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ARTICLE

Potential Effects of *Dobbs v. Jackson Women's Health* on Civil Commitment Law

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Abstract

Since the publication of the U.S. Supreme Court's decision in Dobbs v Jackson Women's Health *in June of 2022, much attention has been paid to the direct effects of that decision on reproductive health care for pregnant or potentially pregnant individuals; and to the potential effects of the Court's approach in* Dobbs *to other established precedent related to privacy and autonomy, such as rights to contraception and marriage equality. This Article will explore another potential negative consequence of* Dobbs; its potential effect on the constitutional parameters of the law of civil commitment and involuntary medication of the mentally ill.

The foundational Supreme Court case establishing the parameters of the State's right to involuntarily commit an individual to a mental institution was decided only two years after Roe v. Wade. *In 1975, the Supreme Court in* O'Connor v Donaldson held that an individual has a liberty interest in "prefer[ring] one's home to the comforts of an institution," and that a State could not, "without more," confine a non-dangerous individual. The two-prong test of requiring a showing of both mental illness and dangerousness to one's self or to others has remained the cornerstone of civil commitment law ever since.

The language and analysis of O'Connor *is similar to that of* Roe, *the abortion rights case overturned by* Dobbs. *In particular, the grounding of the right to avoid civil commitment in the individual liberty and privacy interests are common themes in the two cases. The current Court, in its decision in* Dobbs, *has cast substantial doubt on the continued vitality of that analysis; and one can easily imagine a reconceptualization of* O'Connor *along the lines of* Dobbs *that substantially alters the requirements for civil commitment. In particular, the reliance in* Dobbs and other recent Supreme Court opinions on historical precedent as a linchpin of originalist analysis could lead the Court to search for justifications in colonial or 19th-century mental health practices, time periods which predate modern psychiatric science.

This Article will explore the parallels in approach between Roe *and* O'Connor, *and will suggest ways in which the post-*Dobbs *Supreme Court majority might disrupt the civil commitment status quo, including potential expansion of civil commitment or other detention of pregnant individuals for the protection of the fetus; and possible relaxation of the dangerousness requirement for civil commitment articulated in* O'Connor.

Keywords: Abortion; *Dobbs*; Civil Commitment; Mental Health; Involuntary Treatment; Civil Rights

I. Introduction

Since the publication of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[1] in June of 2022, much attention has been paid to the direct effects of that decision on reproductive health care for pregnant or potentially pregnant individuals;[2] and to the potential effects of the Court's approach in *Dobbs* to other established precedent related to privacy and autonomy, such as rights to contraception and marriage equality.[3] This Article will explore another possible consequence of

[1]Dobbs v. Jackson Women's Health Organization, 597 U.S. 2228 (2022).
[2]See *infra* notes 43-44 and accompanying text.
[3]See *infra* notes 68-70 and accompanying text.

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Dobbs: how it bears upon the constitutional parameters of the law of civil commitment and involuntary medication of the mentally ill.

The foundational Supreme Court case establishing the parameters of the State's right to involuntarily commit an individual to a mental institution was decided only two years after *Roe v Wade*.[4] In 1975, the Supreme Court in *O'Connor v Donaldson*[5] held that an individual has a liberty interest in "prefer[ring] one's home to the comforts of an institution,"[6] and that a State could not, "without more," confine a non-dangerous individual.[7] The two-prong test of requiring a showing of both mental illness and dangerousness to one's self or to others has remained the cornerstone of civil commitment law ever since.[8]

The language and analysis of *O'Connor* and subsequent cases such as *Addington v Texas*[9] is similar to that of *Roe* and *Casey*,[10] the abortion rights cases overturned by *Dobbs*. In particular, the grounding of the right to avoid civil commitment in the individual liberty and privacy interests are common themes in the two lines of cases. The current Court, in its *Dobbs* decision, has cast substantial doubt on the continued vitality of that analysis; one can easily imagine a reconceptualization of *O'Connor* along the lines of *Dobbs* that substantially alters the requirements for civil commitment.[11] In particular, the reliance in *Dobbs* and other recent Supreme Court opinions on historical precedent as a linchpin of originalist analysis could lead the Court to search for justifications for civil commitmentin colonial or nineteenth-century mental health practices, time periods which predate modern psychiatric science.[12]

This Article explores the parallels between *Roe* and *O'Connor* and suggests ways in which the post-*Dobbs* Supreme Court majority might disrupt the civil commitment status quo, including potential expansion of civil commitment or other detention of pregnant individuals for the protection of the fetus and possible relaxation of the foundational Constitutional requirements for civil commitment articulated in *O'Connor*.

II. Dobbs v. Jackson Womens' Health Organization

The *Dobbs v Jackson Womens' Health Organization* opinion represents the culmination of decades of work by antiabortion activists, lawyers and politicians.[13] While earlier cases had eroded the protections provided originally by *Roe*,[14] *Dobbs* takes the final step, long-desired by conservative activists, of overturning *Roe* entirely and "return[ing] to the people and their elected representatives"[15] the power to regulate or ban abortion entirely.

Dobbs arose out of a legal challenge to a 2018 Mississippi statute[16] banning abortion after fifteen weeks of pregnancy, the Gestational Age Act. This state statute itself was part of a wave of legislation

[4]Roe v. Wade, 410 U.S. 113 (1973).

[5]O'Connor v Donaldson, 422 U.S. 563 (1975).

[6]*Id.* at 575.

[7]*Id.* at 576.

[8]*See, e.g.,* Ronald D. Rotunda & John E. Nowak *§ 17.9(a)(vii) Commitment for Mental Care, in* 3 Treatise on Const. L. ("When the state seeks to commit someone for mental care on an involuntary basis, it must establish a fair procedure for determining that the individual is dangerous to himself or others due to a mental problem." (citations omitted).

[9]Addington v. Texas, 441 U.S. 418 (1979).

[10]Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

[11]See infra notes 83 - 84 and accompanying text.

[12]Dobbs v. Jackson Women's Health Organization, 597 U.S. 2228, 2257 (2022).

[13]*See* Deepa Shivaram, *The Movement Against Abortion Rights is Nearing its Apex. But it Began Way Before Roe*, NPR (May 4, 2022, 5:00 A.M.), https://www.npr.org/2022/05/04/1096154028/the-movement-against-abortion-rights-is-nearing-its-apex-but-it-began-way-before [https://perma.cc/AUW7-XMXD].

[14]*See, e.g.*, Elizabeth A. Cavendish, *Casey Reflections,* 10 Am. U. J. Gender Soc. Pol'y & L. 305, 305 (2002) ("Women in the United States today have fewer reproductive rights than their mothers had in 1973, and the status of those rights has only become more imperiled since Casey.").

[15]*Dobbs*, 597 U.S. at 2279

[16]*See* Gestational Age Act, Miss. Code Ann. §41–41–191 (West 2018) ("Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform … or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.").

explicitly aimed at overturning *Roe* and *Casey*.[17] The District Court for the Southern District of Mississippi, following the precedents of *Roe* and *Casey*, held that this statute was unconstitutional,[18] and permanently enjoined its enforcement.[19] This decision was affirmed by the Fifth Circuit,[20] and the Supreme Court granted certiorari.[21] *Dobbs* presented a headlong challenge to *Roe* and *Casey*; Mississippi argued not that its statute satisfied the requirements of those cases, but that they were wrongly decided, and that the Court should abandon its prior precedent and judge state abortion laws on a rational review basis, rather than the strict scrutiny applicable to laws infringing fundamental rights.[22]

The *Dobbs* majority analyzes the "right to abortion"[23] as an element of the liberty interest protected by the 14th Amendment to the US Constitution.[24] The Court articulates a two-part test for this liberty analysis. First, we are told, we should ask whether the right in question is one which is articulated in the first eight amendments to the Constitution, or whether it is an unenumerated, but nonetheless fundamental, right.[25] Second, we must inquire whether "the right is 'deeply rooted in [our] history and tradition,' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[26] This second prong, then, requires "a careful analysis of the history of the right at issue."[27] Purporting to engage in such a careful historical analysis,[28] the Court in fifteen pages concludes that there was no history of a right to abortion at "the time of the adoption of the Fourteenth Amendment."[29] The majority bolsters its historical argument with an Appendix showing "statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868."[30]

Although *Dobbs* only expressly overturned *Roe* and *Casey*,[31] the general critique of *Roe* expressed in *Dobbs* can be extended to other contemporaneous precedent. The Roberts Court has shown itself to be less bound by *stare decisis* than past Courts have been,[32] and there is good reason to believe that the

[17]*See generally* Adeel Hassan, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade*, N.Y. Times (May 6, 2022), www.nytimes.com/article/mississippi-abortion-law.html [https://perma.cc/Z5XV-3PCB] ("In recent years, Republican-controlled states have passed … legislation [similar to Mississippi's] only to have the laws struck down in appeals courts because they were in conflict with [Roe and Casey]. Those states, in effect, were vying for the chance to be heard by the [C] ourt."). *See also* Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20 Wm. & Mary J. Wom. & L. 123 (2013).

[18]Jackson Women's Health Org. v. Currier, 349 F.Supp.3d 536, 540 (S.D. Miss. 2018).

[19]*Id.* at 545.

[20]Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019).

[21]Dobbs v. Jackson Womens' Health Organization, 141 S.Ct. 2619 (2021).

[22]*See Jackson Women's Health Org.*, 349 F.Supp.3d at 542 ("[T]he real reason we are here is simple. The State chose to pass a law it knew was unconstitutional to endorse a decades-long campaign, fueled by national interest groups, to ask the Supreme Court to overturn *Roe v. Wade.*").

[23]The framing of the right at issue as a "right to abortion," rather than more broadly as a right to bodily autonomy, seems to be an intentionally narrow framing of the issue at hand.

[24]*Dobbs*, 597 U.S. at 2242.

[25]*Id.* at 2246.

[26]*Id.* (citations omitted).

[27]*Id.* at 2247-48 ("Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' itself provides little guidance.").

[28]The historical analysis undertaken by the majority opinion in Dobbs has been heavily criticized since the leaking of that opinion and its eventual release. *See, e.g.*, Press Release, American Historian Association & Organization of American Historians, History, the Supreme Court and Dobbs v. Jackson: Joint Statement From the AHA and the OAH (July 2022), https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022) [https://perma.cc/2T2U-X2P5] ("The OAH and AHA consider it imperative that historical evidence and argument be presented according to high standards of historical scholarship. The court's majority opinion in [Dobbs] does not meet those standards and has therefore established a flawed and troubling precedent.").

[29]*Dobbs*, 597 U.S., at 2248.

[30]*Id.* at 2285.

[31]*Id.* at 2284.

[32]This critique of the Roberts court predates *Dobbs*. *See, e.g.*, Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 Tulane L. Rev. 1533, 1537-38 (2008).

historic “originalist” analysis adopted in *Dobbs* and in other current cases will be applied equally to other past precedent the Court might be asked to reconsider.[33]

III. *O’Connor v. Donaldson* and Constitutional Civil Commitment Law

In 1971, involuntarily institutionalized mental patient Kenneth Donaldson sued the hospital where he was confined and sued his treating physicians, claiming that his confinement did not meet minimum constitutional standards.[34] Donaldson had been committed to the institution by his family[35] in 1957, and confined ever since, despite numerous requests for release.[36] After a jury verdict in Donaldson’s favor, The Fifth Circuit[37] agreed that Donaldson’s constitutional rights had been violated by his continued commitment, and the Supreme Court granted certiorati.[38] In a limited opinion, the Court held that the state “cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom[.]”[39] The opinion in *O’Connor* is widely regarded as a foundation of modern civil commitment law.[40]

IV. Post-*Dobbs* Commentary and Criticism

Dobbs has been met with a wave of critical responses from the legal academy, the medical establishment, and the popular press. Critics of the decision note that the Court in *Dobbs* has for the first time-diminished, rather than expanded, constitutional rights.[41] They write of the negative public health effects of abortion restrictions, even pre-*Dobbs*,[42] and predicted that *Dobbs*’ endorsement of further state-level restrictions will lead to worsened maternal and fetal health outcomes, especially among people of color and other marginalized groups.[43] Some note the contrast between the *Dobbs* decision and the public positions on Roe taken by recently-confirmed Justices,[44] claiming or implying that these Justices were

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[33] *See generally* David Cole, *Egregiously Wrong: The Supreme Court’s Unprecedented Turn*, N.Y. Rev. (Aug. 18, 2022), https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole/ [https://perma.cc/BJV5-B9UQ].

[34] Donaldson v. O’Connor, 493 F.2d 507, 510 (5th Cir. 1974).

[35] *Id.*

[36] O’Connor v. Donaldson, 422 U.S. 563, 568-569 (1975).

[37] *Donaldson*, 493 F.2d, at 510.

[38] O’Connor v. Donaldson, 419 U.S. 894 (1974).

[39] O’Connor, 422 U.S. at 576.

[40] See, e.g., Grant Morris, The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment, 60 Tul. L. Rev. 927 (1986).

[41] *See The Impact of the Supreme Court’s Dobbs Decision on Abortion Rights and Access Across the United States, Before the H. Comm. On Oversight and Reform* (2022) (statement of Rep. Gerald E. Connolly, Member, H. Comm. On Oversight and Reform) https://docs.house.gov/meetings/GO/GO00/20220713/114986/HHRG-117-GO00-MState-C001078-20220713.pdf [https://perma.cc/D2SQ-EWZS]. Others have noted that, while diminishment of citizens’ rights by the Court is rare, it is not unprecedented. *See* Christopher M. Richardson, Opinion, *Dobbs Isn’t The First Time The Supreme Court Took Away Key Rights*, L.A. Times (July 15, 2022), https://www.latimes.com/opinion/story/2022-07-15/supreme-court-abortion-civil-rights [https://perma.cc/RC7M-6NSC] (comparing *Dobbs* to the Civil Rights Cases of 1883).

[42] *See* Eugene Declercq et al., *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, The Commonwealth Fund (Dec. 14, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes [https://perma.cc/B7D8-LR6C].

[43] *See* Nandita Bose, *Roe v. Wade Ruling Disproportionately Hurts Black Women, Experts Say*, Reuters (June 27, 2022), https://www.reuters.com/world/us/roe-v-wade-ruling-disproportionately-hurts-black-women-experts-say-2022-06-27/ [https://perma.cc/44D6-9TVU]; Keon L. Gilbert et al, *Dobbs, Another Frontline For Health Equity*, Brookings (June 30, 2022), http://www.brookings.edu/blog/how-we-rise/2022/06/30/dobbs-another-frontline-for-health-equity/ [https://perma.cc/53CW-NVF5].

[44] Joan E Greve, *Trump Justices Accused of Going Back On Their Word on Roe – But Did They?*, The Guardian (May 5, 2022), https://www.theguardian.com/law/2022/may/05/trump-justices-abortion-roe-v-wade-gorsuch-kavanaugh-coney-barrett

less than truthful in their confirmation hearings,[45] and have raised concerns about the effect of this and other recent decisions on the legitimacy of and trust in the Court as an institution.[46] There has been extensive criticism of the historical methodology used by the Court in making its determination that the right to abortion is not "deeply rooted in our history and tradition."[47] Others have called for reform of the Supreme Court to increase the number of Justices and make the Court reflect the size of the federal judiciary.[48]

In contrast, *Dobbs* has been embraced by the pro-life movement.[49] Many states with conservative legislatures have either welcomed the enforceability of existing state laws restricting or banning abortions or introduced new bills restricting abortion.[50] *Dobbs* is consistent with the new originalist direction the conservative supermajority on the Roberts Court appears to be taking in Constitutional interpretation,[51] and, given the ages of the recently appointed conservative justices,[52] appears to be unassailable in the near future.

A common thread in the post-*Dobbs* critical commentary—and indeed in *Dobbs* itself—is the scope of the decision. Is the approach and holding of *Dobbs* limited to its narrow set of facts on abortion, or does it augur a sea change in the approach the Court is taking to a range of issues involving personal autonomy?[53] Opinions on this differ widely even on the Court itself. The majority opinion in *Dobbs* takes the narrow position, attempting to assure the reader that *Dobbs* is only applicable to the right to an abortion established in *Roe* and reaffirmed in *Casey*;[54] that only those decisions are overturned by *Dobbs*,[55] and that other established Supreme Court precedent is unaffected.[56] These assurances, however, are of limited value. They are convincingly rebutted by the dissenting opinion,[57] which argues that there is nothing in the logic of the majority opinion which limits it to the right to an abortion,[58] and

[https://perma.cc/KP5D-NNWB]; Lisa Mascaro, *Is Roe V. Wade 'Settled' Law? Justices' Earlier Assurances Now In Doubt*, PBS News Hour (Dec. 3, 2021), https://www.pbs.org/newshour/health/is-roe-v-wade-settled-law-justices-earlier-assurances-now-in-doubt [https://perma.cc/YCR2-AXYA].

[45]*See Senator Collins' Statement on Leaked Dobbs v. Jackson Women's Health Organization Draft Decision*, Susan Collins (May 3, 2022), available at https://www.collins.senate.gov/newsroom/senator-collins-statement-on-leaked-dobbs-v-jackson-womens-health-organization-draft-decision [https://perma.cc/6AQB-RAJC].

[46]*See* Annenberg Public Policy Center, *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, Annenberg School for Public Communication U. Penn. (Oct 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets [https://perma.cc/E4RB-NXYR].

[47]*See supra* note 26 and accompanying text.

[48]*See* Joshua Zeitz, *How the Founders Intended to Check the Supreme Court's Power*, Politico (July 3, 2022), https://www.politico.com/news/magazine/2022/07/03/dont-expand-the-supreme-court-shrink-it-00043863 [https://perma.cc/AY23-T4W3].

[49]*See National Right to Life Praises the Supreme Court's Decision in Dobbs v. Jackson Today's Ruling Overturns High Court's 1973 Roe v. Wade Decision*, Nat'l Right to Life (June 24, 2022), https://www.nrlc.org/communications/dobbs/ [https://perma.cc/C3L5-QQ9B].

[50]*See* Nicole Dube et al., *State Abortion Laws Enacted Post-Dobbs Decision*, Connecticut Office of Legislative Research (Sept. 29, 2022), https://cga.ct.gov/2022/rpt/pdf/2022-R-0227.pdf.

[51]*See* Cole, *supra* note 33.

[52]*See* David Ingold et al., *Biden Nominee Jackson Could Serve for Decades With a Conservative Supreme Court Majority*, Bloomberg (Feb. 25, 2022), https://www.bloomberg.com/graphics/2022-supreme-court-justice-stephen-breyer-retirement/?leadSource=uverify%20wall [https://perma.cc/YA2E-CTZ5].

[53]*See* Sarah Rosenbaum et al., *Dobbs: The Immediate Aftermath and the Coming Legal Morass*, The Commonwealth Fund: To the Point (June 17, 2022), https://www.commonwealthfund.org/blog/2022/dobbs-immediate-aftermath-and-coming-legal-morass [https://perma.cc/KA8M-B2UM].

[54]Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022) ("[T]he Solicitor General suggests that overruling [Roe and Casey] would 'threaten the Court's precedents holding that the Due Process Clause protects other rights.' … That is not correct[.]") (citations omitted).

[55]*See id.* at 2239 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

[56]*Id.*

[57]*Id.* at 2317-50 (Sotomayor, J., Breyer, J. & Kagan, J. dissenting).

[58]*Id.* at 2332.

that if the majority are serious about their analytical approach to similar precedent under the 14th Amendment, then those cases too are at risk of being overturned.[59]

Alongside the dissenting opinion, Justice Thomas' concurring opinion in *Dobbs*[60] undermines the assurances of the majority as to *Dobbs*' limitations. Justice Thomas, while concurring in the elimination of the constitutional right to abortion and agreeing that *Dobbs* itself only overrules *Roe* and *Casey*,[61] explicitly invites constitutional challenges to a range of other rights previously established by the Court under the 14th Amendment.[62] Thomas's opinion expressly calls for the reconsideration of the rights to use contraception (*Griswold v. Connecticut*[63]), right to engage in consensual sexual acts (*Lawrence v. Texas*[64]) and the right to marriage equality (*Obergefell v. Hodges*[65]).[66]

In addition to the *Dobbs* opinions themselves, a host of commentary since the opinions were handed down has raised the question of how far the Roberts court is willing to go in reconsidering 14th Amendment jurisprudence. Most of the commentary, like the opinions themselves, discusses the potential effects of *Dobbs* on other rights having to do with reproductive and sexual freedoms, including contraception,[67] same-sex marriage,[68] interracial marriage,[69] and others. However, there is nothing in the *Dobbs* opinion or the Roberts Court's new analytical approach which necessarily limits it to these social or "culture war" issues. This Court's approach could likely reshape constitutional thinking on a host of other issues.

An example of this is the Court's recent decision in *New York State Rifle and Pistol Assoc. v. Bruen*,[70] a Second Amendment case decided one day before *Dobbs*. In *Bruen*, petitioners challenged a New York statute requiring an applicant for a license to carry a firearm in public to show a "special need for self-protection distinguishable from that of the general community."[71] The Court, in a six-three split virtually identical to that in *Dobbs*,[72] held that the New York statute violated the Second and Fourteenth Amendments by imposing a heightened requirement on applicants above and beyond the ordinary self-defense needs of citizens.[73] In doing so, the Court applied a historically oriented test to the New York statute, rejecting prior precedent requiring means-end testing of modern firearms regulation to

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[59] *Id.* at 2350 (The *Dobbs* majority "places in jeopardy other rights, from contraception to same-sex intimacy and marriage.").

[60] *Id.* at 2300-01 (Thomas, J., concurring in judgment).

[61] *Id.* at 2301.

[62] *Id.* ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents[.]").

[63] Griswold v. Connecticut, 281 U.S. 479, 485-86 (1965).

[64] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[65] Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[66] *Dobbs*,142 S. Ct. at 2310 (Thomas, J. concurring in judgment).

[67] Indeed, after the *Dobbs* decision, H.R. 8373, the Right to Contraception Act, was introduced in Congress, in part as a response to Justice Thomas' concurrence in Dobbs. *See* H.R.8373, 117th Cong. § 3(25) (2d Sess. 2022).

[68] *See* Marc Spindleman, *The 'Dobbs' Promise Gets Tested at the Supreme Court*, The Am. Prospect (Dec. 1, 2022), http://prospect.org/justice/dobbs-promise-gets-tested-at-the-supreme-court/ [https://perma.cc/8YRT-8JAK] (discussing the case of *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), cert granted 142 S.Ct. 1106 (2022), a First Amendment challenge to a Colorado anti-LGBTQ discrimination statute). Post-Dobbs, Congress passed, and President Biden signed, the Respect For Marriage Act, codifying some limited protections for same-sex marriage into federal law. *See* Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305.

[69] *See* At Liberty Podcast, How Dismantling Roe Puts Interracial Marriage at Risk, ACLU (June 9, 2022), https://www.aclu.org/podcast/how-dismantling-roe-puts-interracial-marriage-at-risk [https://perma.cc/QXC8-HJJV] ("the United States has a long history of criminalizing, surveilling and controlling Black and brown families and the mixing of races.").

[70] New York State Rifle & Pistol Assoc. v. Bruen, 142 S.Ct. 2111 (2022).

[71] *Id.* at 2123.

[72] The *Bruen* majority opinion was authored by Thomas, and joined by Roberts, Alito, Gorsuch, Kavanaugh and Barrett, with Breyer, Sotomayor and Kagan dissenting. *Id.* The *Dobbs* majority opinion was written by Alito, and joined by Gorsuch, Kavanaugh, Barrett and Thomas and Chief Justice Roberts wrote an opinion concurring in the result, as did Justices Kavanaugh and Thomas, and Breyer, Sotomayor and Kagan similarly dissented. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[73] *Bruen*, 142 S.Ct. at 2122 ("Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.").

determine its constitutionality.[74] As in *Dobbs*, the *Bruen* Court engaged in extensive historical analysis of the regulation of firearms at the time of the adoption of the Fourteenth Amendment;[75] similar to the *Dobbs* court's focus on what it considered the overwhelming evidence of the illegality of abortion during the same historical period.[76]

Since *Bruen*, lower federal courts have seized on this historical analysis to issue decision which, if upheld, greatly constrain virtually all regulation of firearms,[77] such as cases from Texas invalidating laws preventing indicted but not convicted individuals from possessing firearms[78] and preventing individuals with active restraining orders against them from possessing firearms.[79] In both cases, the judge found that, because no sufficiently similar regulation of firearms existed at the time the Fourteenth Amendment was adopted,[80] the modern regulation could not pass constitutional muster.[81] The Court thus, in both modern lines of cases, rejects an analysis which balances the needs of modern society with the text of the Constitution, in favor of a much more limited inquiry into historic statutes and regulations.

V. *Dobbs* as applied to *O'Connor* and civil commitment

There are a number of similarities between *Roe* and *Casey*, on the one hand, and *O'Connor* on the other, which suggest that the Roberts Court, if asked to do so, might take a similar stance on the right to avoid civil commitment that it took with respect to abortion. The *O'Connor* and *Roe* decisions are separated from each other in time by only two years, and both are the products of the same Supreme Court. There were no Supreme Court appointments between January 1972—when Justices William Rehnquist and Lewis Powell were sworn in—and December 1975, when Justice John Paul Stevens was sworn in.[82]

Additionally, the cases of *Roe* and *O'Connor* are both Burger Court cases,[83] and share a similar approach to 14th Amendment analysis. *O'Connor* grounds its analysis of the right to avoid civil commitment in the liberty interest protected by the 14th Amendment, but unsurprisingly engages in no historical analysis of whether such a right is "deeply rooted" in the national traditions, nor of whether such a right existed at the time of the adoption of the 14th Amendment. The *Dobbs* majority referred to the *Roe* opinion's 14th Amendment analysis as "remarkably loose,"[84] and there is no indication that it would see the *O'Connor*

[74] *Id.* at 2125-26.

[75] The Court's historical analysis in Bruen has been criticized, just as its historical analysis in Dobbs was, as being insufficiently historically rigorous, and being merely a pretext for the politically expedient result of expanding the scope of Second Amendment rights.

[76] *Bruen*, 142 S.Ct. at 2130 ("our focus on history also comports with how we assess many other constitutional claims."). *But see id.*, 142 S.Ct. at 2176 (Breyer, J., Sotomayor, J. & Kagan, J., dissenting) (" the Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history 'accords with how we protect other constitutional rights.'") (citation omitted).

[77] *See* Steven Lubet, *Is The Supreme Court Turning the Constitution Into a Homicide Pact*, The Hill (Nov. 30, 2022, 8:00 A.M.), https://www.thehill.com/opinion/judiciary/3755180-is-the-supreme-court-turning-the-constitution-into-homicide-pact [https://perma.cc/FT5P-HC9U].

[78] *See* United States v. Quiroz, No. PE:22-CR-00104-DC, 2022 WL 4352482, at *1 (W.D. Tex. Sept. 19, 2022).

[79] *See* William Melhado, *Federal judge in Texas rules that disarming those under protective orders violates their Second Amendment rights*, The Tex. Trib. (Nov. 14, 2022), https://www.texastribune.org/2022/11/14/texas-judge-domestic-abusers-second-amendment/ [https://perma.cc/Y92Q-P4LM].

[80] *See, e.g.*, *Bruen*, 142 S.Ct. at 2131-32 ("[W]e will consider whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation[.]").

[81] *See Quiroz*, 2022 WL 435282, at *1 ("There are no illusions about this case's real-world consequences—certainly valid public policy and safety concerns exist. Yet *Bruen* framed those concerns solely as a historical analysis. This Court follows that framework.").

[82] *See Justices 1789 to Present*, Sup. Ct. U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/6JCD-RQH5] (last visited Mar. 12, 2023).

[83] For histories of the Burger Court, see generally Vincent Blasi, The Burger Court: The Counter-Revolution That Wasn't (Yale Univ. Press 1983); Vincent Blasi, The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986 (Herman Schwartz ed., Viking Penguin 1987).

[84] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022).

court's treatment of the Constitutional text as superior. Second, there was no consensus that there was a robust right to avoid civil commitment, either at English common law at the time of the founding, in the writings of the early American legal thinkers cited favorably by the Court in *Dobbs* and other recent cases, or at the time of the adoption and ratification of the 14th Amendment in 1868.

The first asylum for the confinement of the mentally ill in the American colonies was constructed in Virginia in 1773, virtually contemporaneously with the American Revolution.[85] Although this was progress from the earliest days of the colonies, in which the Puritanical authorities often saw mental illness as evidence of demonic possession,[86] in fact in the eighteenth century "[p]atients were committed to the hospital with an amazing ease and informality[.]"[87] Into the later years of the century, the mentally ill were treated as public spectacle, with mental institutions charging admission to the public to view and interact with patients.[88] From the beginning of these institutions, involuntary commitment was viewed as a necessary and positive way to ensure the mentally ill received treatment. Benjamin Franklin was one of the founders of Pennsylvania's first mental institution, of which he wrote "few or none of [the mentally ill] are so sensible of their Condition, as to submit voluntarily to the treatments that their respective Cases require … whereas it has been found … that above two Thirds of the Mad People received into Bethlehem Hospital, and there treated properly, have been cured."[89] Of course, with the limited understanding of mental illness of the day, there was in fact little if anything of "treatment" provided in these colonial institutions. Nonetheless, individuals were committed to them with no thought to their individual interest in "liberty," and very little due process as we understand it today.

VI. Past Abuses of Psychiatry – A Cautionary Tale

Although we think of state misuse of mental health and psychiatry as a vestige of authoritarian regimes,[90] there is unfortunately a robust American history of such abuses as well, typically focused on marginalized groups and populations acting outside of societal norms, including but not limited to women, enslaved people, and the LGBTQ+ community.

Hysteria as applied to women

Hysteria has been described as "the first mental disorder attributable to women,"[91] and has existed as a diagnosable disease for four millennia.[92] This diagnosis was used to justify the inferior status of women at law for decades, and still has echoes in today's politics when women are described as "too emotional" for leadership positions.[93]

[85] Albert Deutsch, The Mentally Ill in America: A History of Their Care and Treatment from Colonial Times 66 (Columbia Univ. Press, 2nd ed. 1949).

[86] *Id.* at 16.

[87] *Id.* at 62 (discussing the Pennsylvania Hospital, established in 1751.).

[88] *Id.* at 62-65.

[89] *Id.* at 59.

[90] *See, e.g.*, Paul Chodoff, Book Review, *Bulletin of the History of Medicine,* 72 Johns Hpkins Univ. Press 580 (No. 3, Fall 1998) (reviewing Theresa C. Smith and Thomas A. Oleszczuk, No Asylum: State Psychiatric Repression in the Former USSR (New York Univ. Press 1996)).

[91] *See* Cecilia Tasca et al., *Women and Hysteria in the History of Mental Health*, 8 Clinical Prac. & Epidemiology in Mental Health 110 (2012).

[92] *Id.* at 110.

[93] *See id. See, e.g.,* Emily Friedman, *Can Clinton's Emotions Get the Best of Her? How voters interpret N.Y. senator's appearances could affect campaign,* ABC News (Jan. 7, 2008), https://abcnews.go.com/Politics/Vote2008/story?id=4097786&page=1 [https://perma.cc/84GU-V4EK].

Drapetomania and the medicalization of enslaved people's desire for freedom

In the nineteenth century, slave owners in need of an explanation for enslaved people's desire for freedom found medical justification in the "diagnosis" of drapetomania, a word coined to literally refer to the desire for freedom and likelihood of trying to escape enslavement.[94]

Pathologizing homosexuality and gender nonconformity

More recently, homosexuality was considered a diagnosable mental disorder in the Diagnostic and Statistical Manual until, and a cottage industry of "treatments" developed to try to "cure" same-sex attraction.[95]

VII. Modern Examples of Attempts to Expand Civil Commitment Beyond Current Constitutional Boundaries

The Roberts Court's new focus on the search for historical foundations for the "liberty" interests protected by the Fourteenth Amendment,[96] to say nothing of Justice Thomas's continued determination to eliminate the protections of substantive due process altogether,[97] provide a fertile ground for those who would expand the power of the state to incarcerate individuals outside of the protections of the criminal justice system. This Article predicts that we will see a wave of such attempts to expand the power of the state to use civil commitment against marginalized populations, and that eventually, those seeking that expansion of power will use the door that has been opened by the decision in *Dobbs* and other recent 14th Amendment cases to justify those powers, even in the absence of the showings of mental illness and dangerousness to self or others that have been required since *O'Connor*. This section briefly outlines only a few examples of modern incarceration that might well end up in a direct challenge to the limitations of *O'Connor* and its progeny.

Incarceration of the unhoused

Criminalization of homelessness has a long and unfortunate history in this country, with the most recent example coming from the home city of this Article's author.[98] Most attempts to criminalize homelessness have been declared unconstitutional in the past.[99] However, New York City, under the leadership of Mayor Eric Adams, recently announced an initiative to hospitalize unhoused individuals "even when no recent dangerous act has been observed."[100] This new approach violates the common understanding of the "dangerousness" requirement that the individual being deprived of their liberty pose an imminent

[94]*See* Gary Greenberg, The Book of Woe (Plume, 2013). *See also Africans in America*, PBS (last visited Mar. 2, 2023) (republishing Dr. Cartwright, *Diseases and Peculiarities of the Negro Race*, 11 De Bow's Rev. (1851)), https://www.pbs.org/wgbh/aia/part4/4h3106t.html [https://perma.cc/B5M2-KR4L].

[95]*See* Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 Behav. Sci. 565, 565-566 (2015).

[96]See infra notes 26-30 and accompanying text.

[97]See infra note 63 and accompanying text.

[98]Darby Bean, New Ordinance Aimed At Clearing Sidewalks, Parks Doesn't Solve Louisville's Root Homelessness Issue, Critics Say, available at Darby Bean, *New Ordinance Aimed At Clearing Sidewalks, Parks Doesn't Solve Louisville's Root Homelessness Issue, Critics Say*, WDRB (Dec. 16, 2022), https://www.wdrb.com/news/new-ordinance-aimed-at-clearing-sidewalks-parks-doesnt-solve-louisvilles-root-homelessness-issue-critics-say/article_1f3845fc-7d63-11ed-aa14-7b7d1d5ed305.html [https://perma.cc/NP5Z-F9Q5].

[99]*See generally*, Memo to Members, Supreme Court Upholds Ruling, Homeless People Cannot Be Criminally Punished for Sleeping Outside if No Alternatives Exist, Nat'l Low Income Hous. Coal. (Dec. 23, 2019), https://nlihc.org/resource/supreme-court-upholds-ruling-homeless-people-cannot-be-criminally-punished-sleeping [https://perma.cc/KQ7Q-RZSL].

[100]See Hassan Kanu, *New York Plan for Forced 'Removal' of Mentally Ill Tests Limits of the Law*, Reuters (Dec. 8, 2022), https://www.reuters.com/legal/government/new-york-plan-forced-removal-mentally-ill-tests-limits-law-2022-12-08/#:~:text=(Reuters)%20%2D%20New%20York%20City,its%20susceptibility%20to%20police%20abuse [https://perma.cc/JV8G-SQNK].

threat to themselves or others,[101] not merely a theoretical or possible threat based on their housing status. New York City's Mayor Adams addressed this disconnect between existing law and his program, stating that "[t]he common misunderstanding persists that we cannot provide involuntary assistance unless the person is violent. … Going forward we will make every effort to assist those who are suffering from mental illness."[102] Two things about this statement are worth highlighting. First, it is couched in the language of treatment and assistance to the mentally ill. This is characteristic of pro-involuntary commitment advocates, and shows the tension between providing treatment and protecting civil liberties.[103] Second, it shows that Mayor Adams intends to try to lower the legal threshold for the deprivation of liberty of those who are mentally ill and unhoused. [describe NY law here]. It is clear that we are seeing a push to swing the pendulum back in the direction of paternalism and forced treatment for the good of the mentally ill individual, regardless of their expressed desires, which was expressly rejected by the Court in *O'Connor*.

Incarceration of pregnant people for the protection of the fetus

Shortly after the *Dobbs* decision, national news reported on cases in Alabama where pregnant individuals being incarcerated for the purpose of protection of the fetuses they carried from perceived potential harms due to their conduct.[104] While this incarceration is not technically civil commitment—the individuals kept in jail had been arrested for possession of cannabis, which is illegal under Alabama law[105]—the rationales for the incarceration parallel those of civil commitment. According to the reporting, pregnant individuals were treated differently from non-pregnant individuals arrested for the same offense: they were not allowed to post bail and be released, on the grounds that if they continued cannabis usage, it would harm the fetuses they carried.[106] Thus, these individuals remained in jail, or involuntarily in a drug rehabilitation facility,[107] for months (ironically creating other dangers to them or their fetuses).[108]

The trend of criminalizing pregnant individuals on the pretext of protection of fetuses parallels the increase in attempts to civilly commit the unhoused, in that it elevates the purported need for care or treatment over the protection of the civil liberties of the individual. In another way, the trend is distinct: it focuses on the "danger" prong of the traditional civil commitment standard, rather than on the "mental illness" prong. Indeed, some of the pregnant individuals sought to be sent to treatment facilities by the authorities in Alabama were turned away by those facilities because they were not in need of inpatient

[101] Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 Psychiatry 30, 32-33 (2010) ("[I]t is commonly interpreted that dangerousness refers to physical harm to self (suicide) or physical harm to others (homicide), and that the requirement for imminence means that the threat must be likely to occur in the close future.").

[102] *See* Andy Newman & Emma G. Fitzsimmons, *New York City to Involuntarily Remove Mentally Ill People from Streets*, N.Y. Times (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/nyregion/nyc-mentally-ill-involuntary-custody.html#:~:text=the%20main%20story-,New%20York%20City%20to%20Involuntarily%20Remove%20Mentally%20Ill%20People%20From,posed%20no%20threat%20to%20others [https://perma.cc/NA3B-QG36].

[103] For another example, California's Governor Gavin Newsom recently declared himself "exhausted" by demands for the protection of civil liberties of the unhoused mentally ill in the civil commitment process, declaring that "[t]heir point of view is expressed by what you see on the streets and sidewalks all across the state." Janie Har & Adam Beam, *California Governor OKs Mental Health Courts for Homeless,* AP News (Sept. 14, 2022), https://apnews.com/article/health-california-san-francisco-gavin-newsom-mental-0e68288d97959f9ceeb5c5683afa092b [https://perma.cc/KRT4-U3YR].

[104] *See* Moira Donegan, *Alabama is Jailing Pregnant Marijuana Users to 'Protect' Fetuses*, The Guardian (Sept. 14, 2022), https://www.theguardian.com/commentisfree/2022/sep/12/alabama-jailing-pregnant-marijuana-users-protect-fetuses [https://perma.cc/J6KK-GFNR] .

[105] Although Alabama recently became the 36th state to enact a medical marijuana law, cannabis is still illegal for recreational purposes. S. Res. 464, 2021 Leg., Reg. Sess. (Al. 2021).

[106] *See* Donegan, *supra* note 104.

[107] *Id.*

[108] *Id.*

drug treatment.[109] Nonetheless, they were kept in confinement because the state deemed its need to protect these women's fetuses as stronger their own liberty interests.[110]

As of this writing, the Alabama policy of incarceration of pregnant individuals has been abandoned after national reporting and outcry.[111] However, this Article predicts that, as with the New York policy regarding the unhoused, zealous prosecutors and politicians eager to establish a pro-life reputation with the electorate will not stop at this one instance, and we will see more attempts to elevate supposed dangers to the fetus from maternal behaviors to a valid rationale for civil commitment. In light of post-*Dobbs* questions about the rights of pregnant individuals to travel interstate to obtain reproductive health care services,[112] it is not out of the realm of possibility to imagine a zealous prosecutor attempting to take the "health of the fetus" argument one step further and using incarceration or civil commitment as a device to prevent interstate travel.

Attacks on LGBTQ+ Populations

The final section of this Article—admittedly more speculative than the others—in some ways represents a natural conclusion to current trends in extreme right-wing rhetoric. Recent years have seen an alarming increase in anti-LGBTQ+ rhetoric from the extreme right wing of American politics,[113] driven in part by Q-anon inspired conspiracy theorists,[114] but increasingly echoed by more mainstream news outlets,[115] political candidates[116] and office holders.[117] This rhetoric, ostensibly a backlash to the achievement of marriage equality after *Obergefell v. Hodges*,[118] attempts to cast LGBTQ+ individuals, especially but not

[109] *Id.*

[110] *Id.*

[111] Amy Yurkanin, *Alabama County Ends Practice of Keeping Pregnant Women in Jail Awaiting Rehab Beds*, AL News (Sept. 26, 2022), https://www.al.com/news/2022/09/alabama-county-ends-practice-of-keeping-pregnant-women-in-jail-until-trial.html [https://perma.cc/8FUU-REPF].

[112] Devon Minnick et. al., *Disorder in the Post-Roe World? … "It is so Ordered" by the Dobbs Court*, Am. Health L. Ass'n (Aug. 19, 2022), https://www.americanhealthlaw.org/content-library/health-law-weekly/article/50b326b2-e6ee-45e1-89e3-cab572f818c6/disorder-in-the-post-roe-world-it-is-so-ordered-by [https://perma.cc/5GCS-257C].

[113] Kelsey Butler & Ella Ceron, *Colorado Club Shooting Follows Rise in Anti-LGBTQ Rhetoric, Violence*, Bloomberg: Equity (Nov. 21, 2022), 3:43 P.M), https://www.bloomberg.com/news/articles/2022-11-21/colorado-club-shooting-follows-rise-in-anti-lgbtq-rhetoric-violence?leadSource=uverify%20wall [https://perma.cc/KTC9-8HZ2].

[114] *See* Ariel Sobel, *What Is QAnon and How Does It Affect LGBTQ People?*, The Advocate: Politics (Aug. 3, 2018, 2:11 P.M,), https://www.advocate.com/politics/2018/8/03/what-qanon-and-how-does-it-affect-lgbtq-people [https://perma.cc/ZY5W-KYCK].

[115] *See, e.g.*, Alex Paterson, *Fox News attacked LGBTQ people over 100 days in the first half of 2022*, L.A. Blade (July 25, 2022) https://www.losangelesblade.com/2022/07/25/fox-news-attacked-lgbtq-people-over-100-days-in-the-first-half-of-2022/ [https://perma.cc/F6N9-UE36]; Ben Goggin & Pat Tenbarge, *Right-wing influencers and media double down on anti-LGBTQ rhetoric in the wake of the Colorado shooting*, NBC News (Nov. 23 2022), https://www.nbcnews.com/tech/internet/right-wing-influencers-media-double-anti-lgbtq-rhetoric-wake-colorado-rcna58371 [https://perma.cc/UK4Y-3GUX].

[116] *See, e.g.*, Patrick Saunders, *Georgia GOP's Top Candidates Move Harder Right On LGBTQ Issues In Election's Final Days*, WABE: The LGBTQ Vote (Oct. 27, 2022), https://www.wabe.org/georgia-gops-top-candidates-move-harder-right-on-lgbtq-issues/ [https://perma.cc/LDH2-2EN8]; Trip Gabriel, *After Roe, Republicans Sharpen Attacks on Gay and Transgender Rights*, N.Y. Times (July 22, 2022), https://www.nytimes.com/2022/07/22/us/politics/after-roe-republicans-sharpen-attacks-on-gay-and-transgender-rights.html [https://perma.cc/DZ83-YWAW].

[117] *See, e.g.*, Caitlyn Kim, *Lauren Boebert Defends Her Past Anti-LGBTQ And Anti-Trans Tweets During KOA Radio Interview In Wake Of Club Q Shooting*, CPR News (Nov. 22, 2022), https://www.cpr.org/2022/11/22/lauren-boebert-defends-anti-lgbtq-anti-trans-tweets-club-q-shooting/ [https://perma.cc/LUU5-EC8A].

[118] Richard Wolf, *Gay Marriage Victory At Supreme Court Triggering Backlash*, USA Today (May 29, 2016), https://www.usatoday.com/story/news/politics/2016/05/29/gay-lesbian-transgender-religious-exemption-supreme-court-north-carolina/84908172/ [https://perma.cc/ZT3C-SZNM]. *But see* Emily Kayzak & Matthew Stange, *Backlash or a Positive Response?: Public Opinion of LGB Issues After Obergefell v. Hodges*, 65 J. Homosexuality 2028, 2034 (2018) (finding that public support for marriage equality was higher post-Obergefell and disputing the backlash narrative).

limited to transgender and gender non-conforming individuals, as a threat to children.[119] Examples of this type of rhetoric are condemnations of "drag queen story hour" events at public libraries and other venues,[120] descriptions of LGBTQ+ individuals as "groomers,"[121] and other attacks implying a nonexistent link between LGBTQ+ status, gender nonconformity, and sexual abuse of children.[122]

Such rhetoric has resulted in multiple policy proposals at the state level in states with conservative-controlled legislatures,[123] including so-called "bathroom bills,"[124] bans on participation in sports by gender-nonconforming individuals,[125] legislative bans on "drag queen story hours,"[126] and others. Although there have been no reports of states attempting to use civil commitment to isolate LGBTQ+ or other gender nonconforming individuals from society to date, some cautionary points are worth making. First, recall how recently homosexuality was considered a mental illness by the medical community.[127] Second, in many locations, LGBTQ+ individuals still do not have basic legal protections against discrimination.[128] Finally, in an atmosphere of increasing fear and intolerance, it is not difficult to imagine an overzealous elected official or prosecutor attempting to weaponize these diagnostic and therapeutic tools against the LGBTQ+ community, using rhetoric of "need for treatment" similar to that we see used in the attempts to hospitalize the unhoused and pregnant. If the courts, following *Dobbs*'s lead, weaken the substantive protections against misuse of civil commitment, attempts to civilly commit LGBTQ+ individuals could become possible, perhaps building on the relatively recent proliferation of so-called "sexually violent predator" laws.[129]

Increased Civil Commitment of the Mentally Ill

The previous sections of this Article outline the outer limits of potential misuse of civil commitment proceedings in the wake of *Dobbs*, but it is important to realize that, even if these scenarios do not in fact come to pass, *Dobbs* still potentially augurs an expansion of civil commitment of the mentally ill.

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[119] Matt Lavietes, *'Groomer,' 'Pro-Pedophile': Old Tropes Find New Life In Anti-LGBTQ Movement*, NBC News (April 12, 2022, 12:54 P.M.) https://www.nbcnews.com/nbc-out/out-politics-and-policy/groomer-pedophile-old-tropes-find-new-life-anti-lgbtq-movement-rcna23931 [https://perma.cc/DS5Y-TGU7].

[120] *See* Phil Mayer, *Proud Boys Disturb 'Drag Queen Story Hour' At Library, Yell Slurs: Police*, Kron4 (June 12, 2022, 7:48 P.M.), https://www.kron4.com/news/bay-area/proud-boys-disturb-drag-queen-story-hour-at-library-yell-slurs/ [https://perma.cc/TE3Y-KYQF]

[121] Kimberlee Kruesi & Karena Phan, *'Grooming': The Ubiquitous Buzzword In LGBTQ School Debate*, AP News (March 29, 2022), https://apnews.com/article/education-gender-identity-adf10ff5f169fae9c9af4d08a7b0c2bc [https://perma.cc/QBP7-CMJ7].

[122] *See, e.g.,* Ken Walker, *Homosexuals More Likely To Molest Kids, Study Reports*, PabtistsPress: News Articles (May 30, 2001), https://www.baptistpress.com/resource-library/news/homosexuals-more-likely-to-molest-kids-study-reports/ [https://perma.cc/9UEW-C5DE].

[123] *See* Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed In 2022 So Far, Most Of Them Targeting Trans People*, NBC News, (Mar. 20, 2022), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418 [https://perma.cc/ZCR9-KFU8].

[124] *See, e.g.*, S.B. 615, 58 Leg., 2nd Sess. (Okla. 2021).

[125] *See, e.g.*, H.B. 2734, 101 Gen. Assemb., 2nd Sess. (Mo. 2022).

[126] Kelcie Moseley-Morris, *Bill prohibiting public drag performances to be introduced in upcoming Idaho legislative session*, Idaho Capital Sun (Oct. 18, 2022), https://idahocapitalsun.com/2022/10/18/bill-prohibiting-public-drag-performances-to-be-introduced-in-upcoming-idaho-legislative-session/ [https://perma.cc/9NWW-QQX9].

[127] Allison Turner, *#FlashbackFriday -- Today in 1973, the APA Removed Homosexuality From List of Mental Illnesses*, Human Rights Campaign (Dec. 15, 2017) https://www.hrc.org/news/flashbackfriday-today-in-1973-the-apa-removed-homosexuality-from-list-of-me [https://perma.cc/3W3L-QJGV].

[128] LGBTQ Americans Aren't Fully Protected From Discrimination in 29 States. Freedom For All Americans, https://freedomforallamericans.org/states/ [https://perma.cc/67L7-P5JC] (last visited Mar. 6, 2023).

[129] *See, e.g.*, John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control in Symposium: Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. Puget Sound L. Rev. 655 (1992).

As with the expansions of civil commitment into the homeless population described above,[130] involuntary hospitalization may be perceived as an "easy fix" for the problem of inadequate mental health treatment in this country. This risks a return to the paternalism of the early decades of the twentieth century, before *O'Connor* and its progeny helped reduce the number of inpatient hospitalizations for mental illness. Although the funding for community mental health that was promised alongside the deinstitutionalization campaigns of the late twentieth century never materialized,[131] this is no justification for swinging the pendulum too far back in the direction of paternalist interventions.

Although some of the recent attempted expansions of civil commitment arise out of right-wing rhetoric,[132] it is a mistake to think of this as a solely right-wing phenomenon. We are seeing a rise in commitment of the mentally ill homeless, for example, in traditionally "blue" states such as California and New York.[133] Rather, what we are seeing is a swing of the pendulum between our concept of civil commitment as a treatment/law and order issue and civil commitment as a. civil rights issue.[134] This tension has been present for centuries, but the Roberts Court has provided an opening for advocates of increased detention of the mentally ill, and officials across the country are stepping up to seize that opportunity. We will see court challenges to the New York and California initiatives to civilly commit the unhoused, and advocates will use the *Dobbs* framework to argue that the *O'Connor* civil commitment standard is no longer a limiting factor.

Potential Solutions

Although many of the potential overreaching applications of civil commitment laws outlined in this Article are speculative as of this writing, in light of the potential broad reach of the new constitutional approach of *Dobbs* and other recent Roberts Court cases, it is important to imagine what a response seeking to limit such overreach and protect the liberty interests of those potentially subject to civil commitment proceedings. This section briefly sketches a number of such potential protections.

Legislative

As with other rights rolled back or imperiled by the Roberts Court, Congress or state legislatures can consider and pass legislation enshrining in law the right against civil commitment absent the circumstances discussed *in O'Connor*. While such statutes would not have the force of Constitutional rights and might lead to a patchwork of state-by-state variation in individual rights, they would be one path to at least partially protecting the civil rights of those potentially subject to civil commitment law. In the face of the threat of a rollback of the right to marriage equality established in Obergefell, Congress passed, and President Biden signed, the bipartisan Respect for Marriage Act.[135] This Act, while not establishing a national right to marriage equality, does at least partially protect marriages by repealing the Defense of Marriage Act[136] and by requiring states to recognize out of state marriages that were legal where performed.[137] Similarly, after the *Dobbs* opinion, Congress has begun to consider legislation creating a national right to reproductive health services.[138] While such legislation has not passed yet, and may be

[130]See *infra* notes 98-102 and accompanying text.

[131]Chris Koyanagi, Learning from History: Deinstitutionalization of People with Mental Illness as a Precursor to Long-Term Care 1-2, 11 (Kaiser Family Foundation, 2007).

[132]See *infra* notes 104-112 and accompanying text.

[133]See *infra* note 100.

[134]*See* Kanu, *supra* note 100.

[135]Respect for Marriage Act, Pub. L. No. 117-128, 136 Stat. 2305 (2022).

[136]*Id.* at § 3

[137]*Id.* at § 4.

[138]*See* Alexandra Hutzler, *House Passes Bills To Codify Roe, Protect Interstate Travel For Abortion*, ABC News (July 15, 2022, 6:47P.M.), https://abcnews.go.com/Politics/house-vote-codifying-abortion-rights-travel-protections/story?id=86884239 [https://perma.cc/3NAW-EFCF].

imperiled in the Republican-controlled House of Representatives in 2023, the speed with which Congress has responded to these two issues shows the strength of public opinion on these issues.[139] Congress could also take up legislation creating national standards for civil commitment if it is believed that the standards set by *O'Connor* and its progeny are imperiled by the Roberts Court.

Litigation

While the *Dobbs* decision forecloses one path for litigating reproductive rights, the battle has shifted post-*Dobbs* to the state court level, with reproductive rights advocates arguing for state Constitutional protections for abortion access.[140] Further, the support for civil rights at the state level appears to be strong, as evidenced by the results of a Kansas ballot initiative seeking to amend the state constitution to provide that it could not be interpreted to protect abortion rights.[141] Although Kansas has been a conservative state for years, the ballot measure failed resoundingly at the polls.[142] Similarly, a ballot measure designed to prevent a state supreme court from protecting reproductive rights failed in Kentucky, another conservative state, in the November 2022 election.[143]

Court Changes

In the wake of the nomination and approval of Justice Amy Coney Barrett,[144] Democratic frustration with the Supreme Court's direction reached a zenith. Frustrated at Republicans' successful blocking of a Supreme Court nominee in the waning months of the Obama administration,[145] on the theory that Court appointments so late in a presidency should be put on hold pending the results of the next presidential election; and Republicans' reversal of this position to seat Barrett with mere weeks remaining in the Trump presidency,[146] several Democratic politicians and organizations floated the possibility of major reform of the Supreme Court[147] in order to prevent, or at least minimize the impact of, such gamesmanship in the future.

Although such rhetoric played a role in the politics of the 2020 Presidential election cycle, the Democratic nominee and eventual winner Joe Biden did not support any of the proposed changes to the Court (while decrying the gamesmanship that denied his predecessor President Obama the opportunity to name Justice Ginburg's successor on the Court). No such proposals have gained any serious headway after the 2020 election. It seems highly unlikely, therefore, that any such proposals will be seriously entertained in the 118th Congress, where control will be divided between Republican and Democratic chambers.

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[139] *See id.*

[140] *See* Center for Reproductive Rights & Brennan Center for Justice, *State Court Abortion Litigation Tracker*, Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker [https://perma.cc/4EAQ-XH8J] (Feb. 15, 2023).

[141] *See* Dylan Lysan et al., *Voters In Kansas Decide To Keep Abortion Legal In The State, Rejecting An Amendment*, NPR (Aug. 3, 2022, 2:18A.M.), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment [https://perma.cc/VTQ7-CJLP].

[142] *Id.*

[143] *See* Bruce Schreiner & Beth Campbell, *Kentucky Voters Reject Constitutional Amendment On Abortion*, PBS (Nov. 9, 2022), https://www.pbs.org/newshour/politics/kentucky-voters-reject-constitutional-amendment-on-abortion [https://perma.cc/WPF7-A7LN].

[144] Eric Bradner, *Here's What Happened When Senate Republicans Refused To Vote On Merrick Garland's Supreme Court Nomination*, CNN (Sept. 19, 2020, 8:16 PM) https://www.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html [https://perma.cc/537Y-K2XW].

[145] *See* Hulse, *supra* note 144.

[146] *Id.*

[147] *Id.*

Improved Mental Health Treatment Funding

Finally, although not directly related to the standards for civil commitment, it must be said that improvement of the funding for and delivery of mental health services in this country would go a long way towards minimizing the need for civil commitment. Ease of access to mental health services would enable earlier intervention and treatment, before mental illness progresses to a point where involuntary commitment is needed. Although this would not entirely eliminate the need for civil commitment procedures, policymakers should prioritize improvement of the American mental health delivery system at every opportunity.

VIII. Conclusion

We find ourselves at the beginning of a new era in constitutional jurisprudence. Cases like *Dobbs*, *Bruen*, and others, with their diminished deference to the principle of stare decisis and willingness to reshape the contours of long-established rights, demand that we look forward to determine the potential limits and parameters of these new approaches. When we combine the Roberts Court's determinedly historic approach to defining the contours of modern rights with other present-day phenomena such as the expansion of homelessness, continued anti-abortion rhetoric and increased backlash against the LGBTQ + population, it follows that there is a substantial chance that civil commitment will be a tool increasingly turned to by authorities and policymakers. The historic balance in civil commitment law between paternalism and civil liberties is likely to be fundamentally reshaped by these forces. This essay has sketched one potential path that such a reshaping may take. Further attention and research should be devoted to an in-depth review of the history of mental health treatment and mental illness itself, to try to head off the sort of ill-informed "historic" analysis that characterizes some of the current Court's opinions.[148] However, if critics are correct that this Court is more interested in culture war victories than in establishment of workable governance and sustainable balancing of competing interests,[149] then even those efforts may be unavailing.

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[148] See *infra* note 28 and accompanying text.

[149] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2348 (2022) (Breyer J., Sotomayor J. & Kagan J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking." (*quoting Payne v. Tennessee*, 501 U.S. 808, 844 (Marshall, J., dissenting)). For an analysis of Justice Thomas' originalism arguing that it is not only inconsistent, but "unbearable and unsustainable" even for its most ardent adherents, see Samuel A. Marcosson, Original Sin: Clarence Thomas and the Failure of The Constitutional Conservatives (New York University Press 2002).

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