²⁵⁷ In other words, popular discourse touted guardianship as a legal workaround that would solve the problems of Black people's lack of legal personhood, and as a measure of the state's commitment to protect their freedom from enslavement. This meant, in theory, that, if an enslaved Black man believed he was being mistakenly held in slavery and wished to challenge that status, he could find a white male to serve as his guardian and petition the court for a hearing on the merits.

Rather than protective or illustrative of benevolent interests, however, guardianship as a legal device was extractive of those free Black Americans who sought to use it. First, free people of color were dragged into this system along with the costs and administrative burdens associated with legal process precisely because white people would, based on their skin color, challenge Black people's personhood in everyday life as they worked or moved in the world with less risk than that assumed by the free person of color. Second, regarding costs, the burden of proof rested on the free person of color (as opposed to their guardian) to show he was free or defend against claims to labor or nonpayment of expenses brought by white people. Failure to meet this burden not only subjected people of color to pay the white party's litigation costs, but also resulted in their enslavement and additional punishment at the discretion of the slaveowner. At the same time, other procedural hurdles impaired free Black people's ability to advance or defend their legal positions. For example, submission of evidence had to be through the guardian (or "some interested white person" with enough interest to take on the role and post the bond with the court), and the person of color could not testify. Furthermore, the defense had no burden of proof and did not have to proffer a single item of evidence in support of its argument that the Black person was, in fact, not free. This calls to mind the presumption of bondage based on nonwhite skin that operated in the Georgia courts and was captured

257. *Id.* at 7–8.

by the words of the Georgia Supreme Court in the *Macon & W.R. Co.* tort case discussed above: “The black color of the African race is presumptive evidence of slavery.”²⁵⁸ Although free people of color, through their guardian, could be assigned the role of “plaintiff” and avail themselves of state courts, the existence of slavery meant that free people of color were always playing defense and white slave owners, playing offense.

South Carolina, like Georgia, designed its guardianship laws to advance policing and surveillance interests. Henry describes the role of guardians in regulating the movement of free Black people in South Carolina:

[A] special act of 1823 by the General Assembly for the regulation of the patrol on “Charleston Neck” provided that any free [Black American] might be whipped by the patrol when away from his home or his employer’s premises unless he produced his “free papers,” or convince the patrol of his freedom by other satisfactory proof. The act even goes further and declares that free [Black Americans] out of their own or their employer’s premises after 9 p.m. without a ticket from their guardians would be liable to the same punishment meted out to a slave.²⁵⁹

This aspect of South Carolina’s guardianship system was common among the southern states seeking methods of population control through vagrancy laws discussed by scholars such as Risa Goluboff.²⁶⁰

Guardianship and slavery went hand in hand in the antebellum south. The fiction of freedom was made possible by the language of protection (“best interests”), incapacity, and care known to white English settlers in the context of probate law. In fact, southern states during the antebellum period institutionally granted local county probate courts broad jurisdiction over registration of free Black people, appointment of white guardians, and ongoing regulation of the guardianship, much like the discretion afforded guardians by the General Court of the Commonwealth of colonial Massachusetts. Some statutes, like South Carolina, allowed for the free Black person to select their white guardian. Practically, however, this required access to a network of well regarded, willing, and available white men to assume this role. The appointment of Augustus B. Longhead in Georgia, for example, shows the practical reality of this system: that not only did the system resemble slavery substantively, but it did so in form too. Longhead

258. *Macon & W. R.R. Co. v. Holt*, 8 Ga. 157, 165–66 (1850).

259. HENRY, *supra* note 198, at 51.

260. *See generally* GOLUBOFF, *supra* note 224.

served as guardian for several free Black people during this time while also being a fierce proponent and defender of slavery, and holding many people enslaved. As states reckoned with the very presence of free Black people as threats to slavery in its borders and the countervailing need for their labor, some states, outlawed their very presence and, in states like Alabama, drew on existing guardianship relationships like that of Longhead in Georgia, to use the same courts and process of guardianship to promote petitions for voluntary re-enslavement of free persons under guardianship, sometimes requesting that the guardian or a relative of the guardian take ownership of the free Black person.

In January 1860, for example, Alabama promulgated Act 36 which proscribed individual slaveowners from emancipating enslaved people under their control through their wills.²⁶¹ A month later, in February 1860, the state legislature passed Act 71, “An Act Permitting Free [Black Americans] to Select a Master and Become Slaves.” Chambers County became the testing ground for this statute in Alabama, with petitions for enslavement filed by white men on behalf of free people of color who were, at times domestic and farm workers under guardianship. The Act stated that “[a]ny free person of color, or free [Black person] residing in this State, and desiring *voluntarily* to surrender his or her freedom, *shall be permitted to do so* on application by petition.”²⁶² The re-enslavement process under the Act directly drew upon the existing guardianship rhetoric, justifications, and perhaps most interestingly, the institutional infrastructure (petitions filed with local county probate courts, the same judges that oversaw the guardianship system): “[O]n application by petition in writing to the Judge of the Probate Court of the county in which the applicant resides, praying to become the slave of some [w]hite person of good moral character and standing, residing permanently in this state.”²⁶³

The rhetoric of agency, voluntariness, and due process was clearly built into the statute:

[I]f on the trial of the said petition the Judge of Probate shall be convinced of the proof of *disinterested* witnesses, and from all the facts and circumstances ... that the petitioners filed the petition

261. Alexis Cathcart, *A Black Woman's Story of Sacrifice and Survival*, AFR. AM. INTELL. HIST. Soc'Y (Mar. 21, 2024), <https://www.aaihs.org/a-black-womans-story-of-sacrifice-and-survival/#:~:text=In%20February%201860%2C%20the%20Alabama,so%20on%20application%20by%20petition%E2%80%A6> [https://perma.cc/99AD-5GMB].

262. *Id.*

263. *Id.*

voluntarily and free from undue influence . . . it shall be the duty of the Judge of Probate to decree the petitioner or petitioners, the slave or slaves of the person . . . they have selected . . . : Provided, They shall not be sold under any legal process for the debts or liabilities of the master or mistress they have selected, or their heirs²⁶⁴

However, the re-enslavement cases were complicated by the difficult position free Black people (and women, in particular) found themselves in the days and months leading up to the Civil War. Historian Emily West's work on the incentives and agency of free Black Americans to exchange their free status for enslavement (or re-enslavement) encourages us to recognize the complexity of decisionmaking and the centrality of family unity as a motivating force rather than impose a one-dimensional critique denying free Black Americans agency in these processes.²⁶⁵ Among the cases West offers for support is a petition for enslavement to Elizabeth Witter by a free Black woman from Chambers County, Alabama named Cora "because of the attachment and affection she has and bears to [Elizabeth]."²⁶⁶ At the time, Henry Witter, Elizabeth's husband, was the court-appointed guardian of Cora.²⁶⁷

One possible reading is that this petition was against Cora's will, motivated by the Witters' desire to enslave her and extract her labor supported by such evidence as the timing of the petition in line with the promulgation of the Act, the fact that the Witter family had guardianship over Cora and her children, the white male friends of the Witter family offering hearsay testimony about Cora and her children's desires to be enslaved.²⁶⁸ Another reading, one advanced by West, is that it is unsurprising that this might happen after the Act because "there were various permutations of slavery and freedom for free blacks and a whole spectrum of unequal relationships in between."²⁶⁹ Regardless of the exact motivation, this Article argues that the southern states' antebellum guardianship system for free Black Americans provided the language and institutional structures and features that could be redirected to more easily transition to so-called voluntary enslavements. West appears to agree with this when she says that

264. An Act Permitting Free Negroes to Select a Master and Become Slaves § 2, 1860 Ala. Laws 63.

265. See EMILY WEST, FAMILY OR FREEDOM: PEOPLE OF COLOR IN THE ANTEBELLUM SOUTH (2012).

266. *Id.* at 145–46.

267. *Petition #20186038*, DIGIT. LIBR. ON AM. SLAVERY, <https://dlas.uncg.edu/petitions/petition/20186038> [<https://perma.cc/6MDN-5L2F>].

268. WEST, *supra* note 265, at 145–50.

269. *Id.* at 150.

a “sense of fluidity between enslavement and freedom for some free people of color facilitated their movement in the direction of bondage when the opportunity arose, and formal and informal systems of guardianship also enabled such movement.”²⁷⁰

C. From Collective Governance to Management of Racialized Individuals: Native Americans During Allotment

Conservatorship was a key legal device deployed to dispossess Native Americans of their lands as the earlier colonial history demonstrates.²⁷¹ This Part argues that the United States benefitted from the early colonial and southern states’ development of guardianship as a conceptual and practical tool of collective governance, subordination, extraction. My argument that guardianship as a legal concept is so firmly rooted in law and culture that its institutional legitimacy remains unchallenged has support in federal Indian law and doctrine. For example, M. Alexander Pearl recently observed that two core related but distinct concepts in federal Indian law are regularly misunderstood: the guardianship analogy in *Cherokee Nation v. Georgia* and the plenary power doctrine discussed in *United States v. Kagama* and the Supreme Court (or, more accurately, Justice Clarence Thomas) tends to assume the former and take issue with the latter.²⁷² In the sections that follow, I show the work that guardianship is doing and contend that it has been so effective precisely because of its historical use and development in

270. *Id.*

271. See, e.g., Matthew L.M. Fletcher, *Failed Protectors: The Indian Trust and Killers of the Flower Moon*, 117 MICH. L. REV. 1253, 1260 (2019) (quoting *Osage Extension: Hearings on S. 4039 Before the S. Comm. on Indian Affairs*, 66th Cong. 83 (1920) (letter from H.S. Traylor, Inspector) (“The government found white guardians, usually ‘prominent white citizens [of] Osage County’ . . . for ‘incompetent’ Osages. Guardians had near-total control over the finances of Osages deemed incompetent, even requiring Osages to get permission to purchase toothpaste . . .”); see also Nancy Carol Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land-Related Cases, 1887–1924*, 4 AM. INDIAN L. REV. 197, 197 (1976) (“To fully understand the legal status of Native Americans and of Indian land, and to appreciate the current pressure from some Indians for a return of the land base and sovereign recognition by the federal government of Indian tribal government, a study of guardianship is mandatory.”); *id.* at 199 (“[F]ederal government [control] over Indian lands related closely to the growth of guardianship. Important as the land relationship was, however, federal guardianship as it developed during the period studied cannot be said to rest solely on matters of property.”).

272. See M. Alexander Pearl, *Review: The Indian Child Welfare Act in the Multiverse*, 121 MICH. L. REV. 1101, 1105 (2023).

the context of Native and Black Americans (developed in Sections A and B above).

1. The Guardianship Frame: Federal Guardianship by Analogy and Practice

Guardianship operates in the federal context both as an analogy (derivative of federal court cases which are technically not about guardianship) and in the context of specific federal laws from a distinct and later time period that create a legal guardianship relationship between the federal government and Indigenous people. The grounds for guardianship articulated by lawmakers and courts included Native Americans' functional dependency on the United States government for their economic livelihood, their alleged naivety, and their vulnerability to states and non-Native state citizens seeking to defraud and manipulate them. Framed in this way, guardianship (in name or practice) positioned the United States government as guardian to act in its wards' best interests.

Indeed, this is exactly how the U.S. Supreme Court characterized this relationship in *Cherokee Nation v. Georgia*,²⁷³ a case from 1831 involving an action to prevent the state of Georgia from imposing its laws in Cherokee territory in violation of federal treaty provisions. In its opinion, the Court explains the relationship between the United States, its states, and the Cherokee Nation as follows:

It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.²⁷⁴

The Cherokee Nation filed this action in response to Georgia's enactment of a law that "authorize[d] the governor to take possession of the gold, silver, and other mines, lying and being in that section of the chartered limits of Georgia,

273. 30 U.S. (5 Pet.) 1 (1831).

274. *Id.* at 14.

commonly called the Cherokee country, and those upon all other unappropriated lands of the state,” and provided that the state would “punish[] any person or persons . . . found trespassing upon the mines.”²⁷⁵

Deploying the language of guardianship to frame the relationship between Native nations, the United States, and its states invoked guardianship’s deep institutional history and, thus, crafted an immediate power hierarchy in which Native nations were inferior, childlike, deficient, lacking in will and rationality, and dependent on the “kindness and . . . power” of the U.S. government. By building its legal reasoning upon a preexisting and presumptively legitimate legal device (guardianship), the government allowed it to be used in what it believed was justified political disenfranchisement of Native Americans through law.²⁷⁶

To be clear, Justice Marshall’s opinion in *Cherokee Nation v. Georgia* does not expressly say that there is, either statutorily or doctrinally, a legally defined guardianship arrangement between Indigenous nations and the United States; he simply says that the arrangement between the two resembles that kind of relationship. This analogy takes on a life of its own in future cases involving the deprivation of Native American voting rights under state law.²⁷⁷

275. *Id.*

276. *See, e.g.*, S. REP. NO. 268, at 11 (3d Sess. 1870) (writing, with respect to the Fourteenth Amendment, “[t]o maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, and to which they were neither requested nor permitted to assent, . . . would be to charge upon the United States repudiation of national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce their just rights, and were enjoying the voluntarily assumed guardianship and protection of this Government”).

277. Federal guardianship became a core justification invoked by states in statutes denying Native Americans the right to vote. *See, e.g.*, Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 182 (1991) (explaining five central legal arguments used by states to deny voting rights to Native Americans: “(1) failure to sever tribal ties makes Indians ineligible; (2) ‘Indians not taxed’; (3) Indians are under guardianship; (4) reservation Indians are not residents; and (5) tribal sovereignty precludes participation in state and local governments”); *see also* MONROE E. PRICE, *LAW AND THE AMERICAN INDIAN* 229–37 (1973) (listing guardianship among five reasons for denial of the vote to Native Americans). When Native Americans challenged the validity of these laws, courts rejected these challenges based on the Supreme Court’s holding in *Cherokee Nation v. Georgia*, reasoning that Native Americans could not vote because they were under federal guardianship. Despite the distinction between guardianship under state probate law and federal guardianship established by treaties between the United States and Native tribes, courts nevertheless, convinced by similar rationale driving guardianship in general (that is, the belief that Native tribes and

Guardianship offered a legal pathway to the United States' plenary authority over Native American political and economic life.²⁷⁸ In *United States v. Kagama*,²⁷⁹ for example, the Supreme Court affirmed the constitutionality of the federal Major Crimes Act, reasoning that an extension of federal criminal jurisdiction did not rest on constitutional powers, but instead on powers arising from the federal government's guardianship duty.²⁸⁰ Four years later, in the 1890 case of *Cherokee Nation v. Southern Kansas Railway Co.*,²⁸¹ the Court addressed the expansion of the Southern Kansas Railroad onto Cherokee lands. Though its reasoning focused on eminent domain, the Court also noted the "wardship of the Cherokee[]" nation in its rejection of the notion of "tribal sovereignty."²⁸² The expansion of authority through the rhetoric and reasoning of guardianship created the conditions for Native American dependency and incapacity as it had in colonial New England and as states accomplished in the antebellum period.²⁸³ Consequently, guardianship fundamentally shaped the contours of federal Indian law in terms of the statutory and constitutional dimensions of the status of Native Americans both at the tribal level and as individuals.

2. Individual Incapacitation and Extraction to Dilute Collective Power

Guardianship also played a critical role in extracting land from Native Americans, as the United States moved from an approach that focused on relationships with tribes and checking state authority to a focus on

Native people were "inferior, childlike, and incapable of exercising self-governance") repeatedly conflated the two devices. Wolfley, *supra* note 277, at 187; *see also* Porter v. Hall, 34 Ariz. 308, 324 (1928) ("We hold, therefore, that any person who, by reason of personal inherent status, age, mental deficiency, or education, or lack of self-control, is deemed by the law to be incapable of handling his own affairs in the ordinary manner, and is therefore placed by that law under the control of a person or agency which has the right to regulate his actions or relations towards others in a manner differing from that by which the actions and relations of the ordinary citizen may be regulated, is a 'person under guardianship,' within the meaning of section 2, article 7, of the Constitution.").

278. *See, e.g., Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307–08 (1902) (defining tribal membership); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–65 (1903) (discussing when the United States, acting as a guardian, can disregard explicit treaty provisions).

279. 118 U.S. 375 (1886).

280. *Id.* at 383–84.

281. 135 U.S. 641 (1890).

282. Carter, *supra* note 271, at 209.

283. *Id.* at 210 ("[T]he guardianship of the United States took on its unique characteristic of providing direct supervision, through a huge bureaucracy, over almost every aspect of the individual Indian's life.").

assimilation and control over individuals. Importantly, the shift from guardianship as analogy to guardianship as the statutory and policy foundation developed at the end of the nineteenth century to the early twentieth century in line with a shift in federal policy towards Indigenous people from conflicts and war, federal treaties, and removal to sovereign reservations.

Two related propositions formed the basis of federal Indian policy at this time: first, that Native Americans were incompetent (couched in language of disability and incapacity) and, second, that the existing tribes would be dismantled as sovereign political institutions apart from the United States.²⁸⁴ Both of these propositions have roots in the early colonial period in New England as Part II illustrated: the presumption of Native American incompetence and naivety as the justification for (and origin of) guardianship as a governance device in the colonies and the determination that plenary authority best met the governance challenges and advanced the broader goals of assimilation and land dispossession.²⁸⁵

The United States' design and execution of federal allotment, or the division of communally held land into individual parcels, took a page (or several) out of the colonial guardianship playbook starting with the General Allotment or "Dawes" Act in 1887, paying homage not only to its author, Senator Henry Dawes but to the colonial roots of the Act's tenets in Massachusetts. Congress articulated a new federal policy that sought to disaggregate communal landholding such as reservations and grant individual Native Americans land allotments. In New England, Indigenous people faced threats to communal lands from colonial encroachment, approvals of shifts to severalty to allow for the individual sale of lands, all of which left indigenous people more integrated and less protected (and perhaps more assimilated by necessity) despite (or as this Article suggests, because of) the presence of guardians acting on behalf of the General Courts. Congress viewed allotment as a means encouraging individual cultivation of the land and, as a result, gradual assimilation and transition to citizenship that would bring Indigenous people into a non-Indigenous (white American) culture and, over time, would obviate the need for federal oversight. More specifically:

To each head of a family, one-quarter of a section; To each single person over eighteen years of age, one-eighth of a section; To each

284. Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 317 (2006).

285. See *supra* Part II.A.

orphan child under eighteen years of age, one-eighth of a section;
and To each other single person under eighteen years now living,
or who may be born prior to the date of the order of the President
directing an allotment of the lands embraced in any reservation,
one-sixteenth of a section.²⁸⁶

Tribal members had to register with the Office of Indian Affairs to be eligible recipients of shares of former federal reservations. Similarly situated to Indigenous people in colonial New England who could not sell their land without prior approval from the guardian and the general court, recipients of allotted parcels had to secure the approval of the United States acting as a trustee and holding title for a statutorily defined incompetent ward. The Executive Branch received broad discretion from the Congress to carry out these policy goals just as the General Court in colonial Massachusetts granted broad jurisdiction to guardians over the affairs of indigenous communities in New England. The very existence of a trust or guardianship had expressive value as it signaled the collective and presumptive inferiority and incapacity of Indigenous people as it did in colonial New England, in the antebellum south for people of color, and as it does today for people with disabilities under court-ordered guardianship. To be clear, allotment was also about extraction of resources and access to land that could be sold to the U.S. government and private actors for development and commercial purposes as the cases in this section highlight.

In the early twentieth century, several decades into federal allotment, when the U.S. government discovered gas, oil, and other valuable resources on Native lands in the Midwest, “guardianship was one of the most detrimental tactics used [by the U.S. government] against [Native Americans] to remove them from their possessions and their culture,” alongside violent acts such as kidnapping and murder.²⁸⁷ Guardianships of Native Americans were framed in terms of “protection” to guard against their “ignorance” and “incompetence,”²⁸⁸ and the rhetoric of guardianship and dependency

286. General Allotment Act of 1887, Pub. L. No. 49-105, 24 Stat. 388.

287. LANCE KELLEY, *THE GUARDIAN PROGRAM FOR NATIVE AMERICANS: A HISTORIOGRAPHIC REVIEW* 7 (1993); *see also* GERTRUDE BONNIN, CHARLES H. FABENS & MATTHEW K. SNIFFEN, *OFF. OF THE INDIAN RTS. ASS'N, OKLAHOMA'S POOR RICH INDIANS: AN ORGY OF GRAFT AND EXPLOITATION OF THE FIVE CIVILIZED TRIBES—LEGALIZED ROBBERY* 14 (1924) (“Let oil be discovered on an Indian allotment, and one of the profession will promptly file a petition in Court to have the individual declared incompetent . . . and ask to be appointed guardian.”).

288. Fletcher, *supra* note 271, at 1256, 1260; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (“Meanwhile [Native Americans] are in a state of pupillage. Their

became the dominant political and legal narratives replicated and ratified not only by courts at law, but also the court of public opinion.²⁸⁹ According to Nancy Carol Carter, “[f]or the United States to successfully accomplish its acquisition of land and deal with the displaced [Native communities], the power of Congress over [Native Americans] as individuals had to be enlarged and the strength of the tribal unit had to be diminished.”²⁹⁰

Cases on federal allotment and the assertion and exercise of property rights used guardianship as a justification for restricting access and the ability to contract and exert economic agency. In *United States v. Rickert*, for example, a 1903 tax case that preempted state taxes on land held in trust by the U.S. on behalf of Native American allottees, the guardianship frame dominated the Court’s reasoning for why, although they had been declared citizens, Native Americans were labeled temporarily incapacitated and subject to a federal trust.²⁹¹ According to the *Rickert* Court, Native Americans were not yet capable of exercising the rights and responsibilities of citizenship during this transitional period of preparation.²⁹² Therefore, the United States, acting in their best interest, would hold title to their lands and, as wards of the United States, they would instead be allottees who occupied the land with the United States’ consent and approval.²⁹³ Allottees could not enter into legally valid contracts or make any conveyances related to the land; however, they were effectively responsible for working and cultivating the land belonging to others.²⁹⁴

The role of guardianship in the extraction of land, wealth, and resources began with guardians appointed by governors and then the General Court, the legislative body in colonial New England, and, as this Article contends, leaves its mark on future uses of guardianship as a tool of public governance. Initially, in 1907, Congress granted certain classes of Native American allottees (the Five Tribes) legal authorization to sell their lands that it denied other Indigenous communities.²⁹⁵ However, within a year, Congress

relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”).

289. See Fletcher, *supra* note 271, at 1264.

290. Carter, *supra* note 271, at 208.

291. See *United States v. Rickert*, 188 U.S. 432, 439, 442–43 (1903).

292. See *id.*

293. *Id.* at 437–38.

294. See *id.* at 436–37, 442; see also Carter, *supra* note 282, at 212.

295. ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 90 (1940) (explaining that the affected “classes” were “adult whites of the Cherokee, Choctaw, and

transferred jurisdiction over the Five Tribes' lands to Oklahoma county courts, which led to an estimated 90 percent of the 64,000 Native Americans with an interest in that land selling their property, primarily to white Americans, for what Gertrude Bonnin (Indian Welfare Committee of the General Federation of Women's Clubs), Charles Fabens (American Indian Defense Association), and Matthew Sniffen (Indian Rights Association), described as "inadequate consideration."²⁹⁶ This localization of power at the state and county levels opened the floodgates to private petitions for guardianship over individual Native American tribal members, adults and children alike. Private actors (predominantly white men) targeted Native American minors and orphans for guardianship petitions precisely because the latter came to possess valuable estates that were based on the land and resources on it.²⁹⁷

The absence of specific guardrails on guardianship and the vagaries of the legal conception of incapacity made this device an easier path to the assertion of white control, especially early on. Prior to 1913, for example, Oklahoma had no restriction on the number of wards (and, thus, estates) an individual guardian could have, leaving Native American children particularly susceptible to abuse and wealth extraction. In 1913, Oklahoma codified a five to one ratio of wards to guardian.²⁹⁸

In 1924, Gertrude Bonnin, a Sioux woman, described in detail how the system of guardianship in Oklahoma was intertwined inextricably with politics and economic forces, outlining a level of self-dealing and financial capture that remains characteristic of guardianship and conservatorship today. White guardians had lawyers "steadily retained" (and who would recoup steep legal fees); locally elected probate judges (serving two-year terms) depended on the votes of white guardians for re-election; and

Chickasaw nations; adult Cherokee and Seminole freedmen; all Creeks except fullbloods; all mixed bloods of the five tribes from whom restrictions had been removed; and all fullbloods from whom restrictions had been removed prior to April 26, 1906."). There were additional restrictions on inheritance. *Id.*

296. BONNIN ET AL., *supra* note 287, at 9.

297. DEBO, *supra* note 295, at 103–04.

298. OKLA. STAT. tit. 30, § 4-101 (1913) ("No person shall be appointed guardian of any minor or incapacitated or partially incapacitated person, who is, at the time of the hearing of the application for appointment, the guardian of as many as five persons, other than his own family or relatives.") While this statute did not specifically name "incompetency" as a basis for removal, "the practice of the Oklahoma Courts [was] to regard them as included in the term 'minors'" BONNIN ET AL., *supra* note 287, at 17.

business owners depended on the patronization of white guardians who spent the profits of their wards' lands at their stores.²⁹⁹

Evolving federal and state constitutional and statutory prohibitions against people as property and the proliferation of individual rights shifted the legal design and operation of guardianship to probate courts for individual adjudication of incapacity, though the racist rhetoric and norms of presumptive incapacity and cultural inferiority continued to influence these determinations. White people seeking guardianship under this probate system—the parallel system that operated since the country's founding and imported from England for individual, white, propertied persons—had to prove a specific Native American person lacked the capacity to manage their allotted property. However, these cases often relied on evidence of Native Americans' failure to understand the value of U.S. currency or property rules as defined by a capitalist market they were neither a part of nor allowed to enter.³⁰⁰

Consider a 1912 Oklahoma Supreme Court case, *Shelby v. Farve*.³⁰¹ Here, the court reviewed a petition for guardianship over Marcelene and Stella Farve, two members of the Choctaw Tribe, on the ground that they were "incapable" (synonymous with "mentally incompetent" in the case) of managing their property.³⁰² The trial court had found that the sisters attempted to sell lands they inherited from their mother—lands that were rich in asphalt and reputed to be worth around \$40,000—"for a grossly inadequate consideration."³⁰³ The trial court, faced with abundant testimonial evidence that the two sisters did not meet the existing statutory definition of incompetency with respect to self care, declined to appoint a guardian even though the court found that "they were so ignorant in so far as the value of their property was concerned that it was probable they would

299. BONNIN ET AL., *supra* note 287, at 15–18.

300. *Id.* at 18 (citing the cases of Susanna Butler, and Munnie Bear, two full-blood Creek women, who were both adjudged incompetent based on their spending habits and their lack of understanding of the monetary value of the oil beneath their lands); *id.* at 14 ("Let oil be discovered on an Indian allotment, and one of the profession will promptly file a petition in Court to have the individual declared incompetent . . . and ask to be appointed guardian.").

301. 126 P. 764, 767 (Okla. 1912).

302. *Id.* at 764. The court carefully reviewed the distinction between "insane" and "mentally incompetent" or "incapable", the latter two being synonymous and distinguishable from the former.

303. *Id.* On this issue, the court considered testimony from a U.S. district agent who was appointed to represent the Department of the Interior.

make an improvident disposition thereof.”³⁰⁴ The Oklahoma Supreme Court reversed, granting the appointment of a guardian of the estate (rather than of the person), reasoning that such a move was clearly within the “power and jurisdiction” of the court and supported by not only the intent of the statute, but also the evidence before the court in the case.³⁰⁵

The probative evidence the Oklahoma Supreme Court relied on to reverse the trial court came from the testimony of two illiterate, poor Native American women about their understanding of the fair market value of their mother’s land, the identity and value of asphalt on their mother’s land, and their ability to read, write, and perform mathematical calculations on demand to the court’s satisfaction.

Marcelene Farve testified in reference to the value of the land:

Q. Do you own a half interest in that land?

A. No.

Q. What interest do you own?

A. I don’t know.

Q. Do you know what interest you own in that land?

A. No, sir

Q. And you were going to sell your interest in that land to this man Criner for \$450?

A. Yes, sir

Q. Did he tell you that was all it was worth?

A. Yes; he said that’s all it was worth.

Q. Did you believe that?

A. I don’t know. He said that’s all it was worth

Q. Did you sign a deed to Walter Colbert?

A. No, sir.

Q. Are you sure that you didn’t?

A. I don’t know.

Q. Have you ever signed any paper for Mr. Colbert?

A. Yes, sir.

Q. Do you know what it was?

A. I don’t know. You all got me puzzled now.

304. *Id.* at 765.

305. *Id.* The court cited *Easley v. Bone*, a case wherein the Missouri Court of Appeals affirmed both a judgment of insanity and the appointment of a guardianship of the estate where no person would “accept the office of guardian of his person, because of his dangerous character” *Easley v. Bone*, 39 Mo. App. 388, 391 (1890).

Q. You may just tell the court what the transaction was you had with Mr. Colbert. Do you understand that question? You can tell the court what the trade was between you and Mr. Colbert, if there was any.

A. I can't answer that.

Q. You mean that you don't know?

A. No.

Q. You don't know?

*A. I don't know*³⁰⁶

Stella Farve's testimony offers additional insights into the criteria used to judge the Farve sisters' legal incapacity and justify the imposition of a conservatorship. During her cross examination, despite saying at the start that she had not attended school, was illiterate, and could not write or perform mathematical calculations, she was humiliated by counsel and asked to answer a math question in real time (and was even instructed by the court to do so), which ultimately forced her to concede that she did not know the answer:

Q. Can you figure?

A. No, sir.

Q. Do you know how many five dollar bills it takes to make a hundred?

A. Yes.

Q. How many?

A. I ain't going to tell you, though.

Q. Tell the court. You aren't telling me.

The court: Answer the question.

A. I ain't going tell.

The court: Well, you must answer. Tell him how many.

*A. Don't believe I could tell you.*³⁰⁷

A U.S. government official testified in the *Shelby* case on behalf of the petitioner that their property with its asphalt deposits was worth \$40,000³⁰⁸:

From the foregoing and other testimony contained in the record we are convinced that these parties were mentally incompetent and incapable of protecting themselves in their estate, and that, by reason thereof, they are not only likely, but absolutely certain, to be deceived and imposed upon by artful and designing persons, and

306. *Farve*, 126 P. at 766.

307. *Id.* at 767.

308. *Id.*

the jurisdiction and authority is vested in the county court to appoint a guardian or guardians to protect them.³⁰⁹

Nearly swindled by two white men to sell their land for way below market value, and judged by norms not their own, the court then inflicts an additional harm upon them by using this fraud as evidence of their incapacity to manage their property and then strips them of their agency and decisional rights.

At first blush this case may appear to undermine the extraction story. That is, if government officials really wanted to facilitate the transfer of Native American resources to white people, perhaps they should have allowed these sales to proceed unencumbered. However, it is also possible that this example demonstrates quite persuasively the need for a federal role as trustee as an intermediary between allegedly incompetent Indigenous people and state and private actors.

Once appointed, white guardians, though assuming fiduciary duties in the probate system, faced little accountability for their self-dealing and resource extraction from Native American wards. Guardians provided meager weekly allowances to their wards, and decided when, where, and how much of the ward's own money would be used for the ward's support.³¹⁰ In addition, white guardians controlled which stores the ward could patronize by withholding reimbursement and allowances unless they shopped exclusively at stores approved by their guardian.³¹¹ Guardians would often loan their wards' money to personal friends of theirs (with any risk of loss falling upon the wards), keep the wards' accounts in banks of the guardians' choice, and spend the wards' money "for the wards' benefit" on items like automobiles (which would often go straight to the guardian).³¹²

D. Insights From the Governance Frame

A few insights emerge when we read the Native American and free Black American examples together.

First, guardianship was a successful tool of collective governance precisely because it relied on public acceptance that there is a class of people properly denied legal personhood and agency because they do not behave

309. *Id.*

310. BONNIN ET AL., *supra* note 287, at 21.

311. *Id.* at 17.

312. Fletcher, *supra* note 271, at 1260 ("Guardians often concocted complex transactions to swindle Osages, such as purchasing cars at market value and reselling the car to their Osage wards at five times the value of the car.").

according to some prescribed set of social norms. As a result, the logical conclusion is that we, as a society, will always need some mechanism to regulate the decisions of this delineated group. Guardianship, then, is a highly normative, malleable institution that operates on a set of norms defined by those in and with power (for example, lawmakers who define the contours of the law, judges and other legal actors who argue and interpret the meaning of the laws, and private actors who have resources to trigger the court's jurisdiction). Deviance from the dominant norms of decisionmaking justified intervention in the person's "best interest" and was understood as a benevolent act, concepts that were and continue to be highly normative and manipulable. We think of guardianship today as a function of courts, due process, and individual adjudication of incapacity given the individual property and liberty interests at stake. English settlers certainly understood a version of this and yet when faced with coexisting with nonwhite people, decided that the principles of this English system could be used as justification for intervention and control. Yet in the colonies, they established a system not through courts and individual adjudication (perhaps because they lacked the infrastructure for this) but through decentralized functionaries appointed by the legislature to carry out administrative oversight and surveillance with broad discretion and in the interests of those they served.

Relatedly, guardianship also enabled other systems of social control or extraction to thrive, for example, nuisance and vagrancy laws. Guardians became an important tool of the police state designed to manage resistance to racial subordination as visible in the context of free Black Americans in Georgia, South Carolina, and Florida. In this respect, guardianship was a tool of risk management for the state. Guardianship has played a central part in the history of property, the development of markets, and commodification, all critical to the history of capitalism. Guardians may have also contributed to the development of debtor and creditor markets. In his review of Claire Priest's book, *Credit Nation*, Greg Ablavsky credits Priest with core insights about the development of early market tools and legal devices during the colonial period and notes that "[c]redit markets required discrete ownership interests that could be freely bought, exchanged, and, if need be, seized."³¹³ Guardianship offered ready rhetoric and a legally authorized, publicly-accepted process to regulate ownership interests.

313. Gregory Ablavsky, *Book Review*, 61 AM. J. LEGAL HIST. 340, 342 (2021) (reviewing CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA* (2021)).

Second, a system predicted on and assumed to be informed by benevolence suffered significant conflicts of interest that made those allegedly needing protection more susceptible to manipulation and abuse. The assumption was that white people of status and means serving in these roles would be motivated by the best interests of their wards rather than self-interest even when they did not receive separate compensation for their service. Another example of a conflict of interest, a system designed to maximize reliance on individual assets and avoid dependence on the public fisc can meaningfully conflict with what is in the best interests of individuals and groups. Avoidance of public dependency by establishing a system that relies on the ward for its operation (fees for guardians and legal process, for example) creates conflicts of interest for the actors in the system. While guardians for Indigenous groups in colonial New England purported to operate as fiduciaries for Indigenous communities, when they did not, there were no clear remedies; the general courts simply removed and replaced the individual bad actor, sometimes with minimal financial restitution.

Third, at times, the availability of some oversight or access to courts masks structural harm. Examples include the portrayal of guardians as a form of due process that allowed Black Americans access to courts when someone would challenge their status as free or stake claims to their labor or resources. In actuality, some guardians colluded with third parties to receive kickbacks and other benefits at the expense of their wards and the framing and discussion of access to courts diverted attention from identifying and redressing the conflicts of interest so integral to the structure of the guardianship system. Marginalized groups certainly tried to use guardianship to their advantage if they could, and some successfully did (for example, tribes that petitioned the General Court and prompted formal investigations and relief from individual guardians, alliances with guardians to maintain the status quo especially post-Revolutionary War when states sought to reconsider and abolish prior commitments such as prohibitions on sale of Indigenous land to outsiders).³¹⁴ However, those examples are sparse because the system was too susceptible to manipulation and incentives almost irreparably skewed so it corrupted even those who may have

314. These stories are reminiscent of the work of scholars like Brittney Farr and others whose work demonstrates the agency of marginalized groups who used the legal process and systems to their advantage. See, e.g., Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674 (2022) (exploring how sharecroppers and tenant farmers in the Jim Crow south, who experienced violence and were denied benefits under their contracts pursued and, at times successfully, secured legal remedies framed in the language of private law).

accepted the appointment with good intentions but ultimately took a different path, perhaps like John Quincy.

This Article does not provide a comprehensive survey of the exercise of jurisdiction over racialized people through guardianship. The examples above offer a window into the development, design, and execution of guardianship in different contexts beyond the standard history of the probate system. Part II shows how guardianship operated as a tool of collective governance for Black and Native Americans distinct from the individualized adjudication in Anglo-American probate courts described in Part I. Federal and state laws and policies labeled racialized individuals as incompetent based on white norms of knowledge and experience, such as the capacity to engage in commercial transactions. Once these determinations were made, guardianship operated under the guise of due process protections, bearing the marker of legal legitimacy and the promise to protect vulnerable people against public and private abuse of power.

The two forms of conservatorship—as categorical, presumptive incapacity through legislative acts (Part II) and as individual incapacity, adjudicated through the courts (Part I)—eventually merge as groups gain access to individual rights and explicit, categorical exclusions from citizenship on the basis of race or nationality are prohibited by statutory and constitutional laws at the state and federal levels. Yet surrounding laws and practices created conditions that would allow guardianship to continue to be a tool of racial subordination by establishing requirements for the exercise of political and economic rights, using both state *parens patriae* and state police powers to create quasi-criminal systems like civil commitment as tools of social control and extraction.

III. CONTEMPORARY EXAMPLES OF CONSERVATORSHIP AS PUBLIC GOVERNANCE

Part III argues that the legacy of conservatorship as racial governance persists today. This is not to say that conservatorship only operates today as racial governance or that the more traditional form in probate does not operate. Rather, for some people, conservatorship can and does continue to play the role it played in the examples discussed in Part II.

Each of the two themes from Part II—conservatorship as extraction and as population control—has a contemporary analogue.³¹⁵ Through the historical examples, we are able to better understand how guardianship operates today—to see different patterns, to understand the logic that may be at work, and—to move past a “bad apple” framing of every example of harm or abuse that comes to light sequentially.

One major barrier to better understanding the nature of guardianship today is the absence of data and publicity (often framed as a matter of privacy restrictions, as I have written about elsewhere)³¹⁶ which obscures the existence of a through line from the prior examples of its racist and ableist roots identified in this Article to the marquee cases that briefly capture the public’s attention like that of Britney Spears.³¹⁷ Rather than focus on high profile cases alone, this Part highlights cases with little to no public attention, those more common, where race and disability come together to shape the outcome, cases where the core elements of early conservatorship statutes (and their effects) are front and center.

State guardianship statutes vary with respect to the specific procedures, powers, and protections afforded individual respondents to guardianship petitions.³¹⁸ As previously discussed, state guardianship systems developed differently and sometimes used different names (guardianship or conservatorship) to refer to similar devices. In California, for example, conservatorship now refers to the court’s jurisdiction to appoint an individual or institutional guardian over both the estate and the person for individuals deemed incapable of managing an estate or their person.³¹⁹ The

315. These categories are not mutually exclusive. For example, the Michael Oher and Britney Spears cases illustrate both extraction and control of individual bodies.

316. *See, e.g.*, Harris, *supra* note 1 (arguing that the treatment of conservatorship proceedings and related legal documents as presumptively private, nonpublic materials obscures accountability and runs counter to our strong tradition of open courts and records).

317. *See infra* Part IV (discussing marquee cases and the prescriptions advanced because of them).

318. While efforts by the Uniform Law Commission to advance a uniform guardianship act have made some headway, not all states have adopted the language of the uniform guardianship act, and the text of the act has received pushback from some non-profit groups with respect to whether stakeholder interests are represented.

319. CAL. PROB. CODE § 1801 (West 2024) (“(a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter . . . , (b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence Substantial inability may not be proved solely by isolated incidents of negligence or improvidence. (c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).”).

scope of conservatorship and the limitation of rights vary across state statutes based on the identity of the potential conservatee, the grounds for seeking conservatorship, and whether the statute offers more than a plenary (all or nothing) approach or provides for a more nuanced limited carve out to restrict enumerated rights only. Generally, state statutes include broad statements of incapacity and give judges great discretion to add content and meaning, a consistent feature of conservatorship statutes over time.³²⁰

A. Conservatorship as Resource Extraction

Attention to the identity of the petitioner in contemporary cases reveals the ways in which race and disability come together through law to extract economic and political power not only from the proposed conservatee, but from their families and communities. The appointment of family or friends as guardians reflects an expressed preference by lawmakers and courts to entrust the responsibility for substitute decisionmaking to those who may be most familiar with the wishes of the individual. However, it also reflects an assumption about responsibility for the care of the individual residing in the family. Putting aside the problematic assumptions inherent in this position and the subordinating effects of it, this otherwise strong default position favoring familial ties shifts when race is involved. Even when families seek the assistance of the court as petitioners, they risk being displaced by private fiduciaries because they are deemed unfit or incapable to serve in roles designed by white men, decisions made more often by judges (still) demographically unrepresentative of them and their interests. Judgments about fitness, as they do throughout family law and the child welfare system, ignore the structural conditions that have shaped the exercise of agency—such as access to education, employment, healthcare, housing. The roots of structural racism trace back to the history discussed in Part II and conservatorship was a key part of controlling political and economic decisions that early on restricted access to the very resources used to judge legal capacity then and now.

320. See, e.g., Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 480 (2018); Jasmine E. Harris, *The Role of Support in Sexual Decision-Making for People With Intellectual and Developmental Disabilities*, 77 OHIO ST. L.J. FURTHERMORE 83 (2016); Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201 (2015).

1. Labor and Resources From Private Estates: Carter, Oher, and Spears

This subsection highlights three cases—Katherine Carter, Michael Oher, and Britney Spears—to illustrate the operation of conservatorship as a means of extracting labor and wealth from private individuals—two well-known cases and one less known.

First, the case of Katherine Carter, a Black American older adult in Alameda County, California, illustrates this point. Ms. Carter, diagnosed with dementia and comorbid health conditions like kidney disease, required more intensive medical intervention and care. Her family filed for conservatorship to direct her care and manage her assets. When some disagreement arose between Ms. Carter’s husband and her two daughters about the direction of care, the probate court, instead of mediating the disagreement among the family members, appointed a private professional guardian to manage Ms. Carter’s care and assets (bank accounts, property, retirement benefits).³²¹ Though the family had placed Ms. Carter in a skilled nursing facility, the appointed conservator removed Ms. Carter from the facility and placed her in boarding care facility without access to skilled nursing care. Venus Gist, one of Ms. Carter’s daughters, reported that her mother’s health declined in the new placement; for example, Ms. Carter was walking and engaged with others when living in the skilled nursing facility but experienced a significant decline in her health and activity in the new facility. Ms. Gist questioned her mother’s placement and the conservator told her that she “culturally appropriately placed her” in the boarding facility (Carter’s conservator was a white woman and Ms. Carter a Black woman).

Ms. Gist and her family, fearing for Ms. Carter’s condition, petitioned the court to place her in a facility with a higher level of care more appropriate for her declining health. When the court refused to change the placement, the family removed Ms. Carter from the boarding facility without the consent of the conservator. The conservator tried to have the family sanctioned but the judge denied the request perhaps responding to an outpouring of community support, organizing, and media attention. The judge ultimately returned the duties of conservatorship over Ms. Carter’s person to her husband, Mr. Cordell Carter, but left the professional conservator in place with authority

321. Repair, *Racism & Predatory “Care”: Courts, Disability Law, and Conservatorship Abuse*, YOUTUBE (Nov. 16, 2021), https://www.youtube.com/watch?v=G7ADwB_8ISM (recording a virtual conversation with Venus Carther, Katherine Carter’s daughter, in a virtual program moderated by Beth Ribet).

over Ms. Carter's estate. Although the court ordered that the conservator file a final accounting and end the appointment, it took another two years for the accounting to reach the court. The Carter family had a rental property (jointly owned by Cordell and Katherine Carter) and Ms. Gist reports that the conservator went to the property and asked the renters to submit monthly rent to her directly. The conservator took Katherine's social security and retirement benefits, according to Ms. Gist, when she was no longer providing care for Ms. Carter.³²²

An accounting filed in the case offers a window into the costs associated with these proceedings, all paid for out of the estate of the conservatee, another consistent feature of this legal device over time.³²³ During a three-month period that coincided with the initial appointment of the conservator, reports filed with the court show costs of \$51,172 including "board, care bills, care manager, care assessment, and current fees for attorney and petitioner." The temporary conservator fee request was \$13,485 (89.9 hours at \$150/hour, although the court approved rate was \$140/hour) and attorney's fees in the amount of \$21,604 (52.8 hours at \$400/hour and 9.4 hours at \$60/hour plus costs advanced \$1018.96 and other fees: \$8236) in addition to the fee petition from Ms. Gist's attorney in the amount of \$54,421.50 (11.5 hours billing at rates of \$400/hour for lead attorney, \$300/hour for staff attorney and \$200 for law clerk and 138.96 hours billing at \$400/hour for lead attorney and \$300 for staff attorney) and costs of \$1664.50. The court also collected a \$20,000 bond at the start of the case.³²⁴ These fees alone depleted the Carter estate.

Second, former NFL linebacker, Michael Oher's recent challenge to the longstanding conservatorship of the Tuohy family further demonstrates the operation of conservatorship's extractive features today. Oher, a Black man, the subject of the award-winning Hollywood film, *The Blind Side*, petitioned to end an almost twenty-year conservatorship under which a wealthy, white couple in Tennessee, Sean and Leigh Anne Tuohy, held decisionmaking

322. While most documents in the case are not publicly available, many of the examiner's reports are. They are standard forms but occasionally, I was able to get more information on the procedural posture or the factual disputes. *See id.*; Case Summary of Conservatorship of Katherine Carter at 2, No. RP15-778249 (Alameda Cnty. Prob. Ct. Examiners 2020).

323. Account for Conservatorship of Katherine Carter, No. RP15-778249 (Alameda Cnty. Prob. Ct. Examiners 2020).

324. *Id.*

authority over Oher's contracts, business affairs, and healthcare.³²⁵ As a teenager, Oher was homeless and involved with the foster care system. He received a sports scholarship to attend a private Christian school and met a classmate's parents, Leigh Anne and Sean Tuohy, who invited Oher to stay with them. The Tuohy family told Oher they wished to adopt him but because he was over eighteen at the time, according to legal advice, they could not adopt him.³²⁶ Instead, Oher claims that they told him they would file for conservatorship which was effectively the same as adoption. In 2004, with representations of the consent of Oher and his birth mother, a Tennessee probate judge signed an order of conservatorship, noting Michael's financial dependence on the Tuohy's and appointing the Tuohys as plenary conservators over Michael's person and his financial affairs (including his ability to contract).³²⁷

Media attention and public commentary surrounding this case have missed a central key fact indicative of the danger of conservatorship as an available legal device: Michael Oher, to our knowledge, did not have a disability that impaired his decisionmaking capacity as required by Tennessee law. The judge's order makes several findings about his contact with the child welfare system, his homelessness, his desire to improve his life through education, the resources and good intentions of the Tuohy family, and, interestingly, and quite explicitly, the absence of medical disabilities: "Oher has no known physical or psychological disabilities."³²⁸ How could a judge order one of the most restrictive forms of support for decisionmaking for an adult with no known disabilities when this is the threshold statutory question? Why wasn't this the lead headline in this case?

The racial capitalist roots of conservatorship are visible in Michael Oher's story, irrespective of Tuohys' actual intent. Michael, in the petition and court order, appears as a poor, homeless young man who did not have the

325. Petition to Terminate Conservatorship, For Accounting, and Other Relief, at 1, *In re Michael Jerome Williams, Jr., a/k/a Michael Jerome Oher* (2023) (No. C-010333).

326. *Id.* at 3.

327. *See, e.g.*, Order Appointing Conservators of the Person at 45–46, *In re Michael Jerome Williams, Jr.* (2004) (No. C-10333) ("Appoint [the Tuohys] as conservators of the person and that they should have all powers of attorney to act on his behalf and further that Oher shall not be allowed to enter into any contracts or bind himself without the direct approval of his conservators. It further appears to the Court that any and all medical decisions shall be made by the conservators who will have full and complete authority to make these decisions and educational decisions in Oher's behalf.").

328. *Id.*; *see also* Stephen L. Carter, *The Deeply Sad Lawsuit of 'Blind Side' Player*, BLOOMBERG L. (Aug. 15, 2023), <https://news.bloomberglaw.com/litigation/the-deeply-sad-lawsuit-of-blind-side-player-stephen-l-carter> [<https://perma.cc/R9GQ-UE34>].

scaffolding to make decisions that would be normatively acceptable. He had reached the age of majority in the state of Tennessee, yet the court's imposition of guardianship reflects a belief that he was not ready or able to exercise decisional agency. He did, however, have value—his labor as an athlete—and, like Native Americans' title to land or free Black Americans' labor, needed supervision to eliminate (or mitigate) the perceived risk of squandering it. Though the court's 2004 order granted conservatorship over Michael's person and recognized he had no estate to manage, the court's order missed the context in which the original petition arose: contract negotiations with university football programs and the future value of contracts Oher could sign at the professional level.

So how do we reconcile the absence of disability with the court order stripping Oher of the right to make decisions about his health and contract with third parties related to his college and related transactions? The fact that the Tuohys represented to the court that they had Michael and his birth mother's consent likely gave the judge less pause about ordering a conservatorship. So much so that the court even waived certain procedural rights, such as Michael's right to a court-appointed guardian ad litem to ensure his interests were represented in the proceedings.

The Tuohys also presented evidence of Michael's poverty and dependency on the state—he was previously in the foster care system, and, arguably now, without assets, would need to rely on the state for support—to justify court-appointed substitute decisionmakers. The court noted that the Tuohys were wealthy, had resources, and attested that they would provide for Oher and would not seek reimbursement from the public purse. The court made this specific factual finding in the order. Thus, here was a family willing to remove Oher from the public welfare rolls which the court finds compelling and legally sufficient to remove legal capacity. In addition to his dependence on the state, the narratives of Michael's life (as some commentators noted) track stereotypes about Black male athletes (un- or under-educated, foster care, a mother experiencing substance abuse disorder, state dependency, future earning potential through sports).³²⁹ The case also relied on tropes about well-intentioned white people simply trying to help and save people of color. The Hollywood film, books, and news stories emphasized Oher's low IQ before living with the Tuohys and how that IQ

329. Elizabeth Spiers, *I Have a Pretty Good Idea Why Michael Oher Is Angry*, N.Y. TIMES (Aug. 26, 2023), <https://www.nytimes.com/2023/08/26/opinion/i-have-a-pretty-good-idea-why-michael-ohr-is-angry.html> [<https://perma.cc/7Q9P-X74N>].

changed, presumably in response to the care, attention, and academic support provided by the school and the family. Disability or assumptions about Oher's intelligence as a young, poor, Black man may have operated alongside of the general findings of dependency to support the court's order.

Third, while this Article seeks to surface the racialized history and contemporary analogues of conservatorship, I would be remiss not to mention the conservatorship of Britney Spears, a white wealthy woman,³³⁰ in the context of contemporary examples of extraction and control over bodily autonomy. Perhaps best known, #FreeBritney spotlighted the harms experienced by those under court-ordered conservatorships, even celebrities.

Spears' case demonstrates the ways in which disability legal categories in conservatorship also permit gender and reproductive subordination to operate irrespective of race or public status. Spears' case began in 2008 with a temporary psychiatric hold for her alleged erratic behaviors under California Code Section 5150. This allowed for a short-term involuntary detention for medical evaluation and stabilization. James "Jamie" Spears, Britney's father, filed a petition with the probate court in Los Angeles County for temporary conservatorship over Britney's person and her estate alleging she was incapable of caring for herself or finances. Despite a strained and somewhat estranged relationship with her father at the time, the court granted Jamie Spears plenary power over Britney and her estate to act in her "best interests," an arrangement that continued without interruption for thirteen years.³³¹ During the only public hearing in the case, Britney, in real time, in her own words, described the harms of the conservatorship, including abusive labor extraction, punitive practices of removing her children, restricting access to food, friends, and marriage, and involuntary birth control through an IUD.³³²

330. While her estate certainly suffered from the extractive practices associated with her conservatorship, Ms. Spears's estate puts her well above the federal poverty line. Annual Update of the HHS Poverty Guidelines, 89 Fed. Reg. 2961, 2962 (Jan. 17, 2024).

331. Notably, two years post termination order, while Britney Spears has regained decisionmaking over personal care (health, daily living), Spears' estate remains conserved under court-supervision pending several hearings on financial disclosures and final accounting. *See* Conservatorship of Britney Jean Spears v. Britney J Spears, No. BP 108870 (Cal. Super. Ct. 2008) (No. 2:08-cv-01021).

332. I include excerpts from Britney Spears' twenty-four-minute testimony during her only public hearing on June 12, 2021, to give those words publicity. *Read Britney Spears' Statement to the Court in Her Conservatorship Hearing*, NPR (June 24, 2021, 6:52 PM), <https://www.npr.org/2021/06/24/1009858617/britney-spears-transcript-court->

I was on tour in 2018. I was forced to do [it]. My management said if I don't do this tour, I will have to find an attorney and by contract my own management could sue me if I didn't follow through with the tour. He handed me a sheet of paper as I got off the stage in Vegas and said I had to sign it. It was very threatening and scary and with the conservatorship, I couldn't even get my own attorney. So out of fear, I went ahead and I did the tour

There were six different . . . nurses in my homes and they wouldn't let me get in my car to go anywhere for—for a month. Not only did my family not do a goddamn thing, my dad was all for it. Anything that happened to me had to be approved by my dad [who at one point said:] "I'm sorry, Britney, you have to listen to your doctors. They are planning to send you to a small home in Beverly Hills to do a small rehab program that we're going to make up for you. You're gonna pay \$60,000 a month for this." . . .

The control he had over someone as powerful as me . . . he loved the control to hurt his own daughter, 100,000%. He loved it.

I packed my bags and went to that [rehab facility]. I worked seven days a week, no days off—which in California, the only similar thing to this is called sex trafficking, making anyone work—work against their will. Taking all their possessions away—credit card, cash, phone, passport card—and placing them in a home where they—they work with the people who live with them They watched me change every day, naked. Morning, noon and night.

My body—I had no privacy door for my—for my room. I gave eight gallons of blood a week. If I didn't do any of my meetings and work from 8 to 6 at night—which is 10 hours a day, seven days a week, no days off—I wouldn't be able to see my kids or my boyfriend. I never had a say in my schedule. They always told me I had to do this

The last time I spoke to you about just keeping the conservatorship going and also keeping my dad in the loop made me feel like I was dead. Like I didn't matter. Like nothing had been done to to [sic] me. Like you thought I was lying or something. I'm telling you again, because I'm not lying. I want to feel heard and I'm telling you

hearing-conservatorship [<https://perma.cc/6YVU-EKSP>]. As I have described in prior work, privacy veils conservatorship proceedings and denies conservatees agency and power by preventing the public from directly accessing their words and lived experiences. *See, e.g.*, Harris, *supra* note 7; Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681 (2021) (discussing, in both, default privacy norms surrounding disability).

this again so maybe you can understand the depth and the degree and the damage that they did to me back then What state allows people to own another person's money and account and threaten them and saying, "You can't spend your money unless you do what we want you to do." And I'm paying them

I want to be able to get married and have a baby. I was told right now in the conservatorship, I'm not able to get married or have a baby. I have an IUD inside of myself right now, so I don't get pregnant. I wanted to take the IUD out so I could start trying to have another baby. But this so-called team won't let me go to the doctor to take it out because they they [sic] don't want me to have children—any more children. So basically this conservatorship is doing me way more harm than good.³³³

In November 2021, Judge Brenda Penny terminated the conservatorship and ordered Jamie Spears to relinquish control of Britney's estate, believed to be \$60 million (the court also ordered a full accounting of the assets in the estate).³³⁴ However, this reported figure does not account for the financial costs of the conservatorship to her estate. According to public reports, Jamie Spears received an estimated monthly salary of \$16,000 which, over the course of the conservatorship, totaled roughly \$2.4 million.³³⁵ Apart from the monthly salary, Spears' father also received office space and, perhaps the clearest example of capture and extraction, a separate percentage for deals on behalf of Britney, as additional compensation approved by the court.³³⁶ For example, Jamie Spears received a 2.95 percent commission for the "Femme Fatale" tour in 2011 and 1.5 percent of the gross revenues from Britney's performances and merchandising deals connected to her "Piece of Me" Las Vegas Residency (\$138 million across 250 shows).³³⁷ Mr. Spears was not the only person benefitting from the conservatorship. The conservatee pays the costs and fees associated with the operation of the

333. *Read Britney Spears' Statement*, *supra* note 318.

334. Azmi Haroun & Kim Renfro, *Britney Spears Has Officially Been Freed From Her Conservatorship After Latest Court Hearing*, BUS. INSIDER (Nov. 12, 2021, 2:11 PM), <https://www.businessinsider.com/britney-spears-officially-freed-from-conservatorship-2021-11> [https://perma.cc/A5MS-2GNB].

335. *Id.*; Madeline Berg, *How Much Has Britney Spears' Dad Earned Controlling Her Life?*, FORBES (June 24, 2021, 10:28 AM), <https://www.forbes.com/sites/maddieberg/2021/06/24/how-much-did-britney-spears-dad-earn-controlling-her-life> [https://perma.cc/5S2K-QX86].

336. Liz Day, Samantha Stark & Joe Coscarelli, *Britney Spears Quietly Pushed for Years to End Her Conservatorship*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/06/22/arts/music/britney-spears-conservatorship.html> [https://perma.cc/UP55-UKEX].

337. *Id.*

conservatorship, including court fees and legal fees for both the conservator and conservatee, meaning that Britney paid the legal fees of her own lawyer and those of her father, lawyers arguing against Britney's expressed interests. One of Jamie Spears' lawyers filed for reimbursement of \$890,000 for four months of legal work including "media strategizing for defending the conservatorship."³³⁸

2. Extraction From Public Coffers: Medicaid and Social Security

The extraction of economic resources and power is not limited to individuals with private estates. Recipients of public benefits programs with disabilities have had their public benefits systematically depleted through conservatorship at the expense of their personal care and safety. In fact, public benefits may be a key financial underwriter of conservatorship. Federal public benefits such as Medicaid, social security, and veteran's benefits³³⁹ can each be used to defray the costs associated with conservatorship proceedings, in some instances, creating financial incentives for conservators to engage in self-dealing as repeat players in an obtuse system.

Medicaid, in some states, may create a steady funding stream for conservatorship as legitimate medical expenses. Since Medicaid is a federal-state partnership, how Medicaid and conservatorship laws affect each other differs across states. Medicaid recipients who receive long-term care in nursing homes or through Home- and Community-Based Services (HCBS) waivers must spend a portion of their income on their care known either as the Patient Paid Amount (PPA) or Net Available Monthly Income (NAMI).³⁴⁰ Some states allow recipients to deduct the costs associated with instituting or maintaining a conservatorship from their income when calculating their NAMI, while others do not.³⁴¹ Michigan, for example, allows recipients to

338. *Id.*

339. This Article focuses on the incentives created by federal Medicaid and Social Security benefit programs. Veteran's benefits have a similar structure to Social Security benefits but do differ in important respects beyond the scope of this Article.

340. Catherine Seal & Spencer Crona, *Standards for Guardian Fees*, 2012 UTAH L. REV. 1575, 1596 (2012).

341. *Id.* at 1597-98.

deduct \$83 per month for conservatorship expenses such as fees, travel mileage, and other costs associated with the conservator's duties.³⁴²

Furthermore, Medicaid regulations require states to deduct "[n]ecessary medical or remedial care recognized under State law but not covered under the State's Medicaid plan, subject to reasonable limits" from a recipient's NAMI.³⁴³ Although some state courts have interpreted these regulations to exclude reimbursement for the administration of conservatorships,³⁴⁴ others have allowed for the recoupment of certain costs related to conservatorship as medically necessary expenses. For example, a Massachusetts lower court broadly held that "when legal fees and costs associated with guardianship are necessary ... to authorize any medical treatment for an incompetent person under Massachusetts law, they are medical expenses."³⁴⁵ The Massachusetts Supreme Court later narrowed the lower court's holding by clarifying that "deductions from a recipient's income are mandated only in circumstances where a guardian is essential for an incompetent Medicaid recipient to gain access to or consent to medical treatment."³⁴⁶ Given the very heart of conservatorship entails a court-ordered determination that the conservatee requires conservatorship because they cannot otherwise make decisions about their health or finances (or both), it is likely a relatively low threshold to meet in Massachusetts even after the state supreme court's clarification.

342. MICH. DEP'T OF HEALTH & HUM. SERVS., MSA 18-37, GUARDIANSHIP/CONSERVATOR FEE (Oct. 2, 2018), https://www.michigan.gov/-/media/Project/Websites/mdhhs/Folder3/Folder50/Folder2/Folder150/Folder1/Folder250/MSA_18-37.pdf?rev=74df074167374c9b88e4514b9f21fbf0 [https://perma.cc/H4AQ-PNX6].

343. 42 C.F.R. §§ 435.832(c)(4)(ii), 435.726(c)(4)(ii) (2024).

344. ARIZ. ADMIN. CODE § R9-22-101 (2015) (defining "medically necessary" as services "provided by a physician or other licensed practitioner of the healing arts"); *Day ex rel* Ariz. Dep't of Veterans' Servs. v. Ariz. Health Care Cost Containment Sys. Admin., 109 P.3d 102, 104–05 (Ariz. Ct. App. 2005) (holding that the state Medicaid agency correctly denied a NAMI deduction for conservatorship fees because conservatorship was not medically necessary); *accord* Lutheran Servs. Fla., Inc. v. Dep't of Child. & Fams., 199 So. 3d 286, 291–92 (Fla. Dist. Ct. App. 2015) (upholding, similar to *Day*, the state Medicaid agency's denial of NAMI deduction because guardianship fees were not medically necessary under Florida law).

345. *Rudow v. Comm'r of the Div. of Med. Assistance*, 707 N.E.2d 339, 343 (Mass. 1999). The court uses "guardianship." I use both "guardianship" and "conservatorship" interchangeably.

346. *Id.* at 347; *see also In re Guardianship of Lamb*, 265 P.3d 876, 885, 890 (Wash. 2011) (en banc) (upholding the denial of fees for "general advocacy activities" by guardian because state regulations limited guardianship fees that may be charged to Medicaid recipients to only fees that were "necessary to render guardian services").

Federal Social Security benefits, in some instances, may also be used as payment for costs associated with conservatorship.³⁴⁷ The Social Security Administration's regulations and relevant guidance allow beneficiaries under conservatorship to use a portion of their benefits to pay "customary" conservatorship costs, provided the conservatorship appears to be in the beneficiary-conservatee's best interests, the beneficiary-conservatee's "personal interests are met first," and payment of the costs would not "deplete" the beneficiary-conservatee's funds.³⁴⁸ Recall Florida's guardianship law for free Black Americans that paid white conservators, upon appointment, one dollar for each conservatee they had, thus incentivizing the sheer number but not quality of service. Under Social Security laws, a conservator can serve (and receive payment for serving) more than five Social Security recipients; in fact, when serving more than five Social Security recipients, a conservator may qualify as an "organizational payee" with fee-for-service status³⁴⁹ and collect additional fees up to the lesser of ten percent of a beneficiary-conservatee's benefits or \$55 (or \$103 for recipients with substance use disorders).³⁵⁰

Researchers at Boston College estimate that 10.3 percent of retirement/survivor benefit recipients, 5.4 percent of Social Security Disability Insurance (SSDI) recipients, and 5 percent of Supplemental Security Income (SSI) recipients with a representative payee had a

347. Interestingly, the Social Security Administration's representative payee program may offer a less restrictive alternative to conservatorship for individuals who may need assistance in managing their social security benefits. However, if there is a court order finding that a recipient is legally incapacitated and in need of conservatorship, SSA policy requires that a representative payee be appointed but does not require any additional evidence of incapacity such as medical evidence to independently evaluate or corroborate the court's conservatorship order. *GN 00502.023 Developing Legal Evidence of Capability*, U.S. SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (June 29, 2022), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502023> [<https://perma.cc/6PE3-HQGS>].

348. *GN 00602.040 Guardianship Fees*, U.S. SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (Feb. 27, 2024), <https://secure.ssa.gov/poms.nsf/lnx/0200602040> [<https://perma.cc/R9BP-UUA8>]. Notably, key terms in the guidance such as the modifier "customary" and verb "deplete" are undefined. *Id.*

349. *Id.*; see also *GN 00506.220 When Fees for Service Cannot Be Collected*, U.S. SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (May 1, 2023), <https://secure.ssa.gov/poms.nsf/lnx/0200506220> [<https://perma.cc/894N-E37J>].

350. *GN 00506.200 Fee Amounts*, U.S. SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (Oct. 18, 2024), <https://secure.ssa.gov/poms.nsf/lnx/0200506200> [<https://perma.cc/3QX4-UMJP>].

conservator.³⁵¹ Notably, in 85 percent of these cases, the conservator was the representative payee.³⁵² Similarly, the study found that 5.2 percent of Social Security recipients with a representative payee had a conservatorship.³⁵³

The appointment of private guardianship companies as institutional representative payees for purposes of public benefits programs such as Social Security and as public guardians has produced active criminal investigations by the U.S. Department of Justice (DOJ). One recent example is the DOJ investigation and prosecution of Ayudando Guardians, Inc.³⁵⁴ According to court records, Ayudando Guardians acted as representative payees³⁵⁵ on behalf of clients for federal public benefits programs, specifically, the Department of Veterans Affairs and Social Security Administration. In this role, the company would receive clients' monthly benefits to manage expenses and distribute stipends to clients for living expenses. The company's founders and principal owners received lengthy prison sentences for embezzling over \$10 million dollars from an estimated 1000 clients. "As Ayudando's executives globe-trotted [cruises, travel, sporting events], some of their disabled and needy clients were left homeless."³⁵⁶ Rick Black, Co-Director of the Center for Estate Administrative Reform (CEDAR), has described the need for reforms in the system and called on bipartisan efforts because "this isn't a red or blue thing ... it's a green thing."³⁵⁷ Black has also publicly recognized the disproportionate effects of extraction on historically marginalized communities and efforts to discredit

351. Anek Belbase & Geoffrey T. Sanzenbacher, *Guardianship and the Representative Payee Program* 4 (Ctr. for Retirement Rsch. at B.C., Working Paper No. 2017–8, 2017) (linking the Social Security Administration's Master Beneficiary Record to data from the Census Bureau's Survey of Income and Program Participation).

352. *Id.*

353. *Id.* at 1, 6 (using another data set that, unlike Census Bureau's Survey of Income and Program Participation, surveyed people in nursing homes).

354. "Ayudando" means "helping" in Spanish. The name may be noteworthy given the Latinx Spanish-speaking population in New Mexico. *See, e.g.*, New Mexico, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/state-profiles/state/language/NM> [<https://perma.cc/XAY8-2LMX>].

355. *See Representative Payee*, U.S. SOC. SEC. ADMIN, <https://www.ssa.gov/payee> [<https://perma.cc/EX7T-YN87>].

356. Ronnie Greene & Holly Barker, *Guardians' Dark Side: Lax Rules Open the Vulnerable to Abuse: Part I: The Profiteers*, BLOOMBERG (Mar. 6, 2023, 5:00 AM), https://news.bloomberglaw.com/interactive/guardians-dark-side-lax-rules-open-the-vulnerable-to-abuse?utm_source=twitter&utm_medium=lawdesk&campaign=5F733FEC-21EF-11EE-B5C7-FCDCCE1A27A3 [<https://perma.cc/28MP-TU8Z>].

357. Repair, *supra* note 321.

available familial relatives or community ties as legitimate conservator appointees, as Katherine Carter's case demonstrates.³⁵⁸

B. Conservatorship as Population Control and Risk Management

Today states continue to see conservatorship as a legitimate state tool within their police powers to manage difficult populations that threaten public safety. While conservatorship as governance today has a different design and look and may be justified legally under a different set of powers or legal theories, the elements of the earlier population management persist. Conservatorship over the person or property traditionally fell under the state's *parens patriae* authority to protect the individual from others;³⁵⁹ today, the state may deploy conservatorship as a governance tool under its police powers to protect the public from a disabled person who poses a danger to themselves or others.

The shift was necessary and, indeed, possible, because of the evolution of constitutional and societal norms that required different legal theories to justify state action coupled with the fundamental malleability of disability as a legal category.³⁶⁰ When Black Americans were considered property, probate laws and courts did much more of the heavy regulation of the racialized bodies, movement, and labor. Post-Reconstruction, however, probate courts lacked a jurisdictional hook because there was often no tangible and independent property at issue. However, in the case of Native Americans, federal, state, and private actors extracted resources and depleted land. Today, some diagnoses of intellectual, developmental or psychosocial disabilities still offer a legal pathway to conservatorship over the person. The center of gravity shifted with criminal and quasi-criminal laws such as civil commitment. State and private actors could exercise jurisdiction over people with mental and psychosocial disabilities through civil commitment to compel treatment in their best interests and/or in society's best interests to advance public safety.

358. *Id.*; see also *Advocacy*, CTR. FOR EST. ADMIN. REFORM, <https://www.cejrjustice.org/advocacy> [<https://perma.cc/LL8Q-48JW>]; *supra* Part III.A.

359. See *supra* Parts I and II.

360. While state action on the basis of other protected classes—race, gender, sexuality—receives heightened constitutional scrutiny, the U.S. Supreme Court held in *City of Cleburne v. Cleburne Living Center* that state action on the basis of disability receives only rational basis review, offering states great discretion in regulating on the basis of disability. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

Civil commitment and conservatorship in probate law have different procedural and substantive requirements and derive from different sides of state power. Yet the two have overlapping goals and targets: the former, to secure involuntary treatment for someone in imminent danger and the latter, to appoint a substitute decision maker for someone mentally incapable of managing self-care or financial matters. The “least restrictive alternative” standard³⁶¹ in mental health law together with pivotal deinstitutionalization cases such as *Olmstead v. L.C.*³⁶² and *Addington v. Texas*³⁶³ ushered in state laws and policies, such as assisted outpatient treatment programs.

California’s recent rollout of the Community Assistance, Recovery, and Empowerment (CARE) Courts, a derivative of assisted outpatient treatment programs, illustrates the contemporary use of conservatorship as population control to respond to perceived public safety risks.³⁶⁴ Aiming, at least in theory, to avoid more restrictive downstream restraints on liberty such as psychiatric institutionalization, incarceration, or conservatorship, the law still incorporates conservatorship as part of its core design.³⁶⁵ The courts predicate success on the respondents’ ability to perform capacity according to norms and demonstrate access to resources systematically inaccessible or unavailable to them. Once a court approves an initial petition, the respondent must agree to a court-monitored treatment plan. Should the respondent fail to meet that plan for whatever reason, including the inability to procure a service provider in a state with an active mental health service provider

361. See *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) (establishing the least restrictive alternative standard).

362. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Amendments to the Medicaid rules allowed for Medicaid recipients to apply for Home and Community Based Services waivers to receive their treatment as outpatients in community settings rather than as inpatient residents in hospitals and institutions. See also Amy Allbright, Frederick Levy & Nisha C. Wagle, *Outpatient Civil Commitment Laws: An Overview*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 179 (2002) (describing the history of assisted outpatient treatment laws).

363. 441 U.S. 418 (1979); see also HANNAH-ALISE ROGERS, CONG. RSCH. SERV., R47571, INVOLUNTARY CIVIL COMMITMENT: FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS (2023).

364. Other states and localities have attempted similar programs. See, e.g., Giulia Heyward, *NYC Mayor Adams Faces Backlash for Move to Involuntarily Hospitalize Homeless People*, NPR (Nov. 30, 2022, 6:14 PM), <https://www.npr.org/2022/11/30/1139968573/nyc-mayor-adams-faces-backlash-for-move-to-involuntarily-hospitalize-homeless-pe> [<https://perma.cc/PMT6-87WJ>] (describing program in New York City).

365. See *CARE Court FAQ*, CAL. HEALTH & HUM. SERVS. (2022), https://www.chhs.ca.gov/wp-content/uploads/2022/03/CARECourt_FAQ.pdf [<https://perma.cc/AVP8-3TAS>] (“CARE Court is an upstream diversion to prevent more restrictive conservatorships or incarceration; this is based on evidence which demonstrates that many people can stabilize, begin healing, and exit homelessness in less restrictive, community-based care settings.”).

shortage, the court may begin the conservatorship process with the evidentiary presumption that the respondent failed to meet the agreed upon treatment, and thus could not succeed under less restrictive circumstances.

SB 1338 passed through the California legislature with bipartisan support as a dual policy solution to address the mental health and homelessness crises in the state which disproportionately affect people of color.³⁶⁶ The CARE courts do not offer any substantive services; instead, the legislation creates a judicial process for court-ordered and managed outpatient treatment. Though billed as an upstream intervention to give people in crisis much needed services, and there is a shortage of mental health services across the state,³⁶⁷ this law does not provide new state budget line items for the expansion of housing, the mental health workforce, or community-based mental health services.³⁶⁸ Margot Kushel, Director of the Benioff Homelessness and Housing Initiative described her frustration with the program: “There’s a new door being built onto a small house . . . [t]here’s no square footage, there’s no nothing, just a new door.”³⁶⁹

Consider notable parallels exist between the early use of conservatorship as governance of Native and Black Americans and the CARE Courts today. First, the program turns on the vagaries of disability as a placeholder for normative conceptions of incapacity, and its categorical applicability, here, to medicalized, diagnostic categories of schizophrenia and other serious psychiatric disabilities. Second, although not specifically targeting people of color, unhoused people in California are disproportionately Black Americans: Black Californians represent 7 percent of the total population but comprise

366. See Press Release, Governor Gavin Newsom, California Senate Votes to Support CARE Court, as Leading State Business Organizations Join Expanding Coalition (May 25, 2022), <https://www.gov.ca.gov/2022/05/25/california-senate-votes-to-support-care-court-as-leading-state-business-organizations-join-expanding-coalition> [https://perma.cc/Q6EE-ACTK] (noting that the California Senate voted 38–0 to approve the Care Courts).

367. See SIMON VUE, ADDRESSING CALIFORNIA’S BEHAVIORAL HEALTH WORKFORCE SHORTAGE 3 (2022), https://www.csus.edu/college/social-sciences-interdisciplinary-studies/public-policy-administration/_internal/addressing-cas-bh-workforce-shortage_svue_5.4.2022.pdf [https://perma.cc/3M47-ZUQS] (“Today, roughly eight million Californians, the majority of whom are Latino, Black, and Native American, live in Mental Health Professional Shortage Areas (MHPSAs), a federal designation for geographic regions, populations, or facilities experiencing a shortage of mental health professionals.”).

368. Jocelyn Wiener & Manuela Tobias, *CARE Court: Can California Counties Make It Work?*, CAL MATTERS (July 14, 2022), <https://calmatters.org/health/2022/07/care-court-california> [https://perma.cc/86VX-739W] (“While the new budget deal includes \$65 million this year and \$49 million in ongoing annual funding to cover training, court costs and legal representation, counties say the proposal doesn’t include any new funding for housing or services.”).

369. *Id.*

26 percent of unhoused people statewide.³⁷⁰ Moreover, research suggests that Black Americans are over- and mis-diagnosed with schizophrenia or other serious psychosis when they may experience other more common mood disorders such as depression.³⁷¹ Racism is a major contributor to these phenomena.³⁷² Third, the CARE Act grants standing to a broad group of interested parties who can petition to bring racialized individuals with disabilities within the court's jurisdiction.³⁷³ Much broader than the permissible petitioners in the context of probate, civil commitment, and

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370. KARA YOUNG PONDER, TIANA MOORE, SILA ADHININGRAT, REGINA SAKODA & MARGOT KUSHEL, BENIOFF HOMELESSNESS & HOUS. INITIATIVE, TOWARD EQUITY: UNDERSTANDING BLACK CALIFORNIANS' EXPERIENCES OF HOMELESSNESS IN THE CALIFORNIA STATEWIDE STUDY OF PEOPLE EXPERIENCING HOMELESSNESS 3, 4 (2024) (reporting that although Black Californians represent 7 percent of the total population, they comprise 26 percent of unhoused people across the state and that Black people had "a higher prevalence of severe mental health symptoms and problems than members of other racial groups."); *see also* Sam Levin, *California's Homelessness Crisis Is the Worst in the US. But Who Is Struggling the Most?*, THE GUARDIAN (Dec. 19, 2023), <https://www.theguardian.com/us-news/2023/dec/19/california-us-street-homelessness-youth-unsheltered-annual-report> [<https://perma.cc/635N-TSDY>] (detailing that California has the greatest share of its homelessness population living outdoors relative to other states at 68 percent); *The Sunday Story: Mental Health Care Goes to Court*, NPR (Jan. 14, 2024, 3:00 AM), <https://www.npr.org/2024/01/14/1198910282/mental-health-care-goes-to-court> [<https://perma.cc/8F5Q-TQAB>].
371. *See, e.g.*, Michael A. Gara, Shula Minsky, Steven M. Silverstein, Theresa Miskimen & Stephen M. Strakowski, *A Naturalistic Study of Racial Disparities in Diagnoses at an Outpatient Behavioral Health Clinic*, 70 PSYCHIATRIC SERVS. 130, 132 (2019) (concluding that "among individuals diagnosed as having schizophrenia, African Americans were significantly more likely than non-Latino whites to screen positive for moderately severe to severe depression").
372. *See generally* JONATHAN M. METZL, THE PROTEST PSYCHOSIS: HOW SCHIZOPHRENIA BECAME A BLACK DISEASE (2009) (discussing the shift in diagnostic criteria for schizophrenia in the second edition of the Diagnostic and Statistical Manual to reflect a masculine belligerence that coincided with the rise of the Civil Rights movement in the United States); *see also* Ramenda Cyrus, *How Race Bends Science*, AM. PROSPECT (Dec. 6, 2023), <https://prospect.org/health/2023-12-06-how-race-bends-science> [<https://perma.cc/BP9U-ZJDA>] (discussing the social constructedness of schizophrenia and other psychiatric disabilities).
373. This is not the first time that states have expanded standing as part of a policy response to hard to manage populations. Families and other interested parties lobbied for expanded standing to petition for involuntary treatment of people with severe opioid use disorders. *See, e.g.*, Leo Beletsky, Elisabeth J. Ryan & Wendy E. Parmet, *Involuntary Treatment for Substance Use Disorder: A Misguided Response to the Opioid Crisis*, HARV. HEALTH PUBL'G (Jan. 28, 2018), <https://www.health.harvard.edu/blog/involuntary-treatment-sud-misguided-response-2018012413180> [<https://perma.cc/5D4R-BFUM>]; Philip Marcelo, *Use of Forced Rehab on the Rise in Opioid Addiction Battle*, NBC WASH. (May 23, 2018, 7:34 AM), <https://www.nbcwashington.com/news/national-international/forced-rehab-opioid-addiction-battle-data-analysis/150775> [<https://perma.cc/QRD5-GPJ4>].

other assisted outpatient treatment laws, the CARE Act allows petitions from family, friends, roommates; the director of a hospital where the respondent received treatment; the director of a public or charitable organization, agency, or home which has provided behavioral services to the respondent; licensed behavioral health professionals supervising or providing treatment; “a first responder” broadly defined to include “a peace officer, firefighter, paramedic, emergency medical technician, mobile crisis response worker, or homeless outreach worker, who has had repeated interactions with the respondent in the form of multiple arrests, multiple detentions and transportation”; the public guardian or public conservator of the county in which the respondent is present or reasonably believed to be present; the director of a county behavioral health agency; director of county adult protective services; director of a California Indian Health Services program or tribal behavioral health department; the judge of a tribal court located in California; or the respondent.³⁷⁴

Governor Gavin Newsom’s experiment has a captive audience. States across the country watch the early rollout of the CARE Courts as a potential model. For example, New Mexico Governor Michelle Lujan Grisham recently announced her support for amendments to the Assisted Outpatient Treatment (AOT) Act which, like the CARE Courts, centers state court judges in managing the treatment of those with certain mental health disabilities and offers court-ordered conservatorship as a key legal tool in the purported management of care for disabled people.³⁷⁵

IV. IMPLICATIONS

How is it that so many people could end up in prison without major debates regarding the efficacy of incarceration?

ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 11 (2003)

374. CAL. WELF. & INST. CODE § 5974 (West 2023).

375. See N.M. STAT. ANN. §§ 43-1B-1 to -14 (2023); HOLLY AGAJANIAN, CHIEF GENERAL COUNSEL, OFF. OF N.M. GOVERNOR MICHELLE LUJAN GRISHAM, ASSISTED OUTPATIENT TREATMENT ACT (2021), <https://www.nmlegis.gov/handouts/CCJ%20060524%20Item%2010%20Assisted%20Outpatient%20Treatment.pdf> [<https://perma.cc/DB4S-KDBC>]; Alyssa Munoz, *New Mexico Courts Could Soon Be Allowed to Have Someone Undergo Mental Health Treatment*, KOAT ACTION 7 NEWS (June 10, 2024, 10:16 PM), <https://www.koat.com/article/new-mexico-courts-could-soon-be-allowed-to-have-someone-undergo-mental-health-treatment/61063949> [<https://perma.cc/TV89-9ZCE>].

Part IV has three primary goals. First, it considers the implications of the historical and contemporary examples of conservatorship as governance discussed in Parts II and III. Second, it asks the first order question reflected in Angela Davis's opening quotation: How can so many people be confined to conservatorships without major debate about the legitimacy of conservatorship as a legal institution? The number of people under conservatorship nationally, unlike the number of people incarcerated, is unclear and underreported.³⁷⁶ While conservatorship and incarceration certainly differ, liberty and dignity interests run through each institution and yet our public knowledge and discussions differ in these two distinct areas. The opening quote challenges us to ask with precision: what is the actual problem we are trying to solve through conservatorship? Third, this Part then puts the lessons in this Article in conversation with the current debates on conservatorship reform to frame the problems scholars identify and the solutions that flow from the problem identification. I argue that the flaws identified as targets of reform may actually be core features of the system that have served to control and allocate economic and political power. As such, scholarly prescriptions that focus on access, accountability, and procedural due process (as much of the literature does almost exclusively) have not (and are unlikely to) radically change the system's operation. This Part concludes with a discussion of why abolition ought to be a part of the current debates and the benefits of bringing conservatorship into existing discussions about racial injustice, disability, and carcerality taking place in other spaces.

A. Disability as a Legal Category

This Article has argued that conservatorship as an institution has always been about money and power whether or not the prospective conservatee holds typical wealth assets such as property. Disability's social construction and malleability, however, have contributed to its sustainability as a legal category. As historians Douglas Baynton and Kim Nielsen have argued, disability is a blended concept, always doing other work.³⁷⁷ In the

376. See Harris, *supra* note 332, at 1715 ("The public interest in transparency in [conservatorship] cases is high given repeated allegations of conservator abuse and overly broad grants of plenary conservatorship.").

377. See Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33, 33 (Paul K. Longmore & Lauri Umansky eds., 2001) ("Disability has functioned historically to justify inequality for disabled people themselves, but it has also done so for women and minority groups. That

conservatorship context, we need to see disability and race as operating together, the construction of their socioeconomic and political meanings intimately tied.³⁷⁸

Yet disability in the history examined in this Article did not operate in the highly medicalized way we understand it today. This is why we see the history of conservatorship within probate as individualized, separate and apart from conservatorship's collective governance function. Disability in the modern sense was not the primary basis for exercising jurisdiction over their person or property. Perhaps there was some blurring of the lines but the state or its agents in the context of conservatorship for Native and Black Americans did not assert that a particular Black American or Native American was mentally ill, instead, the assertion was one of distrust of a group of racialized persons, not perceived as equals from whom the state and private actors wished to extract their labor, land, or bodies. The decision to bind them to a white guardian was about power and resources and not disability as we understand this term today. The Anglo-American probate system offered a familiar, well-known and accepted set of legal constructions consistent with a developing democracy such as due process and neutral dispute resolution. Today, a medicalized category of disability does the major public work of governance still through conservatorship situating medical expertise at the heart of contemporary determinations of incapacity.

Conservatorship, presumed to be a legitimate device of governance, operated stealthily in major historical examples of marginalization and social control. This Article focuses on maintenance of slavery in the antebellum South and Native American land dispossession and allotment, but the device also played a role in denials of reproductive freedom, such as in the context of eugenics and the Supreme Court's infamous 1927 opinion, *Buck v. Bell*.

Guardianship played an important role in the story of the plaintiff in *Buck v. Bell*,³⁷⁹ Carrie Buck, a poor white woman. The Virginia Sterilization Act, the legislation at the center of this case, contained, by design,³⁸⁰ robust

is, not only has it been considered justifiable to treat disabled people unequally, but the concept of disability has been used to justify discrimination against other groups by attributing disability to them.”). See generally KIM E. NIELSEN, A DISABILITY HISTORY OF THE UNITED STATES (2012).

378. See generally Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 HARV. C.R.-C.L. L. REV. 663 (2023) (discussing the co-constitutive nature of race and disability in law); Jasmine E. Harris, *Reckoning With Race and Disability*, 130 YALE L.J.F. 916 (2021); Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683 (2021).

379. 274 U.S. 200 (1927).

380. *Buck v. Bell* was a test case from its inception intended to test the constitutionality of the Virginia Sterilization Act.

due process protections for the person subject to involuntary sterilization. Specifically, with respect to notice and consent, the Act said that individual wards of the state and their guardians would receive notice of recommendations for compulsory sterilization and that determination could be appealed. To protect the interests of the person subject to sterilization, a guardian would be appointed and paid for by the state if the individual did not already have one. Carrie Buck's appointed guardian, Robert G. Shelton, had personal relationships with the key actors driving the test case on behalf of the state of Virginia.³⁸¹ Shelton appealed the sterilization order at the express request not of Carrie Buck but of Virginia legislator, Aubrey Strode, drafter of the Virginia Sterilization Act, and Dr. Albert Priddy, the Superintendent of the Virginia Colony for the Epileptic and Feebleminded, where Buck was committed, and which sought permission to involuntarily sterilize Buck and other residents at the institution.³⁸² The due process protections provided the pathway to the Supreme Court for Strode, Priddy and other eugenicists looking to reinvigorate the eugenics movement by statutorily codifying its methods.

Legal historian Paul Lombardo, whose invaluable work on *Buck v. Bell* has helped elucidate the ways in which the test case was masterfully orchestrated by powerful and politically connected eugenicists in Virginia, reflects on Buck's guardian, Robert Shelton, and the extractive nature of guardianship, two important but rarely discussed issues in the literature on this case:

By statute, Shelton was paid [by the state] for representing the interests of patients scheduled for sterilization This provision of the Virginia law eventually provided a comfortable side income for Shelton. For at least ten years, he was the only person designated as guardian of Colony inmates, and often appeared at sterilization hearings to represent as many as twenty-five patients

381. Shelton was appointed guardian ad litem for the purpose of the proceeding by the Circuit Court of Amherst County on July 24, 1924. *See, e.g.,* Walter Berns, *Buck v. Bell: Due Process of Law?*, 6 W. POL. Q. 762, 765 (1953). Shelton received service of process and notice of the sterilization pursuant to the VA Sterilization Act of 1924, 1924 Va. Acts 569, 569–71. *See also* PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 101–02 (2008); *noted in* Jasmine E. Harris, *Commentary: Buck v. Bell*, 274 U.S. 200 (1927), in *FEMINIST JUDGMENTS: REPRODUCTIVE JUSTICE REWRITTEN* 15 (Kimberly M. Mutcherson ed., 2020).

382. *See* Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1457 (1981). Shelton was appointed guardian ad litem for the purpose of the proceeding by the Circuit Court of Amherst County on July 24, 1924. Berns, *supra* note 381, at 765.

simultaneously So little work was involved that Shelton agreed to accept less than the statutory amount regardless of the number of patients he represented [In fact, w]hile still serving as a guardian, Shelton later became a judge of the Juvenile and Domestic Relations Court of Amherst County.³⁸³

Another insight into institutional designs that allow for self-dealing, after representing Dr. Priddy and the Virginia Colony in *Buck v. Bell*, Aubrey Strode became a judge of the Lynchburg Corporation Court.³⁸⁴ According to Paul Lombardo's research, "[Strode] at times . . . was called upon to approve the appointment of guardians for sterilization proceedings at the Colony."³⁸⁵ Shelton, Strode, and Priddy, among others, were repeat players in the system who strategically deployed guardianship and other due process guarantees to label poor white women (and men) like Carrie Buck as disabled and incapacitated and extract labor and other resources from them. Like the pipeline of guardians to public service positions of power and prestige in colonial New England, Shelton's service as conservator may have contributed to his access to top public service positions.

When we examine conservatorship's history alongside the present examples in Part III, we see the same patterns of racial and gender subordination, racism, white supremacy, fictitious claims of independent legal institutions shrouded in procedural rather than substantive due process, and extraction of labor and wealth alongside neoliberal and capitalist pressures. Despite periods of reform, certain elements—such as broad public standing (including that extended to law enforcement) to petition the court, broad judicial discretion, medical expertise required for capacity determinations, the shroud of privacy around the institution (lack of data, public participation and institutional accountability), frames of benevolence and care and designs that require the person at the heart of the proceedings to fund its operation, use of lawyers as meaningful proxies for procedural fairness—persist in the operation of this legal institution in all of its forms.³⁸⁶ The longevity and

383. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U.L. REV. 30, 49 n.103 (1985) (citations omitted).

384. Obituary, *Judge Aubrey E. Strode; Virginia Jurist, State Ex-Senator, Once on Pershing's Staff*, N.Y. TIMES, May 18, 1946, at 19.

385. Lombardo, *supra* note 381, at 58.

386. Though this Article focuses on conservatorship in the context of probate and its history in public governance, other forms of conservatorship may share the same extractive elements and rich histories, for example, conservatorship over children, women, or mismanaged, abandoned, or blighted property including cities such as Detroit, Michigan (also known as receivership). Such exploration, however, is beyond the scope of this paper.

stickiness of these elements suggest that rather than flaws, they are core, deeply rooted features of conservatorship's institutional design that help explain its institutional longevity. The next Section turns to the current debates about conservatorship reform and argues that failure to understand the history discussed in this paper may lead scholars and lawmakers to narrowly focus on institutional reforms that reinforce the extractive features without asking critical questions about the utility and legitimacy of conservatorship as a legal institution.

B. Conservatorship Reform and Current Scholarly Interventions

Conservatorship as an institution largely escaped public scrutiny and calls for reform until the late 1970s when the public received a window into the horrors of largescale residential institutions for people with intellectual and developmental disabilities, for example through Geraldo Rivera's expose of the Willowbrook State School in Staten Island, New York.³⁸⁷ Since then, scholars, journalists, activists, and government agencies periodically scrutinize guardianship, often in response to publicized incidents of financial mismanagement by guardians.

1. Federal and State Reform Efforts

In addition to Geraldo Rivera's reporting on Willowbrook, another example of media publicity igniting the public's interest in guardianship reform came in 1987 when the Associated Press published a six-part series titled "Guardians of the Elderly: An Ailing System;" the series was the end result of a year-long national investigation of guardianship.³⁸⁸ The following year, Congress held hearings on guardianship and the American Bar Association sponsored the first National Guardianship Symposium,

387. Pamela B. Teaster, Erica F. Wood, Susan A. Lawrence & Winsor C. Schmidt, *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 196–97 (2007); Harris, *supra* note 60, at 917 n.117 (2019) (quoting Geraldo Rivera's observations: "[T]he . . . smell of the place staggered me. It was so wretched that my first thought was that the air was poisonous and would kill me I saw . . . a grotesque caricature of a person, lying under the sink on an incredibly filthy tile floor in an incredibly filthy bathroom It was skinny. It was twisted. It was lying in its own feces Sitting next to this thing was another freak . . . making a noise. It was a wailing sound I said out loud, but to nobody in particular, 'My God, they're children.'") (citation omitted and alterations in original). For a discussion of the effects of privacy on antidiscrimination laws and public norms of disability, see Harris, *supra* note 332.

388. *Id.* at 197.

commonly known as the “Wingspread Conference.”³⁸⁹ These events triggered the first of three waves of guardianship reform focused principally on procedural due process and enhanced accountability for guardians.³⁹⁰ A second national convening on guardianship, fondly named the “Wingspan Conference,” took place in 2001 and committed to refining earlier procedural reforms; for example, in the period between 1989 to 2004, every state passed at least one minor reform to its guardianship laws.³⁹¹ Legislative reforms, however, did not always change how legal actors (judges, attorneys, and guardians) carried out their legal responsibilities in state guardianship proceedings.³⁹² For its part, likely the product of states’ exclusive jurisdiction over guardianship, federal participation in guardianship reforms have mostly emphasized education and awareness through public hearings and reports by federal committees and agencies such as Government Accountability Office,³⁹³ the U.S. Senate Special Committee on Aging,³⁹⁴ and the National Council on Disability.³⁹⁵

Internationally, the introduction of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) (adopted in 2006 and opened for signatories in 2007) and, domestically, the convening of the Third National Guardianship Summit in 2012 began a third wave of guardianship reform.³⁹⁶ The CRPD, though not ratified by the United States, greatly influenced domestic guardianship reform movements by shifting focus from a substituted decisionmaking model of guardianship—where the guardian assumes decisional authority for the ward—to a supportive decisionmaking model that centers the individual and offers different degrees of support to determine and execute an individual’s decisional wishes.³⁹⁷ The conservatorship of popstar Britney Spears and the Netflix film *I Care a Lot* (inspired by the abuses of a Nevada guardian) have also sparked new media

389. NAT’L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 56 (2018), <https://www.ncd.gov/report/beyond-guardianship-toward-alternatives-that-promote-greater-self-determination-for-people-with-disabilities/> [https://perma.cc/XHM5-EWFX]

390. *Id.* at 56–58.

391. *Id.* at 57.

392. *Id.* at 58.

393. *E.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS (2016), <https://www.gao.gov/assets/gao-17-33.pdf> [https://perma.cc/FH6L-4ZLR].

394. *E.g.*, S. REP. NO. 115-392 (2018).

395. *E.g.*, NAT’L COUNCIL ON DISABILITY, *supra* note 390.

396. *Id.* at 59.

397. *Id.* at 60.

coverage and reform efforts.³⁹⁸ States such as California, Florida,³⁹⁹ and Nevada⁴⁰⁰ in recent years have taken a more active role in guardianship reform in response to media reports of guardianship abuse coming out of their states.

Contemporary reform proposals seek due process enhancements, often with the goal of reducing unnecessary or overly broad guardianships. Such process-based reforms, however, tend to privilege lawyers as key agents of change. However, centering lawyers in this way narrows the scope of potential interventions to calls for greater access to lawyers, for example, through a statutorily defined, categorical right to counsel (*civil-Gideon*) in conservatorship proceedings to establish, modify, or terminate guardianship or conservatorship. According to the National Coalition for a Civil Right to Counsel, eighteen states now have a categorical right to counsel in guardianship proceedings.⁴⁰¹ These states permit potential or existing conservatees to retain a lawyer of their choosing, or have a lawyer assigned to them by the court.⁴⁰² Some states express a preference for attorneys from civil legal aid or public defender organizations when appointing counsel in conservatorship proceedings; in Nevada, for instance, the Legal Aid Center of Southern Nevada's Guardianship Advocacy Program represented nearly 3000 clients in 2020 alone and avoided or terminated guardianships in nearly half of the cases their attorneys closed.⁴⁰³ Lawyers certainly have an important role to play in

398. See Sam Levin, *After Britney Spears Testimony, Lawmakers Push Changes to Conservatorship Laws*, THE GUARDIAN (July 2, 2021), <https://www.theguardian.com/law/2021/jul/02/britney-spears-court-testimony-conservatorship-reform> [https://perma.cc/CW7N-7R2V]; Samuel Spencer, *'I Care a Lot': The Shocking True Stories Behind the Netflix Movie*, NEWSWEEK (Feb. 24, 2021, 7:25 AM), <https://www.newsweek.com/i-care-a-lot-real-life-true-story-marla-grayson-1571600> [https://perma.cc/D8PU-FP6D].

399. See generally Hung V. Nguyen & Stacy B. Rubel, *The Shifting Landscape of Guardianship Law: Three Consecutive Years of Changes*, 90 FLA. B.J. 52 (2016).

400. E.g., *Nevada Legislature Rewrites Guardianship Law to Strengthen Right to Counsel*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (NCCRC) (June 5, 2017), https://civilrighttocounsel.org/major_developments/nevada-legislature-rewrites-guardianship-law-to-strengthen-right-to-counsel/ [https://perma.cc/8UXB-X646].

401. NCCRC, *State Status Map*, <http://www.civilrighttocounsel.org/map> [https://perma.cc/L5CK-LKR4]. Select "Right to Counsel Status" and "Guardianship/Conservatorship of Adults – Protected Person" as the subject matter. Then, hover over states for more information.

402. See, e.g., NEV. REV. STAT. § 159.0485 (2023).

403. LEGAL AID CTR. OF S. NEV., 2020 ANNUAL REPORT (2020), https://www.lacsn.org/images/annual-reports/lacsn_annual_report_2020.pdf [https://perma.cc/T4U2-7SHV]. But cf. ALAMEDA CNTY. BOARD OF SUPERVISORS, 2021–2022 ALAMEDA COUNTY GRAND JURY FINAL REPORT

guardianship reform and a clear statutory right to counsel may be particularly important in guardianship cases because the threat to statutory and constitutional rights is quite high and yet given their seemingly low public profile, the longevity of these cases, and low fees available, attorneys may be less willing to take these cases.⁴⁰⁴

This Article, however, challenges reformers to think about the problem they are trying to solve and how this may itself be limiting. By defining the problem as too many guardianships or overly broad guardianships, reformers assume the system itself is legitimate and necessary to support the decisionmaking of people with diminished capacity. But is this correct?

In addition to the appointment of counsel, other procedural reforms have focused on shifting evidentiary and administrative burdens away from potential or existing conservatees to other legal actors such as courts, lawyers, or conservators. For example, instead of requiring a ward to request termination of guardianship, California law was recently changed, in response to publicity around Britney Spears's thirteen year conservatorship, to place a continuing duty on courts and their investigators to assess whether a conservatorship remains appropriate, or whether it should be terminated or modified to make it less restrictive.⁴⁰⁵ An initial order of conservatorship may grant the conservator plenary authority over both the person and the estate. California's new provision shifts the burden to the court to periodically review the case and determine whether a limited conservatorship that grants the conservator limited authority is more appropriate—one that specifies in the court order those decisions under conservatorship (for example, medical decisions) and leaving all other decisional rights not specifically enumerated in the hands of the conservatee. California also recently amended its conservatorship laws to better protect the property of conservatees, most importantly, their homes. A conservator must proffer clear and convincing evidence of a compelling need for the sale of the home before a court can authorize the conservator's sale of a conservatee's

53 (2022), <https://cao-94612.s3.amazonaws.com/documents/Item-7c-GrandJury.Report.2022.pdf> [<https://perma.cc/5VCJ-HA5S>] (describing the limited capacity of the County Public Defender, who is tasked with representing indigent clients in conservatorship proceedings). Like all legal service provision to low-income clients, guardianship defense requires adequate funding to protect individual rights.

404. Maria de los Angeles Reyes Olmedo, *Overprotected but Unrepresented: An Argument for Mandatory Appointment of Counsel and Against Automatic General Conservatorships in California*, 56 LOY. L.A. L. REV. 369, 400 (2023).

405. See 2021 Cal. Stat. ch. 417.

home.⁴⁰⁶ Relatedly, another amendment removes a court's ability to waive certain prerequisites to the sale of the home, including the requirement for an appraisal as a means of additional protection for the conservatee.⁴⁰⁷ Another popular state level reform is the creation or promotion of a robust continuum of alternative, less restrictive interventions than guardianship (using contract law) with the goal of positioning court-ordered guardianship as an intervention of last resort. Article V of the Uniform Guardianship, Conservatorship, and Other Protective Proceedings Act, for example, empowers judges to create protective agreements that would allow nursing homes to acquire necessary personal and medical information for Medicaid applicants with suspected or actual diminished capacity without resorting to guardianship.⁴⁰⁸ However, only a handful of states have adopted Article V.⁴⁰⁹ A related less invasive intervention, volunteer advocate programs, such as the CARE Volunteer Advocates Program in Marion County, Indiana, trains volunteers to serve in similar roles as health care proxies to individuals requiring additional decisionmaking support without resorting to expansive (and expensive) court-ordered guardianship.⁴¹⁰

2. Legal Scholarship

The scholarly literature on conservatorship almost exclusively focuses on issues within the legal institution rather than on the institution's inherent legitimacy. These analyses can be roughly organized into three categories of institutional challenges: (1) operational (including bad system actors); (2) legal (breadth, and scope of conservatorship); and (3) social norms underwriting the operation of the system. Debates, then, mostly concern the proper intervention points and prescriptions to reform state systems,

406. 2019 Cal. Stat. ch. 847.

407. *Id.*

408. See UNIF. L. COMM'N, UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT (2017), <https://www.guardianship.org/wp-content/uploads/2018/04/UGCOPAA-Summary-Oct-2017.pdf> [<https://perma.cc/6UYL-UFCA>].

409. Nine states have adopted Article V. Patrick Hecker, Note, *Legally Alone: The Redeemability of Guardianship and Recommendations Toward Equitable Access*, 18 NW. J.L. & SOC. POL'Y 74, 98–99 (2023).

410. Thaddeus Mason Pope, *Unbefriended and Unrepresented: Better Medical Decision Making for Incapacitated Patients Without Healthcare Surrogates*, 33 GA. ST. U. L. REV. 923, 981–82 (2017).

restrict their use, and develop alternatives to guardianship as the first line of defense.⁴¹¹

Much of the legal scholarship on conservatorship critiques the internal operation of existing systems once a person is under the court's jurisdiction. Despite decades of reform efforts (discussed above), conservator misconduct—such as financial, emotional, or physical abuse; exploitation; or even death of the conservatee—continues to be a primary concern and one, at times, attracting media attention.⁴¹² Operational shortcomings include a failure to properly screen prospective guardians and conservators⁴¹³ or the court's failure to monitor the relationship between conservators and conservatees for abuse because of constraints on resources, court capacity, and the absence of meaningful data collection.⁴¹⁴ Although some courts collect limited data on filings and dispositions, they generally lack data that could improve conservator oversight or reveal information about operational inequities.⁴¹⁵ Even if a judge can identify a potential bad actor, state courts lack meaningful accountability mechanisms to shift the inherent

411. The principal scholarly debate has largely collapsed into the use of supported decisionmaking and conservatorship where advocates and scholars tend to set up a tiered or binary prescription—conservatorship as a last resort for “the most severe” cases and supported decisionmaking as the default alternative to conservatorship. The scholarship engaging with international laws like the UN CRPD comes closest to prescribing abolition given an interpretation of Article 12 of the CRPD that would prohibit states from having any court-ordered conservatorships as a legal tool. *See, e.g.*, G.A. Res. 61/106, Convention on the Rights of Persons With Disabilities (Dec. 13, 2006); Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People With Disabilities*, 35 *TOURO L. REV.* 301, 309, 339 n.172 (2019).

412. *See* Kellen Dykstra, *Guardians of the Elderly: Not Always So Heroic, and Sometimes, Unnecessary and Abusive*, 30 *ELDER L.J.* 383, 389–94 (2023); Berenice Quirino, *Toxic: The Case of Britney Spears Sheds Light on Issues With California Conservatorship Laws*, 52 *GOLDEN GATE U. L. REV.* 217, 219 (2022); Ashleigh M. Zurek, *Beyond #FreeBritney: A Legal Analysis of the Conservatorship System in the United States*, 43 *N. ILL. U. L. REV.* 21, 30–37 (2022); Morgan R. Thurston & Georgia J. Anetzberger, *Addressing Abuse by Guardians: The Roles of Adult Protective Services, Law Enforcement, and the Courts*, 72 *SYRACUSE L. REV.* 369, 373–74 (2022); Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 *NAELA J.* 33 (2021); Jeffrey Bausch Jr., *Who Watches the Watchmen? Conservatorship Reform in Connecticut Misses the Mark*, 32 *QUINNIPIAC PROB. L.J.* 277, 280–82 (2019).

413. *See* Dykstra, *supra* note 412, at 392 (noting that current procedures often permit “individuals with criminal convictions and/or significant financial problems to manage estates worth hundreds of thousands or even millions of dollars”).

414. *See* Heisz, *supra* note 412, at 45.

415. *See* Dari Pogach & Christopher Wu, *The Case for a Guardianship Court Improvement Program: Federal Funding to State Courts Could Improve Guardianship Systems & the Lives of Millions of Older Adults & People With Disabilities*, 72 *SYRACUSE L. REV.* 495, 510 (2022).

power dynamics and disincentivize abuse or self-dealing, reminiscent of the operation of conservatorship in the early American colonies when the General Courts would simply replace bad actors after their investigations found self-dealing, negligence, or intentional misconduct. Furthermore, abuse and misconduct may proliferate because of ineffective interagency communication about bad actors, privacy walls, and the existence of repeat players and cottage industries of professional guardians. Adult Protective Services, law enforcement, and state courts, for instance, all have key oversight roles to play but may be siloed, unable to preemptively monitor and failing to collaborate when issues do arise.⁴¹⁶

Beyond individual conservator misconduct, legal scholars have also repeatedly expressed concerns about the high degree of operational variation across state guardianship and conservatorship systems. Although many states have passed supported decisionmaking statutes as alternatives to guardianship,⁴¹⁷ they can (and do) reach different statutory conclusions about the proper legal relationship between informal or even more structured supported decisionmaking arrangements and the formal conservatorship process.⁴¹⁸ This high degree of variation not only means that a person's legal rights can change greatly depending on their state of residence, but also complicates and may undermine broader reform efforts.⁴¹⁹ Scholars across the different waves of conservatorship reform efforts have critiqued this broad variation across states and, although forty-six states have now passed some version of the Uniform Guardianship Act,⁴²⁰

416. See Thurston & Anetzberger, *supra* note 412, at 371.

417. See, e.g., 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, 157–58 (2010); Leslie Salzman, *Guardianship for Persons With Mental Illness—A Legal & Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279, 280 (2011); Pamela B. Teaster, *The Wards of Public Guardians: Voices of the Unbefriended*, 51 FAM. RELS. 344, 349 (2002).

418. See Rachel Mattingly Phillips, *Model Language for Supported Decision-Making Statutes*, 98 WASH. U. L. REV. 615, 616 (2020); Emily A. Largent & Andrew Peterson, *Supported Decision-Making in the United States and Abroad*, 23 J. HEALTH CARE L. & POL'Y 271, 284 (2021).

419. See Largent & Peterson, *supra* note 418, at 284.

420. Heather Kirson, Howard Krooks & Melissa Williams, *Uniform Guardianship Would Strengthen Adult Protection in Florida*, BLOOMBERG L. (Mar. 15, 2023, 1:00 AM), <https://news.bloomberglaw.com/us-law-week/uniform-guardianship-would-strengthen-adult-protection-in-florida> [https://perma.cc/5BSC-R2TG].

differences in state terminology and practice continue to undermine standardization projects.⁴²¹

Taken together, the literature argues that despite reform efforts like the supported decisionmaking model and greater adoption of the Uniform Guardianship Act, continued limits on funding, data, and coordination often generate a wide gap between statutory and regulatory reforms and their day-to-day implementation.⁴²²

A second category of legal scholarship raises legal challenges to conservatorship under the U.S. Constitution, Americans with Disabilities Act (ADA),⁴²³ state constitutions,⁴²⁴ and international law.⁴²⁵ With respect to federal constitutional concerns, legal scholarship identifies procedural⁴²⁶ and substantive due process issues, such as right to counsel⁴²⁷ and federal jurisdiction;⁴²⁸ and, in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, access to abortion and related

421. See Sally Balch Hurme & Diane Robinson, *What's Working in Guardianship Monitoring: Challenges and Best Practices*, 72 SYRACUSE L. REV. 291, 336–40 (2022).

422. Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313, 350 (2021).

423. See, e.g., Alexandra Wallin, *Living in the Gray: Why Today's Supported Decision-Making-Type Models Eliminate Binary Solutions to Court-Ordered Guardianships*, 57 SAN DIEGO L. REV. 433, 463 (2020) (arguing such violations occur where “the individual is inappropriately placed into an institution, perpetually isolated, and not fully integrated within society”); see also Sydney J. Sell, *A Potential Civil Death: Guardianship of Persons With Disabilities in Utah*, 2019 UTAH L. REV. 215 (2019).

424. See, e.g., Hannah Shotwell, *More Than #FreeBritney: Remediating Constitutional Violations in Guardianship for People With Intellectual Disabilities*, 52 N.M. L. REV. 513 (2022) (arguing that New Mexico's state constitution protects the right of people with developmental disabilities to the least restrictive means of intervention).

425. See, e.g., Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons With Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8 (2012).

426. See Ally Seneczko, *Special Education, Guardianships, and Procedural Due Process*, 81 MONT. L. REV. 289 (2020) (arguing that Montana law around guardianship of special education fails the *Mathew v. Eldridge* balancing test); Tooba Naveed, *California's CARE Act: A Step Forward for Mental Healthcare, or a Step Back for Individual Liberties?*, 55 U. PAC. L. REV. 77, 80 (2023) (questioning, in the context of California's new CARE Court system, whether the due process protections—such as proof of state compelling interest, and narrow tailoring to unhoused people with schizophrenia—will be sufficient to protect the interests of respondents).

427. See Gabrielle Davis-Jones, *Probate Law—A New Guardian Angle: A Proposed Change to Arkansas's Public Policy on Guardianship for Individuals With Intellectual Disabilities*, 42 U. ARK. LITTLE ROCK L. REV. 279, 303 (2020) (arguing that Arkansas law should provide a right to counsel if the alleged incapacitated person is unable to financially afford legal counsel).

428. See David English, *Jurisdictional Conflicts in Adult Guardianship*, 97 TUL. L. REV. 743 (2023) (arguing that common law is ill-equipped to address challenges of modern guardianship because of jurisdictional issues due to mobility of both the guardian and person under guardianship).

healthcare.⁴²⁹ Conceptually, scholarship in this category contends that state conservatorship and guardianship systems are inappropriately placed in a legal vacuum, when they, in fact, intersect with a variety of other well-recognized and hotly contested legal concepts and protected rights, such as marriage,⁴³⁰ reproductive justice,⁴³¹ and end of life decisionmaking.⁴³² According to former probate court judge and legal scholar Kristin Booth Glen, conservatorship and guardianship systems are part of “a vast network of laws . . . that nevertheless require some specified level of mental capacity and that, accordingly, may serve to deprive legal capacity to adults to adults with disabilities who are not subject to guardianship.”⁴³³ This includes areas such as a voting, marriage, or reproductive autonomy.

A third category of current research on conservatorship argues that negative social norms about people with disabilities and older adults are deeply rooted in conservatorship law’s construction and interpretation. Facially neutral conservatorship laws, therefore, may “legally perpetuate and codify existing social issues”⁴³⁴ When people with disabilities under guardianship seek romantic relationships, for instance, they may face at least two incorrect assumptions: (1) that they do not desire marriage and are incapable experiencing sexual attraction or romantic love; and (2) that guardianship does (and can) protect people with intellectual and developmental disabilities from making poor or irrational choices.⁴³⁵ Additionally, many responses to elder abuse have been “distorted

429. *Dobbs v. Jackson Women’s Health Org.*, 597 US 215 (2022). See Devraat Awasthi, *Britney’s Prerogative: A Critical, Constitutional View of Conservatorships*, 75 OKLA. L. REV. 551 (2023); see also Powell, *supra* note 13, at 265–67 (discussing the constraints on bodily autonomy imposed by Britney Spears’s conservatorship).

430. See Marisa A. Leib-Neri, *Love, Marriage, & Neurodiversity: Using Neuroscience to Equalize Marriage Rights for People With Intellectual & Developmental Disabilities Under Guardianship Arrangements*, 108 IOWA L. REV. 1475 (2023).

431. See Edwin M. Boyer & Rebecca C. Morgan, *Maximizing Autonomy and Ensuring Accountability: Rights-Based Post-Appointment Issues in the “New Normal”*, 72 SYRACUSE L. REV. 41 (2022); Powell, *supra* note 13.

432. See Brenna M. Rosen, *Supported Decision-Making and Merciful Health Care Access: Respecting Autonomy at End of Life for Individuals With Cognitive Disabilities*, 80 WASH. & LEE L. REV. 555, 556 (2023).

433. Kristin Booth Glen, *Not Just Guardianship: Uncovering the Invisible Taxonomy of Laws, Regulations and Decisions That Limit or Deny the Right of Legal Capacity for Persons With Intellectual and Developmental Disabilities*, 13 ALB. GOV’T L. REV. 25, 26 (2020).

434. Margaret Bushko, Comment, *Toxic: A Feminist Legal Theory Approach to Guardianship Law Reform*, 81 MD. L. REV. ONLINE 141, 144 (2022).

435. Leib-Neri, *supra* note 430 at 1478.

by ageism”⁴³⁶ and in effect “infantilize the elderly.”⁴³⁷ These prevailing norms of aging and disability as infantilizing, incapacitating, and de-sexualizing not only affect the interpretation of the legal standards for incapacity in guardianship determinations but also the quality of life of those under guardianship.⁴³⁸

C. Institutional Flaws or Features?

One indication that an institutional design may not be a flaw but a feature is its receptiveness to reforms over time. Conservatorship reform efforts repeatedly have identified several of the flaws flagged in legal scholarship.

Critics identify flaws in the system, ways in which historically, the state has exercised jurisdiction improperly to remove decisional agency from those who do not need the most restrictive level of protection that conservatorship provides. The prescriptions, as a result, target bad actors in this system—private actors, conservators (especially professional fiduciaries), medical evaluators, lawyers, and judges—not the institutional design of conservatorship itself. For example, on the Michael Oher saga, Nina Kohn writes that this case lays bare the central problem with conservatorship: “[C]ourts unnecessarily strip people of their rights and then fail to monitor the risky arrangements they create.”⁴³⁹ Thus, the presumption here is that with certain reforms—federal oversight, state and local funding increases, accountability for judges and other system actors—the institution is redeemable. Importantly, the reform proposals can improve—and, in some cases, have already improved—the operation of conservatorship. But the current conversations assume that there is a set of reforms that will improve the operation of conservatorship to serve those who need this system’s protection and that the system, in fact, can protect rather than extract and subordinate.

436. Rebekah Diller & Leslie Salzman, *Stripped of Funds, Stripped of Rights: A Critique of Guardianship as a Remedy for Elder Financial Harm*, 24 U. PA. J.L. & SOC. CHANGE 149, 149 (2021).

437. Ralph C. Brashier, *Incapacity and the Infancy Illation*, 71 ARK. L. REV. 1, 2 (2018).

438. See generally Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift From Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495 (2016).

439. Nina A. Kohn, *Michael Oher’s Shocking Conservatorship Exposes Court Failures*, HILL (Aug. 23, 2023, 8:30 AM), <https://thehill.com/opinion/judiciary/4164229-michael-ohers-shockingly-unnecessary-conservatorship-exposes-court-failures> [<https://perma.cc/7YT3-47XH>].

Certainly, efforts to address these flaws could be ineffectively or incompletely executed, or they might improve the quality of life under conservatorship for some or even decrease the absolute number of people under state court jurisdiction. Evaluation of the merits of specific reforms and their impact are beyond the scope of this Article. Instead, this Article plants another possible explanation for the apparent stickiness of identified flaws: that they may be features of a system operating as it was designed to.⁴⁴⁰

D. Reframing the Questions: An Abolition Framework

So where does this leave us? Is conservatorship irredeemable?⁴⁴¹ This Article on its face is not an invitation to maintain or eliminate conservatorship. This is a question for public consumption and debate recognizing the high stakes involved—individual liberty interests, quality of life, safety, and security.⁴⁴² Any prescription must account for those interests and engage with a broad base of stakeholders centering the experiences of people with disabilities and older adults for long term sustainability and meaningful impact.

However, a first order question is what is the problem we are trying to solve? Is it how to provide decisional support for people in certain areas when they need it or when third party actors need a contractual safe harbor from liability for doing business with people with perceived or actual diminished capacity? Is it how to protect a person's agency when they encounter functional incapacity? Or is the problem one of capture, that is, how do we control and allocate power and who should get to manage their lives? The latter question requires us to consider whose decisions count and the normative baseline we use to judge qualitatively good versus poor decisions. Once we define the operative question (or questions), we can determine how best to answer it (or them).

Are there ways this cashes out that can inform new models of public governance? Can we shift, for example, from individual decisionmaking models to collective models like supported decisionmaking beyond the disability context? How might supported decisionmaking be seen as a

440. Evaluation of specific reform proposals is beyond the scope of this paper.

441. *C.f.* Hecker, *supra* note 409, at 95 (“While guardianship has issues, the reform movement’s singular focus on the pursuit of decreasing the number of guardianships out of a desire to stymie abuse does little to help those in need of a caring guardian. Despite the misgivings of the reform movement, access to guardianship deserves attention. The reality is that the need for caring guardians is simply too massive to ignore.”).

442. It is also a question I am currently exploring in other work.

limited reform on one hand or radical on the other? It is too soon to know, and this is not the process (or forum) for generating specific solutions. Again, this requires public debate. The value of this Article, however, is in reframing the questions on the table and bringing to that table more information about an institution with tremendous longevity precisely because it has been understood as benevolent, care-based, and flawed by individual bad apples and not an intentionally designed, well-operating, extractive structures necessary for our social, economic, and political functioning. Perhaps this allows us a broader periphery and the space to imagine what else might take its place.

Conservatorship's history of racial extraction must inform these discussions and weighs in favor of starting from scratch. In this respect, I am aligned with those exploring abolition for similar reasons, in other areas of law and society. As abolitionists like Dorothy Roberts have professed, abolition is not a single act but a path you choose to be on, a goal that you hope to achieve but may never reach in your lifetime. It is a framework, a mindset, that helps evaluate reform proposals and allows you to see whether reforms simply replicate the existing systems or help you progress on a path to something new. For example, is supported decisionmaking a "non-reformist reform" or a reformist reform? Does codification of supported decisionmaking (as some states like Texas have done) make the intervention a reformist reform because it involves law? Does the informality of supported decision make it a non-reformist reform because it is outside of court supervision?

While the paper unearths racial extraction in conservatorship and connects it to disability, there is a danger of showing that this is itself proof of the need for reform or reducing the history presented to bad actors during particularly heinous moments in history. In other words, one counter argument is that this history only proves the illegitimate uses of conservatorship, not that this institution is fatally flawed. Instead, with reforms, the argument might go, there is some group of incapacitated people for whom the system is supposed to work.⁴⁴³ A similar counterargument may be that if we did not have conservatorship already, we would need to invent it because we have no other way to deal with legitimate cases. Thus, as reformers currently argue, the goal should be to reduce instances of

443. See Eleanor B. Cashmore, *Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of Olmstead*, 55 B.C. L. REV. 1217, 1220 (2014) ("Although there is growing societal acknowledgment of the importance of respecting individual choice, guardianship is still widely accepted as a necessary mechanism for the protection of vulnerable adults.").

illegitimate uses of conservatorship. Interestingly, similar critiques of and conversations about abolition are unfolding in the context of the criminal justice system.

Ruth Wilson Gilmore describes “capitalism” as “never not racial” and “a mode of production developed in agriculture, improved by enclosure in the Old World, and captive land and labor in the Americas, perfected in slavery’s time-motion field factory choreography”⁴⁴⁴ The work of race in capitalism, as this paper has advanced, has been possible because of the law’s treatment of disability and a uniquely extractive legal device: conservatorship. Capitalism then is also never not about race *and* disability. When we fail to reckon with this history of race and disability, we miss what may be the actual problem, the legal device designed to remove rights with the blessing of public legitimacy.

CONCLUSION

Conservatorship has played a critical role in the foundations of American capitalist society and the evolution of neoliberalism. Specifically, if we reorient our contemporary understanding of conservatorship as care/protection to conservatorship as public governance, we can see the ways in which conservatorship becomes a key part of early forms of state regulatory burdens on production and exchange in the budding capitalist economy, first in colonial New England, later, in the antebellum South, and more recently in state public policy efforts such as the California CARE Court. Conservatorship continues to do all this work precisely through legal constructions of disability. It, thus, helps shed light on the interconnectedness between markets and the state, specifically, conservatorship’s operation makes more visible “the extent to which *both* state and market governance are embedded in raced and gendered subjugation”⁴⁴⁵ and do this work through disability labels. As Angela Harris writes, “scholarship on racial capitalism in law has the potential to make theoretical interventions into the underlying code of liberal capitalist democracy.”⁴⁴⁶ This Article contributes to that corpus of work and, in doing so, further solidifies the importance of studying race and disability together in American law.

444. Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, in FUTURES OF BLACK RADICALISM 225, 225–26 (Gaye Theresa Johnson & Alex Lubin eds., 2017).

445. Angela P. Harris, *Foreword: Racial Capitalism and the Law*, in HISTORIES OF RACIAL CAPITALISM, at vi, xi (Destin Jenkins & Justin Leroy eds., 2021).

446. *Id.* at xiii.