

RIGHTS IN PROPERTY AND PROPERTY IN RIGHTS:
PRIVACY, CONTRACT AND OWNERSHIP OF THE BODY IN
ANGLO-AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT

A Dissertation Presented

By

GARY L. GARRISON

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DEDICATION

This dissertation is dedicated to the memory of my late father, Sgt. Stephen F. Garrison (1937-1968), and to my life-partner, Dr. Nels P. Highberg, III. *Te amo in aeternum.*

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Though I am the author of this dissertation, I take no credit for its strengths but readily accept any, and all, responsibilities for its deficiencies. Starting with my committee members, to my advisor, Dan Gordon, I owe you an incomparable debt of intellectual gratitude and could not have asked for a better advisor. You are both a consummate professional and an intellectual historian from whom I learned more about the craft of history than anyone else I have known in the decade plus since I started graduate study in that field. Your comments and critiques, though sometimes taken personally and with great umbrage, also led me to some of the best work I think I have ever done. Thank you, for your comments and your guidance. I credit you with the best of this work.

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ABSTRACT

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This dissertation examines the history of the idea that people possess property rights in their own bodies. I also argue such rights are an alternative foundation on which to base the right to privacy recognized by the Supreme Court in 1965. The Court found privacy to exist in an admittedly nebulous “penumbras formed by emanations” from other parts of the Bill of Rights. I argue that privacy can be grounded on property rights as well.

Modern notions of property are far more rigid than they were two centuries ago. In a 1792 essay titled *Property*, James Madison explained man owned property in, among other things, religious beliefs, opinions and the liberty of his person. Madison, like many founders, was well-schooled in Enlightenment era thought and writings of John Locke and Adam Smith that argued men had property rights in their bodies. Unfortunately, like

many founders, Madison asserted property rights in bodies of others (slaves) and similar ownership interests in wives and children.

With abolition of slavery and emancipation of married women from the status of femme covert, the notion of ownership rights in the body fell from favor. If white men could no longer assert claims to property in other bodies, there was nothing to stop the government from stepping in to fill the void. The rise of the “regulatory state” in the nineteenth and twentieth centuries saw a proliferation of laws attempting to regulate lives of Americans, particularly in the area of reproduction. From eugenic laws mandating some people be sterilized and prohibited from bearing children, to anti-contraception and anti-abortion laws essentially mandating other people be forced to bear them, government control of the body expanded.

Through it all, however, ownership interests in one’s own body remained an economic fact if not a widely recognized constitutional right. Commodification of the body, be it through sale of tissue or even renting of a womb through surrogacy contracts, is a modern day reflection of the fact that we still acknowledge property rights in our own body. A government “taking” of that right should be treated as any other taking of property.

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CHAPTER I

INTRODUCTION

*If the United States mean [sic] to obtain or
deserve the full praise due to wise and just
governments, they will equally respect the
rights of property, and the property in
rights.¹*

As illustrated by the above epigram, more than two centuries ago, James Madison, our fourth president, and arguably the greatest intellect of his (or any other) time envisioned a fluidity of rights in general and of property rights, in particular. Ownership of property was a right to be sure but, at the same time, incorporeal rights—our thoughts, beliefs and most intimate interactions with one another—were also considered property in which we all had interests. The reciprocal nature of rights in property, and property in rights, is summarized no better than the contemporary stories of Susette Kelo and LeRoy Carhart.

Kelo and Carhart would appear, at first glance, to have little in common with one another. The former was a twice-divorced paramedic who bought a small house near the waterfront in New London, Connecticut, in 1997, which she promptly painted pink. The

¹ Madison, James, “Property” in *Madison, Writings*, Jack N. Rakove, ed., Literary Classics of America (1909) 515, 517.

house was run down, but Kelo was no stranger to poverty and, eventually, made it the sort of home she always dreamed of owning for herself. Unbeknownst, to her at the time, however, Connecticut had successfully wooed Pfizer Pharmaceutical Company to build a new research facility in the general area of her home. Inasmuch as Pfizer did not want to build a world-class research facility within what was considered to be a “rundown” part of town, the company encouraged the city’s New London Development Corporation (NLDC), to entice its developer to transform the area into a part of town more conducive to hosting a renowned national and international corporation. This would require that NLDC buy up all real estate in the area necessary to accomplish that end.²

In 1998, a realtor working on behalf of NLDC offered to buy Kelo’s home but she refused to sell. The day before Thanksgiving, 2000, the sheriff posted a notice on her door alerting Kelo her home was about to be taken by the city under its power of eminent domain. Kelo hired an attorney to fight the condemnation proceeding who challenged the seizure throughout the state system but lost in the Connecticut state courts. Kelo then turned to the United States Supreme Court when the Connecticut Supreme Court afforded her no relief.³

² Jeff Benedict, *Little Pink House: A True Story of Defiance and Courage* (New York: Grand Central Publishing, 2009). The color Kelo painted the house, she insisted, was not really pink but “Odessa Rose” – a color which she claimed to have gotten off the “historic paint chart at Benjamin Moore.” *Id.* at 26.

³ *Id.* at 1-119. The FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, under which Kelo appealed the condemnation of her land, prohibits seizure of private property unless (1) the owner is afforded fair compensation and (2) the seizure serves a valid public purpose. It was the latter of these two requirements under which Kelo challenged the taking of her house, arguing that the transfer of her property to another private interest did not meet the “public purpose” requirements of the Fifth Amendment given that her land was transferred to another private interest which, in fact, stood to make a profit from her property.

LeRoy Carhart, by contrast, came from a very different background. He received his medical degree in 1973 and later served as chief of surgery and emergency medicine from 1978 to 1985 at the medical facility on Offutt Air Force base in Nebraska. He retired from the U.S. Air Force as a lieutenant-colonel and went into private medical practice serving, for awhile, as an assistant professor of surgery at Creighton University School of Medicine and then the University of Nebraska Medical Center.⁴ Part of his obstetrics practice included providing abortions for women. In 1991, an anti-abortion activist set fire to his home, which destroyed everything, he and his family owned. Dr. Carhart, nevertheless, continued with his practice serving women. Even after his friend and colleague, Dr. George Tiller of Kansas, was assassinated—shot and killed while attending church in 2009 by an anti-abortion extremist—Carhart still continued to provide medical services for women in his area.

When Nebraska passed a law in 2000 that banned late term abortion procedures, Carhart took the case to court and won. The United States Supreme Court struck down the Nebraska law in *Stenberg v. Carhart* on grounds it made no exception for provision of these abortions where it was necessary to protect the health of the mother.⁵ In response, the United States Congress passed a so-called “Partial Birth Abortion Ban Act” in 2003 prohibiting the very same late term abortions nationwide that was struck down in

⁴ For a discussion of Carhart’s background, see *Carhart v. Stenberg* (D.Neb. 1998), 11 F.Supp.2d 1099.

⁵ See *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Stenberg.⁶ Because this law, likewise, made no exception for the health of the mother, Dr. Carhart was confident it, too, would be struck down by federal courts. That optimism proved justified only in the lower federal courts. But, the make-up of the Supreme Court changed after *Stenberg*⁷ and Carhart's opponents were determined to seek further review now that a newer, and more conservative, justice had been appointed and confirmed. Both Kelo and Carhart lost their cases in the Supreme Court. This begs the question, though: why are their case important, though, and how are they connected? The answer is that they both involved property interests.

In 2005, the Court upheld the use of eminent domain to take Kelo's home and transfer it to a private developer. While acknowledging a "sovereign may not take the property of *A* for the sole reason of transferring it to it to another private party, *B*," the Court essentially blessed just such an arrangement in *Kelo v. New London*, ruling the NLDC project promoted economic development in the Fort Trumbull area of New London, Connecticut, and it provided jobs as well as increased tax revenues, thereby meeting the "public use" requirement under the Fifth Amendment.⁸ The Supreme Court's majority brushed aside any "hypothetical" argument this could lead to a city taking land from person *A* and transfer it to person *B* simply because person *B* may put that land to more productive economic use. But, Justice O'Connor called out the

⁶ Similar bills were passed by Congress in 1995 and 1997 but were vetoed by President Bill Clinton. President George W. Bush was sworn into office in 2001 and quickly made it clear he would sign such a bill if presented to him. It was, and the bill became law.

⁷ Associate Justice Sandra Day O'Connor, who was part of the majority in *Stenberg*, retired from the bench in 2006 and was replaced by Associate Justice Samuel Alito.

⁸ *Kelo v. New London*, 545 U.S. 469, 477, 483-484 (2005).

majority on this point, anyway, and noted all private property, anywhere, of any kind, was now vulnerable to being taken for any reason so long as it increased a city's tax base.

There was nothing, Justice O'Connor remarked, to prevent a state from replacing a Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory. Indeed, while Kelo suffered the most immediate loss from the decision, all private property owners were now made vulnerable to takings of their property if there was a chance that it could be put to greater economic use.⁹ The only recourse private property owners had was to various state constitutions which might provide them with greater protection from such takings than the U.S. Constitution now that the U.S. Supreme Court afforded no such road-block to it.

Two years later, Leroy Carhart lost his case in the high Court as well. In *Gonzales v. Carhart*, the Supreme Court upheld a federal ban on certain late term abortion procedures.¹⁰ Though the earlier *Stenberg* case was not explicitly overruled—indeed, the Supreme Court went to great lengths to try and distinguish the two cases on their facts even though they are largely indistinguishable—the new decision certainly undermined *Stenberg* if not overruled it, *sub silentio*.¹¹ No exception was needed to

⁹*Kelo*, supra at 486-487 & 494, 503 (O'Connor, J. Dissenting). New London subsequently paid Kelo \$442,000 for the property. Having understandably no interest in remaining a citizen of that city, she moved across the river to Groton. By the fall of 2008, all homes in the area had been demolished but the project never broke ground. The developer was unable to secure financing – most likely because of the financial crisis which hit that year – and the land continues to sit vacant, a “barren wasteland of weeds, litter, and rubble.” Benedict, *Little Pink House*, at 374-377.

¹⁰*Gonzales v. Carhart*, 550 U.S. 124 (2007).

¹¹ The term *sub silentio* means “under silence” and “without any notice being taken.” *Black's Law Dictionary* (St. Paul: West Publishing Co., 1979) 1280. I use the term here in the context of suggesting that the United States Supreme Court overruled the *Stenberg*

protect the health of the mother in this case, the Supreme Court opined, because there existed other options for late term abortions rather than the dilation and extraction, or dilation and evacuation, procedure covered by the federal act. The Court was somewhat vague on its medical reasoning but governments (state or federal), the majority held, had a legitimate interest in preserving fetal life. The Court noted women sometimes came to regret their decisions to have an abortion and, thus, it was within the province of government to safeguard them from their own bad decision-making.

Justice Ruth Bader-Ginsburg, writing for the four dissenting justices, was quick to point out how the majority opinion, literally, dripped with condescension regarding women forced to obtain abortions under dire circumstances. “[T]he Court deprives women of the right to make an autonomous choice, even at the expense of their own safety” and, essentially, “reflect[ed the] ancient notions about women’s place in the family.”¹² What justified upholding the federal ban, in the absence of an exception to protect the mother’s health, was one of many points, which particularly galled Ginsburg and many others. The 2003 *Partial Birth Abortion Ban Act* did not really promote fetal life, some argued, because it did not ban various other late term procedures. Congress simply decided to ban certain procedures it found objectionable—a procedure many obstetricians (like Carhart) believed were safer than other late term abortion methods. The state, in short, rather than a physician, or the patient herself, was now to be the final determinative on how obstetrics was practiced. If the state’s determination interfered

case in *Gonzales* but did not want to come right out and say that this was what it was doing.

¹²*Gonzales v. Carhart*, supra at 145, 159, 161-167; *Id.* at 184-185 (Ginsburg, J. Dissenting).

with a woman's individual choice or interfered with the advice of her physician, women could at least take solace in the fact that they were prohibited from making choices which they may otherwise come to regret!

As I suggested earlier, at first glance, these cases appear to have nothing in common. The first concerns a city government's use of its eminent domain power to take real estate (with, or without, any clearly stated, public purpose) whereas the second is about elimination of an abortion procedure within a physician's obstetrics practice. But, there are two important, if not immediately obvious, similarities between them. The first is both cases are emblematic of the increasing reach of what I describe throughout my dissertation as the *regulatory state*. While the historical antecedents of this so-called *regulatory state* can be found earlier in American history,¹³ the modern *regulatory state*

¹³ As early as *Commonwealth v. Alger*, 61 Mass, 53 (1851), Massachusetts Chief Judge Lemuel Shaw ruled “[w]e think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.” *Id.* at 84-85. Few cases so succinctly summarize the principle of *salus populi suprema lex est* which, contrary to a myth of unrestrained *laissez faire* society of the nineteenth century, was a pivotal part of nineteenth century legal regulation. See William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996) 1-18.

arguably began during the Progressive era (c. 1877-1917)¹⁴ but expanded during the presidency of Franklin D. Roosevelt¹⁵ and has continued its expansion even to this day.

In a larger sense, though, the *Gonzales* case also concerns a loss of rights by Carhart's patients to obtain a particular late-term abortion procedure. It is, in this larger sense, which I suggest Carhart's patients share more in common with Suzette Kelo than first meets the eye. Specifically, I argue the right to control one's own body—including the right have an abortion without government interference—is as much a property right as the interest Suzette Kelo asserted to her “little pink house” in Connecticut.¹⁶ I further contend our bodies are as much *property* as any real estate or personal property (chattel) to which we claim right. Compared to other forms of property we own—real estate,

¹⁴ Defining the “Progressive Era” is, at best, a term of art. I choose the end of Reconstruction in 1877 as the start of this period as it roughly coincides with the beginning of the mass industrialization that began after the Civil War. Likewise, I choose 1917 as the end period for this date as it marks the U.S. entry into World War I which, for most purposes, ended the movements of unions in the United States if not the push for regulatory reform at the federal level.

¹⁵ I spend no time in this dissertation discussing creation of the social safety net during the New Deal or the further regulation of property rights during this time period as that subject has been treated exhaustively elsewhere. But, what is important to one of my primary arguments is rejection during this time period of the highly controversial principle of *liberty of contract*. I spend considerable time addressing the formation, and rejection, of this principle later in my dissertation and will not repeat it here.

¹⁶ Linda Gordon, for example, argues the political control of reproductive rights—either prohibiting childbearing through involuntary sterilization, or encouraging it through denial of access to birth control—as affecting what she calls the moral *property* of women. See Linda Gordon, *The Moral Property of Women: A History of the Birth Control Politics in America* (Urbana: University of Illinois Press, 2002) 342-347. Although Gordon never gives her reader an exact definition of what she means by “moral property,” the story of Puerto Rican women, as well as poor white women and women of color in the United States being forcibly sterilized at the same time wealthy white women in the U.S. were prohibited from access to any birth control, clearly speaks to the violation of a property right women have in their own bodies—a property right similar to the one Suzette Kelo had to her house in Connecticut.

stocks, household goods, etc.—bodily property interests are *sui generis*,¹⁷ to be sure, but are still property nonetheless.

If a comparison of bodily property rights and economic property rights seems a bit of a stretch for modern readers, it is only because contemporary language as well as contemporary thought surrounding property and the body has changed considerably over the previous two centuries. It is this change over time upon which I focus my dissertation.

Not only were property rights enormously important to our founders but, as illustrated by the Madison quote above, the term itself had far more reaching implications than today. For Madison and many others in the waning years of the eighteenth century, property meant more than just land or other economic assets. It also meant the right to such diverse things as one's political beliefs, religious views and—as I argue herein—control over the private sphere of one's own body. To deny someone of a bodily property right was, thus, to deny them of their property.

This *rhetoric of rights* has been lost over the last two plus centuries. I argue herein that there are three principle reasons for this. The first is that Americans eventually came to realize the evils associated with owning property rights in bodies of *others*. The Thirteenth Amendment abolished slavery and, over the course of the nineteenth and twentieth centuries, American law and society also (albeit slowly) rejected as well the assertion of ownership rights in wives and children. As a result, today, the

¹⁷ This is a Latin phrase meaning of its “own kind” or “peculiar.” Black's Law Dictionary, *supra* at 1286. Property rights in our own bodies are different than property right is land or personalty like cars, stocks or bank accounts but it is still property which can yield significant financial gains as I discuss in final the few chapters of this work.

notion of property rights in the body strikes us as something unseemly or unnatural. We thus, naturally, recoil from the implication that property rights in the body could be a basis for liberty and privacy.

The second reason we no longer consider the existence of ownership rights in the body as a basis for privacy is attributable to ratification of the Fourteenth Amendment in 1868. The guarantees of this amendment were that no state would deprive any of its citizens either Due Process of law or Equal Protection of the law. No sane person would argue equal treatment under the law is a bad thing and I will not do so here. What I do suggest, however, is that the focus on equality of laws has obscured most of the nation from the importance of property laws which, as I discuss next, have been forced to take a second, even third, seat at the back of the bus insofar as constitutional rights are concerned.

The third reason we no longer consider the existence of ownership rights in the body, I maintain, is because of our acquiescence to state and federal government assumption of those rights. During the same century which saw state sanctions of slavery fall, and coverture begin to fall, both state and federal government stepped up to assume those rights rather than allow them to be claimed by the people themselves. This was a process I characterize as the rise of the *regulatory state*. This *regulatory state*, under auspices of progressivism and waiving a banner of protecting the poor and abused, began to regulate the economy with the goal of protecting those less fortunate from the so-called *robber barons* of the nineteenth century.

Though admirable in intent, this movement was disastrous in effect. The regulatory state managed, to one degree or another, over time, to reign in the worst of

industrial excess, but also set a precedent for regulation of the very people that it meant to protect. Rejection over eugenic control of the body, I maintain, is yet another reason why many contemporaries are reluctant to recognize property rights in the body as a basis for privacy. If government can regulate liberty of (economic) contract between two persons, what is there to stop it from trying to regulate (bodily) contracts between these people as well?

This is the subject of chapter two, which I title the “Legacy of the Enlightenment.” Notions of property and contract reigned supreme from the latter part of the seventeenth century to the time of the American Revolution. Not only was there a transfer of importance from land to chattel (feudalism to capitalism) but, at the same time, economic and contractual obligation replaced obligation born of status. The old-English adage a man’s *home was his castle* extended not just to the aristocracy but to middling colonials in America and the idea only Parliament could vote revenue to the monarch was replaced by cries of “no taxation without representation” from periphery colonials who had no say in the core’s (London) Parliament whatsoever.

After laying the philosophical groundwork for the importance of property and contract to Anglo-American thought, I examine the practical effects of those beliefs for life in the United States. The most important of those effects—which I cover in chapter three—was chattel slavery. There was no law, or even a philosophy, of slavery in the beginning but no lesser intellects than Thomas Jefferson, John C. Calhoun and George Fitzhugh felt compelled to provide some degree of philosophical justification for the notion that one human being could own property in another and that such principle did not violate the foundational precept that all men are created *equal*.

Chapter four examines the patriarchal control—if not outright ownership—in both white women and children. If white men did not outright own their wives, as they owned slaves, they at least could claim legally enforceable rights in them not just to their property but also for sexual intercourse and labor. Children occupied a similar role in the household. Offspring were viewed as economic units whose labor was controlled by the patriarch. A father was just as entitled to the earnings of his children as he was that of his wife and the notion of liberty of contract which I discuss at great length in the following chapter, was used as a justification to oppose child labor laws. Indeed, children are still exempt today from child labor laws insofar as they apply to family farms. Whereas law regarded women as part and parcel of the patriarch's household in the eighteenth century, a century later, they were essentially wards of the state who needed to be taken care of so as to protect their procreative ability.¹⁸

Chapter five looks to the rise of what I deem the *regulatory state* and this is the turning point for my narrative. Contemporaneous with the rise of the Fourteenth Amendment as the perceived protection for all of American liberty, federal and state governments began to try and regulate the excesses of what Mark Twain characterized as the *Gilded Age*. As activists like Jacob Riis brought attention to how the *other half* lived in this time-period, state legislatures passed work-place regulations meant to control wages, hours and working conditions. Many, if not all, of these regulations were struck down by state and federal courts under the doctrine of *liberty of contract*. The gist of this

¹⁸ See *Muller v. Oregon*, 208 U.S. 412, 421, 28 S.Ct. 324, 52 L.Ed. 551. “[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”

doctrine was employers and employees enjoyed perfect freedom to devise whatever employment contract they desired and neither state nor federal law could constitutionally regulate of such contracts. The most famous (or infamous) announcement of this doctrine came from the U.S. Supreme Court in 1905.¹⁹

Unfortunately, *liberty of contract* came to be associated with the largely discredited notion of substantive due process which—though loosely anchored on the due process clause of the Fourteenth Amendment—was relegated to the purgatory of legal doctrine as a proverbial black-hole from which all manner of legal doctrine could be extracted whether it bore any actual resemblance to the constitution or not. Indeed, it is now *de rigueur* both in American law schools and organizations like the Federalist Society to attack this doctrine as little more than judicial activism. But, substantive due process is not the same as inventing rights out of thin air and, in the case of liberty of contract, this was a right which was certainly implied in the Constitution long before the Fourteenth Amendment became law in 1868.²⁰

By 1937, however, liberty of contract was all but dead.²¹ The United States Supreme Court and state courts may well have continued striking down labor legislation indefinitely but for the advent of the Great Depression and the constitutional crisis that

¹⁹ See *Lochner v. New York*, 198 U.S. 45 (1905).

²⁰ I would make the argument that substantive due process is simply another way of recognizing unenumerated rights – the existence of which are guaranteed by the aforementioned Ninth Amendment to the Constitution – but this is a subject well beyond the scope of this dissertation.

²¹ See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) which held liberty of contract was not sacrosanct and could be overcome by government legislation. I discuss this case in greater detail in chapter seven.

was provoked by the willingness of the Supreme Court to decimate President Roosevelt's first New Deal. After a constitutional *game of chicken*—known to most Americans as the proverbial *court-packing scheme* between the Supreme Court and President Roosevelt—the Supreme Court blinked and the *switch in time that saved nine* allowed Congress and the states to pass laws in derogation of *liberty of contract*.²²

The rise of the regulatory state affected not only property but also the body as well which I discuss in chapter seven. There is no doubt that some very intelligent people viewed Eugenics—the so-called *science of better breeding*—as humane at the time²³ but it is difficult to imagine even the most steadfast opponent of civil liberties recoiling at the idea that state governments, with the sanction of the United States Supreme Court, could forcibly sterilize large swaths of people against their will.²⁴ White patriachs no longer had claims to bodies of color or to white women; those claims had passed to government.

My dissertation then examines the rise, and partial fall, of the right to privacy. Chapter four examines the origins of this right as theorized by future Supreme Court Justice Louis Brandeis. As I chronicle in chapter nine, though, it was Associate Justice William Douglas who Brandeis's theory, incorporated it into law and invoked it as a

²² Id.

²³ Justice Oliver Wendell Holmes, for instance, offered “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Buck v. Bell*, 274 U.S. 200, 207 (1927).

²⁴ Some states which sanctioned Eugenic sterilization have even considered the idea of reparation payments to the survivors – North Carolina proposed it in 2012 only to have the measure die in legislative committee – but victims of such practices have little political power and are rarely a constituency to which legislators listen.

shield against government control of the body. Numerous attempts were made in the 1950s and 1960s to repeal anti-contraceptive laws in Connecticut. When those attempts failed, its opponents challenged it in state court. That case was later dismissed on a legal technicality. A second attempt, which went to the United States Supreme Court, was more effective and recognized privacy rights between married couples. It was almost a decade later before privacy was recognized as a right enjoyed by single people as well as those who were married.

Chapter five examines the extension of that right from contraception to abortion. This was the holding of *Roe v. Wade*²⁵ authored by U.S. Supreme Court Justice Harry Blackmun who simply carried the Brandeis theory, as expanded by Douglas, to its logical conclusion. The core holding of *Roe*—that privacy extended to the right to terminate a fetus—still stands today though the trimester system announced in that case is no longer law.²⁶

The *Roe* case in 1973 was the proverbial high-water mark of privacy jurisprudence and, as noted earlier in this introduction, reproductive rights to one degree or another have been retreating from assault by the regulatory state ever since. The right to an abortion has been chipped away at to such an extent that what is left, bears little resemblance, to the broad right pronounced in 1973. Moreover, it is almost impossible

²⁵*Roe v. Wade*, 410 U.S. 113 (1973).

²⁶ The trimester system in *Roe* was based on the concept of fetal viability and, as now retired Justice Sandra Day O'Connor remarked in a series of cases in the 1980s and 1990's, improvements in science and medicine put the trimester system on a "collision course" with itself. This is an issue I discuss in more depth in chapter ten and, thus, do not do so here.

today to find the word privacy anymore used by the Supreme Court. It is either ignored almost entirely or replaced by words like “liberty.”

I would anticipate that, in twentieth and twenty-first century America, it seems strange to talk about property rights in our own bodies and that such rights are a justifiable basis on which to ground privacy rights. The truth of the matter, however, is that we continue to this day to treat the body—or parts of the body—as valuable commodities and this is what I address in chapter six. I highlight the extent to which we have commodified both corpses and body tissues as well as turned women’s bodies into rental property in the case of surrogacy contracts. No example of this is more poignant than the case of Henrietta Lacks, who nominally held a degree of property interests in her own body while alive, but then suffered the indignity (as did her family) of her body being used as a mine from which to extract valuable property by those who harvested her cervical cancer cells—and made millions of dollars—after her death. Federal law has done well to protect the medical industry and the almost unimaginable profits they make from harvesting the bodies of the poor, but have done almost virtually nothing to protect the bodies and the claims to those bodies by their families.

Finally, in chapter six, I address the link between contract, property and marriage, particularly with the regard to the controversial (but now settled) issue of same-sex marriage. The United States Supreme Court held in *Obergefell v. Hodges* that state bans against same-sex marriage were a violation of the Fourteenth Amendment.²⁷ Though I agree that allowing some people access to a marriage contract, but not others, is a

²⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

violation of Equal Protection rights, wholly absent from the Court's decision was any discussion of property rights.

Scholars have long agreed there is a wealth effect to marriage and this was certainly the underlying basis for the Court's prior decision in *Windsor v United States*, which had nothing to do with love or public recognition of same-sex relationships but, instead, economics.²⁸ Because Windsor was not legally recognized as a surviving spouse under federal law, she was forced to pay hundreds of thousands of dollars in estate taxes as beneficiary of her spouse's estate that she would not have had to pay had she been in an opposite-sex marriage. The point here is that, as with privacy rights, so with marriage, courts focus on the Fourteenth Amendment as the arbiter of rights rather than the implied right of property.

What I hope to show by the conclusion of my dissertation is not that American thought, in general, or judicial thought, in particular, was wrong to rely on the Fourteenth Amendment as a panacea to every ill affecting our republic. Rather, I mean to argue that there is an older—more pedigreed—principle to accomplish the same objectives and that is the right to acquire, own and dispose of property along with the concomitant right to enter into contracts. With America's eventual (and much welcomed) rejection of claims to ownership in the bodies of others, as well as the rise of Fourteenth Amendment jurisprudence, our insistence on property rights has atrophied. But, the taxonomy of rights should no more be held hostage to passage of time than it should be rejected on the grounds of more innovative constitutional triangulations.

²⁸ *Windsor v. United States*, 133 S.Ct. 2675 (2013).

CHAPTER II

THE LEGACY OF THE ENLIGHTENMENT

*Property should be . . . as a general rule, private; for, when everyone has a distinct interest, men will not complain of one another, and they will make more progress, because everyone will be attending to his own business.*²⁹

My argument in this dissertation is that the Constitutional right to privacy is neither found in “emanations formed by penumbras”³⁰ as Justice William Douglas and several other of his fellow justices believed—although that phrase, and its reasoning, provide an historical justification for recognition of the right—nor was it invented out of thin-air as critics, both historical and legal, contend. Instead, the notion of an individual privacy rights against an overweening government has an historical lineage that is traceable in one form or another all the way back to antiquity. In Athenian democracy,

²⁹ Aristotle, *Politics* (Mineola: Dover Publications, Inc. 2000) 62.

³⁰ *Griswold*, supra at 484. The *Griswold* case is correctly described as a plurality opinion meaning there was no majority opinion as to where the right of privacy arose. Justice Douglas and three other justices relied on the “emanations from penumbras” language whereas three others relied on the Ninth Amendment which I discuss in detail later in the dissertation. Two justices dissented altogether. Justice Douglas was the only supreme court justice to ever use this phrase and he only did it once again, see *Osborne v. United States*, 385 U.S. 323, 87 S.Ct. 439 (1966). Otherwise, as mentioned earlier, the phrase is taken as one of derision by scholars and courts alike.

for instance, where majorities could pass laws infringing on the rights of others, the above noted epigram expresses Aristotle's belief that the best way to keep everyone out of one's else's own business (or private life) was to ensure that property was private. While Aristotle may not have had the concept of bodily property in mind, his comment nevertheless illustrates the connection between property and privacy.

To be clear, I do not mean to suggest Aristotelian property rights philosophy justifies recognition of an unenumerated American Constitutional Right to privacy. What I do maintain, however, is that this and other pre-Enlightenment thoughts on the issue(s) form the ancient antecedents to Enlightenment era thinking on the body and property. I will not address antiquity any more than my reference to Aristotle as this part of the dissertation looks, instead, to early modern English property law, Enlightenment era thinking on the concepts of property, contract, the body and privacy and then how those thoughts both influenced the founding and early republican eras in American history. Certainly, by the time I reach Part V of this work everything—from Aristotle through the Enlightenment—can fairly be characterized as a *lost rhetoric* of Anglo-American property rights.

For now, however, I address only English and, later, Anglo-American thinking on the matters. As this point lays the foundation for the rest of my arguments set out herein, the part necessarily requires a considerable amount of detail. Determining the existence, and enforceability of property rights, even if only for purposes of taxation, was the impetus behind the *Domesday Book*³¹ in eleventh century England and securing the rights

³¹ On the importance of *Domesday Book* to English property law, see Thomas F.T. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown & Company, 1956) 12-13. This record of land tenures was not important simply for tax purposes,

of property owners against arbitrary infringement by the king was an important part of *Magna Charta* in the thirteenth century.³² These were the foundations upon which English, and later, colonial-British, property rights (indeed, the very notion of *liberty* itself) were grounded. If a man owned enough real property upon which to grow food for his family, and perhaps some extra to use as barter for the other necessities of his family, than he had liberty from his feudal lord. The importance of property rights to Anglo-American political, constitutional and philosophical development, in short, is almost as old as western civilization itself.

If medieval English property rights hold little sway among contemporary Americans, then surely the repeated cries of *no taxation without representation* as a solid placeholder for both rhetorical and intellectual stock-in-trade used by colonials toward advocating revolution against Great Britain which refused to afford what American colonials believed was their inherent rights to property. Even before then, however, the European Enlightenment of the seventeenth century stressed the vital importance of individual rights, which, ultimately, were based on property rights. Indeed, it was an arguably disastrous oversight on the part of America's founders to protect private property from seizure by the government, as part of a bill of rights (originally left out of the Constitution when first drafted in 1787) that formed one of many arrows in the ideological quiver used by anti-federalists to oppose ratification of the new framework of

however, but also recorded the various rights and interests feudal landowners held in the property. See Blackstone, *Commentaries*, II:49-99.

³² Though the importance of *Magna Charta* in representing real property rights as civil rights against overweening government is often overstated, the legal restraints that it placed on government against infringement of property rights (even if only those of feudal lords) was a first step in recognizing the centrality of property – any variation of property – in the Anglo-American mindset.

government. Protection of property rights—at least that of wealthy white males—was, in short, an important part of Anglo-American history for centuries and the disregard for such rights was as much a reason for rebellion against Great Britain as it was for the anti-Federalists to oppose ratification of the proposed constitution of 1787.

Though it may seem that way at times, this part of my dissertation is not meant to be a history of property law in England or even the English (later British) North American colonies. Admittedly, I spend considerable time in this part addressing the issue of property and contract rights in English law. But, as is noted above, this is necessary to prove my point that property and contract rights operate as dual-theoretical constructs lay at the heart of all Anglo-American intellectual, political and constitutional thought—particularly in the years following the Enlightenment. Property and contract rights, as such, were so important to the founding generation (the generation which

As drafted and ratified the Constitution, as well as the so-called Bill of Rights) that it is not only appropriate—but necessary—to spend time chronicling their thought in Part I of this dissertation. This is important because, property and contract, while not spelled out as rights in the Constitution, were at least assumed to be implicit rights just the same, as I maintain, was *privacy*.

Even then, what interests me most—and what I explore most in the chapters that follow—is the affect this period had on American *constitutionalism*.³³ The *idea* of

³³ Unless otherwise noted, I use the phrase *constitutionalism* in the same general way the late constitutional historian, Charles H. McIlwain used it to mean “a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government; the government of will instead of law. . .” “[T]rue [c]onstitutionalism,” he maintained represented “limitations of government by law.” Charles H. McIlwain, *Constitutionalism: Ancient and Modern* (Indianapolis: Liberty Fund Press, 2007) 21. While the adjectives used in McIlwain’s definition may suggest to some that the arbitrary rule to which he

property, I maintain, was among the most important—if not *the* most important—idea behind both English Whig³⁴ as well as (elite) American colonial thought. Property represented not only real estate and an ability to sustain life as a subsistence farmer but was also a mark of both citizenship and the right to participate in civic affairs as a citizen of the polity. Property (both in those days and still today) signified power and the absence of property, as it still does today, signified powerlessness. White men, if they did not own property, had no control over the vicissitudes of government. Government could pass whatever laws thought necessary to maintain control over those without property and left out of the Social Contract. The same was true for all women, children, free-blacks and slaves to at least claimed to own property. *Property*, in short, according James W. Ely, was not just an important right during the founding of American history, but was, in fact, the *guardian* of every other right written into the Bill of Rights.³⁵ Ownership of land (no matter how meager) not only guaranteed the farmer who owned it a subsistence living but also assured him the status of citizenship—under a social

mentioned was a monarchy, his references to ancient Greek constitutions suggests the limitation on arbitrary rule applied to democratic states as well as autocratic ones. See generally *Id.* at 33-38. McIlwain’s definition is still relevant today, I believe and I continue to use it in my own classes on Constitutional law.

³⁴ I realize the term “whig” is a term of art and throughout this dissertation (unless otherwise noted), I use it in the same context as did Bernard Bailyn in his most seminal of work. See Bernard Bailyn, *The Ideological Origins of the American Revolution*>>>

³⁵ James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Right* (New York: Oxford University Press, 2008). With a nod to the notion of change over time, Ely writes that, “[i]n 1955 Justice Felix Frankfurter observed, ‘Yesterday, the active area in this field [constitutional law] was concerned with property. Today, it is civil liberties.’” *Id.* at 3. This is just one of many instances throughout this dissertation where I note that property and civil liberty are interchangeable concepts. I am, thus, not the first person to suggest that *privacy* and *property* are philosophically interrelated.

contract—and also guaranteed his right to participate in the affairs of the body politic. Lack of property ownership, by contrast, excluded African-Americans (even free blacks), women and children from any participation in the affairs of state in the new republic. Rights in property, therefore, were not only an economic asset which sustained life but were also a means by which to participate in the government or, at the very least, to obtain personal protection against the government itself.

The absence of property ownership then, much as it is today, virtually guarantees the individual has no protection against state or federal government authority. Property rights that could be asserted against an overweening government, however, was essential to the announcement to the Declaration of Independence in 1776 as well as maintenance of independence today.³⁶ Property, therefore, has always meant life and freedom for those who strove to find their place in American society.

To that end, this chapter is dedicated to illustrating the importance of property in general to Englishmen³⁷ as well as the added importance it took on as an element of the Enlightenment in Anglo-American political thought. Chapter two is devoted to the

³⁶ I use property in this context to denote not only real estate, but also chattel property in the form of money, stocks, bonds and other financial instruments. With the decline of feudalism, and the rise of capitalism, these instruments of chattel property would only become more important as the nineteenth, twentieth and twenty-first centuries of American history progressed. As historians and legal jurists of the time noted, one feature which distinguished America from Europe was the absence of a feudal state in what would become the United States. The American Revolution, among other things, led to abolishment of British property rights concerning entail and primogeniture. See St. George Tucker, *View of the Constitution of the United States with Selected Writings*, Ed. Clyde N. Wilson, (Indianapolis: Liberty Fund, 1999) 9.

³⁷ I choose the gendered term “Englishmen” purposely in this contest rather than a more generic reference to the “English” because, as I discuss subsequently in this dissertation, women (particularly, married women) were not only excluded from individual ownership of property but were also excluded from the status ownership brought them in the context of the so-called “social contract.”

importance property played, not just in construction of the Constitution, but also the Bill of Rights. If the Declaration of Independence can be likened to a birth announcement of the new nation, then the Constitution of 1791 was a birth certificate setting out the important legal parameters of this nation's conception. A Constitution is incomplete, however, without the addition of a bill of rights securing property rights and chapter three looks to the intellectual antecedents of an American Bill of Rights and the important role property played in early republican thought.

Equally important to this dissertation, chapters one, two and three incorporate the importance of contract to Anglo-American economic and political thought during the seventeenth and eighteenth centuries. *Contract* was a notion that served dual purposes in Anglo-American thought for several centuries. On the one hand, it was an economic construct which allowed for the easy trade of assets between peoples. While the development of free-market capitalism is an issue well beyond the scope of this dissertation, suffice it to say that markets could not exist without recognition and enforcement of contract. On the other hand, contract also served another—more political—function. As a result of the Enlightenment, contract became the means by which individual citizens defined their relationships with each other and with the polity. Civil society—according to philosophers like Thomas Hobbes, John Locke and Jean Jacques Rousseau—was no longer determined by one's status at birth, as it had been in earlier European history but, instead, in the seventeenth century by contract.

Contemporaries may query *who cared what these two Englishmen and a Swiss thought?* But, as I explain throughout Part I of this dissertation, their writings, the writings of their contemporaries (men such as Smith, Montesquieu and Burlamaqui) and

the writings of their followers both in Great Britain and here in America were critical in shaping American political thought and what later became American Constitutionalism. It is true that contemporary notions of property rights are very different than they were two, or even three, centuries ago. That is why the concept of privacy, as a property right, may seem foreign to so many and why it is necessary to retrace this period of American history. Privacy, I maintain, has strong historical roots in property rights. Part one of my dissertation is intended to review the importance of property rights in colonial Anglo-American thought and Part II of my dissertation exhibits the importance of those interests on more practical matters of the time period—that is to say, as a basis for slavery, for coverture and for patriarchal domination of children. But, Part II would make little sense absent an explanation of why property interests (in general) and property interests in the body (in particular) were so important, to the founding generation. Property and contract fell out of favor during the nineteenth century—as I discuss in part three of my dissertation—for a variety of reasons, not the least of which was ratification of the Fourteenth Amendment to the United States Constitution in 1868. But, proper understanding of *privacy* and *liberty* interests in the twentieth century requires—to borrow an archaeological metaphor—nothing short of a complete excavation of earlier notions of property to fully understand the meanings of those terms in historical Anglo-American thought.

A: Anglo-American Views on Property and Contract

Anna Gordon was the daughter of a wealthy merchant in colonial Boston.

William Martin was an up-and-coming artillery officer dispatched by Great Britain to

protect the North American portion of its' empire. The two met, fell in love and married sometime before 1752. When Anna's father, James Gordon, died in 1770, her brother inherited two-thirds of his estate and she inherited the other one-third—a mixture of developed and undeveloped properties scattered throughout Massachusetts and New Hampshire. The revolution broke out six years later at which time William's military career took him and his family, first, to Nova Scotia and, later, to British occupied New York. William eventually rose to the rank of commander in the Royal Artillery but he and Anna left New York during the evacuation of 1783 and returned to Great Britain. Anna never saw her native homeland again.³⁸

The Martin land in Massachusetts was confiscated in 1781 under a statute that called for seizure of property owned by those who remained loyal to the empire. Though Anna was the actual recipient of her father's land, in actuality, greater title passed to William. Under the doctrine of Coverture, all rights of landownership in what was the Bay Colony, later the Commonwealth of Massachusetts, passed from a *femme covert* (married woman) to her husband with one exception and that was a right of remainder in real estate.³⁹ That said, it is easy to understand why Massachusetts moved to seize any land held by a British artillery officer. This was a man who, after all, took up arms against the Commonwealth that protected his and his wife's property interests. What Massachusetts did not anticipate was that, years later, their forty-one year old son, James,

³⁸ All my factual recitations prior to the judicial decision in *Martin v. Commonwealth* comes from the detailed research into this case by Linda Kerber in "The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805," 97 *American Historical Review* (1992) 349-378.

³⁹ A "right of remainder" is a legal concept which means the fee (overall ownership) interest in the property would revert to Anna if she survived her husband.

would, one day, return from Britain and file suit to reclaim his mother's interest in the family real estate.⁴⁰

The son's attorneys took the position in *Martin v. Commonwealth* that the Confiscation Act did not apply to their client's mother. The law was drafted in such a way as it applied only to "members" of the Commonwealth. Was Anna Martin a "member" of the Commonwealth of Massachusetts? George Blake one of Martin's attorneys, argued she was not. *Femme coverts* were not required to take an oath of allegiance to the republic. Their allegiance, under common law, was to their husband and to no one else. Furthermore, what, precisely, did the commonwealth's legislature think the role of women should be in a time of war? Were *femme coverts* expected to take up arms, even against their own husbands, and resist an invasion? Was there any real fear they would give aid or comfort to the enemy against the directives of their own petit commonwealth?

The Massachusetts legislature, Blake argued, clearly did not anticipate a *femme covert* could be part of a class to which the Commonwealth's Confiscation Act would apply.⁴¹ The Commonwealth, put in a difficult position of having to justify a seizure of property eighteen years earlier, turned to the only argument it could logically make and that was to argue Anna Martin was within the scope of the statute because, as an autonomous individual, exercising her own agency, she had power to defy her husband and then could have remained in America and loyal to its government. The Massachusetts high court was not convinced and all judges agreed the Commonwealth's

⁴⁰ Ibid. I discuss the legal system of coverture in the next chapter and therefore will not duplicate it here.

⁴¹ *Martin v. Commonwealth*, 1 Mass. 347, 362-363 (1895)

legislature would have never intended the Confiscation Act to apply so as to take the property interest of a *femme covert*. Judge Sedgwick filed an opinion which, after noting significant precedent holding a *femme covert* could not be found liable for committing crimes under direction of her husband, opined he could not even begin to envision how the Massachusetts legislature meant to include women. “Can it be believed,” an incredulous Sedgwick asked, “that a humane and just legislature ever intended that wives should be subjected to the *horrid alternative* of, either, on the one hand, separating from their husbands and disobeying them, or, on the other, of sacrificing their property? It is [certainly] impossible for me to suppose that such was ever their intention.”⁴² Another judge, Strong, agreed noting that married women had no will of their own and were, thus, bound to obey their husbands or open themselves up to possible punishment from their husbands.⁴³ In the end, however, James Martin still recovered the property his grandfather had left to his mother. Ownership rights in property—despite the passions of that particular period—triumphed over the politics of the day.

In many ways, *Martin v. Commonwealth* is the legal history equivalent of a Rorschach test where everyone sees something different.⁴⁴ What follows is my own

⁴² Ibid. at 392 (Sedgwick, J.). (Emphasis mine.)

⁴³ Ibid., at 395 (Strong, J.)

⁴⁴ My interpretation of the *Martin* case, admittedly, is different than most. Historian Linda Kerber has probably spent more time dealing with this case than anyone else of whom I am aware. She describes the arguments made by Massachusetts as “unprecedented” for the time period as they asserted the agency of women. Kerber, “The Paradox of Women’s Citizenship,” at 370. But, did they really argue, as Kerber asserts elsewhere, that “if patriarchy in politics is rejected, so too must be patriarchy in marriage”? See Linda Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1988) 32. I am not so sure this is the argument they were making. First, as noted above, the Commonwealth attorneys were placed in situation of trying to defend the confiscation and were ethically charged to

interpretation of the case, or what I find important from its history and holding which, admittedly, is different than most. To begin, the holding in *Martin* reifies the sanctity of private property against government interference. The Court was clearly bothered by depriving the son of a former *traitor* (William Martin) to forfeit ancestral lands and allow them to be confiscated from his family in which it had been, presumably, been for generations. This unwillingness to allow government intervention, I maintain, is a narrative we can detect in American history at least through the Progressive Era before meeting its demise in the mid 1930s. Second, the Supreme Judicial Court of Massachusetts refused to permit a statute, duly passed by the legislature, to interfere with the private relationship that existed between husband and wife.

Nowhere in the Court's opinion do the words "private" or "privacy" ever appear but, in the end, what triumphs is the sanctity of the private sphere over the public one. Indeed, the head of the petit commonwealth (meaning Anna's husband) could impose domestic law superseding that of the larger Commonwealth of Massachusetts. Positive law (a statute that was enacted by a democratically elected legislature) could not trump laws regarding a private marital relationship even if that relationship was, in part, defined by law. The relationship between Martin and his wife, in short, was a private matter over

make any argument in support of their client. Second, both sides were arguing interpretation of the Commonwealth Confiscation Act and whether Anna Martin, as a *femme covert*, was an actual "member of society." I have never thought, in several readings of the case, that they were making a larger argument for ending patriarchy in general. Joan Hoff, on the other hand, omits reference to the argument altogether and simply states the Supreme Judicial Court of Massachusetts "thought it dangerous to encourage women to disobey their husbands their husband . . ." Joan Hoff, *Law Gender and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991) 93. This is a much more pessimistic view of this case than Kerber or others, including one of my own advisors on this very dissertation, takes away from it.

which a legislature could not tread.⁴⁵ The common law doctrine of Coverture, however repellant it may seem to our modern sensibilities, was said to be natural law whereas the Confiscation Act, passed by a democratically elected legislature which tried to insert itself into the privacy of the Martin household and thus alter the relationship between husband and wife was positive law which sought to alter the natural relation of things. The operative effect of the *Martin* decision, much like that of the *Griswold* case over a century and a half later, was to say that there existed a zone of privacy around a marital relationship against which the Commonwealth of Massachusetts could not interfere.⁴⁶

The purpose of Chapter I, as I have already said, is to explain not only the significance but the near sacrosanct importance of property and contract rights in English and, then later, Anglo-American thought. America was a polyglot of nations from the very beginning but, even if you were not English in origin, you quickly developed an affinity for English property rights which (in essence) defined the very concept of liberty. As Enlightenment era philosophers sought to explain, among other things, the very purpose of government, they recognized man had an inherent property interest in his own

⁴⁵ The primacy of English (later British) common law over positive (statutory) law is a common theme in American history until the 1930s and the death of *liberty of contract* which I discuss supra in this dissertation.

⁴⁶ Although *Griswold* could arguably be construed as stressing the personal privacy of the married woman to use contraceptives, whereas *Martin* clearly stressed the control of a husband over his wife, the important part to take away from these two cases is that they both stressed a zone of privacy around the marital relationship into which the government could not tread. As long as principles of coverture remained the law of the land, the benefit of that decision would have inured to the husband. With the demise of patriarchy in general, and coverture in particular, that privacy right should have inured to the benefit of the wife (or child or slave). What stopped that from happening, however, as I argue in Part V of this dissertation, was the rise of the regulatory state which assumed the role of the patriarch or *parens patriae*.

body. The legal fiction of the so-called Social Contract, in fact, had no real basis without the notion of property rights and the conversion of common property into personal property.

Contract is also a fundamental part of my thesis. The majority of my dissertation focuses on the relationship between property and privacy, but contract is essential to understanding that relationship for two reasons. First, contract is what gives property most of its value. All of the land on Manhattan is worthless if you cannot sell, lease or mortgage it and those transactions are all accomplished through contracts. Contract also led industrial capitalism to flourish in the late nineteenth and early twentieth centuries and the fight to preserve contract gave rise to one of the arguably most notorious decisions in United States Supreme Court history.⁴⁷ Contract is also important in Anglo-American constitutional culture because it defined the relationship between the citizen and the state as part of the so-called Social Compact.

1. Anglo-American Principles of Property

Although the most important strands of Anglo-American political thought on property came from the Enlightenment, the intellectual building-blocks for that idea already had strong foundations prior to that time. The earliest known dialectic on the value of private property rights was between Aristotle and his mentor, Plato. The opening epigram to this chapter was Aristotle's response to his teacher's advocacy of communal property ownership. Although Peter Garnsey of Cambridge University

⁴⁷ By this I mean *Lochner v. New York*, 198 U.S. 45 (1905) which I discuss at length in various future chapters of this dissertation and, thus, will not do so here.

challenges Aristotle’s reading of his predecessor’s texts—indeed, even labeling him a “bad historian of philosophy”—even Garnsey concedes the dichotomy between the two philosophers were a primary concern in early Christendom. This was particularly true given how much Platonic philosophy found its way into early Christian, or Catholic, theology.⁴⁸

Christendom, or at least Christians wrestling with biblical text, changed Western European ideas on property. After all, God supposedly gave to man a common dominion over the earth. By the end of the first millennium, CE, both ecclesiastics and non-ecclesiastics claimed private ownership rights in land. How was it possible for early Christendom—of which England was a part—to justify private, as opposed to communal, ownership rights in land? This was both a spiritual question as well as a political one as the Roman Catholic Church was a significant landowner both in the British Isles and the rest of continental Europe. Politics—most notably, warfare—presented private property as a *fait accompli* by the end of the first millennia but it was up to the Church and bar, with help from classical philosophy, to justify private rather than communal ownership.

After the Norman Conquest of England in 1066, the new King—William I (“the Conqueror”)—considered himself owner of all land in England. In turn, the new king subinfeudated his land to loyal nobles in return for services to the crown. Those nobles, then, further sub-infeudated with their own vassals who agreed to provide service to their

⁴⁸ Peter Garnsey, *Thinking about Property: From Antiquity to the Age of the Enlightenment* (Cambridge: Cambridge University Press, 2007) 6-58. Garnsey’s comment on Aristotle as a bad historical philosopher can be found at *ibid.* at 31. Wrong or not, Aristotle made a spirited defense for private property rights. “if [men] do not share equally in enjoyment and toils, those who labour much and get little will necessarily complain of those who labour little and receive or consume much.” Aristotle, *Politics*, at 61; “It is clearly better that property should be private. . .” *Ibid.*, at 62.

lords. Real property was, therefore, not only a means of support, in which subsistence farming staved off starvation for both noble and vassals, but was also a marker of wealth, power and privilege within the English caste system; English nobles provided for their new king, while the lesser nobility, and then yeomen farmers, provided for their nobles. The Norman invaders were so thorough at obliterating Anglo-Saxon land tenures, and then listing and defining their own, that their so-called *Domesday Book* delineated Norman ownership down to local farmer. Any loss of these rights would impact both one's own economic well-being as well as his place in society. The Church, though still holding tenure under Norman kings, held in "free alms" which alleviated them of any earthly service.⁴⁹ Clearly, the Catholic Church had an enormous interest in rejecting both the Platonic view of communalism as well as the biblical pronouncement of dominion.

Two centuries after the Norman Conquest, St. Thomas Aquinas came up with an answer in his *Summa Theologica*. Though true Hebrew Scripture said God had dominium over everything on earth, man should still be able to exercise dominion over parts of the earth because God created those things for his use and because it was necessary for survival. As for acquiring private property, to the exclusion of other claimants, Aquinas also reasoned that this was necessary for man's survival and, in any event, it provided for more peaceful relations between men who would surely argue amongst themselves if they all claimed use of property in common. Human affairs are also conducted in a more orderly manner if each man is charged for the care of something

⁴⁹ Theodore F.T. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown & Co., 1956) 11-13; Lyon, *Constitutional History of the United Kingdom* (London: Cavendish Publishing, 2001) 21.

his own.⁵⁰ I concede this is a vast over-simplification of centuries of legal and theological thought but my objective here is to show how Europe—particularly England—rejected what they believed was Platonic communality in favor of private property ownership.

Though Norman regulation proved a precise system for defining land rights for a generation or two after conquest, tenuous feudal claims eventually led to conflict between descendants of both king and vassal who no longer appreciated (or, for that matter, remembered) the purpose of the relationship to begin with. The lack of institutional memory between crown and vassal would, as one might expect, eventually lead to conflict between them.⁵¹ Less than two centuries after conquest, open rebellion broke out between king and vassal. This rebellion ultimately led to King John I submitting to the first *Magna Charta* in 1215. Because *Magna Charta* only affected king and his nobles, many argue its importance is overstated in Anglo-American history. Perhaps. But the Great Charter would evolve and take on greater importance over time and, even if it had

⁵⁰ Gen. 1:26 (“And God said, “Let us make in our image, after our likeness: and let them have dominion . . . over all the earth. . . .”); Gen. 1:28 (“ . . . replenish the earth and subdue it . . .”). See *Aquinas, Political Writings*, ed. R.W. Dyson (Cambridge: Cambridge University Press, 2002) 205-208. Development of natural law theory, both under Aquinas and later Thomists, also stressed that one of the most fundamental principles of natural law is self-preservation. Howard P. Kainz, *Natural Law: An Introduction and Re-Examination* (Chicago: Open Court, 2004) 15-30. It naturally follows that claiming land, to the exclusion of all others, and farming it to provide for one’s family aids self-preservation.

⁵¹ One of the greatest, if not the greatest, recorded breaks from English common law in colonial America was considered was the re-ordering of rights in real property. St. George Tucker, who edited one of the first editions of Blackstone’s Commentaries on English law for an American audience, noted both “abolition of entails” and the right to primogeniture” was one of the bulwarks of the American system of jurisprudence. St. George Tucker, *View of the Constitution of the United States With Selected Writings* (Indianapolis, Liberty Fund, 1999) 9.

not, *Magna Charta* still forms the foundation of legal thought regarding property that would, five centuries later, would form the bulwark of American Constitutional law regarding property.

First, it regulated relations between king and nobles thereby affecting all the obligations nobles owed to their king under feudal law. Second, and more importantly, it also regulated (albeit, to a far more limited extent) the relation between noble and their “undertenants.” Over time, this grew into a singular statement of opposition by landowners against the state. The legal device employed to explain this change were the rhetorical concepts of *dominium* and *usufruct*. The English king may have retained *dominium* (or right of ownership) over the land but his vassals gained a concomitant legally recognized right of *usufruct* (or right of enjoyment without the right of actual ownership)⁵². Ownership, combined with the right of exclusive use, was only represented by the higher title of *dominium directum et utile*.⁵³ The distinction between *dominium* and *usufruct* is not a dry and ancient rhetorical device that played with words but would, later, have a significant impact on property rulings by the United States Supreme Courts as well as state supreme courts throughout the republic.⁵⁴

⁵² As I discuss later in chapter three, these principles, if not the precise rhetoric, found its way into legal reasoning justifying U.S. seizure of native-American land.

⁵³ Lyon, *supra* 19-25; Plucknett, *supra* at 22-25.

⁵⁴ Much of the intellectual, if not legal, justification for early private ownership rights came from clergyman who sought to justify such rights for the Roman Catholic Church. To that end, scholars have long noted the interplay of ancient thought with medieval philosophy. William of Ockham, and others, came close to enunciating that private property inured to the individual. See K. Pennington, “Law, Legislative Authority and Theories of Government, 1150-1300,” in *The Cambridge History of Medieval Political Thought, c. 350-1450*, ed. J.H. Burns (Cambridge: University Press, 1988) 424, 438-439; Antony Black, “The Individual and Society,” in *Ibid.*, 588, 601-603. Many ecclesiastics could, for instance, point to ancient Greek and Roman texts which supported the efficacy

In any case, *Magna Charta* eventually led to solidification of private property right recognition at all ends of the economic spectrum thereby impacting recognition of rights of yeomen farmers as well as others in the Anglo-American legal and constitutional pecking-order. These private rights in land would eventually *trickle down*—to borrow a twentieth-century catch-phrase—to the lesser English landowners. Jean Louis De Lolme, a Swiss historian of the British Constitution, observed *Magna Charta* prevented all “arbitrary attempts” by the sovereign (king) from “touching any part of the property of the [s]ubject[.]” More recently, Bernard Siegan, traced the substance of America’s Fifth and Fourteenth Amendment *Due Process* Clauses of the United States Constitution to the Fourth English *Magna Charta* issued in 1225. That version of the Great Charter, in Chapter Twenty-Nine, stated no freeman could be “disseised of his freehold” except by “the law of the land.” Britain’s parliament later expanded that protection of *Magna Charta* through different legislative acts over the centuries and common law courts further expounded on both those enactments as well as the Great Charter.⁵⁵ All of this inured, of course, to the land and property owner.

of private property arrangements. See Janet Coleman, “Property and Poverty,” in *Ibid* 607-648. Aristotle, for instance, had argued property should be private rather than common as it would cause far less conflict between men than the holding of property in common. Aristotle, *Politics* (Mineola: Dover Publications, 2000) 62-66. So too agreed Saint Thomas Aquinas who, drawing on Aristotle’s *Politics*, argued that, while God continue to exercise dominium over all the earth, mankind gained the right to exercise usufruct over all that was necessary to support his existence on the earth. Coleman, *supra* at 616-625. Later natural law philosophers, however, would disagree with Aquinas. See Heinrich A. Rommen, *The Natural Law: A Study in Social History and Philosophy* (Indianapolis: The Liberty Fund, 1998) 207 (“The institution of private property is of natural law. In the long run man cannot exist, cannot make good his right to marriage or to a family or to security of life, and cannot maintain his sphere of individual right to a life of his own, unless he is entitled to ownership through the acquisition of goods”).

⁵⁵ Jean Louis De Lolme, *The Constitution of England*, ed. David Lieberman (Indianapolis: Liberty Fund, Inc., 2007) 239-240; Bernard H. Siegan, *Property Rights:*

As important as the Great Charter was, we should not underestimate the interpretation and application given it by sixteenth century jurist, Edward Coke, Chief Justice of Common Pleas and, later, the King's Bench. Bernard Siegan, illustrates that the many rights extended English property owners through not only Magna Charta but its subsequent expansion by Coke. These included, in no particular order of importance, the requirement that (1) nobody could be deprived of life, liberty or property without due process of law; (2) any laws attempting to do so must be prospective, rather than retroactive; (3) every person has the freedom to practice the vocation of his choice; (4) monopolies are violative of Magna Charta: and (5) property rights may be limited only when necessary to protect the lives or property of others. While none of this may strike contemporary Americans as particularly noteworthy, it was a tremendous restriction on princely prerogative that, along with other changes that were to come about in the seventeenth century, rendered the English (later British) monarchy the laughing-stock of kings and emperors on continental Europe.⁵⁶

By the dawn of the Fourteenth Century, English law focused on property in its most basic sense, meaning land. Real property enjoyed much of the focus of the common law and possession of land, as opposed to actual ownership, was the *sine qua non* for judicial backing of a claim of right thereto. If the protections for real property seemed lax, protections for chattel ("movable") property was even worse. Personal property,

From Magna Carta to the Fourteenth Amendment (New Brunswick: Transaction Publishers, 2001) 5-29.

⁵⁶Siegan, *Property Rights from Magna, Charta*, at 28. As many historians have noted, the notion of divine right, though infrequently asserted by Stuart monarchs, died in England much sooner than it did on the continent and British kings had no other choice but to respect property rights of their nobles and gentry.

during this time period, for all intents and purposes, was “synonymous with cattle” explained Sir Frederick Pollock and William Maitland. Protections for modern property rights acquired by contract (e.g., stock, bonds, bank deposits, mortgages) were virtually non-existent for the centuries following *Magna Charta*. Indeed, Medieval protection for real estate—as primitive as it was—covered far more than any legal protections afforded chattel rights. What benefitted English kings most was the institution of land tenures and entails through which they could derive military service of knights. The first *Magna Charta*, notably, restricted the English king’s abuse of land rights but did little to protect rights of chattel property, which became increasingly important in later centuries as new forms of property rights were developed.⁵⁷ Indeed, as society advanced to the modern era, protection of contract rights would, eventually, overtake protection of real property rights.

Certainly *Magna Charta* was significant in protecting English property rights, but various wars and political resolutions over the course of the seventeenth century largely overshadow the importance of the thirteenth century C.E. The English Civil War (1642-1651) and, even later, the Glorious Revolution (1688), had a greater impact on English ideas on the importance of property in England, generally, and its’ American colonies in particular. Cut off from the mother country during the seventeenth century, and being part of a generation which grew up with little or no instructive contract from the metropol, Anglo-American colonists found themselves in the unique position of absence from England and the inability to experience the political context from which many of

⁵⁷ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Washington, DC: Lawyers’ Literary Club, 2nd Ed., 1959) I:56-57; Id. at II:153; Theodore F.T. Plucknett, *A Concise History of the Common Law* (Boston: Little Brown & Co., 5th Ed. 1956) 506-558.

these ideas emerged and, because of that, could simply pick and choose which theory benefitted them at the time. One theory that would play a significant role in later American thought was espoused in Emerich de Vattel's, *The Law of Nations*. *De Vattel* wrote of virgin lands, like America, that:

When a nation in a body takes possession of a country, everything that is not divided among its members remains common to the whole nation, and is called *public property*. . . . As soon as the nation commits the reins of government to the hands of a prince, it is considered as committing to him, at the same time, the means of governing. Since therefore the income of the public property, of the domain of the state, is destined for the expense of government, it is naturally at the prince's disposal and out always to be considered in this light.⁵⁸

The political philosophy of *de Vattel* may not have had the same effect as Locke for purposes of acquiring ownership of property interests in the New World. But, at the same time, it weakened the legal rights of traditional aboriginal owners and helped usher in a new way of thinking about property and property interests in the new world. What was taken for granted in European thought (i.e., both the improvement and development of property) would make its way here, to America and have some disastrous consequences for aboriginal peoples.

2. Anglo-American Principles of Contract

As mentioned previously, property, as important as it was to the founding generation, lacked value absent the notion of contract even if contract did not seem immediately apparent to those who wrote our founding documents. Contract, and contract alone, granted status to property owners even for those white men who did not own property. In short, the ability to contract not only guaranteed access to the economic

⁵⁸Emerich de Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, Inc. 2008) 229.

system, but also defined the role of white men within governmental structure. Slaves, women, children and even free blacks, however, were not only denied access to contract in the economic sense of the term but, as discussed later in Part III of this dissertation, were also excluded altogether from the so-called “social contract” and, therefore, the polity in which they lived.

In 1861, Sir Henry Sumner Maine observed “[t]here are few general propositions concerning the age to which we belong which seem at first sight likely to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by [c]ontract.”⁵⁹ Maine’s comment, at least for America, had both economic/sociological implications stretching far beyond anything involved with the European continent to which he had contact.

As mentioned above, contract (in the context of this dissertation) has two separate meanings--both of which are important to understanding my argument. Though flawed in some respects, the best explanation I have seen to explain the distinction between the two is that given by P.S. Atiyah, a British legal historian, who writes as follows:

The law of contract in the modern world, even the ideas which underlie it seem to have no relationship to the ideas which underlay the Social Contract. The relationship between Government and governed appears to have no relationship at all with the relationship between contracting parties. The former is largely perceived as an authoritarian and hierarchical relationship. . . . A contractual relationship, by contrast, is seen as deriving from agreement; it is felt to be the creation of the parties who give it life.⁶⁰

⁵⁹ Sir Henry Sumner Maine, *Ancient Law* (Dorset Press, 1861) 252-253.

⁶⁰ P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) 36.

Though true to a large extent, this explanation neglects to mention (at least for Americans) that participation in the Social Contract was also a prerequisite to participating in contract in the economic sense of the term. For instance, white men could sell their labor through a contractual arrangement, but that option was almost always off-limits to women, children, slaves and, sometimes, even free blacks. If you were not a party to the social contract, in short, you oftentimes could not enter into the economic contracts benefit it provided either.

This is not meant to disparage the importance of social contract theory, however. As noted by Sir Henry Maine, contract (as opposed to status) allowed white men to define their place within society. While this notion may have been slow to take root in England/Great Britain, it found enormous support in an egalitarian American where (European white) men could escape the caste into which they were born and scale the heights of society based on their own merit. James Wilson, a Scottish émigré to the United States, who later became an Associate Justice of the United States wrote “[t]his theory [meaning social contract] is a material basis of political rights; and as a theoretical point, is not difficult to be maintained. For what gives any legislature a right to act, where no express consent can be shown.” Though an important statement of social contract theory, suffice it to say, Wilson left out all those were not (heterosexual) white male property owners.⁶¹

Economic contract was therefore intended to be the means by which many born into the lower castes enabled themselves to achieve riches many of them would have never achieved had they been living in Europe. What is meant to be, however, is

⁶¹*The Collected Works of James Wilson*, Ed. Kermit L. Hall & Mark David Hall (Indianapolis, Liberty Fund, 2007) I:713.

oftentimes not what turns out to be. Many men, from John Jacob Astor, to John Davison Rockefeller, proved this was possible. Many others, however, proved the notion of American success a failure and died in the process.

I will come back to the concept of contract later in this dissertation. Property and contract are almost inextricably linked with one another but that link is not truly realized until the nineteenth century of American history. The eighteenth century, however, is still infused with rhetoric of the Enlightenment which at least in eighteenth century America, meant the idea of social contract for white, propertied men.

B. Constitution-Making

There occurred in British North America what I describe to my undergraduate history classes as a creolization of Anglo-American legal and constitutional thought. The British Constitution, at least in the Eighteenth Century, was unwritten and therefore undefined by contemporary American standards. Though it included various historical documents like *Magna Charta* and the British Bill of Rights of 1688, it was also influenced by Parliament and parliamentary precedent. Historians such as Bernard Bailyn chronicled the importance of republican (and what Bailyn also characterized as “radical whig”) thought in Anglo-American politics that led to the American Revolution and the American Constitution. The notion of an unwritten constitution—the organic law of the land—was appealing to everyone on this side of the Atlantic both as a fundamental statement of law as well as a restriction on the legislative branch of government which did not exist in Great Britain. Although American colonies (later states) rejected the

notion of British Constitutionalism, what is amazing is how much of the British common law was retained—even today in the twenty-first century America.⁶²

1. Confederation Threats to American Property and Contract Rights

Polemics from the latter half of the eighteenth century make clear that the founders, both Federalists and Anti-Federalists alike, agreed that man possessed certain natural rights and that those rights required protection. Where they disagreed was over how to defend those rights and what threatened them in the first place. In 1776, Americans perceived that the preeminent threat to liberty emanated from unchecked magistrates. They responded by creating republican state constitutions which vested enormous power in legislatures and provided for weak executives. It never occurred to orthodox Whigs drafting those constitutions that representative bodies could be just as tyrannous as executive ones or that the problem lay not with the body in which power was reposed but the lack of institutional safeguards to check the exercise of that power.

Between 1776 and 1787, however, there occurred a series of events which transformed republican thinking and re-focused attention onto the state legislatures as a source for tyranny. Proliferation of paper money and debtor relief statutes with their effect on “republican virtue,” not to mention the value of property interests, caused political elites to reorient their thinking as to the origins of tyranny. It was not just magistrates that were capable of violating the people’s rights, legislative assemblies could

⁶² See e.g. . *Shenwick v. HM Ruby Fund, L.P.*, 106 A.D.3d 638, 966 N.Y.S.2d 69 (N.Y. AD 1, 2013); *State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 426-427, 54 A.3d 1005 (2012). *In re Marriage of J.M.H. and Rouse*, 143 P.3d 1116, 1118 (Col.App. 2006); *Davis v. Slater*, 861 A.2d 78, 85 (MD.App. 2004).

be equally tyrannical. This change in thought—the so-called “republican synthesis”—manifested itself in a movement to strengthen the national government and to check state governments. Although Madison’s proposed national veto of state legislation never came to fruition, the founders succeeded in prohibiting states from any further effort to coin money or impair the obligation of contract. More importantly, though, the founders crafted a frame of government which significantly cut back the power of the legislative branch and instituted checks against popular majoritarianism. As a further check on overreaching legislatures, Federalists like James Madison who had in the past opposed inclusion of a bill of rights, were willing to adopt them as a check on “excess democracy” and legislative tyranny.

As noted previously, the groundwork for the “republican synthesis” was first laid by Bernard Bailyn, who pointed out that Whig Oppositional thought, inherited from the Glorious Revolution and transplanted into colonial America, advocated free and independent parliaments as the best guardians of liberty. What made this belief problematic, however, was the colonial conception of British Constitutionalism and the place of Parliament in that sphere. Constitutions were perceived by Whigs as simply arrangements of institutions or frames of government. They were not viewed, as we view them today, as written documents specifying rights which cannot be infringed by popular government. The British Constitution did not check Parliament because Parliament was, in fact, a part of that constitutional system and laws passed by Parliament were *ipso facto* constitutional. After independence, Americans carried these views over into their initial experiments with republicanism in state governments. Representation in the new state governments was based on direct consent of the governed and the former colonists tried

to make government, particularly the legislatures, more reflective of the people who gave their consent. Indeed, these new state governments “had no separate existence apart” from the people. Only after the turbulent years of the 1780s would Americans begin what Bailyn described as a process of disengaging popular assemblies from fundamental law so that, by the time of the Philadelphia convention, the founders would conceive of government not as a part of such law but subordinate thereto.⁶³

The task fell to Gordon Wood and subsequent scholars to elaborate on that process of disengagement and explain how legislatures came to be viewed, not as part of the fundamental organic law of the land, but as constrained by it. This process began, according to Wood, in the 1780s and was attributable to two factors—the first was the systemic defects in the Articles of Confederation which made the national government weak and dependent on the states and the second was what Wood calls “excess democracy” or legislative tyranny in the state governments. The defects in the Articles of Confederation are well known and require little elaboration—the national government had no power to tax, no power to regulate foreign or interstate commerce and no power to enforce its treaty obligations with Great Britain. The crisis in state government is a little more complex and was a natural outgrowth of what Bailyn described as a concerted effort to make legislatures more reflective of the people. The problem was that, in the process, state legislatures became more populist and passed legislation which reflected popular

⁶³ Bailyn, *Ideological Origins of the American Revolution*, 67-68, 86, 160-229; Wood, *Creation of the American Republic*, 259-305.

interests thereby running contrary to the concept of disinterested republican virtue which disdained such parochial interests.⁶⁴

The Revolutionary War, with its vast government expenditures and its easy money policies to finance the war effort, precipitated great prosperity which came to an end with the Paris Peace Treaty of 1783. Consumers who had grown used to being flush with available cash, middling traders who wanted to unload their inventories, debtors who needed easy money to repay loans, farmers and planters who wanted to finance future crops and current consumption all petitioned their state governments to issue its own paper money and the states were all too eager to oblige. Emissions of paper money proved inflationary, though, and creditors tried to avoid accepting the devalued currency as payment for debts. States responded by passing legal tender laws requiring creditors to accept depreciated currency in satisfaction of their debts. If that was not enough, states also passed relief legislation allowing debtors to repay their debts in several installments over time.⁶⁵ Of all the problems that precipitated the calling of the Philadelphia

⁶⁴ Wood, *Creation of the American Republic*, 393-429; Gordon S. Wood, "Motives at Philadelphia": A Comment on Slonim," *Law and History Review* 55 (1998): 553-562 (refuting the criticism that his "republican synthesis" describes the problems of the Confederation government as "incidental" to the problems in the states); Gordon S. Wood, "Interests and Disinterestedness in the Making of the Constitution," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein and Edward C. Carter II, 69-112 (Chapel Hill: University of North Carolina Press, 1987) (discussing the problems of "popular politics" during the Confederation period and how such politics failed to live up to ideals of republican virtue and "disinterestedness" in legislating for the good of the whole community rather than parochial interests).

⁶⁵ Wood, *Creation of the American Republic*, 396-409; Wood, "Interests and Disinterestedness," 77-81; Steven R. Boyd, "The Contract Clause and the Evolution of American Federalism, 1789-1815," *William and Mary Quarterly*, 44 (1987) 529-548 (review of state legislation regarding impairment of debt and its effect on Constitutional thinking); Mary M. Schweitzer, "State-Issued Currency and the Ratification of the U.S. Constitution," *Journal of Economic History*, 49 (1989): 311-322 (discussing state emissions of paper money and pointing out that there were other reasons for its issuance that had nothing to do with debtor relief legislation including replacement of more cumbersome forms of "commodity money"). For a report of various state paper money

convention, scholars agree that these interferences with property interests were among the most significant.⁶⁶

The solution to these democratic excesses lay in a reorientation of political thinking that has come to be called “the republican synthesis.” There are several aspects to these changes in republican theory but, for our purposes, we need only concentrate on two. The first was a realignment of the political system and distribution of power within that system. The colonial experience had proven to Americans that too much power given to the executive led to tyranny. Likewise, the Confederation experience proved that too much power given to elected assemblies also led to violation of rights. The founders eventually concluded that perhaps the problem was not who held power but that too much power should never be vested in a single body no matter what the body. The solution was to divide power, to spread it over several bodies, and then to institute systems of checks and balances. To that end, the founders devised various “brakes” on democracy. Those brakes included not only the concept of an extended republic but also more concrete measures like an executive veto, a supreme court and filtering mechanisms such as an electoral college and the appointment of senators by state legislatures. The second important change in the “republican synthesis” was a reconceptualization of the role of constitutions in the American polity. As Bailyn and Wood have shown, the British model of constitutionalism perceived the constitution as merely a system of government with

laws, and the perceived effect of those laws on the economies of the states that had passed them, see James Madison to Thomas Jefferson, 12 Aug. 1786, in *The Papers of James Madison*, ed. Robert A. Rutland (Chicago: University of Chicago Press, 1975) 9:93-95.

⁶⁶ Wood, *Creation of the American Republic*, 393-425; Beard, *An Economic Interpretation of the Constitution*, 178 (of the forces which created the Constitution, “those property interests seeking protection against omnipotent legislatures were the most active.”); McDonald, *Novus Ordo Seclorum*, 180 (considerable numbers of Americans began to talk of Constitutional monarch as a better safeguard to liberty and property than republicanism);

Parliament as part of that system. Parliament could not violate the constitution because it was a part of that constitution and all of its actions were therefore constitutional. By the time of the revolution, however, Americans undertook what Wood calls a “crucial divergence” from their British counterparts and envisioned the British Constitution as constraining Parliament. Indeed, it was the perceived violation of their rights under the British Constitution which justified the revolution in the minds of the colonials. But, even as Americans reconceived of constitutions as being above positive law passed by legislatures, they hesitated in taking the next step of putting constitutions entirely beyond the reach of legislatures. State constitutions were largely drafted by state legislatures and during the Confederation era were frequently revised and rewritten by the state legislatures to accommodate their own needs. A significant part of the “republican remedies” for the crisis of the 1780s was a realization that constitutions must be put beyond the power of the legislatures so that they could only be changed by the sovereign people acting in convention.⁶⁷

This changed view of Constitutionalism would have a profound effect on the proceedings both in the Philadelphia Convention and in the First Congress. Federalists and Anti-Federalists alike were suspicious of government. For Federalists, the danger lay in state governments which proved only too willing during the Confederation period to pass legislation which trammelled on the natural rights of property owners. For Anti-Federalists, the danger lay in a distant national government which could pass laws

⁶⁷ Wood, *Creation of the American Republic*, 259-268, 306-310, 437. Some state constitutions put certain issues beyond the reach of legislative amendment or required action above and beyond the vote of state legislatures. For a discussion of differing requirements for alteration of state constitutions, see Adams, *The First American Constitutions*, 136-142, 298-299.

violating the rights of their citizens. The one point on which both sides could agree was the necessity of inserting “brakes” on democratic government at the national level.

2. The Making and Ratification of the Constitution (1787-1789)

In May, 1787, fifty-five delegates from twelve states began to arrive in Philadelphia for the express purpose of amending the Articles of Confederation.⁶⁸ These delegates, despite absences of such notable intellectuals as John Adams and Thomas Jefferson, were among the best and brightest of America’s political elite and they quickly came to the conclusion what was needed was not an amendment to the articles of governance but a new set of articles altogether. Thus, in great secrecy, they set about drafting an entirely new framework of government. Most of their work that summer centered upon both the structure of government and the relationship between a national government and the states (Articles IV & VI). Little attention was paid to the “rights” of citizens. In August, Charles Pinckney suggested several propositions be taken up by the Committee of Detail including proposals that liberty of the press be “inviolably preserved” and that soldiers could not be quartered in private homes during peacetime “without consent of the owner” (which language pre-figured what eventually became the First and Third Amendments) but the committee took no further action on the proposal.⁶⁹

The matter came up again, almost by accident, in the final days of the convention. On September 12, 1787, Hugh Williamson of North Carolina observed that the document they were debating made no provision for jury trial in civil cases. Elbridge Gerry of

⁶⁸ Rhode Island sent no delegates to the convention at all.

⁶⁹ Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), 2:340-341.

Massachusetts echoed his concern noting juries were necessary to guard against corrupt judges. At that point, George Mason of Virginia spoke up and voiced agreement with Williamson and Gerry and suggested the proposed constitution be prefaced with a bill of rights. Mason continued that such a bill would “give great quiet to the people” and could be prepared in just a few hours thereby not delaying adjournment of the convention.⁷⁰ Roger Sherman of Connecticut questioned the need for a bill of rights. Though all for “securing the rights of the people where requisite,” Sherman noted the state constitutions and declarations of rights were not being repealed by the new proposed federal constitution and that they would suffice to protect the rights of the people. Mason answered that, while the state constitutions were not repealed, the new federal Constitution would nevertheless “be paramount to State Bills of Rights.” Gerry then moved the matter be referred to a committee where a bill could, presumably, be quickly drafted. Mason seconded his proposal but, in the end, the motion was unanimously defeated with neither Virginia nor Massachusetts in support of the positions advocated by their own delegates.⁷¹

Gerry and Mason ultimately refused to sign the final draft of the proposed Constitution. On draft blanks, Mason noted that “[t]here is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security.” So upset was Mason with these perceived defects, that he declared to his fellow delegates that he

⁷⁰ Ibid., 2:587-588. Mason may well have had himself in mind for the task of drafting a bill of rights in just a few hours. He had plenty of experience in similar endeavors given that he was the author of the Virginia Constitution of 1776 with its Declaration of Rights.

⁷¹ Ibid.

would “sooner chop off his right hand than put it to the Constitution as it stood.” Gerry was not so much troubled by the absence of a bill of rights as he was by eight other structural problems with the new government, all of which he said he could “get over” if the rights of citizens were not rendered insecure by the power of Congress to make whatever laws they pleased and then to establish tribunals without juries.⁷² The proposed constitution was nevertheless approved by the overwhelming majority of delegates who remained in Philadelphia until September. Only three delegates at the conclusion of the convention (Mason, Gerry and Edmond Randolph of Virginia) refused to give their assent to the document. The new frame of government was then sent to the states for their approval and ratification.

If Federalists expected the same muted reaction to the absence of a bill of rights at state ratification conventions as they received in Philadelphia, then they sorely underestimated the salience of that issue. Anti-Federalists, concerned with national intrusion on both individual and state’s rights, seized on the absence of a bill of rights as reason to oppose what they saw as an emerging federal leviathan. This is not to suggest that the absence of a bill of rights was the only reason Anti-Federalists opposed the new constitution. As Saul Cornell has persuasively shown, few groups in history were as

⁷² Ibid., 2:637; 2:479 (remarks of Mason); James Madison, *Journal of the Federal Convention*, ed. E. H. Scott (Chicago: Albert Scott & Co. 1893) 740-741. Gerry’s specific objections to the structure of the Constitution included (1) duration and re-eligibility of the Senate, (2) power of the House to conceal their journals, (3) power of Congress over the places of election, (4) unlimited power of Congress over their own compensation, (5) Massachusetts was not given what he thought to be that state’s “due share of representatives,” (6) three-fifths of blacks were to be represented as if freemen, (7) monopolies could be established under Congressional powers over commerce and (8) the Vice President was made head of the Senate. Ibid.

heterogeneous, and had such differing ideas on the inviolability of rights and the role of democracy in America, as Anti-Federalists. There were elite, middling and plebian strains of Anti-Federalism—each with its own philosophical concerns about the national government and oftentimes as suspicious of their Anti-Federalist colleagues as they were of their Federalist opponents. Nevertheless, the lack of a bill of rights was a more tangible point around which to rally than, say, differing views of democracy and republicanism.⁷³

The ensuing struggle between these groups played out over class and ideological battlegrounds. Progressive historians like Charles Beard cast Federalist and Anti-Federalist positions in terms of economics, with support for the Constitution coming from merchants, money lenders and securities holders while opposition originated with farmers, debtors and advocates of loose money. Subsequent scholarship demonstrated that the battle for ratification was far more complex and involved differing political ideologies and concepts of representative government. Federalists viewed good republican government as administered by the virtuous who arose from the ranks of the

⁷³ Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill: University of North Carolina Press, 1999) 1-34. Other perceived defects cited by Anti-Federalists as reason to oppose the new Constitution included (1) consolidation of a large national government to the detriment of the states, (2) unrepresentative government that did not give sufficient representation in the House of Representatives and removed the Senate from popular will, (3) a judiciary that could threaten the integrity of state courts, (4) a chief executive with powers resembling that of a monarch, (5) extensive powers of taxation and (6) no prohibition against a standing army. Ibid. 30-31. In referring to the opponents of the proposed constitution as “Anti-Federalist,” it is worth noting that this is not a name they gave themselves but was given to them by Federalist proponents. As Herbert Storing points out, Anti-Federalists almost never addressed themselves as such and many believed that they were the true “Federalists” but that the name was “filched” from them and the proponents of the constitution would not give it back. See Herbert J. Storing, “What the Anti-Federalists were For,” in *The Complete Anti-Federalist*, 1:9.

elites and would govern for everyone. Anti-Federalists were obsessed with what they saw as a Federalist cabal to govern through “aristocracy.” Elite Anti-Federalists, like George Mason of Virginia, were not so concerned about a “natural aristocracy,” but feared the new frame of government concentrated too much power in the hands of too few people who would eventually form a “governmental aristocracy” to rule everyone else. Their solution was a bill of rights to protect individual liberty. Middling Anti-Federalists, merchants, mechanics and professional men, were wary of the very sort of natural aristocracy to which men like Mason belonged and resented the Federalist arguments that filtering mechanisms in the new Constitution were needed to ensure that these “better sorts” were the ones who rose to power in the new Congress. A bill of rights was all well and good but did little to relieve their concerns about the structure of the new government. The solution for these men was to strip power away from the national government and keep it at the state level where it could be controlled. At the far end of the Anti-Federalist spectrum were plebian populists, like farmers in the western back countries, who were the most class conscious and favored representation by “populist localism” where representatives more closely resembled the constituents they were supposed to represent. Thus, while the battle lines between Federalists and Anti-Federalists coalesced around the issue of a bill of rights, their differences were much more systemic and theoretical.⁷⁴

The Constitution, as ratified in 1789, provided a number of affirmative protections for

⁷⁴ Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York City: Free Press, 1986) viii.; Gordon S. Wood, *Creation of the American Republic 1776-1787* (Chapel Hill: University of North Carolina Press, 1998) 488-490, 499; Saul Cornell, “Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism,” *Journal of American History* 76 (1990) 1149, 1155, 1158, 1167.

private property even if it did not spell out the right to acquire, use or sell *property* per se. Article I of that document ostensibly dealt with power of the legislature, but section ten of that article prohibited states from either issuing the much maligned paper money or interfering with the obligation of contract. Moreover, despite arguments by some historians the Constitution was neutral to slavery, its various provisions woven throughout the original document clearly indicates protection for slave property. Ownership of property was not an enumerated right but was certainly implied by the provisions protecting it. Recognition of this unenumerated right, and perhaps others, would become even more clear with passage and ratification of a bill of rights.

3. The Bill of Rights: Unenumerated Rights in General and Property in Particular

It is clear the founders, both Federalists and Anti-Federalists, were concerned about protecting the rights of citizens—or at least those of white male property owners—but what is less clear is what they meant by the term “rights” and what specific protections for those rights they thought necessary to included in the new polity. From the writings of Federalists and Anti-Federalists alike, it would appear that the “rights” with which they were primarily concerned were, in fact, “natural rights.” Thomas Paine wrote that he considered the war against Great Britain to be the war of the people “for the security of their natural rights, and the protection of their own property.” Later, when arguing for adoption of the Constitution, John Jay admitted that it was “undeniable” that people must cede to the new government “some of their natural rights” but that this was necessary to vest government with requisite power to function and that the institution of government was “an indispensable necessity.” Indeed, to create a proper civil

government, it was necessary “that a certain portion of natural liberty” belonging to man in a state of nature be surrendered. That said, Anti-Federalists like Richard Henry Lee thought it absolutely essential to expressly declare a “residuum” of “natural rights, which is not intended to be given up to society” upon entering the new polity.⁷⁵

Due to their amorphous and undefined nature, though, devising a means to protect the people’s natural rights was a primary point of contention between proponents and opponents of the Constitution. Anti-Federalists insisted that the only way to protect their rights was with a bill specifically setting out rights that could not be infringed by government. Federalists responded that it was impossible to enumerate all the natural rights of man and an incomplete enumeration was even more dangerous than no enumeration at all. In proposing what ultimately became the Ninth Amendment, Madison devised an ingenious compromise that addressed the arguments of both groups.

The most convincing concern cited by Federalists for not including a bill of rights in the Constitution centered on the fact that natural rights were amorphous and incapable of any precise delineation. Many founders were well-schooled in law and were well-aware of the ancient legal maxim of *expressio unius est exclusio alterius* (the expression of one thing means exclusion of another). They were concerned that an enumeration of some rights could later be construed by tyrants as having been meant to exclude any other rights which were not so enumerated. James Wilson summed up the danger for his fellow Pennsylvanians:

⁷⁵ Thomas Paine, “Common Sense on Financing the War,” in *Thomas Paine: Collected Writings*, ed. Eric Foner (New York: Library Classics, 1995) 297; John Jay, “Federalist 2,” in *The Federalist*, 7-12; Brutus [pseud.], Essay, in *The Complete Anti-Federalist*, 2:373; Richard Henry Lee to Samuel Adams, 5 October 1787, *Documentary History of Ratification*, 13:323.

In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous. . . . [In] a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.⁷⁶

On December 4, 1787, just days before Pennsylvania would ratify, Wilson again rose to emphasize what he saw as the futility of including a bill of rights: “[e]numerate all the rights of men! I am sure . . . no gentleman in the late convention would have attempted such a thing.”⁷⁷ Hamilton sounded the same clarion in *Federalist 84*:

I go further, and affirm that bills of rights, in the sense and to the extent to which are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish to men disposed to usurp, a plausible pretence [sic] for claiming that power.⁷⁸

Future Supreme Court Justice James Iredell of North Carolina agreed and called

⁷⁶ Elliot, *Debates*, 2:436.

⁷⁷ Farrand, *Records of the Federal Convention*, 3:162.

⁷⁸ Hamilton, “Federalist 84,” in *The Federalist*, 550.

the demand for a bill of rights nothing short of “absurd.” Iredell argued that no man, in all of his ingenuity, could enumerate a list of rights that were not relinquished in the Constitution. Should a legislature violate an unenumerated right in the future, Iredell pointed out, the legislature could merely point to the fact that such a right was never included in the bill of rights and, thus, was not protected. A bill of rights in a government based on delegated powers was thus a “snare” for the unwary rather than a “protection.”⁷⁹ In proposing his amendments, Madison did not wholly abandon the Federalist concern over the *expressio unius* argument of an imperfect enumeration of rights later being construed to deny other rights that were not enumerated. To guard against it, the final paragraph of his fourth proposed amendment provided that “[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people.”⁸⁰ Madison explained the purpose of this paragraph as follows:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as

⁷⁹ Elliot, *Debates*, 4:149.

⁸⁰ Madison’s Resolution of 8 June 1789, in *Creating the Bill of Rights*, 11-14.

gentlemen may see by turning to the last clause of the fourth resolution.⁸¹ Thus, to prevent a partial enumeration of rights from being construed to deny protection to other rights not expressly set out in the Constitution, Madison proposed that which ultimately became the Ninth Amendment. There is little legislative history on what happened to the “last clause” of Madison’s “fourth resolution” as it wound its way through Congress. But, somewhere during its time in committee the language was re-shaped to read the way it does today. A House Committee Report on July 28, 1789, shows the language of the amendment as reading that “[t]he enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”⁸² Elbridge Gerry moved to delete the word “disparage,” which he claimed was unclear, and to insert the phrase “deny or impair” but his motion was not seconded. There is no record of any further debate on that particular provision and it was sent to the states where it was ultimately ratified.

The proposal, debate and ratification of the Bill of Rights is important for two reasons. First, the Fifth Amendment of that Bill provided, in pertinent part, that no person shall be deprived of “property, without due process of law.” The very promise that

⁸¹ Gales, *The Annals of Congress*, 1:439. Several weeks after introducing his proposals, Madison forwarded them to Jefferson in Paris stating that, while other amendments might have been made as well, everything of a “controvertible nature” that could have endangered passage in Congress and ratification in the states was avoided. Madison to Thomas Jefferson, 30 June 1789, *The Republic of Letters*, 1:618-624. Jefferson responded several months later and assured his protege that, while there were other amendments he would have liked to have seen included in Madison’s proposals, he had enough confidence in his countrymen that “we shall have them as soon as the degeneracy of our government shall render them necessary.” Jefferson to James Madison, 28 August 1789, *Ibid.*, 1:627-631.

⁸² House Committee Report, in *Creating the Bill of Rights*, 31.

property should not be taken without due process of law assumes, at the very least, that there is a right to acquire or retain property without interference from the government. More importantly, however, if the right to own property is not enumerated in the text of the Constitution, and if the Ninth Amendment is taken to mean precisely what its drafter (James Madison) said it meant, then it is logical to assume that there are other enumerated rights that exist, or at least permutations on the right to own property.

My thesis—that the notion of bodily property was encompassed within the Enlightenment notion of property in general—is put to the test in the next chapter of my dissertation. Enlightenment principles continue to hold sway (more or less) over the political and legal thought of this country. I maintain that well into the early parts of the nineteenth centuries, those principles found a sympathetic ear with judicial branches of government. Chapter Three, explores how in the early days of the republic the United States Supreme Court both—indeed, even state supreme courts—rigorously enforced both property and contract rights. Moreover, John Locke’s theory of land improvement found its way into jurisprudence of American Courts insofar as disposition of native lands.

C. Property and Contract in the Early Republic

Property and contract, as aforesaid, are inextricably intertwined with one another. Private property rights cannot exist without contract and contract (in and of itself) has little meaning beyond the realm of transfer of property rights. This chapter of my dissertation examines the link between these concepts insofar as constitutional principles are concerned. Associate Justice Potter Stewart once opined the “dichotomy between

personal liberties and property rights is a false one” and the right to enjoy property, without unlawful deprivation, no less than the right to speak or the right to travel is, in truth, a personal right.”⁸³

1. The Marshal Court, Property and the Contracts Clause

In 1801, during the waning days of the Adams presidency, one of the final acts of the Federalist congressional majority was to confirm John Marshall to the office of Chief Justice of the United States. Though Marshall was related to the incoming President, Thomas Jefferson, the two men were soon to become bitter enemies as a result of rulings handed down by the Supreme Court. John Marshall is widely credited (or excoriated) for strengthening the power of the national government, usually at the expense of state governments, and ushering in the concept of judicial review. But for our purposes, it is the Marshall Court’s economic jurisprudence that is most important.

In 1790, ten years before appointment to the high court, a thirty-five year old Marshall went before the Commonwealth Court of Appeals to argue that a 1779 Virginia statute—enacted to protect citizens from debts owed to British merchants—did not forestall his client from collecting a debt owed by another man. His arguments were procedurally technical, and based on the ancient English writ of *indebitatus assumpsit*, but what is important was his contention that there existed no “stronger moral obligation” than “to pay for property purchased[.]” Marshall also maintained that the Commonwealth’s legislature did not—indeed, could not,—destroy “this moral

⁸³ *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

obligation.” There was a substantive right vested in contract that could not be disturbed by a state legislature. The court agreed and Marshall won the case.⁸⁴

It is oftentimes difficult to separate an advocate’s personal views from the arguments advanced on behalf of a client. In Marshall’s case, though, it is safe to say two coincided. In a series of seven cases dealing with the Article I, section 10, prohibition against states interfering with “obligation of contract,” the Marshall Court laid out a foundation of economic jurisprudence that both protected vested property rights and limited the power of state legislatures to interfere with those rights. The first—and arguably most important—decision on property rights was the aforementioned 1810 case of *Fletcher v. Peck*. This case involved Georgia’s attempt to rescind the infamous, and fraudulent, Yazoo land grants made by a previous legislature. Before the new legislature could rescind those grants, however, some of the land was sold to buyers who played no part in the original fraud. When the new legislature tried to rescind those grants, John Peck, one of the subsequent owners, brought suit against the state. Chief Justice Marshall quickly struck down the act of rescission as an unconstitutional impairment of contract. Peck had vested contract rights, Marshall explained, and it would be “indecent, in the extreme,” to go back and retrospectively question the sale of the property.⁸⁵

Marshall could have ended the decision solely on the basis of the contract impairment. But, he went further to connect the contract impairment to disturbance of real property rights in general. “If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States,” Marshall warned,

⁸⁴Argument in *Beall v. Edmundson* (1790), in *The Papers of John Marshall*, Charles F. Hobson, ed. (Chapel Hill: University of North Carolina Press, 1987) V: 488, 491.

⁸⁵*Fletcher v. Peck*, 18 U.S. 87 (1810).

then the state “may divest [*sic*] any other individual of his lands, if it shall be the will of the legislature so to exert it.” What limit could there be “to the legislative power” if the State could simply seize private property without compensation. There was, in other words, a higher principle here—a principle that allowed states to go only so far with their regulations, but no further. In addition, by slipping back and forth between the rhetoric of contract rights on one hand, and real property rights on the other hand, Marshall signaled the Constitution would be read expansively to protect many more rights than those expressly enumerated in the document itself. Indeed, Marshall concluded the State of Georgia was prohibited from interfering in Peck’s property interests either because of the “particular provisions” of the Constitution noted in the opinion, or “by general principles which are common to our free institutions.”⁸⁶

Two years later, in *New Jersey v. Wilson*, the Court struck down another state statute interfering with vested property rights. In that case, the state of New Jersey set aside land for the Delaware nation in 1758 and agreed the land would remain exempt from state taxation. In 1803, however, the Delaware sold the land to someone else. When the legislature passed a law in 1804 to revoke the tax exemption for the new owner, that owner filed a lawsuit. In one of the shortest opinions ever issued by the Chief Justice, Marshall found the New Jersey legislation unconstitutional. Writing for a unanimous Court, Marshall observed that the tax exemption “annexed” to the land not to the “persons” of the “Indians” to whom it was originally granted. Any subsequent purchaser stood in the same position as the “Indians” and, just as the state legislature

⁸⁶Ibid. 134-135, 139.

could not divest the “Indians” of their rights, so too could they not divest the rights of subsequent purchasers to whom the “Indians” sold their property.⁸⁷

Although Marshall did not author the majority opinion in *Green v. Biddle*, his influence is clear. The issue in that case was a compact between Kentucky and Virginia whereby the latter agreed to grant some of its western lands for creation of the former. As part of that compact, and in exchange for the land, Kentucky agreed the rights of occupants in those lands would be determined under Virginia law. When Kentucky passed statutes in 1797 and 1812, attempting to curtail those rights, successors of the original occupant brought suit. It made no difference that this contract was between two states rather than between a state and an individual or two private individuals. A “contract” is an “agreement of two or more parties, to do or not to do certain acts.” States are just as much parties as individuals and Kentucky and Virginia both undertook certain obligations in exchange for obligations from the other. Thus, their compact was a legally enforceable contract. That, said, Justice Bushrod Washington went on to declare “that the duty, not less than the power of this court, as well as of every other court in the Union to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other courts to be now shaken[.]”⁸⁸

The question in *Dartmouth College v. Woodward* was whether the state of New Hampshire could alter a corporate charter granted in 1769 and convert a private college into a public institution. Marshall answered in the negative. Dartmouth’s charter created

⁸⁷*New Jersey v. Wilson*, 11 U.S. 164 (1812).

⁸⁸*Biddle v. Green*, 21 U.S. 1, 92 (1823).

an artificial, but immortal, being as capable of entering contracts as a natural being. More importantly, however, the college had solicited, and accepted, donations of money and other property held and used to further its educational purposes. Reordering the corporate charter would, essentially, reorder the college's property holdings. Not only did private trustees hold legal title to property but the donors had vested rights in seeing their donations were used for the stated purpose of the college. By altering those rights, Marshall ruled, the New Hampshire legislature enacted a law prohibited by the United States Constitution.⁸⁹

What is interesting about *Dartmouth College* is not just the holding but also some of its ancillary lines of thought linking property rights to other personal rights. An argument raised by New Hampshire's attorneys against application of the contracts clause was that such provision was never meant to apply to "civil contracts" such as a college charter. What would be next? Would the Court apply the "contracts clause" to state regulations affecting marriage contracts? Marshall largely sidestepped that issue, noting the clause was inserted into the Constitution to "to restrain the legislatures in future from violating the right to property." It should be confined to cases, like *Dartmouth College*, "within the mischief it was intended to remedy." The clause was always understood to extend only so far as "property or some object of value" though Marshall left the door open to reviewing marriage legislation in the future if a legislature passed some hypothetical law "annulling all marriage contracts." In his concurring opinion, however, Justice Story was more direct noting "[a] man has just as good a right

⁸⁹*Trustees of Dartmouth College v. Woodward*, 17 U.S. 463, 624-655 (1819).

to his wife” as to his property and to deprive him of her society (or fortune) “would be as flagrant a violation of the principles of justice, as the confiscating of his own estate.”⁹⁰

A particularly problematic issue in the Court’s contracts clause jurisprudence was state insolvent and bankruptcy laws. Although Article I, section 8, of the Constitution grants Congress the authority to enact “uniform” bankruptcy laws, the Court found there was nothing to prohibit states from passing their own laws if Congress was silent – so long as the state legislation did not impair the obligation of contract. The first time the Court was called to pass on this issue was the case of *Sturges v. Crowninshield* wherein the Court ruled a New York bankruptcy statute was unconstitutional insofar as it applied retrospectively and allowed for discharge of debts contracted prior to its passage. It was the retrospective application of the New York statute which made *Sturges* a relatively simple, straightforward, decision. Indeed, Chief Justice Marshall spent more time justifying the reach of the contract clause to bankruptcy law than to explaining the unconstitutionality of that law.⁹¹

Eight years later, the Supreme Court was called upon to decide the constitutionality of another bankruptcy law. This time, however, the statute at issue predated the formation of the contract and there was no issue of retrospective application. The question, instead, was whether legislation could be enacted regulating future contracts. Though the Court ruled in *Ogden v. Saunders* that Louisiana could enact prospective bankruptcy legislation, there was no clear rule to emerge from the decision and Chief Justice Marshall dissented—the first, and only, time he was on the losing end

⁹⁰*Ibid.*, 524 (Story, J. Concurring).

⁹¹*Sturges v. Crowninshield*, 17 U.S. 362, 366-368 (1819).

of a contract clause case. Justice Bushrod Washington, who typically sided with Marshall, parted company with his colleague this time. Conceding “universal law” requires “that all men are bound to perform their contracts” once made, Washington held states could pass legislation regulating what types of contracts could be formed in the future.⁹²

The most theoretical opinion in the case, insofar as property rights were concerned, came from Justice Trimble. “[M]en have, by the laws of nature, the right of acquiring and possessing property, and the right of contracting engagements.” Trimble continued “that, in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is co-extensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law.” But, this did not mean that the civil polity had no right to regulate the contract.

[W]hen “men form a social compact and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it, then, to be true, that, in general, men derive the right of private property and of contracting engagements from the principles of natural, universal law; admitting that these rights are, in the general, not derived from or created by society, but are brought into it. . . it is equally true that these rights and obligations resulting from them are subject to be regulated modified and sometimes absolutely retrained, by the positive enactions [*sic*] of municipal law.”⁹³

The Constitution did not prohibit impairment of contract. What the Constitution prohibited, Trimble reasoned, was the impairment of the “civil” obligation of contract. This “civil” obligation of contract is determined under state law. Indeed, contractual

⁹²*Ogden v. Saunders*, 25 U.S. 132, 136-137 (1827).

⁹³*Ibid.*, 182, 186-187. (Trimble, J.).

obligations so incurred absorb the laws regulating it and the law becomes part of the contract. If it were otherwise, and the Constitution banned impairment of the “universal law” of contract, then states would be incapable of passing even the most innocuous laws such as those barring usurious interest rates.⁹⁴

Marshall dismissed the prospective/retrospective analysis of his colleagues as irrelevant. The real issue for him was the substantive right of contract and whether state legislatures could pass laws limiting that right or whether they were restrained to enacting only legislation for enforcement of the obligation itself. The Chief Justice ultimately came to the latter conclusion. Every man, Marshall wrote, “retains [the right] to acquire property [and] to dispose of that property” as he sees fit. Property rights can neither be acquired, nor disposed of, without contract. The right to enter contracts is not something government grants to individuals but, rather, they “bring that right with them into society[.]” Man only surrenders to government the right to coerce performance of the contract when he enters civil society and this is the sole area, Marshall reasoned, where states were permitted to legislate.⁹⁵

The opinion of the Chief Justice was in the minority, of course, and the operative effect of *Ogden* was to allow states to prospectively regulate the terms of a contract so long as they did not disturb rights that were already vested when the contract was made. The final “contracts clause” decision came in the case of *Providence Bank v. Billings* wherein Chief Justice Marshall, writing for a unanimous court, ruled in favor of the State of Rhode Island rejecting an argument that a State decision to tax the bank impaired its

⁹⁴Ibid., 187-192.

⁹⁵Ibid., 196, 208-209, (Marshall, C.J.).

corporate charter. Marshall opined that the charter never expressly exempted the bank from taxation and the forfeiture of a power of such “vital importance” can never be assumed. As shown by his dissent in *Ogden*, Marshall championed contract and property rights farther than most but even he had limits and, true to his federalist roots, one of those limits was taxation:

The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature.⁹⁶

The Supreme Court’s “contracts clause” cases are among the first examples of an American ethos that favored economic liberty. But, they are not the only examples. In 1833, three years before his death, Justice Joseph Story published his *Commentaries on the Constitution of the United States*. This was the first treatise published on American constitutional law and it was favorably compared to Blackstone’s commentaries on English law published a generation earlier. “A government can scarcely be deemed to be free,” Story warned, that if “the rights of property are left solely dependent upon a legislative body, without any restraint” then liberty cannot be safeguarded. Indeed, “[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property should be held sacred.” Story’s jurisprudence required neither an express prohibition against the states, nor an express power on the part of the federal judiciary to strike down laws that infringed on property rights. Citing his opinion

⁹⁶*Providence Bank v. Billings*, 29 U.S. 171, 173-174, 175 (1830).

in *Wilkinson v. Leland*, Story wrote “no court of justice, in this country” would be warranted in believing [that] states possessed some “implied” power so repugnant to the common principles of justice and civil liberty” that it allowed them to interfere with vested property rights.⁹⁷ It was property rights, after all, which both granted citizenship in the American republic and represented each individual member of the polity a stake in that republic.

Though Story was a Democratic-Republican, appointed to office by President James Madison, he nevertheless frequently found himself siding with the Federalist Chief Justice. He parted company with Marshall, however, as to the reach of the Article I, section 10 contracts clause. Citing principles stated by Justices Washington and Trimble in *Ogden v. Saunders*, Story differentiated between “contract” and “the obligation of contract,” Story explained positive law (statute) gives form to the “civil” obligation of contract and—as long as it does not eliminate entirely the remedies for enforcing it—the states may control various aspects of their formation. Accordingly, Story found no theoretical problem in allowing states to regulate contracts for such things as usury.⁹⁸ Though a ban against usurious loan instruments may arguably be beneficial in a free market society, Story’s jurisprudence, unfortunately, also laid the groundwork for institutions such as chattel slavery, coverture and legal recognition of children as little more than economic inputs to a familial household.

⁹⁷Joseph Story, *Commentaries on the Constitution of the United States* (Durham: Carolina Academic Press, 1987) (Boston: Brown, Shattuck, and Co., 1833) Introduction Ronald D. Rotunda and John E. Nowak, xi, 510-511.

⁹⁸Story, *supra* 499-503.

2. Locke, Marshall and Deprivation of Aboriginal Lands

A “labor theory of property,” as enunciated by Locke and his Enlightenment era contemporaries, was more than rhetorical flourish—at least in the so-called “new world.” It was also a means by which to explain (or justify) exercise of sovereignty over new lands “discovered” in the western hemisphere. A failure to subdue virgin land, and improve it, meant one could not establish title to it. Those who settled on land, but never farmed it, mined it or otherwise made any productive use of may acquire a right of usufruct (use) but could not maintain a claim to title. Nowhere was this principle more evident than state and Supreme Court decisions justifying removal of aboriginal Americans from their native lands.

A dispute over conflicting land titles, one granted by the Illinois and Piankeshaw tribes, another by U.S. government patent, placed the issue of native property rights squarely in front of the United States Supreme Court in the first quarter of the nineteenth century. Forced to give legal imprimatur to what was already a *fait accompli*, Chief Justice John Marshall reasoned in *Johnson v. M’Intosh* aboriginal peoples had no “ultimate” title to the land they simply “occupied” and, thus, could not convey absolute title to anyone else. Europe provided a convenient scapegoat and Marshall detailed all of the extensive exploration, and subsequent *carving-up* of North America from the Sixteenth Century up through to the Louisiana Purchase. “Discovery” of these lands, Marshall wrote, gave an exclusive right to European nations to extinguish native occupancy either through purchase or by conquest. “Conquest,” in turn, gave a title which courts of the conqueror could not deny. The United States was then successor to

those titles either by treaty, as was the case with Great Britain and Spain, or sale, as was the case with France.⁹⁹

Though ostensibly basing the Court's decision on title by conquest, there is also a distinct strain of Enlightenment thought running through *Johnson*. First, throughout the opinion, aboriginals are only referred to only as occupants. This suggests their only relationship to the land was to occupy it. Indeed, no mention was ever made of their improving the land either by tilling it, or building homes on it, and thus there was no mixing of their own labor in such a way as to convert common property to private property. The only fleeting reference to any exercise of dominion over land was the hunting of game and, as Marshall would have known, such *ferae naturae* is a species of property separate and distinct from land. As if to drive the home the absence of dominion, Marshall opined "the tribes of Indians inhabiting this country were fierce savages . . . whose subsistence was drawn chiefly from the forest. *To leave them in possession of their country was to leave the country a wilderness.*" For Marshall, without any permanent settlement, or tilling of soil, the North American continent essentially existed in a state of nature. Marshall drew even further attention to that state in observing that "vacant" land vested in the British crown and the initial object of the crown was to "settle" the sea coast. There can be no theft, after all, of that which has never been claimed. What Marshall downplayed, of course, was the idea that title to all but use was gained through military conquest which, as Pierre-Joseph Proudhon would later say is little more than "theft."¹⁰⁰

⁹⁹ *Johnson v. M'Intosh*, 21 U.S. 503, 504-513 (1823).

¹⁰⁰ *Ibid.* at 514, 517 & 522. Marshall concedes at one point that application of these principles "may be opposed to natural right, and to the usages of civilized nations" but,

Still this reasoning continued. Chief Justice Taylor of North Carolina's Supreme Court ruled in favor of Cherokee land titles, by virtue of several pre-Revolutionary War treaties, but nevertheless explained the European philosophy on land use thusly:

Writers on the law of nature have maintained the justice of this principle in furthering the designs of Providence, and tending to the increase and civilization of the human race. . . . They argue, that every nation is under a natural obligation to cultivate the land that has fallen to its share, since otherwise, the whole earth, which is destined to feed its inhabitants, would not yield an adequate supply, if large tracts of fertile land were peopled only by hunters and shepherds: that however right this might have been in the first ages of the world, when the spontaneous productions of the earth were more than sufficient for its few inhabitants, [*sic*] it cannot now be justifiable, when the great multiplication of the human race, in some countries, has rendered it essential to their subsistence, that the forests should be cleared and cultivated. The unsettled habitation of savages in those extensive tracts of country over which they wander, but cannot cultivate, must be inconsistent with the views of Nature, while other nations are confined within a small compass, which no degree of skill or labour [*sic*] will render sufficiently productive. The only obligation which justice imposes on other nations, is, that they leave the natives a sufficiency of land.¹⁰¹

Though Marshall relied on no authority but his own view of the law, Taylor cited Montesquieu and Vattel. The Supreme Court was once again called to comment on the unique legal status of aboriginal peoples when the State of Georgia passed a series of laws stripping Cherokees of their rights. That nation filed an original action in the Supreme Court asking for an injunction to prevent those laws from taking place. Noting the Constitution allowed for an original action against a state, thus making Georgia a permissible defendant, the bigger question was whether the Cherokee were a foreign

because the country has already been settled in this way, "it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice." *Ibid.* at 515. In short, the Court was never going to rule in favor of the "Indian" title in this case as it would have thrown title to all other land throughout the country into question.

¹⁰¹*Eu-Che-La v. Welsh*, 10 N.C. 155 (1832).

nation such that they could bring the suit. The Supreme answered in the negative.

Though acknowledging the Cherokee had “an unquestionable right to the lands they occupy, until that shall be extinguished” the fact remained that they occupied “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.” Without title to the land that they had occupied for generation, but apparently not sufficiently developed, the Cherokee (and by inference all tribes) were said to exist in a state of “pupilage” with the United States—a relationship more closely resembling that of ward and guardian than one foreign nation to another.¹⁰²

The descriptor of “occupier” rather than settler or owner was used again nine years later in *Worcester v. Georgia* where Marshall described Europeans as having found a new world “in possession of a people who had made small progress in agriculture or manufactures,” activities which would have converted common property to private property, “and whose general employment was war, hunting and fishing.” This time, however, the question before the Court did not involve the aboriginal title but, rather, the extent to which the state of Georgia could exercise jurisdiction over their lands. In determining the laws of Georgia could have no effect within the Cherokee nation, Marshall observed that all “Indian” nations “retain[ed] their original natural rights” but

¹⁰²*Cherokee Nation v. Georgia*, 30 U.S. 178, 179-181 (1831). Marshall was not wholly unsympathetic to the plight of the Cherokee, noting he could scarcely imagine any case better suited to excite the sympathies of the Court, *Ibid.* at 179, and that the State of Georgia had inflicted wrongs on the tribe with ever greater harm apprehended to occur in the future. *Ibid.* at 184. At the same time, however, Marshall was reluctant to pick a fight the Court could not possibly win within the state legislature. The request for an injunction essentially asked the Court “to control the legislature of Georgia, and to “restrain the exertion of its physical force.” *Ibid.* at 183. As Hamilton commented only a generation earlier, the Supreme Court was the weakest of the three branches of government as it did not hold the power of the sword.[*Federalist* 78].

that right was not to the property itself but to the “undisputed possess[ion] of the soil from time immemorial.”¹⁰³

¹⁰³*Worcester v. Georgia*, 31 U.S. 214, 228, 242-243 (1832).

CHAPTER III

OWNERSHIP RIGHTS IN THE BODIES OF OTHERS

We know Anglo-American products of the Enlightenment conceptualized property rights in a much different way than we do now. John Locke and Adam Smith, among others, particularly located a property right in the ownership of one's own body. No lesser a figure in American history than James Madison opined that men not only had rights in property but they also had property interests in their rights which included not only freedom of conscious but other, inchoate, rights that existed in a state of nature but were perhaps too nebulous to be codified into a Bill of Rights. How did this philosophy play itself in the practical sphere (both public and private) however? Were ownership rights in the body really recognized either formally by the law or informally by the dictates and constraints imposed by American society? The answer to that question is an emphatic "yes."

A. Chattel Slavery

The most difficult—and most distasteful—issue in American property ethos is the concept of owning "property" in other human beings. Chattel slavery simply cannot be reconciled with a Lockian view of any notion of "liberty" and proclamations that "all men are created equal" as espoused in the Declaration of Independence nor is it compatible with guarantees of liberty appearing in the Constitution. Robert Cover explains the founders circumvented this theoretical problem in their own minds by a thoroughgoing belief in "legal positivism." That is to say, even if slavery was contrary to

natural law and natural liberty, it was nevertheless permissible if sanctioned by the Constitution. While this may have resolved the issue from a jurisprudential standpoint, it does not explain how the founders resolved this paradox in their own minds. As Henry David Thoreau would later ask, how could a nation that undertook to be a “refuge of liberty,” keep a sixth of its population in slavery? William Lloyd Garrison provided one answer: the Constitution was an “unholy alliance” and “dripping with blood.”¹⁰⁴

A more thoughtful answer was given by John C. Calhoun who argued the revered Jefferson—a fellow southerner and fellow slaveholder—was, in fact, wrong. “All men are not created [equal].” The genesis of this flawed reasoning, Calhoun maintained, was over-reliance on principles espoused by Locke and Algernon Sydney that men were equal in a state of nature. This state of nature, Calhoun maintained, was a “hypothetical truism” that never existed. Man is a social creature and his natural state is actually living in a “society” But, by the same token, no society can exist without government and, thus, man’s natural state is, in reality, a “political” state. The quantum of power necessary to run the government, and the liberty necessary to enjoy it, must be “unequal among different people, according to their different conditions. For just in proportion as a people are ignorant, stupid, debased, corrupt, exposed to violence within and danger from without, the power necessary to preserve society against the danger those people pose

¹⁰⁴ Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975) 33-41. For parts of the Constitution which write (albeit obliquely) slavery into our organic law, see U.S. CONST. art. I, §2 (three-fifths clause); *ibid.*, art. I, §8 (power to suppress insurrections); *ibid.*, art. I, §9 (importation clause); *ibid.*, art. IV, §2 (fugitive clause); Henry David Thoreau, “Civil Disobedience,” in *Anti-Slavery and Reform Papers*, ed. H.S. Salt (London: Swan Sonnenschein & Co., 1890) 21, 26; William Lloyd Garrison, “The Great Crisis,” in *Documents of Upheaval: Selections from William Lloyd Garrison’s The Liberator, 1831-1865* (New York: Hill & Wang, 1966) 55, 56-57.

must grow and the liberty of those people decrease to a point “when absolute and despotic power becomes necessary on the part of the government, and individual liberty extinct.” In a state devoid of liberty, of course, man is essentially a slave.¹⁰⁵

Much as it had done to protect vested property rights in contract, the Supreme Court also lent its imprimatur to protection of slave property. In *Prigg v. Pennsylvania*, the United States Supreme Court struck down a Pennsylvania law criminalizing recapture of runaway slaves. Justice Story, writing for the majority, held that the Constitution “manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave” to reclaim property. Indeed, citing Blackstone, he noted the rights of a slave owner in this regard were no different than the right of an owner to reclaim any other property. While the states could not be compelled to enforce fugitive slave returns, they also could not pass laws to impede the return of such property to the “rightful” owner. Chief Justice Roger Taney, appointed to the Court by President Andrew Jackson in 1836 after the death of John Marshall, agreed with the first part of the opinion but not the latter. “The individual right now in question, stands on the same grounds” as any other property right and the obligation to protect it, Taney concluded, was imposed as a duty upon the several states.¹⁰⁶

Of course, Taney’s most famous (infamous) pronouncement on slave property rights came in the case of *Scott v. Sandford*. Dred Scott was a slave belonging to an army

¹⁰⁵ John C. Calhoun, “Speech on the Oregon Bill (1848),” in *The Papers of John C. Calhoun*, eds. Clyde N. Wilson and Shirley Bright Cook (Columbia: University of South Carolina Press, 2003) XXV: 513, 534-537.

¹⁰⁶ *Prigg v. Pennsylvania*, 41 U.S. 417, 421-423 (1842); *ibid.*, 434-437 (Taney, C.J. Concurring in part and dissenting in part).

surgeon who took Scott with him to an assignment at an Illinois fort in 1834. Scott accompanied his master to another assignment in 1836 in Louisiana and, in 1838, they went to Missouri where the surgeon sold Scott (as well as his wife and two daughters) to John Sandford. Scott filed a civil action for his freedom, arguing that his stay in Illinois and federal territories (where slavery was not allowed) made him free. The Court rejected that argument and, in the process, gave one of the most explicit statements on the legal status of “slave property” in America.¹⁰⁷

First, Taney noted that slaves were not “citizens” for purposes of the Constitution and the state of Illinois could not make them so in violation of federal law. Taney then took aim at the Declaration of Independence and Jefferson’s remark that “all men are created equal.” Whereas Calhoun had argued that Jefferson was just plain wrong, Taney was more circumspect positing “it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people.” If Jefferson’s Declaration of Independence was understood to include slaves, Taney concluded, it would have opened its framers to “universal rebuke and reprobation.” Finally, Taney got to the crux of the matter noting “the right of property in a slave is distinctly and expressly affirmed in the Constitution.” The government “in express terms is pledged to protect” those property interests and nothing in the Constitution afforded less protection for slave property, “than property of any other description.” In short, government had a “duty of guarding and protecting the [slave] owner in his rights.”¹⁰⁸

¹⁰⁷ *Scott v. Sandford*, 60 U.S. 393 (1856).

¹⁰⁸ *Ibid.*, 404-406, 410, 451-452.

A “property rights” analysis was not confined to the majority opinion. Justice Wayne concurred with Taney observing the “case involve[d] private rights of value.” Justice Campbell observed that it was the province “of the States, to ascertain and determine what is property, and the rights of the owner.” Missouri gave masters a property right in slaves and neither the federal government, nor other states, could interfere with those property rights.¹⁰⁹

To say the “Dred Scott” case was highly controversial is an understatement. The case was both applauded, and attacked, in Congress and state legislatures across the country while newspaper editorials debated its merits. Not surprisingly, *Scott* featured prominently in the 1858 Illinois Senate campaign and the 1860 Presidential election, both of which pitted Abraham Lincoln against Stephen Douglas. Lincoln resigned himself to the decision in *Scott*—admitting that “to take Dred Scott from his master” would be “interfering with property.” “[N]othing in the Constitution or laws of any State can destroy the right of property in a slave.” But, he also chided Douglas for the “sacredness” he afforded that decision. While the ruling must be respected, it was also true lawyers routinely questioned the soundness of one or another Supreme Court cases and this one should be no different, Lincoln observed.¹¹⁰

Indeed, as the senatorial campaign wore on, Lincoln became more aggressive in challenging the *Scott* decision. Citing Taney’s claim that the “right of property in a slave is distinctly and expressly affirmed in the Constitution,” Lincoln noted there was nothing

¹⁰⁹ *Ibid.*, 454 (Wayne, J. Concurring); *ibid.*, 493, 515-516 (Campbell, J. Concurring).

¹¹⁰ Abraham Lincoln, “Speech” (10 Jul. 1858) in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick: Rutgers University Press, 1953) II:495; “Debates Between Lincoln and Douglas, (27 Oct. 1858)” in *ibid* III: 207, 231.

in the Constitution expressly granting the right to property in slaves and challenged Douglas to prove him wrong. “[N]either the word ‘slave’ nor ‘slavery,’ is to be found in the Constitution, nor the word ‘property’ . . . in any connection with language alluding to the things slave or slavery.” Had the founders been cryptically referring to slaves when using the word “person,” Lincoln suggested, there would be some evidence of that fact either in the Constitution or some other contemporaneous document. He later warned Ohioans that the *Scott* case took “the right of property in a slave” and so wove it into the fabric of the Constitution that “it cannot be detached without breaking the constitution itself” and would require that slave property brought into free states (like Ohio) be allowed by that state’s law even if forbidden in its charter.¹¹¹

Like Thoreau, Transcendentalist Orestes Brownson was personally opposed to the institution of slavery. But, his views on what to do with slave “property” were much more nuanced. After calling for a “substantial equalization of property” in 1842, Brownson “found religion,” converted to Catholicism and became more conservative in his various world views. Conceding ownership of property was a “natural right” and protection of that right was “the duty of the temporal power,” Brownson declared any attempt by the state to deprive a man of that right struck “a blow at the sacredness of all rights” and aimed “a death blow at the spiritual.” The same was true of the proverbial “slave power.” In those states which allowed slavery, the master held title to that slave and such title was “good against the state.” Although the state was certainly “bound” to

¹¹¹ Abraham Lincoln, “Debate with Stephen Douglas” (7 Oct. 1858) in *The Collected Works of Abraham Lincoln*, III:207, 230-232; Lincoln, “Speech” (27 Feb. 1860), in *ibid.*, III:522, 544-545; Lincoln, “Speech at Columbus, Ohio” (16 Sep. 1859) in *ibid.*; III:400, 420-421;

undo its wrong, Brownson argued that the state could only do so upon payment of just compensation to the master. In arguing slavery could simply be abolished—as Senator Sumner did—congressmen advocated violation of the very Constitution they swore to uphold.¹¹²

Where slavery did not exist, however, man could claim no property right in another man. “By the law of nature,” Brownson reasoned, “all men are born free and equal and man has no *jus dominii* in man.” A “natural right” to slave property simply did not exist as it did for other species of property. Given that there never developed a national common law of slavery, the “peculiar institution” was purely local in nature and slavery could not exist outside of its locale. Thus, in a case currently working its way through the Kansas legal system, courts would be forced to declare “the alleged slave a free man.” Slave property must be respected in those states where slavery existed, Brownson concluded, but not in those states (or territories) where it did not exist.¹¹³

Not everyone was as quick as Brownson to accept the argument that slave property stood on an equal basis with all other property and that federal abolition would invoke the Fifth Amendment mandate that “just compensation” be paid. Senator Sumner of Massachusetts characterized it as an “[i]mpossible pretension for man to claim *property in man*.” (emphasis in original). Harkening back to Madison’s essay on property almost a century earlier, Sumner argued every human being has title to himself

¹¹² For his changed views on property rights, see Orestes Brownson, “The Papal Power,” in *The Works of Orestes A. Brownson*, XII: 351, 361-362; for his views on slavery, see Orestes Brownson, “Sumner on Fugitive Slaves,” *ibid.*, XVII: 39-41, 51.

¹¹³ Orestes Brownson, “Slavery and the Incoming Administration,” *ibid.*, XVII: 54, 59; Orestes Brownson, “The Slavery Question Once More,” in *ibid.*, at 77, 81.

and, while a “man may be poor in his world’s goods[,] he owns himself.” Another so-called radical republican agreed. In a speech before Congress in the early years of the Civil War, Thaddeus Stevens announced “I do not admit the rightful ownership of any human being in any human soul.” But, “in deference to chronic error and prejudice,” he was willing to treat it “as if such a thing were possible” and even pay compensation to slave holders in the slave states that stayed in the Union. With regard to states that had seceded, though, Stevens noted Congress and the President were empowered to suppress insurrections and that immediate emancipation of slaves in rebellious states was justified as a measure taken for the safety of the people.¹¹⁴

Although Lincoln acknowledged that the government had no power to end slave “property rights” where it existed, his acceptance of the “peculiar institution” was premised on a normal state of affairs in the nation. After secession, and the onset of civil war, that all changed. On January 1, 1863, he issued the Emancipation Proclamation freeing slaves in that part of the Confederacy which was not yet under Union control. The proclamation did not end slavery in loyal border states, nor did it end slavery in those part of the Confederacy under Union control, but this was more indicative of Lincoln’s awareness of his constitutional limitations rather than unwillingness to take on the issue. Lincoln firmly grounded his actions in his Article II, section 2, war powers as

¹¹⁴ Charles Sumner, “The Barbarism of Slavery,” in *Charles Sumner: His Complete Works* (New York: Negro Universities Press, 1900) VI: 119, 131-132; “Subduing the Rebellion” (speech) in *The Selected Papers of Thaddeus Stevens*, ed. Beverly Wilson Palmer and Holly Byers Ochoa (Pittsburgh: University of Pittsburgh Press, 1997) I: 241, 246-248.

commander in chief noting the proclamation was a “necessary war measure for suppressing [the] rebellion.”¹¹⁵

Exigency of battle may well have justified emancipation as a wartime measure but Lincoln knew as a lawyer that slaves were legal property and that, constitutionally, he could not free them in the border states, or in the south after war ended, without invoking the Fifth Amendment guarantee of compensation. In a letter to one of his cabinet officers, Lincoln noted “[t]he original proclamation has no constitutional or legal justification, except as a military measure” and the areas exempted were excluded from its reach “because the military necessity did not apply.” If he continued emancipation “without the argument of military necessity,” would he “not thus give up all footing upon constitution or law?” Would he not, Lincoln asked rhetorically, “be in the boundless field of absolutism?”¹¹⁶

If slave property was part of the Constitution, then only a constitutional amendment could end rights in that property. In his Annual Message to Congress, just a month before issuing the Emancipation Proclamation, Lincoln called for an amendment to the Constitution to provide for gradual emancipation of slaves by 1900 and, at the same time, provide compensation for slave owners. Even as late as the winter of 1865, Lincoln requested the Senate and House allocate him \$400 million to compensate slave holding states for emancipation. He ultimately abandoned that position and approved the Resolution which sent the Thirteenth Amendment to the states for ratification.

¹¹⁵ “Emancipation Proclamation,” in *The Collected Works of Abraham Lincoln*, VI:28-29.

¹¹⁶ Lincoln to Salmon P. Chase, 2 September 1863, in *ibid.*, VI:428-429.

Involuntary Servitude was thereafter abolished with no provision made for compensating slave holders.¹¹⁷

If the Civil War ended one type of property, Reconstruction revived another. Contracts—particularly labor contracts—were thought to be the mechanism by which to make the transition from a slave-based to free market economy. As Eric Foner points out, however, the belief that labor contracts would allow for freedmen to convert labor into wages, and show ex-Confederates that free market labor rests on consent rather than coercion, was “hopelessly unrealistic.” Transition from slave owner to employer was not an easy one for planters who feared losing both social hegemony and a captive labor force. Consequently, southern states passed laws circumventing any notion that these contracts would be voluntary by using civil law to enforce performance and criminal law to punish breach. Freedmen who tried leaving before the term of their employment was up, or who had not yet found labor, or tried to find higher wages than their former masters offered, all too often found themselves in a criminal proceeding and bonded out to their former owners for peonage labor.¹¹⁸

Not surprisingly, court systems that were all too willing to allow reintroduction of slavery in the guise of peonage labor, provided little help to freedmen seeking civil relief

¹¹⁷ Abraham Lincoln, “Annual Message to Congress, 1 Dec. 1862,” in *ibid.*, V: 518, 529-532; Abraham Lincoln, “To the Senate and House of Representatives” in *ibid.*, VIII: 260-261; “Resolution Submitting the Thirteenth Amendment to the States (Feb. 1, 1865), in *ibid.* VIII:253.

¹¹⁸ Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988) 136-137; Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004) 71-76, 86-88.

when their employers would not pay them what was due. Georgia, for instance, barred freedmen from bringing actions, or testifying against whites unless through a white patron acting as a “next friend.” The freedmen’s bureaus provided some relief for these cases but were too few and far between in the former Confederacy. Federal troops provided even less help oftentimes finding more in common with former Confederate enemies than those of a different race. Federal troops even coerced freed blacks into signing one-sided labor contracts and, as Jonathan Bryant notes in his study of Reconstruction Georgia, some military commanders severely punished free blacks who used “disrespectful language to their former masters.” After “redemption” of Georgia by Democrats, a new county court system was created where labor contracts could be recorded and, if breached, resulted in arrest and imprisonment of the non-performing party. The only persons ever prosecuted for breach, of course, were freedmen.¹¹⁹

It is naïve to think the lack of will on the part of Radical Republicans to fully reconstruct labor relations in the south was not partly due to white antipathy (racism) towards freedmen as well as sheer exhaustion over a war that lasted four years and an occupation that lasted twelve more. But, at the same time, their reliance on “contract labor” ideology to introduce freedmen into the American economy was perfectly consistent with the primacy that had been afforded property and contract rights in the past. As far back as John Locke and Adam Smith, a man’s body and the labor that it produced were perceived as “property.” Contract—even unwritten employment agreement—was the accepted means by which to sell that property. Where the

¹¹⁹ Foner, *Reconstruction*, 136-137, 164-166; Jonathan M. Bryant, *How Curious a Land: Conflict and Change in Green County, Georgia 1850-1885* (Chapel Hill: University of North Carolina Press, 1996) 102, 156-157.

reconstruction congress, and so-called radical republicans, arguably went wrong was in their failure to provide the political and legal mechanisms necessary to scrutinize both private and public overreaching in those contracts and to enforce them for the benefits of freedman. This failure of contract labor ideology in the reconstruction south undoubtedly diminished its luster in the eyes of jurists and political theoreticians who for so long had been schooled on its efficacy. Subsequent developments in the remainder of the nineteenth century would show that it was just as much a failure for working class whites as it was for freedmen.

B. Substantive Due Process Versus State Police Powers

Civil War and Reconstruction also set in motion two forces that were on a collision course with each other by the end of the century. The first was ratification of the Fourteenth Amendment in 1868. Among other things, this amendment prohibited states from depriving the people of “due process of law.” Few phrases in the Constitution are as vague as the Fourteenth Amendment Due Process Clause and none are as controversial. Many scholars insist “due process” means only procedural due process requiring the implementation of procedural safeguards—like notice and an opportunity to be heard—before someone can be deprived of life, liberty or property. Others, particularly in the *Lochner* era, found a “substantive” component to due process which measured pieces of legislation against certain, inchoate, standards of natural justice such as whether the law violated an unwritten, unenumerated, “liberty of contract.”¹²⁰

¹²⁰ For criticism of substantive due process doctrine, see Ely, *Democracy and Distrust*, 14-18; Scalia, *A Matter of Interpretation*, 24-25, 85; Bork, *The Tempting of America*, 31-32, 61-64.

The second force set in motion by Civil War and Reconstruction was a period of industrialization, which reached dizzying heights by the close of the nineteenth century. Economies of scale, streamlined manufacturing and technological advances turned small factories into industrial behemoths which, by the use of trust agreements, allowed companies to circumvent prohibitions against interstate corporations and create national—even international—conglomerates in steel, oil refining and meat-packing to name a few. As industry grew, and as available land on the frontier slowly diminished and then disappeared altogether, America’s growing population was absorbed into industry as wage laborers. But, industrialization came at a huge social cost thus prompting states and municipalities to pass legislation attempting to ameliorate its harsh effects. This, in turn, prompted business to fight back with their new weapon—the Fourteenth Amendment Due Process Clause. In retrospect, we see it was during this clash between substantive due process and state police powers that society’s attitudes (ethos) toward property began to change and rights in property became disassociated from other fundamental liberties.

What critics derisively refer to as “substantive economic due process” did not simply spring forth, fully grown, from the *Lochner* decision. To the contrary, like most jurisprudence on economic right and liberty, it enjoyed a long and storied pedigree. In 1798, the Supreme Court passed on the constitutionality of a Connecticut statute that overturned a probate court ruling. Justice Chase opined as follows:

The purpose for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. . . . There are acts which the Federal, or state, legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent

and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An ACT [*sic*] of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.¹²¹

There were limits, in other words, to the reach of a state legislature. Three decades after *Calder*, Justice Story reiterated the point in *Wilkinson v. Leland*. Personal liberty and private property are sacred, Story wrote, and “no court of justice in this country would be warranted in assuming, that the power to violate and disregard them[,] a power so repugnant to the common principles of justice and civil liberty[,] lurked under any general grant of legislative authority[.]” He continued that the “people ought not to be presumed to part with such rights so vital to their security and wellbeing, without very strong and direct expressions of such an intent.” Statutory enactments which deprive the people of personal liberty, or private property, must fail because they go against the very reason for the American “social compact” in the first place.¹²²

The same year the Fourteenth Amendment was ratified, Michigan Supreme Court Justice Thomas Cooley published his treatise on the *Constitutional Limitations* imposed on the state legislatures. Cooley interpreted the “due process” clause as analogous to the “law of the land” clause in *Magna Charta* and noted analogous phrases appeared in almost every state constitution. What was meant by due process of law? Cooley rejected any argument the phrase meant only “procedural” due process:

It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words ‘by the law of the land,’ as

¹²¹ *Calder v. Bull*, 3 U.S. 386, 388 (1798)

¹²² *Wilkinson*, *supra*, at 657.

used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: ‘You shall be vested with the legislative power of the State, but no one shall be disenfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong, unless you choose to do it.’¹²³

Citing various federal and state precedents, Cooley concluded that such phrases in constitutions were meant to shield people from “the arbitrary exercise of the powers of the government” unrestrained by established principles of private right:

The principles, then, upon which the process is based are to determine whether it is ‘due process’ or not, and not any consideration of form. Administrative and remedial process may change from time to time, but only with due regard to the old landmarks established for the protection of the citizen. When the government, through its established agencies, interferes with the title to one’s property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence [*sic*] which have become established in our system of law, and not by any rules that pertain to forms of procedure merely. . . . Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.¹²⁴

Furthermore, even before the United States Supreme Court decided *Lochner*, state supreme courts applied substantive due process principles to strike down laws passed by their own legislatures. As early as 1895, the Missouri Supreme Court struck down a law criminalizing employers who forced employees to quit labor unions or face termination from employment. The Court held that the right to “terminate” a contract was one of the

¹²³ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little Brown & Co. 1868) 354.

¹²⁴ *Ibid.*, 356.

“essential attributes of property.” That same year, the Illinois Supreme Court struck down a state statute limiting the number of hours women could work to eight a day and forty-eight a week. Such statute interfered with the right of “contracting” which the Court found was both a liberty and a property right and, thus, could not be taken without due process of law.¹²⁵

The Supreme Court of Colorado granted *habeas corpus* to a jailed employer in 1899 after he was convicted of working someone at a “smelter” longer than the eight hour day required by statute. In so doing, the Court essentially found the state law unconstitutional. The Illinois Supreme Court ruled a law unconstitutional for criminalizing the termination of a union employee noting that, just as there is liberty to enter a contract, there is also liberty to refuse a contract and the statute violated that right. A prevailing wage statute was struck down by New York’s highest court because it “invades right[s] of liberty and property” requiring employers to pay their workers an arbitrary, uniform, compensation. In 1902, the California Supreme Court ruled a state statute requiring terms of payment in construction contracts to be in money only violated the due process clause of the state constitution. That same year, Ohio’s Supreme Court struck down a state statute limiting the number of hours a worker could labor at any public works project to eight hours a day. Work hours are an integral part of a service contract, the court found, and to limit those hours impaired obligation of contract. “The

¹²⁵ *State v. Julow*, 129 Mo. 163, 175, 31 S.W. 781 (1895); *Ritchie v. Illinois*, 155 Ill. 98, 104-105, 40 N.E. 454 (1895).

legislature is not supreme” under our system of government, the court ruled, and cannot pass laws that go against the very foundation of the social compact.¹²⁶

The statutes against which these substantive due process doctrines had been applied were passed by legislatures for the *salus populi* (benefit of the people) pursuant to the state’s inherent “police powers.” One of the earliest delineations of the concept of “police powers” was given by Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts. In upholding the power of the City of Boston to regulate the extent to which a wharf could stick out into Boston Harbor, Shaw reasoned that “it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others.” He continued that “[r]ights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious” as the legislature may determine to be necessary and expedient. This was also reflected in an 1864 treatise on real property law which immediately starts by recognizing the importance of rights in property, but with the caveat that the “right of property . . . is so far limited, that its use may be regulated from time to time by law, so as to prevent its being injurious to the equal enjoyment by others of their property, or inconsistent with the rights of the community.”¹²⁷

¹²⁶ *In re Morgan*, 26 Col. 415, 58 P. 1071.(1899); *Gillespie v. Illinois*, 188 Ill. 176, 185, 58 N.E. 1007 (1900); *People v. Coler*, 166 N.Y. 1, 38-39, 59 N.E. 716 (1901); *Stimson Mill Co. v. Braun*, 136 Cal. 122, 125 (1902); *Cleveland v. Clement Bros. Construction Co.*, 67 Ohio St. 197, 211-212, 218-219, (1902).

¹²⁷ *Commonwealth v. Alger*, 7 Cush. 53, 84-85 (1851); Emory Washburn, *A Treatise on the American Law of Real Property* (Boston: Little, Brown & Co., 1864) I:2.

The “myth” of an unregulated *laissez-faire* society during the nineteenth century was put to rest by William J. Novack who persuasively argues that state and local authorities around the country made frequent use of police powers in the nineteenth century to regulate everything from businesses to the market place. Still, the extent of those regulations in the first half of the century came nowhere near the extent to which they would be used (oftentimes unsuccessfully) by the century’s end. Justice Cooley conceded that states could exercise police powers for the benefit of the health, safety and welfare of its citizenry but noted such powers had to be exercised “within certain limits.” He never clearly expressed what he thought those limits were except to say that state legislatures could not deprive property owners of vested rights.¹²⁸

Just as there are numerous examples of state courts applying substantive due process doctrines during this time, there is also no shortage of cases demonstrating successful use of police powers. The Mississippi Supreme Court in 1854 ruled that taxes imposed on a landowner were not an unconstitutional taking of property. In so ruling, the court observed that every revenue bill had some detrimental effect on property rights but that was a necessary evil if the advantages of the “social compact” were to be enjoyed. “This principle rests in the very foundation of society and is illustrated in every day’s experience of the citizen yielding his natural rights, even of life, liberty or property, to the public good.” One of the earliest cases to see a retreat from property law in the face of government police powers is *Milne v. Davidson* where the Louisiana Supreme Court

¹²⁸ *Commonwealth v. Alger*, 7 Cush. 53, 84-85 (1851); William J. Novack, *The People’s Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996) 1-14, 90-95; Cooley, *Constitutional Limitations*, 357, 572-597.

upheld a municipal ordinance barring operation of a hospital in city limits. When the ordinance was challenged as an infringement on the natural right to use property, the court disagreed. “The natural right to the enjoyment of property, in opposition to the positive regulations of society, is a subject of little utility in a court of justice.” The right to acquire property may be inherent in man but it “received its perfection, and had a permanency given to it, by municipal or civil law” and the natural right of property must be considered in this context. A property owner could still do whatever he wanted with the property so long as it did not violate municipal or state law.¹²⁹

Ironically, one of the first Supreme Court cases to discuss state police powers was also one of the few to uphold those powers despite a challenge on economic grounds. In upholding legislation allowing the City of New Orleans to grant a monopoly on slaughter-houses within the city, the Court noted “[t]his power is, and must be from its very nature, incapable of any very exact definition. Upon it depends the security of social order, the life and health of the citizen . . . the enjoyment of private and social life and the beneficial use of property.” Police powers extend to “protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the street.” Persons are subject to all kinds of restraints and burdens in order to secure the general comfort health and prosperity of the state. The Court further noted a few years later that police powers “belonged to the States when the Federal Constitution was

¹²⁹ *Milne v. Davidson*, 5 Mart (n.s.) 409, 412 (1827); *Williams v. Cammack*, 27 Miss. 209, 224 (1854).

adopted” and “rests upon the fundamental principle that every one shall so use his own as not to wring and injure another.”¹³⁰

The majority ruling in the *Slaughter-House Cases* was an anomaly. Courts typically sided with property interests when those interests were infringed by state legislation and the majority’s decision to uphold the exercise of police power was largely unprecedented—and controversial. Justice Field filed a dissent noting that “the right to pursue lawful employment in a lawful manner” was one of the “privileges and immunities” protected by the Fourteenth Amendment. Justice Bradley also dissented noting that life, liberty and property were fundamental rights and the ability to choose one’s own profession or calling was necessary “[f]or the preservation, enjoyment and protection of these rights.”¹³¹

The Court reverted back to a more consistent property jurisprudence when it revisited the New Orleans monopoly in 1884 when one of the original slaughter-houses filed suit after a new constitution abolished the monopolies and the city of New Orleans allowed another such company to open business. Rejecting a claim that this was an impermissible impairment of contract, the majority held that a state legislature cannot contract away the police power of the state so that a future legislature can no longer act to protect the lives, health and property of its citizens. This would violate the maxim of *salus populi suprema lex* (the welfare of the people is the supreme law). What makes the case interesting, though, is not so much the majority opinion as the opinions of the

¹³⁰ *In re Slaughter-House Cases*, 83 U.S. 36, 62 (1872); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667 (1878).

¹³¹ *In re Slaughter-House Cases*, 83 U.S. at 97-98 (Field, J. Dissenting); *ibid.* at 116-117 (Bradley, J. Dissenting).

concurring justices. Justice Field opined the monopoly itself was against “common right” and thus void. Among the “inalienable rights” set out in the Declaration of Independence was the right of men to pursue “any lawful business.” Citing Adam Smith and the *Wealth of Nations*, Field noted the property man has in his own labor is the original foundation of all property and is the most “sacred and inviolable.” The Louisiana monopoly forced thousands of workers to abandon their regular livelihood and, thus, forfeit that property. Justices Bradley, Harlan and Woods also concurred noting that “if a man’s right to his calling is property” then the monopoly deprived men of their “property, as well as their liberty, without due process of law.”¹³²

The actual use of “liberty of contract” as a federal constitutional doctrine began with the case of *Allgeyer v. Louisiana* where the Court was called upon to decide the constitutionality of a statute which made it a criminal offense for a property owner to seek insurance from a company not licensed in that state. Justice Peckham—writing for a unanimous court—quickly dismissed any state police power claim on grounds that, while Louisiana could regulate contracts made in its own territory, it had no power to regulate contracts made in another state. Peckham then turned to the real question which was whether Louisiana could bar one of its own citizens from entering such a contract and answered that question in the negative:

The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that [Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be

¹³² *Butcher’s Union Co. v. Crescent City Co.* 111 U.S. 746, 752 (1883); *ibid.* at 754, 757, 760 (Field, J. Concurring); *ibid.* at 760, 765 (Bradley, Harlan & Woods, JJ. Concurring).

free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes mentioned above.”¹³³

It was in this environment that *Lochner* came to the Supreme Court. To be sure, “substantive due process” and “liberty of contract” were doctrines that fit nicely (perhaps, too nicely) with the entrenched property and industrial interests with which the conservative courts were thought to be aligned. Literal application of these doctrines frequently maintained economic status quo hindering progressive efforts to ameliorate the harsh labor conditions in industry. On the other hand, consistent application of “liberty of contract” also aided in progressive causes on occasion. In the little-remembered case of *Buchanan v. Warley*, the United States Supreme Court struck down a Kentucky ordinance forbidding sale of homes to “colored people” if the home was on a block primarily occupied by white people. A white seller brought suit claiming the law interfered with his right to dispose of property as he saw fit—even if it meant selling that property to a black family. The Court agreed. In so ruling, the Court acknowledged a number of its past decisions upholding Jim Crow laws. But, *de jure* segregation of the races was altogether different than denying the private right of someone (a white someone) to dispose of his property as he saw fit.¹³⁴

In the end, it made little difference whether “liberty of contract” or state “police power” carried the day in *Lochner*. The American ethos of property had already started to change; the Supreme Court had simply not taken notice yet. Whereas the outset of the

¹³³ *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1896).

¹³⁴ *Buchanan v. Warley*, 245 U.S. 60, 79-80 (1917).

“Gilded Age” was characterized by Horatio Alger whose formulaic stories like *Ragged Dick* showed that hard work and honesty could transform a rough “boot black” into “Richard Hunter, Esq.,” a “young gentleman on the way to fame and fortune,” that optimism was largely gone by the dawn of the twentieth century. In its place, we see characters like Jurgis Rudkus of *The Jungle* whom, after years of exploitation in the meat-packing industry, and abuse in tenements of Chicago, stumbles by mistake into a meeting of a local Socialist Party. Only when Jurgis hears the orator give voice to the plight of the wage laborer, “despised and outraged,” blinded, bounded and ignorant of his own strength,” does he experience a “mighty upheaval” in soul and “rebirth” as a new man.¹³⁵

Indeed, change was palpable. No longer were progressives arguing for reform using the rhetoric of property rights. Now, they attacked the system of property rights head-on. Jacob Riis observed that “[h]aving solemnly resolved that all men are created equal and have certain inalienable rights, among them life, liberty, and the pursuit of happiness, we shut our eyes and waited for the formula to work.” It did not. “Liberty” amounted to nothing more than sixty cents a day living wage and this kind of crushing poverty was “the scandal and the peril of our political system.” Upton Sinclair speculated that, in a few years, the American worker would rise up and reject the American capitalist system in favor of what he called the “industrial republic” – essentially, an industrial government of the people, by the people and for the people

¹³⁵ Horatio Alger, “Ragged Dick” in *Horatio Alger: Gender and Successes in the Gilded Age*, ed. Charles Orson Cook (St. James: Brandywine Press, 2001) 89, 143-145; Upton Sinclair, *The Jungle* (Urbana: University of Illinois Press, 1988) 288-289.

where everyone shares “equally” in all its advantages. Indeed, “equal benefits” of industrial government “will be the elemental right of every citizen.”¹³⁶

No longer was property the great equalizer and benefactor that it was in the early republic. To the contrary, property and contract rights were now perceived as being an impediment to equal enjoyment of American society. The opportunity costs of maintaining property rights and economic liberties were now too much to bear. American industry and society had changed and if state and federal governments were going to regulate those changes—as it was becoming increasingly obvious that they must—then the law was going to have to change as well. To the extent society in general, and wage laborers in particular, ever valued property rights and “liberty of contract” as much as the courts claimed they did, they now valued a living wage and humane working conditions even more.

The decision in *Lochner* was not the beginning of the era of substantive due process, but it was the beginning of the end of an era where property rights were considered fundamental. Constitutional text, context and structure all support the existence of unenumerated economic rights. Legal and social discourses prior to the Civil War also support the primacy afforded property in the American ethos. But, that began to change, first, when contract labor failed to reconstruct labor relations in the south and, later, when adherence to contractualism and property rights impeded progressive era labor legislation passed to ameliorate the harsh conditions of industrialization.

¹³⁶ Jacob A. Riis, *The Battle With the Slum* (New York: MacMillan Co., 1902) 3-4; Upton Sinclair, *The Industrial Republic: A Study of the America of Ten Years Hence* (New York: Doubleday, 1907) 18-23, 37-38, 216.

The person who came closest to pinpointing “the problem” with *Lochner* was Roscoe Pound who wrote an article in the Yale Law Journal just a few years after the case was decided. Liberty of contract, he maintained, was essentially a fraud. Why, Pound asked rhetorically, did a “great and learned court” insist on treating the industrial employer and an industrial employee “as if they were [individual] farmers haggling over the sale of a horse?” He concluded that one of the reasons was because the schooling of lawyers and judges in the nineteenth century was still steeped in “eighteenth century theories of natural law.” Conceding natural law was the operative theory in the Bill of Rights, Pound nevertheless chastised judges for clinging to that “orthodoxy” when, in fact, there was no evidence to suggest the framers ever intended “to impose the theory upon us for all time.” Some of Pound’s arguments—such as his claim that early courts overemphasized property/contract rights—are a little harder to maintain, but this portion of the article gets to the crux of the transformation in property jurisprudence. Changing social and economic conditions made strict enforcement of property and contract rights increasingly problematic as America moved toward a more regulated society to reign in the excesses of industry. Americans thus relinquished (or disassociated) property rights from other rights of life and liberty in the national ethos. It simply took the courts a little while longer to catch up.¹³⁷

Some may legitimately ask if a similar sort of problem has not arisen on the opposite side of the spectrum. In 2005, ironically, a century after *Lochner*, a sharply divided United States Supreme Court decided *Kelo v. New London* and upheld the taking of private property and transfer of that property to a private entity for development. The

¹³⁷ Roscoe Pound, “Liberty of Contract,” 18 *Yale L.J.* 454, 464-470 (1909).

majority ruled that this complied with the “public use” requirement of the Fifth Amendment because redevelopment might spawn greater tax revenue for the city. Dissenting, Justice Sandra Day O’Connor reached back to Justice Chase’s decision in *Calder v. Bull* more than two centuries earlier for the proposition that laws passed in violation of “the great first principles of the social contract” cannot stand. By upholding the taking, O’Connor declared, the “Court abandons this long-held, basic limitation on government power” and injured the centrality of property in the American pantheon of constitutional thought. O’Connor may be right from a philosophical perspective, but she was wrong from a legal perspective. The Court did not abandon property rights in 2005. To the contrary, that process began more than a century ago and was complete by the 1930s.¹³⁸ We can only speculate as to whether the pendulum is ready to swing back again.

C. The Origins of Privacy and the Birth of Eugenics

*Three generations of imbeciles are
enough.*¹³⁹

Raymond Hudlow was born in 1925 and like many other children who grew up in the rural south during the Great Depression, knew little more than poverty and privation. What made Raymond’s case a little different, though, was that he also had the misfortune

¹³⁸ *Kelo v. New London*, 545 U.S. 469 (2005); *ibid.*, (O’Connor, J. Concurring).

¹³⁹ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

to be born to an abusive father who beat him with a buggy whip. Some beatings were so severe, Raymond later recalled, that the blood literally ran down his body onto his legs. The boy tried to escape several times by running away but he always wound up back at home with his father. Eventually, the older Hudlow surrendered his son to the county welfare workers explaining he could no longer control him. The teenager was eventually placed into the Lynchburg State Colony for the Epileptic and Feeble Minded where he was diagnosed a “moron.” A year after his arrival, he was ordered sterilized under Virginia’s sterilization law. Raymond was not told what was about to be done to him; he was simply strapped down on a gurney while his feet were forced into stirrups. Then, without bothering to administer any anesthetic, or later give him any pain medication, the doctor proceeded to slice the boy’s genitals and render him incapable of ever having children. “It was the most pain I ever had in my life,” he later recalled.¹⁴⁰

Hudlow certainly knew pain. He was discharged shortly after his vasectomy and was drafted into the military where he participated in the D-Day Landing. Hudlow later took shrapnel to the knee while helping liberate the Netherlands and, when taken as a prisoner of war, he was beaten and nearly starved to death by the Germans. An elderly Hudlow later recalled to a news reporter, however, that none of those experiences during World War II were as painful as his sterilization. The young soldier was later awarded a Bronze Star, Purple Heart and Prisoner of War Medal and served his country in the United States military for a total of twenty-one years. The Virginia legislature adopted a resolution in 2002 thanking Hudlow for his service to the nation. While the resolution acknowledged his involuntary sterilization at the Lynchburg Colony when he was

¹⁴⁰ Stephen Buckley, “Human Weeds,” St. Petersburg Times (11 Nov. 2001).

seventeen, it offered him no apology. When a Florida news reporter tracked Hudlow down to get his reaction shortly before the ceremony, the toothless and understandably bitter old man could only sputter “I ain’t no moron. A man’s got to have a level head to fight.”¹⁴¹

Even if anyone knew (or cared) about Raymond Hudlow’s plight, and even if the seventeen year old could have found access to the legal system, appealing to the courts for protection would have been futile. The very same law that forced him to undergo a vasectomy was upheld fifteen years earlier by the United States Supreme Court in the notorious *Buck v. Bell*. Carrie Buck, the plaintiff who lent her name to that case, was slightly older than Hudlow when sterilized but, as discussed later in this chapter, her circumstances were every bit as tragic. In one important way, however, Carrie Buck was far more representative of forced sterilization victims than Raymond Hudlow. State laws, like Virginia’s, appeared gender neutral but there was far less outrage over its application to women than men. Women could also be sterilized for sexual promiscuity and/or having children out of wedlock whereas this fate rarely, if ever, befell the promiscuous men. Around the time of Hudlow’s vasectomy, the United States Supreme Court revisited the issue of involuntary sterilization in the case of *Skinner v. Oklahoma* which involved a state law calling for involuntary sterilization of “habitual criminals.” While no attention at all was paid to Carrie Buck’s right to have children, in the case of Jack Skinner, Justice William Douglas was outraged that the Oklahoma legislature targeted “one of the basic civil rights of man.” Douglas clearly meant “man” in the literal sense of the term as he also referenced the *Buck* case several times in the opinion without ever

¹⁴¹ Ibid.; Senate Joint Resolution No. 79 (2002) <http://lis.virginia.gov/cgi-bin/legp604.exe?021+ful+SJ79> (accessed 21 April 2011).

voicing any disapproval. The Supreme Court did not hesitate to strike down the Oklahoma law—albeit on Equal Protection grounds, rather than its violation of the fundamental right to bear children—but left *Buck v. Bell* intact.¹⁴²

Some might dismiss involuntary sterilization laws as simply a byproduct of America’s flirtation with the pernicious “science” of Eugenics. But, the truth is that these laws are yet another chapter in a very long history of American government (state and federal) trying to assert control over the bodies of its people. Slave codes and common law coverture were among the first example of this but certainly not the last. With advances in medicine and technology, governments at the outset of the twentieth century found greater—and certainly more invasive—ways to control its citizenry under the guise of improving society as a whole. This process began with local vaccination laws in the early 1900s and gradually progressed to Eugenics. Even as sterilization laws lost favor with the American public after World War II—the Holocaust demonstrating its natural end point—both federal and state governments continued to control and regulate uses of the human body (particularly for women) and restrict intimate decision-making found objectionable with either sex.

But, people began to fight back against these intrusions into their bodily autonomy starting at the outset of the twentieth century. The fight began with assertion of an undefined, inchoate, liberty interest in the integrity of one’s own body. By 1965, that assertion had coalesced into the principle that people have a constitutional right to *privacy*. This right first gained federal recognition in the landmark case of *Griswold v.*

¹⁴² For the full text of the Virginia sterilization statute, see *Buck v. Bell*, 130 S.E. 516, 517 (1925). The United States Supreme Court on Carrie Buck’s case is at *Buck* supra at 200 (1927). For comments concerning application of Oklahoma’s law against habitual criminals, see *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941).

*Connecticut*¹⁴³ though the full extent of it would not be developed until years later.

Critics of this right are quick to point out that the word “privacy” appears nowhere in the Constitution and argue actions taken by democratic majorities should not be struck down as being in violation of an “unenumerated” right. Even those who defend privacy sometimes wince at the language employed by the majority in *Griswold*, which relied on “penumbras formed by emanations.”

These are the issues I will address in this and the following chapters. Though I do not necessarily disagree with the Supreme Court’s reasoning on the origins of privacy rights—particularly the concurring justices that locate it within the Ninth Amendment—I will also offer an alternative locus for privacy not just in constitutional law but also American intellectual and political history. Just as I previously argued that Enlightenment principles held that people owned property interests in their bodies, my argument in this and the following chapter is that privacy can also be conceptualized as a proxy for bodily property. We stopped talking of property in any context other than chattel or real estate a long time ago. But, this idea was very much part of founding thought in the latter half of the eighteenth century. We see a few remnants of that rhetoric in the early days of privacy jurisprudence though, by the time that abortion and sexual liberty took center stage in the so-called *kulturkampf* of the 1980s and 1990s, such discourse had all but vanished. Still, any serious historical, ideological, study of privacy cannot ignore the salience of property rights in the body, particularly insofar as it is relevant to current debates over originalism as a mode of constitutional interpretation.

¹⁴³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The notion of the “body as property” also comports nicely with the other theories advanced in *Griswold* and its progeny for two reasons. First, property rights and privacy rights are unenumerated. The Constitution provides safeguards for property owners, but there is no mention anywhere of a right to acquire, hold or sell property. Of course, as discussed earlier, that right was no doubt omitted from the Constitution because it never occurred to the founders it was in question. It is also highly-doubtful the founders would have thought a federal or any state government would come to micromanage the bodies of its people – at least in the context of propertied white males. Second, as discussed earlier, when the Constitution and Bill of Rights were drafted, the founders in Philadelphia, representatives in the First Federal Congress and members of the state ratification conventions all had a very different conception of property than we have today. Contract and property metaphors were *lingua franca* of the day and, as children of the Enlightenment, American politicians were well versed in social contract theory which not only stressed property but explained how private property was first acquired from common property by the exertion of the body (physical labor) to improve it and physical occupation with the body to claim it. The body, therefore, was integral to the notion of property.

Finally, re-conceptualization of privacy as property rights in the body adds to the meta-narrative of transformational change which occurred as a result of the creation and strengthening of the modern welfare state from the New Deal through the Great Society and beyond. The general consensus among constitutional scholars is that, after 1937, the Supreme Court’s use of “substantive due process”—that is, recognition of unenumerated rights in the Constitution—shifted from the economic sphere to the individual sphere. I

agree, but there is another change that went on during that time period as well. Once the Supreme Court retreated from its *Lochner* decision, federal and state governments quickly imposed greater restrictions on private property rights. Given this diminished importance of economic property, it should come as no surprise that property rights in the body received little protection either. With only a few exceptions in the 1960s and 1970s, and one exception in 2003, the Supreme Court has largely stood on the sidelines as governments (state and federal) invaded the private sphere passing laws controlling bodily autonomy, reproductive rights and intimate decision. The same has also been true, for the most part, of state supreme courts as well. In short, government assault on individual liberty occurred in near synchronous lockstep with its assault on economic liberty.

1. The Origins of Privacy

It is important to understand that there are two different types of privacy rights. The first is a *private law* right of privacy. *Private law* privacy is a right possessed by one private individual to keep another private individual out of one's personal affairs. No government action is involved here. Thus, the *private law* right of privacy is, essentially, a tort—the same as trespass, battery or libel.¹⁴⁴ The second type of privacy right, and the one with which I am concerned here, is a *public law* right of privacy. By *public*, I mean

¹⁴⁴ See W. Page Keeton, *Prosser and Keeton on Torts* (St. Paul: West Publishing, 5th Ed. 1984) 849-869. A “tort” is generally defined as a private civil injury, other than the breach of a contract, for which the law provides a remedy in the form of damages. *Id.* at 2; also see *Black's Law Dictionary* (St. Paul: West Publishing, 5th Ed. 1981) 1335. For those unfamiliar with legal terminology, a “tort” is best understood by the kinds of legal actions encompassed in the term. For instance, negligence, libel, defamation, assault, battery and many others are all torts.

collective action of private individuals acting through machinery of the *res publica*—in short, democratic government. Though the public law right grew out of the private law right, the two rights are fundamentally different in scope and affect. The private law right applies to individuals and imposes a duty on one private individual to refrain from violating the privacy of another individual. By contrast, the public law right applies to people and their relationship to government. This right draws a line in the sand and, essentially, tells government, *you may go this far into our private affairs, but may go no farther.*

Supreme Court critics oftentimes accuse the justices of simply creating privacy rights out of thin air in the 1960s. But, this critique is more political than factual. Implicit, if not explicit, resort to privacy rights abound in American history prior to 1965 for anyone who cares to look. Ruth Bloch, for instance, makes a very persuasive case for the proposition that privacy's theoretical, if not rhetorical, antecedents can be found much in the early days of the republic. As a point of departure, Bloch focuses on the issue of spousal abuse and how that abuse was handled by the legal system in colonial America as compared to how state and local governments dealt with the subject after independence. Although Blackstone's *Commentaries* on the relationship of husband/wife held sway on both sides of the Atlantic for a number of years, Bloch identified the trend in British colonial law to treat domestic violence as breach of king's peace which permitted an abused wife to seek out a local magistrate who, if the situation warranted, could force the husband to swear out a "peace bond" to guarantee good behavior. Though not much, this provided some minimal relief to the abused spouse. After independence, though, Americans became increasingly suspicious of over-reaching government and, as Bloch

argues, came to see “the family” as a private institution beyond the reach of state and local government. This philosophical shift, as well as centralization of the legal process away from local authorities to the state, made it more difficult to seek redress for abuse in the early republic than it had been in the colonial era. The notion of privacy during that time was familial rather than personal and, as Bloch is quick to point out, the actual phrase “right to privacy” never made it into American discourse. But, the legal history of colonial and early republican America makes manifest a growing consensus that there was a private zone, into which the government could not tread. This was only the germination of a right that would take at least another century to be flushed out and developed.¹⁴⁵

In more contemporary jurisprudence, Justice William Douglas, who wrote the plurality opinion in *Griswold*, is usually credited with recognizing our modern *public law* right of privacy. But, in truth, he shares that honor with an earlier Supreme Court justice—Louis D. Brandeis—who sat on the Supreme Court from 1916 to 1939. Brandeis, the son of immigrant Czech Jews, was admitted into Harvard Law School at nineteen and was, by all accounts, a legal prodigy. He and a classmate, Samuel Warren, set up a private practice shortly after they graduated and the two of them proceeded to write what may well be the most famous law review article in American history. People enjoy protection in their persons and property, wrote Warren and Brandeis, and this was a rule “as old as the common law.” But as the times changed, it became necessary to “define anew the exact nature and extent of such protection.” The late nineteenth century was one of those times. Brandeis and Warren were outraged by a news media they

¹⁴⁵ Ruth H. Bloch, “The American Revolution, Wife Beating and the Emergent Value of Privacy.”

perceived as exceeding all bounds of propriety—running pictures in the papers without permission, repeating scandalous gossip, etc.—solely to cater to what the young lawyers believed was a salacious and indolent readership. Courts were struggling to fit into existing legal actions new lawsuits filed by plaintiffs who wanted to protect the intimate details of their lives from being revealed to others. The legal principle which Warren and Brandeis provided for the courts was a *private law* right of privacy which they also called the “right to be let alone.”¹⁴⁶

This emergent private law right was analogous to “the right not to be assaulted or beaten,” or the “right not be imprisoned” they explained. Though similar to private property rights, the authors rejected the notion of grounding privacy in private property. To do so, they argued, would be to use that phrase in an extended an unusual sense.” Instead, they opted to locate privacy within the confines of an undefined right to “inviolate personality.”¹⁴⁷ While Warren and Brandeis rejected property as the locus for privacy, that rejection is not fatal to my argument that property rights justify recognition of privacy rights. Warren and Brandeis were lawyers writing for an audience of other lawyers and judges rather than for historians. Their article was published in a law review rather than a history journal. Why is that so important? The authors meant to address an existing legal problem and propose a practical solution to that problem rather than write history. Early in the article Warren and Brandeis argue that the notion of property had

¹⁴⁶ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” 4 Harv. L.Rev. 193, 196 (1890); Melvin I Urofsky, Louis D. Brandeis: A Life (New York: Pantheon Books, 2009) 98-102

¹⁴⁷ Id. at 205, 230. Though, as a biographer of Justice Brandeis has noted, Warren and Brandeis seized on a person’s “property right” in their own portraiture as a basis for arguing in favor of a private law right of privacy. Urofsky, *Brandeis*, supra at 99.

expanded over centuries from the strictly corporeal (real estate and chattel) to incorporeal as well (stocks, copyrights, patents, etc.).¹⁴⁸ Though true, at the same time, the definition of property contracted as well. Lawyers like Warren and Brandeis would not necessarily have had the same familiarity with property interests in rights, or the body, that eighteenth century lawyers like James Otis or Alexander Hamilton would have had. Late nineteenth century Americans may still have been living the “Enlightenment experiment” but many of the particulars of that experiment had faded from memory over time.

Still, the framework Warren and Brandeis provided the bench and bar quickly gained currency in the law. Many cases in the late nineteenth, and early twentieth, centuries either cited to their article directly or were clearly influenced by it, sometimes even borrowing the phrases “privacy” or “right to be let alone” without attributing them to Warren and Brandeis.¹⁴⁹ More importantly, as state courts came to increasingly cite the private right of privacy, they also began linking it to property. May Schuyler was a New York philanthropist who tried hard to stay out of the public eye. Fourteen years after her death, the New York Women’s Memorial Fund Association began raising funds to commission a statue of her to be shown at the 1893 Columbia Exposition. Her nearest living relative, a nephew, filed suit to stop them and asked for a preliminary injunction.

The trial court granted the injunction, citing Warren and Brandeis in ruling the creation of

¹⁴⁸ *Id.* at 194. Warren and Brandeis refer to an 1854 case where the judge who authored the opinion stated nothing was property unless it could be recovered in detinue (return of actual chattel) or trover (recovery of damages for wrongful detention of property).

¹⁴⁹ See e.g. *Marks v. Jaffa*, 26 N.Y.S. 908 (Super.Ct.NY. 1893) (unauthorized publication of picture in newspaper was actionable); *Caspar v. Prosdame*, 14 So. 317 (LA.1894) (persons have right to be let alone, and not verbally assaulted, even if those persons have bad character); *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (MI. 1899) (company cannot use likeness of well-known decedent to sell cigars).

the statute violated the decedent's right of privacy or "right to be let alone." That decision was reversed on appeal, in part, the majority said, because a decedent's privacy rights died with her. Not so, said one judge, who stated "I cannot see why the right of privacy is not a form of property[.]" This property would have survived the decedent and her representatives could pursue that action.¹⁵⁰

A private law right of privacy, though, offered no protection from overreaching governments. Warren and Brandeis only wrote about private actors and none of the cases that followed their article addressed the right of private individuals to restrict government entry into the same zone of privacy from which they could exclude private individuals. Still, critics who accuse Justice Douglas of simply creating a constitutional right to privacy out of thin air in 1965 are simply wrong. As noted above, American law tried to distinguish itself from British law by privatizing each man's "little commonwealth" and protecting him from government intrusion. It is also worth noting the Third Amendment prohibits government from quartering soldiers in private homes and the Fourth Amendment protects persons and homes from unreasonable searches and seizures. While the "emanations from penumbras" rhetoric of Justice Douglas's opinion in *Griswold* may cause reflexive wincing, it is clear that these amendments—if nothing else—indicate a clear concern on the part of the founders that there is a zone of privacy around certain spheres of interest that the government could not tread. The Ninth Amendment, as discussed earlier, also sets forth a rule of constitutional interpretation for the first eight

¹⁵⁰ *Schuyler v. Curtis*, 15 N.Y.S. 787, 788 (1891), reversed by *Schuyler v. Curtis*, 42 N.E. 22 (NY.App. 1895); *Id.* at 28 (Gray, J. Dissenting).

amendments to the Bill of Rights and instructs future generations that there are rights outside the first eight amendments.

Proto-privacy arguments are also detectable from Supreme Court decisions as early as 1885—several generations in advance of the *Griswold* decision. The Court in *Boyd v. United States* struck down part of a customs revenue act that compelled production of private papers of importers whose goods were seized for failure to pay customs.¹⁵¹ In so doing, the Court cited an English precedent condemning warrants used by officials to find private papers that would help obtain convictions for those violating English customs laws. “The principles laid down in [that] opinion,” the Court held, “affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.”¹⁵² Intrusion into the home was one thing, but what really bothered the Court in *Boyd* was the authority that the customs statute gave the government to rifle through the personal, and private, papers of the person against whom the warrant was executed.

Credit for recognizing a public law right of privacy, to some extent, must also be given to the man who created the private law right. Louis Brandeis was appointed to the Supreme Court in 1916 by President Woodrow Wilson. Twelve years later, Justice Brandeis reached back to his law review article of 1890 to craft an argument that there existed certain private boundaries in life over which the federal government could not transgress. The issue before the Supreme Court in *Olmstead v. United States* was

¹⁵¹ *Boyd v. United States*, 116 U.S. 616 (1885).

¹⁵² *Id.* at 627-630.

whether private telephone conversations, obtained by the government through wiretaps, could be used in evidence in a criminal prosecution. Former President, and now Chief Justice, William Howard Taft answered in the affirmative. There were a number of dissenters, though, including Justice Brandeis who wrote our founders “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. [The founders] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”¹⁵³ These two cases (*Boyd* and *Olmstead*) dealt with property—the invasion of a home/business and the seizure of personal property—in the conventional sense of the term. In neither case was proto-privacy argument made in reference to a government invasion of the body. The first person to actually make that argument, though, was not a lawyer or justice involved in the *Griswold* case but an immigrant Swede.

Henning Jacobson was born in Sweden in 1851 and was thirteen years old when he immigrated to America with his family. As an adult, Jacobson entered seminary and ultimately moved to Cambridge Massachusetts where he helped found the Faith Lutheran Church. A smallpox epidemic swept through neighboring Boston in 1901, causing several hundred deaths, and ultimately prompting the Cambridge Board of Health to enact an ordinance requiring mandatory vaccination. Those who refused vaccination were fined \$5. Claiming to have had a bad reaction to a vaccination as a child in Sweden, Rev. Jacobson refused. He was subsequently indicted and fought his conviction through the commonwealth courts.

¹⁵³ *Olmstead v. United States*, 277 U.S. 438 (1928). Id. at 478 (Brandeis, J. Dissenting).

When that proved fruitless, he appealed to the Supreme Court. Jacobson advanced a number of arguments but the most important, for our purposes, was that the Cambridge Board of Health exceeded its police powers in ordering its citizens to be inoculated. Many people—including some physicians—still disputed the science behind vaccinations and many feared for their lives if forced to introduce an active part of the oftentimes fatal disease into their body. Jacobson’s lawyers argued that a compulsory vaccination law of this sort was “hostile to the inherent right of every freeman to care of his own body.” In rejecting Jacobson’s argument that Massachusetts crossed the line, Justice Harlan never disputed the existence of this “inherent right” but, instead, reasoned that the health and safety of the community must sometimes supersede that right:

The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.’ . . . [We have previously said] The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety,

health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.¹⁵⁴

In holding that Rev. Jacobson's must yield to the health and safety of his community, as determined by the Cambridge Board of Health, the Supreme Court nonetheless implied recognized the inherent right that Jacobson asserted.

Jacobson was not alone in his outrage over the compulsory nature of state and local vaccination laws. Similar arguments were made by vaccine opponents across the country. When Connecticut made it a law that children must be vaccinated before they could attend school, opponents introduced bills in successive legislative assemblies to repeal it. Calling compulsory vaccination a "tyranny," the issue was quickly framed as a matter of "choice." Said one opponent of the law to the Public Health and Safety Committee, "[y]ou have your choice to be vaccinated and we have our choice to avoid it. . . . Have we not a right to preserve our health? Must we be obliged to have this forced on us?" In another attempt to repeal the ordinance two years later, one witness challenged the same committee: "what business has an outsider to come in and tell me what course I shall take in regard to my child or children?" The term "privacy," was never invoked per se, of course, but it is clear these parents had an inchoate sense that government had gone too far by inserting itself into the realm of private decision-making. There was, as yet, no choate sense of what right they felt violate but the outrage at government overreaching was real. As to the source of the right, however, there was a vague general sense it was a natural right and that any law violating that right was unjust. "There is nothing that so

¹⁵⁴ Jacobson v. Massachusetts, 197 U.S. 11, 26 (1904).

undermines the people's confidence in government," argued one proponent of repeal, "as the existence of unjust laws—if a law is unjust, persons lose confidence in the government, and I hold that no law is a just law which compels parents to go against their conscientious [*sic*], their religious, and their scientific principles."¹⁵⁵

The right asserted against government intrusion into the body might have been inchoate. But, there was no doubt amongst the people who argued against compulsory vaccination that one existed and the United States Supreme Court in *Jacobson* certainly did not dispute that one existed. A failure to precisely define that right, or situate it in the Constitutional pantheon mattered little in the long run. On balance, compulsory vaccination was a relatively innocuous part of progressive policy in early twentieth century America and would pale in comparison to what would happen soon thereafter as many state governments took upon themselves the authority to interfere in reproductive or sexual decisions of its citizenry. As government intrusion into the body became increasingly onerous, activists and the bar would eventually coalesce around recognizing a formal public law "right to privacy."

¹⁵⁵ See H.B. 33, Proceedings Before the Public Health & Safety Committee, Connecticut General Assembly (1905); H.B. 741, Proceedings Before the Public Health & Safety Committee, Connecticut General Assembly (1907); H.B. 347, Proceedings Before the Public Health & Safety Committee, Connecticut General Assembly (1911). Though smallpox has long been eradicated, the uproar over mandatory vaccination has not. When pharmaceutical giant Merck & Co., developed a vaccine (Gardasil) against the human papillomavirus (HPV), a leading cause of cervical cancer among women, Governor Rick Perry of Texas issued an Executive Order mandating vaccination of girls in Texas schools. An ensuing uproar amongst parents and conservative groups led to action in the state legislature which ultimately passed a veto-proof bill making vaccination voluntary. Representative Dennis Bonner, the sponsor of the bill stated "only parents and children and doctors [should] decide if this right." *Houston Chronicle*, A-1 (17 Mar. 2007). Also see generally Jane Elliot, "Senate Votes to Overturn Perry's Vaccination Order," *Houston Chronicle* B-4 (24 April 2007).

In short, the unenumerated right of privacy was not created out of thin air by judicial fiat in 1965 as its detractors tend to claim. The right does have a foundation in several federal constitutional amendments as well as Supreme Court case law pre-dating the twentieth century. More importantly, though, the law review article penned by Warren and Brandeis in 1890 recognized—but did not find—a private law right of privacy more than half a century before Justice Douglas recognized the public law right in 1965. Just as the private law right was in response to an increasingly intrusive press, recognition of the public law right was in response to intrusive government which only got worse as the nineteenth and twentieth centuries passed. The full panoply of that right would not come until later and would not have happened without the work of people like Bill Baird, Norma McCorvey and John Lawrence. But, the eventual development of a public law right of privacy was too little, too late for people like Raymond Hudlow and Carrie Buck who found themselves at the mercy of democratic majorities flirting with the Eugenics fad that swept the world in the late nineteenth and early twentieth centuries.

2. Eugenics

Simply put, eugenics is the “science” of better breeding. The improvement of society’s genetic stock required two things. The first requirement was that superior races continue propagating as fast, and as much, as possible. This was referred to as “positive eugenics.” The second requirement was that breeding by inferior races be slowed as much as possible or stopped altogether. This was referred to as “negative eugenics.” The late eighteenth and early nineteenth century saw a huge influx of immigration by those other than from southern or eastern Europe. These immigrants possessed a much greater

rate of fertility than native white Anglo-Saxon Protestants whose fertility rate was decreasing. What many feared was that inferior races from the rest of the world, together with degenerate whites and African-Americans in this country, would eventually outnumber the former and overtake them in society leading to what was characterized as “race suicide.”¹⁵⁶

“Race” is a very fluid concept now and but was more so during the late nineteenth century. As Simone Caron points out, eugenicists of the time period frequently referred to an American “race” or a Protestant “race.” “Inferior races” were certainly thought to have included African-Americans. But, white immigrants from Eastern Europe were also considered a separate race and even white Americans were subjected to eugenic sterilization if they were criminals, drunkards or otherwise unable to care for themselves and their offspring. White women, though not white men, could also be institutionalized and then sterilized for being “notoriously immoral” or sexually active. That said, it would nevertheless be a mistake to gloss over the racism inherent in eugenics as applied to slavery’s descendants in this country. Paul Lombardo notes a California physician called for involuntary sterilization of all African-Americans as a final “solution to the negro problem” and another in Virginia called for it as punishment (along with cutting off ears) for black men that assaulted white women – that is assuming, of course, the accused was lucky enough to have survived vigilante lynching long enough to get to trial.¹⁵⁷

¹⁵⁶ Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America* (Urbana: University of Chicago Press, 2002) 190-203.

¹⁵⁷ *Simone M. Caron, Who Chooses? Reproductive History Since 1830* (Gainesville: University Press of Florida, 2008) 45-48; Paul A. Lombardo, *Three Generations No Imbeciles: Eugenics, the Supreme Court and Buck v. Bell* (Baltimore: Johns Hopkins University Press, 2008) 27, 58; Elyce Zernoff Ferster, “Eliminating the Unfit – Is Sterilization the Answer,” *27 Ohio State Law Journal* 591 (1966).

It is tempting to blame this part of the Eugenics craze on racist Europeans—particularly Germans—who, long before Adolf Hitler, maintained that certain genetic traits made one ethnicity superior to another. But, the fact remains Americans (as well as Western Europeans) embraced this nefarious idea long before a fanatical “Third Reich.” Indiana was the first state in the United States to adopt a compulsory sterilization law in 1907—twenty-six years before Adolf Hitler was even appointed Chancellor of Germany. Many other states followed and even Margaret Sanger, the founder of Planned Parenthood and strong advocate of a woman’s control over her own reproductive system, championed negative eugenics. “Indeed, it has been a great surprise to me,” Sanger wrote in 1923, that medical societies throughout the country had “failed utterly to encourage sterilization of the unfit or to educate the public that it should be done.” “I personally believe,” Sanger wrote four years earlier, “in the sterilization of the feeble-minded, the insane and the syphilitic [*sic*].”¹⁵⁸

This was the climate into which Raymond Hudlow and Carrie Buck were born. Both children were born poor but Hudlow had the advantage of being born male; Buck did not. Carrie’s mother, Emma was born in 1872 and married Frank Buck at the age of twenty-four. Ten years later, Carrie was born. Emma was institutionalized in 1920 and, though also through to be a prostitute, was only formally diagnosed as a “moron.” Carrie was ultimately placed with a foster family by the name of Dobbs but, when she became pregnant at the age of seventeen, he horrified foster family—fearing scandal—took her to the same colony where her mother was institutionalized. She was selected for

¹⁵⁸ Sanger, Margaret to Dr. Ross Gun (8 Oct. 1923), *The Selected Papers of Margaret Sanger*, ed. Esther Katz (Urbana: University of Illinois Press, 2003) I:375; Sanger, “Birth Control and Racial Betterment,” (Feb. 1919) *Ibid.*, I:252-253.

sterilization under Virginia law to be carried out once the baby was born. A friendly attorney was appointed to represent Carrie, in the hopes of establishing a precedent conducive to carrying out these procedures in Virginia, and elsewhere, in the future.¹⁵⁹

Unlike Raymond Hudlow, Carrie Buck was born to an unwed mother who, herself, was confined to a Virginia home for the feeble-minded. We know little about Carrie's mother (Emma Buck) except that she was poor and bore Carrie out of wedlock. Carrie was later placed with a foster family who cared for her until she, too, became pregnant out of wedlock. Fearing the family would scandalized as a result of the pregnancy, Carrie was promptly returned to the Virginia Colony for the Epileptic and Feeble Minded where she gave birth to a daughter, Vivian. Carrie was then diagnosed as feeble-minded and ordered by the superintendant of that institution to undergo a salpingectomy as permitted by Virginia's Eugenics law. An attorney was appointed to represent Carrie on appeal but his efforts are largely regarded by historians as a sham and meant to obtain a favorable opinion by courts to uphold these laws.

The case reached the United States Supreme Court, which ultimately reached a decision in 1926 upholding Virginia's involuntary sterilization law. The *Buck v. Bell* opinion was written by Oliver Wendell Holmes—one of the more famous Justices who never became a Chief Justice—and, to this day, remains one of the more vicious opinions

¹⁵⁹ Lombardo, *Three Generations*, supra 103-106, 183-185. The sterilization procedure performed on Carrie was a salpingectomy which is a surgical remove of the fallopian tubes. American Heritage Dictionary (Boston: Houghton Mifflin Co., 2nd Coll. Ed. 1985) 1086. For males, at first, the sterilization procedure first performed was castration. But, after a number of problems – not the least of which was a castrate hunting down his doctor and murdering him – the practice was discontinued as men were said to show an “absurd sentimental” objection to that procedure. Castration was later replaced by a vasectomy. Lombardo, *Three Generations*, supra at 22-23.

ever authored by the Supreme Court. Justice Holmes, himself from a Boston “Brahmin” family and twice injured fighting for the Union in the Civil War, made it clear he had no empathy for the likes of Carrie Buck. “We have seen more than once,” Holmes said, that the public “may call upon the best citizens for their lives.” It would be very strange, Justice Holmes noted, “if it could not call upon those who already sap the strength of the state for these lesser sacrifices.” Rather than allow society to be “swamped with incompetence,” Holmes declared, it “is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” Three generations of imbeciles are enough.”¹⁶⁰

Counsel for Carrie Buck made the argument that the Virginia statute violated a “constitutional right of bodily integrity” but that issue was never raised in the opinion—perhaps, due to the request of Chief Justice Taft who asked Holmes to tread lightly on the matter.¹⁶¹ At a time when the United States was little concerned with any of niceties of political correctness, the *Buck* decision still comes across as particularly harsh. This did not particularly concern Holmes, however, as he even related to a young protégé that the one decision he wrote that term which gave him pleasure was the one “establishing the constitutionality of a law permitting the sterilization of imbeciles.”¹⁶²

¹⁶⁰ *Buck v. Bell*, 274 U.S. 200, 207 (1926).

¹⁶¹ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993) 404.

¹⁶² Oliver Wendell Holmes to Lewis Einstein (19 May 1927) in *The Holmes Einstein Letters: Correspondence of Mr. Justice Holmes and Lewis Einstein 1903-1935*, Ed. James Bishop Peabody (New York: St. Martin’s Press, 1964) 267. It is also interesting to note that, while Justice Louis Brandeis is credited with articulating the private law right

Part of the opinion's severity was due to Holmes background. He was born into a wealthy and respected Boston (Brahmin) family and was severely wounded several times as a young man fighting for the Union during the Civil War. He no doubt had himself and others like him in mind when he spoke in *Buck* of the ability of the state to ask its "best citizens for their lives." Holmes was also a fervent convert to the principles of eugenics. One biographer even recounts that, in a lecture to law students at Boston University, Holmes told his rapt young audience that it was useless to try and rehabilitate a criminal inclined to crime by an "organic necessity." "He must instead," Holmes told them, "be got rid of."¹⁶³

By the same token, however, we must be careful about ascribing too much significance to either Holmes's elitism or to his support of eugenics when analyzing the *Buck* opinion. A foundational pillar of Holmes's judicial philosophy lay in legal positivism, that is to say a belief that the judiciary should afford considerable—though not abject—deference to legislatures in formulating public policy and crafting of statutes to accommodate changes in society. In 1881, he published a series of lectures he had given as one book entitled *The Common Law*. More thematic philosophy on various legal topics than a true legal treatise, Holmes made clear his belief in the primacy of legislation. "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong."

of privacy, as well as nurturing it into an eventual public right, he also joined with the majority in *Buck*. There are few biographies of Brandeis, but in the most recent, refers to this only once and only in the notes at the back of the book. See Urofsky, *Brandeis*, *supra* at 874 (notes for page 639).

¹⁶³ Liva Baker, *The Justice From Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: HarperCollins, 1991) 590-604.

Following his oft-quoted phrase on the life of the law being experience and not logic, Holmes noted: [t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than . . . syllogism in determining the rules by which men should be governed.”¹⁶⁴

Consistent with that philosophy, it is worth repeating Holmes cast the lone dissent in *Lochner* and would have upheld the New York legislation on the number of hours a baker could work. He also dissented in the *Coppage* case and would have upheld the Kansas legislature’s ban on so-called “yellow dog” contracts forbidding employees from joining unions.¹⁶⁵ Holmes voted to uphold these laws not, as his biographers points out, because he believed in them. To the contrary, he regarded economic laws protecting workers at the expense of employers, and thereby re-arranging property interests between them, as so much “twaddle.” Still, Holmes believed it the job of the legislature rather than the judiciary to decide how to address socio-economic problems that came with industrialization. His voting record on the Supreme Court reflected that belief and while fellow justices struck down progressive labor laws on grounds they violated liberty of contract, Holmes dissented though his own thoughts on political economy probably sympathized with the majority. It thus comes as no surprise that, when Eugenics provided a theory by which to reduce or eliminate those in society deemed manifestly unable to care for themselves, Holmes would have believed it the job of the legislature to

¹⁶⁴ Oliver Wendell Holmes, *The Common Law* (New York: Dover Publications, 1991) 41, 1. Sheldon Novick, who wrote an introduction to this version of Holmes’s book,

¹⁶⁵ *Lochner*, (Holmes, J. Dissenting); *Coppage*, (Holmes, J. Dissenting).

determine its merit and value and whether, or not, to implement its principles. The *Buck* case thus fit perfectly within the parameters of his legal philosophy.¹⁶⁶

The sum total of all paper devoted over the years to critiquing the *Buck* decision in particular, and Eugenics in general, no doubt accounts for a good part of deforestation and there is no point to repeating any of that here. But, a few final words are in order. Carrie Buck, who died in 1983, was *re-discovered* by researchers later in life. Interviews with her, as well as her acquaintances, not to mention review of her primary school report cards and found she was, in fact, not an “imbecile.” She certainly did not rank in the genius range but her academic performance was certainly within ordinary levels. As for her out-of-wedlock pregnancy—an issue which stigmatized virtually all women, but particularly those of lesser economic means—Buck revealed she was raped by the nephew of the Dobbs foster-family with whom she was placed. The out-of-wedlock daughter to whom she gave birth, Vivian, was later adopted by her great aunt and uncle. The *Buck* case has never been formally overruled and remains, technically, good law. Although the commonwealth of Virginia repealed this particular law in 1974, many states still have compulsory sterilization laws of one sort or another on the statute books. Adding insult to injury, it is also worth noting defense attorneys at Nuremburg repeatedly referenced the *Buck* case in defense of their Nazi clients. It is almost impossible to imagine a more embarrassing rebuke to America’s image of itself as the *land of the free*

¹⁶⁶ Baker, *Justice From Beacon Hill*, 601, 298-306; also see G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993) 390-409 which stresses Holmes’s legal positivism as the basis for his dissent in a number of labor cases during the Progressive Era.

than the remnants of a totalitarian government relying on a U.S. Supreme Court case to excuse genocide.¹⁶⁷

The Supreme Court revisited compulsory sterilization fifteen years later when it reviewed an Oklahoma statute applied to “habitual criminals.” An habitual criminal was defined by Oklahoma as anyone convicted two or more times for felonies involving moral turpitude. Embezzlement, political offenses and violation of revenue acts were expressly excluded from the class of crimes involving moral turpitude. Jack Skinner spent eleven months imprisonment in 1926 for stealing chickens and ten years for armed robbery in 1929. He was serving his second sentence when Oklahoma passed its habitual criminal sterilization law in 1931. A third conviction for armed robbery put him squarely within the confines of that law and Skinner became the test case to challenge its constitutionality.¹⁶⁸

The majority decision in *Skinner v. Oklahoma* was written by Justice William O. Douglas who ranks as one of the greater civil libertarians to ever sit on the Supreme Court. The opinion started with soaring, and promising, rhetoric—stating the word “right” no less than three times in two sentences—and characterizing the issue before the Court as a “sensitive and important area of human rights.” The decision, unfortunately, failed to live up to that initial rhetoric. Rather than address the issue of “rights” head-on, Douglas passed and went on to craft an opinion grounded entirely on the Equal Protection Clause instead of individual liberty. Using poultry as a point of departure,

¹⁶⁷ Lombardo, *Three Generations No Imbeciles*, 250-255, xi-xiii.

¹⁶⁸ *Skinner v. Oklahoma*, 316 U.S. 535 (1942), 536-537; Victoria F. Nourse, *In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics* (New York: Norton & Co., 2008) 91-92, 103-104.

Douglas essentially noted that a man who stole chickens on three separate occasions could later be compelled to undergo vasectomy whereas if three chicken owners entrusted a neighbor to care for their chickens while they were absent, the caretaker (bailee) could refuse to return those chickens when the owner came back and would only be guilty of embezzlement which did not subject that individual to sterilization. Douglas reasoned that “[s]terilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed unmistakable discrimination.”¹⁶⁹

That the court acknowledged a fundamental right was at stake in *Skinner*, but then failed to decide the case on the basis of that right, is—to put it mildly—frustrating. Chief Justice Stone filed a concurring opinion that also stated that the case involved an “invasion of personal liberty” but then went on to point out a procedural problem at issue with the Oklahoma statute that was not present with the Virginia statute. The most promising rhetoric of the opinion beyond Douglas’s opening two sentences is perhaps that of Justice Jackson’s concurring opinion wherein he notes: “there are limits to the extent to which a legislatively represented minority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority.”¹⁷⁰

We must be careful not to ascribe to *Skinner* rulings it did not make and/or credit that it does not deserve. To begin, *Skinner* did not overrule *Buck*. Indeed, *Buck* was mentioned numerous times in the majority opinion and in Chief Justice Stone’s

¹⁶⁹ *Skinner*, supra at 539-541. The irony of the Court’s decision to use the Equal Protection Clause to invalidate this statute is that a similar argument was made fifteen years earlier in *Buck*, but was scoffed at by Justice Holmes who characterized it as the “usual last resort of constitutional arguments.” Although Douglas cited *Buck* a number of times in his decision, he never bothered to explain why the equal protection argument held greater salience than it did in that case.

¹⁷⁰ *Id.* at 543-545 (Stone, C.J., Concurring); *Id.* at 546 (Jackson, J. Concurring).

concurrence. Every single mention of the Buck case was, if not positive, at least neutral. Nothing in *Skinner* overturned *Buck*, limited it or even criticized it. Though it is unimaginable we would ever allow that kind of forced sterilization again, *Buck* remains the proverbial law of the land. Furthermore, the Court had before it the perfect opportunity to formally acknowledge the existence of a liberty interest in one's own body but did not take it. The high-flying rhetoric at the opening of Douglas's opinion is nothing more than *obiter dicta* and has no precedential value whatsoever. In addition, it is hard to read Justice Douglas expounding on the "human right" of reproduction for men but never mentioning that women had that right as well, or try and explain why Justice Holmes might not have mentioned it in *Buck*. Was there any real difference between the two cases other than the gender of the proposed sterilizee?

Finally, *Skinner* did not end Eugenics. Although a recent book on the *Skinner* case correctly acknowledges that its principles and holding are problematic, part of the title for that book—*The Near Triumph of American Eugenics*—suggests *Skinner* turned the tide on Eugenic Sterilization. That kind of characterization over-states the value of the case. Negative Eugenic practices continued well after *Skinner* though the horrors of Nazi Germany slowed (but did not stop) involuntary sterilizations. We should also be mindful that between 1927 when *Buck* was decided, and 1942 when *Skinner* was decided, the world had become aware of the *junk* racial science of Nazi Germany and at least suspected some of the ends to which Hitler would put negative Eugenics. The *Skinner* case could just as easily be read as the Supreme Court response to policies which, if not falling out of favor, were being put under a public policy microscope in light of what was transpiring in Europe. Though no one has greater respect for Justice Douglas and his

legacy of jurisprudence than me, particularly with regard to the right privacy, I must also take issue with a recent biographer characterizing the *Skinner* case as Douglas's opportunity to explore "his views on personal autonomy" and that Douglas "ruled expansively on behalf of human rights." This is what Douglas could have done, should have done and no doubt wished he had done later in his career. But, *Skinner* was decided on Equal Protection grounds not on the fundamental rights so eloquently mentioned at the outset of the opinion.¹⁷¹

Nobody seriously doubts the role of racism, misogyny and elitism in American Eugenics. But, the economic aspects of compulsory sterilization deserve some final words. Progressivism spawned a new, centralized, effort in the United States to care for those deemed incapable of caring for themselves. No longer were individual communities necessarily saddled with the burden of caring for the sick and the infirm; states now created their own institutions and entire new bureaucracies to warehouse and care for people. Those institutions were built with, and operated through, taxpayer dollars. To paraphrase Orleck, anytime the government gives you money, there will always be strings attached. Those strings, of course, were forfeiture of liberty and reproductive rights.¹⁷² At least in the case of Carrie Buck, women sacrificed their reproductive rights as quid pro quo for continued shelter and care. This exchange was not truly voluntary, of course—Buck and Hudlow were both committed to Virginia institutions against their will—but the legal fiction was that they exchanged those rights

¹⁷¹ Nourse, *In Reckless Hands*, 15-16, 126-134; Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas, America's Most Controversial Supreme Court Justice* (New York: Random House, 2003) 203.

¹⁷² Annelise Orleck, *Storming Caesar's Palace: how Black Mothers Fought Their Own War on Poverty* (Boston: Beacon Press, 2005) 4.

for care. If the public is going to provide for their care, after all, then the public will expect that it can decide the terms under which that care is given.

But, what is rarely mentioned in any discussion of compulsory sterilization is the economic—or, potential economic—toll that the procedure took on the sterilizee. Before the advent of Social Security and Medicare as a means by which to provide for the necessities of life to the elderly and infirm, parents typically relied on their adult children and/or extended family to care for them in their old age. This was a moral duty, and a natural law duty, imposed on children but it was never a common law duty as the one imposed on a parent to support their minor children. Nevertheless, early on in American history, states passed various legislative measures to impose statutory duties on adult children to care for their parents to the extent they were financially able. Given the endemic nature of poverty, it is admittedly unlikely that Raymond Hudlow or Carrie Buck would have ever had children financially capable of paying to support them. But, even if living in abject poverty, grown children can at least provide their parents with a roof over their heads and a minimal level of sustenance. The State of Virginia deprived Hudlow and Buck of this potential economic asset in their old age. Ironically, such asset deprivation (or, taking of property) continued to self-inflict harm to the Virginia public fisc. Buck lived out her final days in a Waynesboro, Virginia, “District Home” which Paul Lombardo describes as the facilities that were built to replace county almshouses. In assuring Buck would have no more offspring to “sap” the strength of the state,

Virginia also made sure that she and others like her would continue to sap public welfare monies for the rest of their lives.¹⁷³

A state's dabbling in eugenics provided more than just the opportunity cost that could possibly be recouped by a family member. It also provided for reparation payments to those Americans affected by state eugenics programs.¹⁷⁴ Although reparations typically denote what opponents denote as questionable ethnic payments to groups in recompense for an unconstitutional restraint on liberty—for instance, internment of Japanese-Americans at the outset of World War II—they are also represented as mistakes to be reckoned with. Whether recognized as a clear taking of property rights under the Fifth Amendment to the United States Constitution, or a taking of bodily autonomy by the state, the fact remains that deprivation of individual control over the body remains a serious problem in the law.

¹⁷³ *Haxton v. Haxton*, 705 P.2d 721, 726 (OR. 1985); *In re Ray's Estate*, 287 N.E.2d 144, 149 (Ill. App. 1972); *San Bernardino County v. Simmons*, 296 P.2d 329, 330 (CA. 1956); *Dawson v. Dawson*, 12 Iowa 512 (IA 1861); *Edwards v. Davis*, 16 Johns. 281 (N.Y. Sup. 1819); as to Carrie Buck's final days, see Lombardo, *Three Generations No Imbeciles*, *supra* at 254-256.

¹⁷⁴ "Truth and Atonement in North Carolina," *New York Times* (29 April 2012) announcing the State would offer \$50,000 compensation to eugenics survivors still alive at that time;

CHAPTER IV
PRIVACY, PROPERTY, AND CONTRACEPTION

We . . . affirm the right of the individual to determine the chronology and size of the family and strongly disapprove of . . . legislative restriction which would prevent the exercise of free conscience.¹⁷⁵

David Trubek and Louise Grossman were married in June of 1958. That fall, they started at Yale University Law School. A degree from Yale is difficult for anyone to attain, under any circumstances, but it was even harder for a woman in the 1950s and early 1960s. A pregnancy during an era when women were expected to give up their professional aspirations in order to be a mother would have immediately de-railed Louise's academic and professional career. Consequently, on May 20, 1959, the Trubeks filed suit in New Haven, Connecticut, asking the court to declare the state's ban on dispensing birth control, and birth control advice, an unconstitutional deprivation of liberty without Due Process of law. In their complaint, the couple alleged that Louise's education would be interrupted if she became pregnant and that, in any event, they did

¹⁷⁵ "Meriden Ministers Back Birth Control Law Fight," *The Hartford Courant* (16 Feb. 1962) 3.

not want to bring children into the world until they were materially able to provide for them.¹⁷⁶

The State's Attorney General admitted the factual allegations of the complaint but denied that the Trubeks had a legitimate claim for relief. A New Haven trial court judge agreed and, on March 26, 1960, entered judgment against the Trubeks. The young couple appealed to the Connecticut Supreme Court. Catharine Roraback, the Trubeck's attorney, stressed in her brief the importance of protecting Louise's academic career from an unintended pregnancy as well as both their desire to have children only when they had sufficient means to care for them. The Connecticut Attorney General belittled the latter argument in particular. What if the Trubeks never felt they had sufficient economic resources to bear and raise children? What then? The State answered its own rhetorical question and, essentially, argued the legislature had a right to supervise the marriage so as to ensure the couple procreated and then raised their children consistent with their obligations to society, in general, and as well as to the State of Connecticut in particular:

[M]arriage carries with it definite obligations and responsibilities and once undertaken the State becomes an interested party by virtue of its desire to see that the married couple maintain a permanent marriage status with the intention to discharge toward society and one another those duties and obligations which result from a marriage relationship. Such a relationship involves the morals and civilization of organized society.¹⁷⁷

The Connecticut Supreme Court summarily rejected the Trubeks' arguments on the premise that "previous decisions" rendered their claims untenable. *Trubek v. Ullman*

¹⁷⁶ *Connecticut Supreme Court Records and Briefs* (Oct. Term 1960) 590.

¹⁷⁷ *Ibid.*, at 609-610.

never went any further than the Connecticut Supreme Court.¹⁷⁸ Still, Connecticut's ban on dispensing birth control to married couples—indeed, every state's ban on distributing contraceptives to married couples—would fall five years later in the landmark case of *Griswold v. Connecticut*. The *Trubek* case is nevertheless more illustrative of my privacy arguments than *Griswold*. On the one hand, Rorabach never expressly asserted “privacy” as a definitive constitutional right on behalf of her clients though she did stress individual rights such as that to get married and to engage in sexual intercourse as a result of marriage. But, what is most interesting about the *Trubek* case were assertions of economic interests including Louise's legal education which, of course, would contribute to future family wealth-building and the couple's desire to choose when they had children based on their economic resources. Though Rorabach never actually articulated Louise's intrinsic property right to her own body, their arguments to the Connecticut Supreme Court at least emphasized the extrinsic property rights. Therefore, though they lost their case in Connecticut courts, the *Trubeks* contributed as much to the national discourse on privacy and property rights as did Estelle *Griswold* five years later. Fortunately, despite Connecticut's legislative and judicial denial of their right to choose, Louise (and David) graduated Yale in 1962 and are (today) emeriti faculty at the University of Wisconsin Law School.¹⁷⁹

¹⁷⁸ “State High Court Rejects Birth Control Law Case,” *The Hartford Courant* (16 Nov. 1960) 2; *Trubek v. Ullman*, 165 A.2d 158 (1960).

¹⁷⁹ “34 Pass Exams of State Bar,” *The Hartford Courant* (11 Feb. 1962) 11A. Catharine Rorabach was, herself, a pioneer and towering figure in the reproductive rights movement. Born in Brooklyn, New York, in 1920 she graduated from Mount Holyoke College in 1941 with a degree in Economics and from Yale University Law School in 1948. Rorabach was a founding member of the Connecticut Civil Liberties Union and, after representing David and Louise *Trubek*, went on to represent Estelle *Griswold* and

This chapter, and the two that follow, will examine the recognition and expansion of privacy, as well as the doctrine's later contraction, as a byproduct (casualty) of the regulatory state. Constitutional historians all too often cite the 1950s and 1960s as a proverbial heyday of judicial activism. I take issue with that characterization, however, and will argue instead that both state and federal judiciaries were responding (albeit belatedly) to a broad sweep of legislation that tried to regulate individuals and their private lives as much as business regulation tried to control their economic lives. Calvin Coolidge once famously noted in the 1920s that "the business of America is business" and therefore it should come as no surprise that courts – both state and federal – rushed into protect business from what they perceived as laws impeding commerce or regulating their relations with employees. Courts were much slower to react, however, to laws that regulated the individual and the private sphere. Indeed, sometimes, as in the case of eugenics, courts no doubt perceived their inaction as comporting with their sense of "social darwinism."

Still, it is property that remains at the core of not just our economic lives but also our private lives. The regulatory state diminishes property and economic interests as much when it forces the birth of an unwanted child as it does when it seizes land to give to private developers to improve a city's tax base or wipes out shareholder equity in a corporation only to give ownership of the entity that emerges from bankruptcy to its workers. What stops lawmakers and the judiciary from seeing that difference is politics.

other notables such as Bobby Seale. She died in October, 2007, at the age of 87. See David J. Garrow, *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan Publishing Co., 1994) 151-153; Dennis Hevesi, "Catherine Rorabach, 87, Influential Lawyer," *New York Times* (20 Oct. 2007).

Conservatives decry judicial activism when anti-abortion laws are struck down just as much as liberals decry judicial activism when gun restrictions are deemed to be unconstitutional. Moreover, as I will argue in a later chapter, many liberals became uneasy championing property rights in the latter half of the twentieth just as conservatives became increasingly uneasy with assertion of individual rights.¹⁸⁰ I submit conservatives and liberals have more in common than they do differences and that commonality is the tendency of the general public to over-regulate; that is to say, the very sort of “excess democracy” against which James Madison warned more than two centuries ago. If economic and social legislation are viewed in light of affecting property rights, I submit both sides would agree the adversary is not an activist judiciary but, instead, overreaching legislatures.

A. The Home as a Private Sphere

As shown in the previous chapter, the so-called “right of privacy” began its incarnation as a legal doctrine within the realm of private law. The private affairs of one person were legally protected from intrusion by another private entity. With the possible exception of Justice Louis Brandeis, who helped craft the notion of “privacy” as a common law doctrine to begin with, nobody conceived of privacy as a bulwark against overreaching by state or federal government. Brandeis argued privacy should protect an

¹⁸⁰ See e.g. Noah Feldman, “What a Liberal Court Should be,” (27 Jun. 2010) MM38 discussing accusations of judicial activism following the decision in *Lawrence v. Texas*, 539 U.S. 558 (2003); “Judge Wilkinson faults Scalia: 4th Circuit conservative Supreme Court justice's gun view is judicial activism,” *Richmond Times Dispatch* (28 Sep. 2008) A6, discussing accusations of judicial activism in the case of *District of Columbia v. Heller*, 554 U.S. 570 (2008).

individual and his business activities from federal intrusion in *Olmstead v. United States* and a proto-privacy argument was made by the Supreme Court in *Boyd v. United States*. But, its use as a public law, doctrine, endowing citizens with a constitutional right that could be asserted against government, was not fully adopted until 1965. In retrospect, though, its historical antecedents are clearly if one cares to look for them.

Anti-Federalists waged their 1787-1789 campaign against the constitution by highlighting the complete absence of any provisions safeguarding the states or the people. Not only was there nothing prohibiting the federal government from keeping a standing army,¹⁸¹ but the proposed framework of the new government vested enormous powers in the federal government. One of those—the power to levy and collect taxes—raised the ire of many Americans for whom the memory of British abuse of its taxing power was still fresh in their minds. One Anti-Federalist, writing under the pseudonym “Brutus,” raised an immediate warning about the potential of this power to invade the sanctity of one’s home:

The power, exercised without limitation, will introduce itself into every corner of the city and country—It will wait upon the ladies at their toilet [*sic*] and it will not leave them in any of their domestic concerns; . . . it will enter the house of every gentlemen . . . it will attend him to his bedchamber, and watch him while he sleeps.¹⁸²

¹⁸¹ The concerns of many Anti-Federalists were summed up by the opening sentence of an essay in 1788 that “[t]he liberties of a people are in danger from a large standing army” – citing the perennial examples of Julius Caesar and Oliver Cromwell – and that there was no real check on the federal government’s authority to maintain one. Brutus [pseudo.], in *The Anti-Federalist Writings of the Melancton Smith Circle*, ed. Michael P. Zuckert and Derek A. Webb (Indianapolis: Liberty Fund, 2009) 227-233.

¹⁸² Brutus [pseud.], in *The Documentary History of the Ratification of the Constitution*, John P. Kaminsky and Gaspare J. Saladino, eds. (Madison: State Historical Society of Wisconsin, 1981) 15:111, 113-114.

The same fear can also be seen in the acquiescence of James Madison to a Bill of Rights, which not only prohibited quartering government troops in private homes but also refused entry into the home by law enforcement without a warrant from a magistrate.

As noted previously, Ruth Bloch's research indicates a similar fear during the early republic that government would intrude into the privacy of the home. This prompted a growing reluctance to invade the sanctity of the home which led, in turn, to a growing tolerance of domestic violence that would not have been as countenanced under British rule. Indeed, the *home* is the key to understanding early development of a nascent sense of privacy. William Blackstone proclaimed that "the law of England has so particular and tender a regard to the immunity of a man's house, that it [styles] it his castle and will never suffer it to be violated with impunity[.]" James Otis used the same principle during his passionate argument against the legality of Crown Writs of Assistance long before independence was ever seriously entertained in this county. Even after independence, this very principle continued to hold sway. Thus an insolvent debtor could hide personal property in his home and that property could not be reached by creditors, the Massachusetts Supreme Court ruled, but this was not a benefit to the debtor so much as "an incidental protection resulting from the provision of the law that every man's house is his castle." Indeed, a New York Supreme Court held, a sheriff had no right to forcibly enter to execute on a debt as a "man's home is his castle not for his own personal protection merely but also for the protection of his family and his property

therein[.] This was also so in Kentucky though a Sheriff could enter a man's castle to retrieve a slave belonging to someone else.¹⁸³

At the regulatory state grew over time—particularly during the so-called Progressive Era—we see in retrospect that privacy, or privacy-like principles, were occasionally mustered by federal courts to strike down state legislation seen to have strayed too far into the private sphere. For instance, in *Meyer v. Nebraska*, the Supreme Court was called upon to review the legality of a state law—enacted in the context of World War I—that prohibited teaching of the German language to any student short of the ninth grade. Although the case could just have easily been analyzed under a student's right to learn the German language, the Court chose to frame the right as one of a teacher to pursue a career of teaching the language. To that end, the Court ruled that Nebraska overstepped its police power by banning the teaching of a foreign language. “Liberty” is not merely a freedom from bodily restraint, the Court noted, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by men.”¹⁸⁴ The choice of what career to pursue is, perhaps, not quite as personal as the decision to bear children or engage in consensual sexual conduct in the

¹⁸³ Bloch, “Wife Beating and the Emergent Value of Privacy,” at ;[Get Otis Quotations]; Blackstone, *Commentaries*, IV:223; *Widgery v. Haskell*, 5 Mass. 144 (MA. 1809); *Curtis v. Hubbard*, 40 Am.Dec. 292 (NY Sup.Ct. 1842); *Keith v. Johnson*, 31 Ky. 604 (Ky.App. 1833).

¹⁸⁴ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922).

privacy of the home, but the Court nevertheless likened it to these very same private decisions to rule that Nebraska had gone too far.

Similarly, in *Pierce v. Society of Sisters*, the Court was faced with the issue of whether an Oregon law compelling enrollment of students in public schools amounted to an unconstitutional destruction of private school property interests. In ruling that it did, the Supreme Court held that the Oregon “Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.” “The child is not the mere creature of the state,” the Court held, and “those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” In short, it was the parents’ decision and not the State to determine how best to educate a child. The Court, as it did in *Meyer*, simply indicated that there was a realm of private decision making beyond the reach of the state. In the end, however, it was not so much the interests of parents, or children, that motivated the Court as it was the destruction of property owned by private schools. Despite its high flying rhetoric on the sanctity of home and family decision-making, in the end, the Court held that enforcement of Oregon’s law amounted to destruction of the schools and thus property. The law could not stand.¹⁸⁵

These cases—at both the state and federal level—certainly seem related but, at first glance, it is difficult to expressly articulate a unifying theme to connect a maxim as simple as “a man’s home is his castle” to the willingness of the United States Supreme Court to limit the reach (indeed, overreach) of state law into the sanctity of home and the private sphere. In light of *Griswold*, however, as Ruth Bloch suggests, that unifying

¹⁸⁵ *Pierce v. Society of Sisters*, 268 U.S. 510, 530, 534-535 (1924).

theme is a right of privacy. The founders never expressly articulated such a right in the Constitution, in part, because they did not see the necessity. Government was decentralized and the rise of the regulatory state was a century into the future. Still, when Madison and others debated the proposed bill of rights in the First Congress, there was a sense that a resort to unenumerated rights might be necessary in the future as the federal (and later state) leviathans emerged to regulate and control as much of people's lives as possible.

B. Estelle Griswold and the Emergence of Privacy

Privacy, as a personal right that could be asserted as a constitutional barrier against government intrusion into the private sphere, did not emerge until the landmark case of *Griswold v. Connecticut* in 1965. Estelle Griswold was the executive director of the Planned Parenthood League of Connecticut. Together with Lee Buxton, M.D., of the Yale University Medical School, she would succeed in doing that which the Trubeks and Buxton were unable to do five years earlier.¹⁸⁶ The proponents of birth control had, for many years, tried to rescind the legislative proscription against it in the state of Connecticut. But, as David Garrow painstakingly recounts, the Catholic Church had a virtual lock on the legislature in Connecticut which made repeal virtually impossible. Birth control proponents had tried for years, and failed, to combat the Church on

¹⁸⁶ The complaint filed on behalf of the Trubeks five years earlier alleged they consulted Dr. Lee Buxton at Yale to obtain information and medical services "as to the best and safest methods for the prevention of conception" but that Buxton would not provide such information for fear of being prosecuted under Connecticut law. Trubek case, Connecticut Supreme Court Records, *supra* at 592-594.

rescission of these laws. So, why was the Roman Catholic Church so concerned about birth control?

Roman Catholicism can trace its doctrinal objections to birth control back to St. Thomas Aquinas and his expounding of natural law in *Summa Theologica*. As far as the Church was concerned, the chief purpose of the “conjugal act,” was procreation and any interference with that purpose was interference with God’s grand design. It was only after family planning advocates began gaining ground across the country that the Roman Catholic Church was forced to take a more active role in defending these laws. Thus, Pope Pius IX issued his *Casti Connubii* in 1930 calling birth control a “new and utterly perverse morality” and his successor, Pius XII, reiterated that view in 1951 and referred to an “intrinsic immorality of contraception.” At the core of their concern was the idea that, by removing the stigma of an unwed pregnancy, there would be no more deterrent to “promiscuous intercourse.”¹⁸⁷ Indeed, it is almost impossible to underestimate the importance of that stigma in Connecticut.

The Connecticut Supreme Court had held (two decades earlier) in *State v. Nelson*, that the state police power could be deployed to preserve and protect public morals. Its “plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender . . . a virile and virtuous race of men and women.” A skilled attorney could dissect this argument in a heartbeat

¹⁸⁷ On the later involvement of the Roman Catholic Church, see Brooks, “The Early History of Anti-Contraceptive Laws,” 3; Alvah W. Sulloway, *Birth Control and Catholic Doctrine* (Boston: Beacon Press, 1959) 43; For explanation of Roman Catholic Doctrine surrounding birth control, see id. at 37-44; Norman St. John-Stevan, *Life, Death and the Law: Law and Christian Morals in England and the United States* (Bloomington: Indiana University Press, 1964) 82-88.

and Catharine Roraback was nothing if not skilled. She argued in the Trubek case that, if this was actually the aim of the Connecticut statute, it misfired badly insofar as her clients were concerned. The Trubeks were married in 1958. Therefore, even assuming prevention of unmarried sex to be a legitimate objective of the State of Connecticut, that objective was nonsense in this case as the couple was already married. Still, closed minds are impervious to logic, and that argument had no affect whatsoever on the Connecticut Supreme Court in 1960. Whether it would have affected the United States Supreme Court in 1965, however, is anyone's guess.¹⁸⁸

Nevertheless, the facts presented it in 1965 were enough to start a slow transformation in the law. Griswold and Buxton, after notifying authorities they were going to dispense contraceptives and contraceptive advice to married couples at Yale University, were arrested the night of their presentation to students. They were both fined \$50 for violating Connecticut law. The penalty was not particularly severe but it was enough to get them into the federal court system in which they could challenge the idea that the State of Connecticut was a party to the marriage contract and could regulate a married couple's use of birth control. Justice William Douglas made it clear at the outset that the Court rejected any on the sort of "Due Process" arguments that weakened the Court's perceived sense of constitutional legitimacy after its ruling in *Lochner v. New York*. Although I would argue that this was a mistake, in light of my prior arguments, Justice Douglas nevertheless justified the Court's decision on the basis that it did not sit "as a super legislature to determine the wisdom, need and propriety of laws that touch economic problems business affairs or social conditions." No real authority was cited for

¹⁸⁸ *State v. Nelson*, 11 A.2d 856, 862 (1940); The Trubek case, supra, Connecticut Supreme Court Records, 604-605.

this proposition, though the Court might well have cited the negative press it sustained after the *Lochner* decision as well as the attempt by the Roosevelt Administration to “pack” the Court in its own favor.¹⁸⁹

Still, despite an expressed reticence to do so, the Supreme Court very much relied on existence of unenumerated rights to decide in *Griswold*. There are, Justice Douglas wrote, “penumbras, formed by emanations from guarantees” in other parts of the Bill of Rights which demonstrates the existence of a right to privacy. What Douglas meant was certain amendments, like the Third and Fourth, discussed previously indicate a zone of privacy over which the government cannot trammel. Douglas was entirely correct. The history of American Jurisprudence clearly demonstrated that there existed a private sphere which was off limits to the government. Indeed, as Douglas correctly noted, the Court dealt with a right “older than the Bill of Rights” and even older than political parties themselves.¹⁹⁰ That right, as nobody summarized better than Justice Brandeis himself a generation earlier, was the right to be left alone.

Not everyone, however, agreed with Douglas’s concept of “penumbras formed by emanations.” Chief Justice Earl Warren, together with Associate Justices Goldberg and Brennan, would have found a right to privacy encompassed within the concept of unenumerated rights as delineated by the Ninth Amendment to the Constitution. That amendment, as discussed in previous chapters, acknowledges the existence of rights outside those set forth in the Bill of Rights themselves.¹⁹¹ As mentioned previously,

¹⁸⁹ *Griswold v. Connecticut*, 381 U.S. 479, 481-482 (1965).

¹⁹⁰ *Id.* at 484.

¹⁹¹ *Id.* at 486-488 (Goldberg, Concurring).

though I still wince when reading the “penumbras formed by emanations” language of the *Griswold* opinion, I maintain Justice Douglas was right. The Third Amendment to the United States Constitution bars quartering of federal troops in the privacy of one’s own home and the Fourth Amendment prohibits unreasonable search and seizures without permission of a judge. It is hard to imagine how the framers could have any been any more explicit about a zone of privacy around the home. But, in my opinion, Goldberg, Brennan and Warren were correct about the locus of a right to privacy. As discussed earlier, when Madison proposed those amendments that eventually became the Bill of Rights, he expressly got around the *expressio unius* argument with the Ninth Amendment. Indeed, it is difficult to imagine how the founders, with all their expressions about a man’s home being his castle, would have countenanced intrusion by the federal government into the private sphere of intimate decision-making without such an idea in the back of their minds.

That said, it is important to note that there are many misconceptions about *Griswold* and it is important to emphasize both what the Court held and what it did not hold. First, *Griswold* did not signal that there exists of a general “right to privacy” as most people think. The ruling, in fact, applied only in the context of the marital relationship and only recognized a right of privacy only to those who people involved in such a relationship. Single persons could not obtain contraceptives a result of the *Griswold* ruling. Indeed, numerous moral strictures against sex out of wedlock continued to apply to those not married. Second, as noted earlier in this chapter, the right to privacy was not created out of thin air but was consistent with a general feeling of antipathy at government intervention in the home stretching all the way back to the early republic.

The founders may not have enacted a general constitutional ban against all government intervention into the private sphere, but that failure was more likely than not a result of its failure to conceive that local government would attempt to regulate private behavior to this extent in the first place. Third, the Supreme Court did not overturn a ban against the distribution of contraceptives in general. Until the advent of federal Comstock laws, neither states nor individuals were particularly bothered by the existence of contraceptives or the availability of contraceptive literature. Indeed, it is entirely appropriate to think of the *Griswold* case as a reaction—albeit a belated one—to government overreaching that occurred nearly a century before. Still, *Griswold* was extremely limited and it would take someone like Bill Baird to challenge its underlying premises and make contraceptives available to everyone.¹⁹²

C. Bill Baird and the Extension of Privacy

On April 6, 1967, Bill Baird addressed a crowd of roughly 2,000 students who had come to the Hayden auditorium at Boston University. His address included presentation of various demonstration boards to which were attached different contraceptive devices. Police were waiting to pounce on Baird the minute he broke the law and thus, at the end of his talk, when he invited students to come up and help

¹⁹² Baird was unique as one of the few men during this time period that made it a point to involve himself in the reproductive rights movement. He explained that, in 1963, he was in a New York City hospital when he heard a woman scream. Rushing out into the hallway to see if he could be of any assistance, Baird saw a black woman (a mother of nine children) covered in blood. Unable to obtain either a legal abortion or birth control, the woman had inserted a coat hanger into her vagina hoping to scrape her uterus and induce bleeding. Unfortunately, she went a half inch too far and severed a blood vessel. She later died from a loss of blood. “This is insane[,]” Baird recounted. Ellen Messer and Kathryn E. May, *Back Rooms: An Oral History of the Illegal Abortion Era* (New York: Simon & Schuster, 1998), 207-208.

themselves to contraceptives he brought with him, Baird was arrested. The Suffolk County Grand Jury indicted Baird two months later on charges of displaying/disseminating birth control devices. The criminal statute which Baird was charged with violating was enacted almost a century earlier as part of a nationwide anti-vice and “morality” campaign launched by Anthony Comstock.¹⁹³

Comstock was born in New Canaan, Connecticut, in 1844 and, by the age of twenty-nine, had appointed himself the moral guardian of America, in general, and its youth, in particular. In one of his several books, Comstock described the object of his crusade as “to warn honest and simple-minded persons, to shield our youth from debauching and corrupting influences; to arouse a public sentiment against the vampires who are casting deadly poison into the fountain of moral purity in the children; and at the same time to expose to public indignation the infidels and liberals who defend these moral cancer planters.” This kind of work would keep anyone busy and, by all accounts, Comstock was indefatigable in battling vice for more than a quarter of a century. The federal Comstock law of 1873 made it illegal to display, sell, lend or give away, among other things, “any drug or medicine, or other article whatever, for the prevention of conception, or for causing unlawful abortion.” Not satisfied he had rid the nation of “vice” at the federal level, Comstock turned to the states where he pushed for enactment of so-called “mini Comstocks.” The General Court of Massachusetts passed its own version in the winter of 1879 and, like its federal counterpart, banned exhibition, sale or distribution of “any drug or medicine or any instrument or article whatever for the prevention of conception or for causing unlawful abortion.” Comstock later got himself

¹⁹³ For a factual recitation of what happened on the night Baird was arrested, see *Commonwealth v. Baird*, 355 Mass. 746 (1969).

appointed to the position of Postal Inspector thereby giving him broad powers to enforce these laws. Moreover, many feminist organizations were suspicious of Baird in general and, in particular, resented the activities of a man in the liberation of women's rights.¹⁹⁴

These were the organizations aligned against Baird. Unlike those who opposed Griswold just a few years earlier, Baird faced opposition from states themselves and from various feminist organizations which resented a man, rather than a woman, working for "the cause." Unfortunately, because he was a man, these organizations largely turned on him and left him to his own devices whereas, had a woman taken up his positions, they would have almost certainly have supported him as they did Griswold. Baird was arrested for dispensing birth control advice and contraceptives to students in Massachusetts. The treatment afforded him, unlike Griswold and Buxton, however, was horrendous. He was imprisoned in the infamous Charles Street Jail and left there (in its horrendous conditions) to rot until federal courts granted him a release.

Baird was certainly no stranger to Catholic doctrine on birth control. He once approached the physician who headed the Meadowbrook Hospital (now Nassau County Medical Center) on Long Island and asked for assistance in dispensing of birth control

¹⁹⁴ For general biographical information on Comstock, see Anna Louise Bates, *Weeder in the Garden of the Lord: Anthony Comstock's Life and Career* (Lanham: University Press of America, 1995); For comments on his own work, see Anthony Comstock, *Frauds Exposed; or How the People are Deceived and Robbed, and the Youth Corrupted* (Montclair: Patterson Smith, 1969) 5; For the texts of the federal Comstock law, and the Massachusetts "mini-comstock" law, see Carol Flora Brooks, "The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut," *American Quarterly* 18 (1966), 3-23. If read literally, the 1873 federal Comstock law barred even physicians from dispensing contraception to their patients when medically necessary. In 1936, however, the Second Circuit Court of Appeals ruled that Congress could not have intended the law to regulate physicians who prescribed contraceptives for the health needs of their patients. See *United States v. One Package*, 86 F.2d 737 (C.A.2 1936).

devices for women in New York. The doctor, a devout Roman Catholic, declined. Hoping a more scientific, and less secular, argument might sway him, Baird pointed out the dangers of over-population and ensuing pollution of planet that over-population would cause. The head of the hospital, a man charged with the care of suffering people, simply replied that the “four horsemen” of the apocalypse – disease, pestilence, war and famine – would resolve those problems soon enough. Faced with such intractability, not to mention the apparent willingness of a man charged with healing to let others suffer and die rather than go against his own religion, it is no wonder Baird turned to direct action that night at Boston University.¹⁹⁵

Baird pled not guilty to the charges against him and waived his right to a jury trial, preferring instead, to try his chances with a single judge. A short hearing was held on October 17, 1967, and Judge Donald Macaulay found him guilty of both offenses. Baird was not immediately sentenced, however. Recognizing the important legal issues involved, and with the consent of all parties, the judge made use of a provision in Massachusetts Law to immediately “report” a case to the Commonwealth’s highest court for final resolution. Sentencing would be stayed until such time as the Supreme Judicial Court of Massachusetts decided whether Baird’s case, like that of *Estelle Griswold* several years earlier, was of Constitutional dimension.¹⁹⁶

The case made its way to the Supreme Judicial Court of the Commonwealth of Massachusetts which rendered a decision on May 1, 1969, reversing one of Baird’s

¹⁹⁵ Oral History, Lora Sundhausen and Bill Baird (Oct. 23, 2008) (transcript in possession of author).

¹⁹⁶ For background information on Baird’s indictment and conviction in Suffolk County Superior Court, see Report to Supreme Judicial Court, Suffolk County Superior Court Case Nos. 29688 & 29689; *Commonwealth v. Baird*, 355 Mass. 746 (1969).

convictions but upholding the other. As to the charge of displaying contraceptive devices during his lecture at Boston University, the Court found the demonstration boards were part and parcel of the lecture he delivered to the students that evening and that the lecture itself was protected by the First Amendment. Thus, his conviction in Case No. 29689 was reversed. Baird's conviction for disseminating contraceptives, however, was allowed to stand. The Supreme Judicial Court never squarely addressed the question of whether privacy rights in general, and the right of access to contraception, should be extended to single persons. It was noted, instead, the Commonwealth had long had a blanket statutory prohibition against the dissemination of any contraceptives. That statute was amended in 1966 to allow physicians or other similarly trained professionals to disseminate them. This amendment was interpreted by the Supreme Judicial Court to mean the legislature was regulating the credentials of those who could distribute contraceptives so as to prevent any "undesirable, if not dangerous physical consequences." Prohibiting the distribution of such devices by "indiscriminate" persons, the Court reasoned, was certainly within the realm of legitimate legislative (police) power to protect the health, safety and welfare of the public.¹⁹⁷

Baird and his lawyers filed a petition for a writ of *certiorari* so as to advance the Massachusetts conviction to the United States Supreme Court. A writ of *certiorari* is the vehicle by which most appeals are taken to the United States Supreme Court and, essentially, the justices enjoy complete discretion in choosing which cases they want to hear. The justices denied the writ thereby paving the way for Baird's jail stay. Many have no doubt speculated why the Court would choose to hear the *Eisenstadt* case in

¹⁹⁷ Commonwealth v. Baird, 355 Mass. 746, 752, 753 (1969).

1971 but refused to hear the direct appeal in 1970. Roy Lucas, lawyer and a famed reproductive rights activist, may have found the reason in 2003 while reviewing some internal documents recently released by the Court. Among those documents, Lucas reported, was a note to Justice Douglas from one of his law clerks about the *Eisenstadt* case. The clerk reminded Justice Douglas that the state conviction on which *Eisenstadt* was based had been “deadlisted” the year before because the petition for writ of certiorari was one day late. This was noted by the clerk as a non-jurisdictional defect, meaning the Court still could have voted to hear the case, so there may have been other reasons why the justices did not want to review Baird’s conviction. But, still, it is interesting to speculate whether the ordeal Baird endured next might have been avoided if the mails were quicker or his lawyers more expeditious.¹⁹⁸

The case was returned to the Suffolk County Superior Court for sentencing on the remaining conviction for dissemination of contraceptives. The docket of the case provides no further report of what happened in the Superior Court after the report of Judge Macauley to the Supreme Judicial Court. But, commitment records for the notorious “Charles Street Jail” in Boston show that Baird (now prisoner #999) arrived to serve his sentence on February 20, 1970.¹⁹⁹

Certainly no jail stay could ever be deemed “pleasant” but Boston’s Charles Street Jail, built in 1848, had deteriorated to a point that it became almost a poster-child for the prison reform movement of the 1970s. A class action lawsuit filed by some of its inmates

¹⁹⁸ Cert. denied in *Baird v. Massachusetts*, 396 U.S. 1029 (1970); Roy Lucas, “New Historical Insights on the Curious Case of Baird v. Eisenstadt,” *Roger Williams U. L. Rev.* 9 (2003) 9, 31-32.

¹⁹⁹ Elizabeth Bouvier, e-mail message to Gary Garrison, September 11, 2008.

resulted in factual findings that (1) cells that were 8' wide by 11' long and originally designed to hold only one prisoner at a time now held two; (2) no hot water in the cells or shower rooms; (3) ceiling pipes in the kitchen leak into the food while it is prepared; (3) mosquitos bred year round in the jail, and roaches and waterbugs were prevalent; (4) rats were a "serious, continuing problem," (5) toilets in the cells were "corroded and filth encrusted;" (5) the noise in the jail was overwhelming at times and lasted twenty-four hours a day. This latter point was even corroborated by the trial court judge who, along with his clerk, volunteered to spend the night at the Charles Street Jail to experience the place for himself. The court reported as follows:

On the night of the Court's visit (the inmates were unaware of our return to spend the night), the noise seemed to increase after midnight and approached a virtual bedlam that lasted till dawn. At least a dozen radios, turned to various rock music stations, seemed to be turned up to full volume; and for hours from a nearby cell, whether above or below we couldn't tell, a deep-voiced inmate, evidently deranged, shouted an obscene incoherent monologue, beginning, 'Ah want mah beer, you hear? Ah want mah beer . . .' over and over like a broken record.²⁰⁰

Writing about his experience years later, Baird recalled that he was forced to report to jail and live in these unhealthy conditions, despite the fact that he was sick with pneumonia at the time. He was forced to chase rats out of his cell and pick bugs out of his food. His weight dropped from 175 pounds to 146 pounds while there and he, too, noted the constant screaming at "all hours of the night" as addicts and alcoholics went through withdrawal. Though guards subjected him to demoralizing strip searches, he was fortunate enough to escape the various threats of violence—even death—communicated to him anonymously prior to his reporting to the jail.²⁰¹

²⁰⁰ See *Inmates of the Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676 (1973).

While Baird languished in these deplorable conditions, his attorneys prepared for a collateral attack on his conviction in federal court. As noted previously, the case of *Eisenstadt v. Baird* did not spring directly from Baird's conviction by the Suffolk County Superior Court. The final decision on that case came from the Massachusetts Supreme Judicial Court. How Baird got to the nation's highest court was through a petition for a writ of *habeas corpus* filed in the United States District Court for the District of Massachusetts shortly after his incarceration. His petition alleged that he was held in jail in violation of several of his constitutional rights including the right to privacy. District Court Judge Julian, though noting *Griswold v. Connecticut* only applied to married couples, and that "[u]nmarried individuals are still excluded, went on to reason that even if such a right did exist for the single coeds to whom Baird showed and distributed the contraceptive devices, Baird did not have the "standing" or legal ability to assert that right on behalf of the coeds.²⁰² He was thus denied issuance of the writ of *habeas corpus*.

Baird's writ was denied on March 20, 1970, and an appeal was immediately taken to the First Circuit Court of Appeals in Boston.²⁰³ A week later, without even reviewing the case, the Court ordered Baird's release from the Charles Street Jail after he served

²⁰¹ See Bill Baird, "The Politics of God, Government and Sex: A Thirty-One Year Crusade," in *St. Louis U. Pub. L. Rev.* 13 (1993) 139.

²⁰² *Baird v. Eisenstadt*, 310 F.Supp. 951, 953, 957 (1970). Thomas Eisenstadt was the Sheriff of Suffolk County Massachusetts at the time and was named defendant in Baird's suit because he was the one who had control of the county jail and, thus, was unconstitutionally restraining Baird. Ironically enough, Eisenstadt had his own problems with the Supreme Judicial Court of Connecticut and, in 1977, resigned his position as Sheriff rather than face removal proceedings for misuse of county funds. See Brian C. Mooney, "Policing the Sheriffs," *Boston Globe* (September 23, 1995) pp. 14.

²⁰³ The First Circuit Court of Appeals has appellate jurisdiction over lower level federal district courts in Maine, New Hampshire, Rhode Island, Massachusetts and Puerto Rico.

thirty-six days of his three-month sentence. That the appellate court would take such an unusual step, before it even reviewed the legal merits of the case, did not bode well for the Sheriff of Suffolk County. The decision, which explained the release, came a few months later. Reasoning a law which forbids the availability of contraceptives to “unmarried persons who will nevertheless persist in having intercourse, means such persons risk for themselves an unwanted pregnancy, for the child illegitimacy, and for society, a possible obligation of support,” the Court concluded that the Massachusetts statute was not just the opposite of sensible legislation but it also “conflicts with fundamental human rights.” As for whether or not Baird had the legal ability to champion someone else’s privacy interests, the Court simply noted that he was held in jail for violating a statute just found void and, thus, had “as much standing to protest [it] as anyone else.”²⁰⁴

While Baird’s case was going through the Court of Appeals, another important case reached the United States Supreme Court. In executing a search warrant for other contraband, Georgia police found an obscene film in appellant’s bedroom. Appellant was arrested and convicted for possessing that film but appealed his conviction to the nation’s highest court. In holding that the “mere private possession of obscene matter cannot constitutionally be made a crime,” the Supreme Court held the Constitution protected against unwarranted government intrusion into the home. “[T]he individual’s right to

²⁰⁴ As to the date of Baird’s release, see Elizabeth Bouvier, Head of Archives, e-mail message to Gary L. Garrison, September 11, 2008. The Court of Appeals decision reversing the District Court and ordering that habeas corpus be granted is *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1970).

read or observe what he pleases” is fundamental “to our scheme of individual liberty.”²⁰⁵

Perhaps, in light of this case, the Supreme Court was even less inclined to let the State interfere with private lives of its citizens and ban possession of contraceptives.

In any event, *Eisenstadt* appealed to the United States Supreme Court which affirmed the Court of Appeals. Technically speaking, the Supreme Court did not recognize that unmarried individuals have a right to privacy, which included a right of access to contraceptives. Instead, the Court ruled that there was no logical justification under the amended Massachusetts statute to allow married couples at least some access to contraceptives while banning it altogether for unmarried persons. Allowing married couples some access to contraceptives, while denying all access to single persons, violated the Equal Protection of the Fourteenth Amendment. Still, the operative effect is the same, and the *Eisenstadt* decision is cited as standing for the proposition that unmarried persons also have privacy rights which states cannot transgress. Indeed, in high-flying rhetoric that was reminiscent of the bygone Warren Court, Justice Brennan declared that “[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.”²⁰⁶ Nobody

²⁰⁵ *Stanley v. Georgia*, 394 U.S. 557, 559 & 568 (1969).

²⁰⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 452, 454-455 (1971). The decision in *Eisenstadt* was not unanimous, however. Justices Douglas and White opined that they would reverse Baird’s conviction because the dissemination of the contraceptive foam was just as protected by his First Amendment rights as his lecture. *Id.* at 457-460. Justices White and Blackmun also filed a joint opinion noting that the case should not have been reversed on privacy grounds but because the record contained no evidence that the woman to whom Baird gave the Emko foam was actually unmarried. Thus, there was insufficient evidence to support his conviction under Massachusetts law. *Id.* at 463-464.

should doubt the importance of *Griswold* and nobody should doubt the importance of *Eisenstadt*. It is true the *Griswold* case recognized a right to privacy, but did so only in the context of the marital relationship. It was Bill Baird, and his ordeal in the Commonwealth of Massachusetts, that ended in the recognition of that right for everyone. As indelicate as it may be, I continually remind my students that it is Bill Baird, not Estelle Griswold, whom they should thank every time they walk into a drugstore and purchase a pack of condoms. This reminder is not meant to suggest Baird freed them to enjoy premarital sex but, rather, he freed them to enjoy any sex without risk of pregnancy or the threat of contracting a life-threatening disease.

The significance of the *Eisenstadt* case is all too often overlooked as legal scholars and historians focus on *Griswold* as the progenitor of modern privacy rights. While true that *Griswold* was the first to recognize spheres of privacy beyond which government could not legislate, the holding in that case was very narrow and limited solely to procreative decisions of married couples. Bill Baird's case, essentially, extended that right beyond married couples to all single adults. It is also worth noting that Bill Baird's incarceration at the Charles Street jail, in Boston, was far worse than the fine Connecticut imposed on Estelle Griswold and Lee Buxton. Although the contraceptive "troika" was not completed until 1977, when the United States Supreme Court ruled minors also had a right of access to birth control, Baird's contribution to the reproductive rights movement is almost inestimable. Birth control, then as now, is an

Chief Justice Burger, in the lone dissent, opined that Massachusetts had a legitimate interest in requiring contraceptives be distributed by doctors and warned that the Court was returning to the much maligned era of "substantive due process" when the Court was accused of "inventing" right (particularly contract rights) which had no basis in constitutional text. *Id.* at 466-471.

effective—but not foolproof—means of preventing unwanted pregnancies among young adults who engage in premarital sex. Even more crucial, studies show condoms help prevent the spread of sexually transmitted diseases, particularly the human immunodeficiency virus (HIV), which thus makes access to these contraceptives more important than ever. How many young men and women in the 1980s and 1990s owe their being alive today to Bill Baird? Indeed, having taught contemporary civil rights and constitutional history to college undergraduates for several years now, I am amazed by startled looks on their faces when they learn they could not legally buy condoms prior to 1971.²⁰⁷ It is interesting to speculate, of course, how many women (and men) made important contributions to the economy of this country by not dropping out to support a child that neither they nor their partner wanted or planned for.

D. The Final Demise of Anti-contraceptive Legislation

Given *Griswold* and *Eisenstadt*, the ultimate demise of the Comstock legislation is anticlimactic. The final part of the anti-contraception troika banning the dispensation of birth control came in the case of *Carey v. Population Services*. In *Carey*, the Supreme Court struck down a New York law prohibiting the sale of contraceptives to anyone under sixteen years of age. For all intents and purposes, the ban against distribution of

²⁰⁷ As for the Supreme Court's decision recognizing that minors also had a right of privacy which included access to contraceptives, see *Carey v. Population Services International*, 431 U.S. 678 (1977). The *Eisenstadt* case was also an important contribution to the evolution of privacy jurisprudence in its various manifestations. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (right to abortion); *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in same-sex sexual practices). Baird's contribution to reproductive rights jurisprudence is not limited to contraception. He was also the lead litigant in *Bellotti v. Baird*, 443 U.S. 622 (1979), which struck down a Massachusetts law that required absolute parental consent before and unmarried minor could obtain an abortion.

contraceptives was dead. Although religion no doubt fueled Comstock's fervor, the linkage between anti-contraceptive law and religious doctrine, particularly Roman Catholic doctrine, came later after birth control advocates like Margaret Sanger began to gain traction in their efforts to get the laws repealed. As the Second World War slowly consumed Europe, Sanger wrote "[e]verything that women have gained during the first half of the century has practically been lost owing to the vital and fundamental fact that overpopulation is a vital basic cause of world upheaval and international unrest." There will forever be "wars, ignorance [and] poverty" so long as "women respond and obey the edicts . . . and breed for nation or church[.]" A generation later, in an interview with Mike Wallace, she confirmed that "the population question is of great concern" and that the availability of birth control could keep the population static so as to avoid mass starvation.²⁰⁸

As Mary Ziegler points out, the population control issue is largely overlooked by contemporary historians and legal scholars because *Roe v. Wade* changed the dynamic of the debate from one based on policy rhetoric—including a focus on overpopulation—to "rights-based" rhetoric stressing privacy and individual bodily autonomy. She concedes the change was a "sensible one" but correctly points out that, subsequent to *Roe*, the overpopulation argument operated parallel to the rights-based arguments rather than in tandem therewith.²⁰⁹ Still, the conflict between personal rights policy and overpopulation policy continues. This writer, however, with all due respect to the latter comes down on

²⁰⁸ Margaret Sanger to Carrie Chapman Catt, *Selected Papers of Margaret Sanger* (25 Feb. 1940) III:44; Sanger interview with Mike Wallace (21 Sep. 1957), *ibid.*, III:423-425.

²⁰⁹ Mary Ziegler, "The Framing of a Right to Choose: *Roe v. Wade* and the Changing Debate on Abortion Law," in *27 Law & History Review* (2009) 282-330.

the side of the former. A “right” is either a “right” or it is not. This country was grounded, I maintain, on the view that government (state or federal) are excluded from intimate decision-making. In stressing over-population, however, Ziegler and others seem to cede that the decision of whether or not to beget a child is left up to what is best for the community. If the community is already overburdened with excessive children, Ziegler and others would seem to argue, then the community should be able to dictate what children, if any, a couple could bring into this world. I argue that this is as much a part of state control as permitting the state to deny citizens access to birth control. Just as couples should have the right to refuse to bring children into this world, they should also have the right to do so if it fits within their plans for the future. Prohibiting the right to choose carrying a child to term is every bit as onerous as forcing a woman (or married couple) to carry that child to term if they do not wish to do so.

I recognize that the United States and the People’s Republic of China have differing views on the importance of capitalism and individualism in the economy. But the decision of whether or not to bear an atomistic individual, to either assist on the family farm or go on to his or her own objectives, must be one that belongs to the family. If capitalism is to stand for anything, then it must be for the right of an autonomous individual to decide his or her fate within the system. If it stands for the proposition that each atomistic individual is incapable of making individual for himself, then it might as well abrogate the concept of free-will altogether.

Recognition of privacy rights was too little, too late, to preserve the bodily autonomy of such unfortunates as Carrie Buck or Raymond Hudlow. But, at least by 1977, privacy rights were recognized to the extent that virtually anyone could obtain birth

control together with contraceptive advice. This was radically different from a generation earlier when nobody could obtain birth control advice. But, if privacy allowed women or anyone else the right to make intimate personal decisions about whether to bear a child, then what about other intimate personal decisions? What about the right to terminate a pregnancy once conception occurred? Or the right to engage in consensual sexual conduct with which a majority or the public may disapprove or even other actions in the privacy of one's own home to which the public may object? These were all issues to be addressed in the future. But, for now, anyway, states were compelled to withdraw their presence from the intimate decision of whether a two people should bear children as a result of the sexual act.

These decisions came too late, of course, to benefit Louise and David Trubek but the two young Yale law graduates could take comfort in the fact that they helped laid the philosophical groundwork to ensure young woman entering a professional school were no longer forced to play "Russian roulette" with their fertility and economic future. Families could plan for that future, and decide when to have children on their own terms, relative to their own financial goals and economic aspects rather than have the State make the decision about whether to bear children for them. Still, what about those for whom contraceptives were not foolproof, or those for whom private decision-making sought to exclude either state or federal government altogether? These issues would have to wait a little bit longer.

CHAPTER V
PRIVACY, PROPERTY, AND ABORTION

*Texas is going to shrink government until it
fits in a woman's uterus.*²¹⁰

In 1963, roughly ten years before abortion was finally legalized nationwide by the United States Supreme Court, famed reproductive rights activist Bill Baird was at a hospital in New York City when he heard an earth-shattering scream. He rushed into the hallway to see what was going on and what he found was an African-American woman soaked in blood from the waist down. Whether because of pain, or terrified at the amount of blood she was losing, the woman continued screaming. Already mother to nine children, on welfare, and barely surviving at a subsistence level, she had tried to abort a pregnancy of her tenth child with a coat hanger wrapped in gauze. When she inserted the home-made device into her vagina, however, she slipped by merely a “half inch” and inadvertently cut through the wall of her uterus, puncturing a major blood vessel. The woman later bled to death. How could something like this happen in the richest, and supposedly freest, nation on earth? “This is insane,” Baird thought. He could have taken this woman to almost any place in the world—India, Pakistan, or elsewhere—to obtain birth control that was outlawed in the United States but, more than likely, provided

²¹⁰ As quoted in Bob Moser, “Texas’ Wild Tea Party,” *The Nation*, (30 May 2011), 17, 18.

"courtesy of taxpayers of the United States government. But here, in her own country, she could obtain neither contraceptives nor a legal abortion."²¹¹

This was not an isolated incident and there is a reason why the "coat hanger" and other tropes came to be seen as metaphors for either back-alley abortions or self-administered abortions gone awry. Betty Cleveland, and another female defendant, were both declared criminally responsible for the death of a male infant in 1965 after using a "catheter [and a] wire coat hanger" to abort an unwanted fetus. When President Jimmy Carter visited Hartford, Connecticut, in 1977, a local columnist noted that our chief executive never even mentioned women who faced unwanted pregnancies and would "attempt home remedies of the coat hanger variety." Even the 1961 novel *Revolutionary Road* focused on a married couple, the wife of which, died as a result of a self-administered abortion. The ability to obtain an abortion—a practice that has occurred since antiquity—was virtually invisible in the 1960s and early 1970s and women were dying as a result of that invisibility.²¹² Still, that fact barely registered on the national

²¹¹ Ellen Messer and Kathryn E. May, *Back Rooms: An Oral History of the Illegal Abortion Era* (New York: Simon & Schuster, 1988)207-209. As noted previously, population control was a major force in the argument to legalize dissemination of birth control in the early twentieth century. Particularly after World War II, the United States engaged the Soviet Union in what was, essentially, a game of three-dimensional chess to bring the undeveloped world into each of their orbits. Realizing that overpopulation contributed to instability across the so-called "third world," the United States was quick to provide birth control to developing countries even though it denied access to such devices within the United States. See Donald T. Critchlow, "Birth Control, Population Control, and Family Planning: An Overview," in *The Politics of Abortion and Birth Control in Historical Perspective*, ed. Donald T. Critchlow (University Park: Pennsylvania State University Press, 1996) 1-17; John Sharpless, "World Population Growth, Family Planning, and American Foreign Policy," *Id.* at 72-99.

dialogue, or the nation's conscience, at the time. How could this have come to be the case in a nation that not only prided itself as being the freest on earth but also cast itself in distinction to the Soviet Union which was, at the time, arguably, one of the most oppressive regimes on the planet?

The answer to this question lays some of the groundwork for American debates on individual rights versus authority of the regulatory state. As I discuss later, for most of our history, the United States not only accepted abortion in early stages of pregnancy but also turned a blind eye to terminating a pregnancy even in later stages of gestation. It was only, relatively, recently that state and federal law tried to ban abortions outright. Thus, I will argue, the 1973 decision of the United States Supreme Court in *Roe v. Wade* did not create a new right out of whole cloth—as its detractors contend—but, rather, was a modest attempt to restore the status quo of a woman's right to terminate pregnancy before fetal movement—a right which had existed at common law for centuries before *Roe*. Admittedly this adds nothing new to our reproductive rights discourse as historians have made these same arguments since the outset of backlash against the *Roe* decision.

But what I do suggest is that the historical, legal and philosophical parameters of the discourse have been unduly narrowed by framing it as a simple dialectic between “pro-choice” and “pro-life,” or “right to life” versus “right to privacy.” That narrowness—or misdirection of argument—over abortion has blinded us to other contexts for framing the debate. It is these other contexts to which I devote this chapter and the two that follow. Before I explain those contexts, however, I concede that I use a very—

²¹² “Finding is given in Baby's Death,” *Hartford Courant* (6 Apr. 1965) 19; Ron Hendren, “Logic Lacking on Abortions,” *Hartford Courant* (21 Jul. 1977) 22; Jack Zaiman, “With a Whimper,” *Hartford Courant* (26 Feb. 1961) 18F.

perhaps, overly—simplistic model to frame my arguments. On one side are those who generally oppose the regulatory state when it comes to economic interests like taxes and business regulation but then support restrictions on privacy rights including abortions. Let us call these individuals “conservatives.” On the other sides are those who oppose the regulatory state when it comes to issues like privacy but are far less concerned when it comes to economic issues like taxes and business regulation. Let us call these individuals “liberals.” Again, I concede these characterizations are overly simplistic, and most people fall somewhere in the middle between these two positions, but such characterization will allow for economy of language as I present my arguments.

My first argument is that conservatives and liberals may have more in common on the issue of abortion than they think or want to admit to themselves. The rise of business and economic regulation in this country occurred at roughly the same time as intrusive morals legislation, particularly the federal and state Comstock laws. For example, in the mere seventeen year period between 1873 and 1890, Congress enacted not just the federal Comstock law, but also the Interstate Commerce Act and the Sherman Antitrust Act, while the U.S. Supreme Court upheld legislation permitting states to regulate fees charged by grain elevators owned by railroads. The rise of the regulatory state, in other words, negatively impacted the interests of both conservatives and liberals. Legal restrictions on women—and to a lesser extent, gays—only increased during the twentieth century as it did with African-Americans. So too did restrictions on economic and property interests as a result of the New Deal and the Great Society. My purpose here is not to pass judgment on the moral rectitude of any of this legislation but to point out that conservatives and liberals both *lost out* with the rise of the regulatory state.

My second argument is related to my first but diverges insofar as I address the issue of rights rather than the rise of federal and state regulation. Critics of *Griswold*, *Eisenstadt* and *Roe* all point to the fact that the word privacy is mentioned nowhere within the text of the Constitution. Advocates of textualism also generally adhere to the principle that language that appears in the Constitution should be read and understood in light of its original meaning. There are several problems with this kind of argument, however. One of those problems, as discussed previously, is that the Ninth Amendment clearly points to the existence of unenumerated rights, or rights outside the body of the Constitution. So, the fact that the word “privacy” is not mentioned anywhere in that document is hardly relevant.

The other problem with a textualist approach to privacy rights—the problem that I will discuss in this chapter—is that abortion was perfectly legal, and socially acceptable, up through the midpoint of pregnancy. The founders, many of whom were lawyers themselves, would have been surprised to hear the limitations on intrusive government that they were debating as part of the proposed “Bill of Rights,” would not have stopped at least the federal *Leviathan* from reaching into the sanctity of one’s home, and the privacy of the bedchamber, to end to a practice long been permitted under Anglo-American law jurisprudence.

Privacy rights—as I argued before and will continue to argue here—are the direct descendant of property rights. Privacy evolved out of the notion that we have certain rights in our homes and personal possessions over which the government cannot trammel. Moreover, as discussed in earlier chapters, though men did not own women as chattel property the same way slaves were owned, the law certainly regarded them as owning

certain property rights in their wives' bodies including, but not limited to, the power of restraint, the right of sexual access to their bodies and ownership of any earnings they made through their own labor. This was the law in virtually every state when the Constitution was ratified in 1789. Did those property rights simply disappear?

My answer is no. It took a constitutional amendment—the Thirteenth Amendment—to abolish slave property and no such amendment was ever passed with respect to women. So, to whom did those property rights revert? I argued earlier, in the case of emancipated slaves, that those rights reverted to freedmen themselves, and I argue here the property rights in women's bodies reverted to the women themselves. The same law that recognized reproductive rights of men in their wives bodies, must now recognize that those rights belong to wives (or women) themselves. To the extent they do not, states and the federal government should, as Susan Looper-Friedman contends, treat this as a seizure of property under the Fifth Amendment and compensate for the reproductive interests being taken by states or federal government through the process of eminent domain.²¹³ For those who challenge the notion of property rights in the body as absurd, I refer you to chapter six of this work where I discuss the sale of body tissues (e.g. sperm, eggs, plasma) and lease of the body (e.g. prostitution in Nevada or surrogacy). The fact of the matter is American political culture has always recognized bodily property rights, in one form or another, for men but have been slow to acknowledge those rights for women.

In short, the arguments I will make in this chapter play-off the contradictory—and oftentimes nonsensical—contradictions in American law and history with regards to the

²¹³ Susan E. Looper-Friedman, “‘Keep your laws off my body’: Abortion Regulation and the Takings Clause.” *New England L. Rev.* (1995) 253-283.

rise of the regulatory state and protection of property interests. “Conservatives” who frequently rail against the regulatory state in economic matters, tend to support regulation of bodily property rights whereas “liberals” who attack regulation of privacy rights rarely concern themselves with evisceration of economic rights. The adage goes that “politics makes strange bedfellows” and, perhaps, if these two groups would ever jump back into bed together they could affect public policy changes that please both of them.

But, obviously, this is not my concern here. My objective both in this chapter and the others related to it is to highlight parallels between economic and social regulation which, heretofore, have gone unnoticed. I also mean to draw attention to historical antecedents for assertion of contemporary privacy rights which can be found in American debates over property rights stretching as far back as eighteenth and nineteenth centuries just as the antecedents of reproductive rights can be found in Anglo-American common law that imposed no restriction on abortion until well after fetal movement.

A. The History of Abortion Prior to *Roe v. Wade*

The hubris and hyperbole surrounding the yearly anniversary of *Roe v. Wade* is almost enough to convince someone the United States Supreme Court rejected centuries of both moral and legislative imperatives when it struck down a Texas abortion law prohibiting termination of all pregnancies—even those in the first trimester of gestation.²¹⁴ Nothing could be further from the truth. Abortion has existed since antiquity and was completely legal in this country, at least up until fetal movement, for most of our history. Surgical abortion, as well as the sale of abortifacients to the public,

²¹⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

was, more or less, open and tolerated. But, just as the rise of the regulatory state in the late nineteenth and early twentieth century imposed new burdens on capital, so too did it extend regulations over exercise of one's bodily property. Government, in short, sought to exercise as much control over the personal-body as it did over the economic-body.

As long as there have been sexual relations between men and women, there has been abortion. Plato certainly advocated infanticide for children born "defective" or of "inferior parents" and, as this was recognized as a common form of birth control at the time, there can be little doubt that he would have approved of abortion as well. Indeed, as to offspring conceived from incestuous relations, Plato was less vague—the "fetus [should not] see the light of day." Aristotle also advocated abortion for deformed children and in those instances where a state's population limits were exceeded.²¹⁵ Stoics believed a fetus was not alive until it drew its first breath and thus, explains Jeffrey Reiman, Roman law never banned abortion and only regulated it to the extent necessary to protect the rights of the father to his child. After adoption of Christianity as the official state religion, infanticide was made illegal in the empire but Roman law still turned a blind eye toward abortion. "Abortion" appears nowhere in any translation of the Old or New Testaments, but early Jewish and Christian commentators—in contrast to their imperial rulers—viewed the practice unfavorably. Still, even as late as the thirteenth century, Thomas Aquinas argued that it was the killing of an animated fetus that was

²¹⁵ Plato, *Republic*, transl. G.M.A. Grube (Indianapolis: Hackett Publishing, Co., 1992) Bk. 460c and 461c; Aristotle, *Politics*, transl. Benjamin Jowett (Mineola: Dover Publications, Inc. 2000) Bk. VII, 1335b.

homicide and what animated the fetus was entry of the soul. Reiman speculates this may have been an early conception of what later developed as the quickening doctrine.²¹⁶

The idea of fetal animation also took root in secular law at approximately the same time. Henri de Bracton, in his *Laws and Customs of England*, wrote that abortion was only a common law homicide after the fetus was formed or animated and this was determined by quickening. William Blackstone intoned that “[I]f life is the immediate gift of God[.]” Aborting the child prior to quickening carried no legal punishment at all but even after quickening, Blackstone pronounced, ancient law characterized abortion as “homicide or manslaughter.” It was “not murder.” In his own day, however, Blackstone made clear that the degree of the offense had dropped and it was only a heinous misdemeanor.²¹⁷

There was no positive law (statute) banning abortion in Great Britain until well after American independence and thus, during colonial and early republican periods of this country, American courts adopted English/British common law which admitted there was no criminal act either in administering abortifacients, or performing a surgical procedure that resulted in abortion, until a woman was *quick with child* or, in short, there was fetal movement. The so-called “quickening doctrine” made perfect sense for a time period, such as the eighteenth century and before, when neither the mother herself nor her doctor could be sure that the absence of a regular menstrual cycle meant the woman was with child or whether there was some medical disorder preventing a normal menstrual

²¹⁶ See Jeffrey Reiman, *Abortion and the Ways we Value Human Life* (Lanham: Rowman & Littlefield, 1999), 15-25; Diarmid MacCulloch, *Christianity: The First Three Thousand Years* (New York: Viking, 2009) 119.

²¹⁷ Reiman, *supra* at 22-25; Blackstone, *supra* at I: 125-126.

cycle. Therefore, until such time as fetal movement occurred, the mother and the abortion provider were justified in believing there was a medical reason preventing the monthly menstrual cycle and in doing whatever was necessary to remove that obstruction. This was the common law that existed at the time of the formation of this country and, to a large extent, became the law of the states (when codified) thereafter. To the extent abortions were carried out in a clandestine manner, Cornelia Dayton points out, it was to hide not the abortion procedure itself but the fact that the abortion was meant to conceal the sin of sex outside of marriage which, particularly in New England, remained a grave offense during colonial times.²¹⁸

The first American abortion statute was enacted in 1821 in Connecticut but, as James Mohr points out, that law was directed almost exclusively at the administration of a purgative, a substance that induced violent vomiting as a means to abort a fetus. The statute was not meant to ban abortion itself. Nor did it address the growing practice of applying various surgical instruments to induce the female uterus to expel whatever mass was located therein. It was aimed, instead, at the health of the mother and the manner of abortifacient that could be given her. Even in subsequent statutes, adopted by later states, the bans on abortion were directed more toward proscribing certain purgatives, or even limiting the type of quack physicians who performed abortion procedures, than the procedure itself. In short, early American abortion statutes were never meant to outlaw the process per se, but were meant to protect the health of the mother and to regulate the

²¹⁸ James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* (New York: Oxford University Press, 1977) 1-19; Cornelia Hughes Dayton, "Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village," *The William and Mary Quarterly*, 48 (1991) 19-49.

medical profession insofar as who (or what) was allowed to administer medical and obstetric advice.²¹⁹

The seminal case on abortion during the early republic was *Commonwealth v. Bangs* where Isaiah Bangs was indicted for administering a “dangerous or deleterious draught or potion” to a Lucy Holman in an attempt to facilitate an abortion of a “bastard” child of which she was pregnant. The jury found him guilty but, on appeal, the Massachusetts Supreme Judicial Court reversed the conviction and dismissed the indictment against him on grounds that it failed to aver Lucy Holman was “quick with child.” There was no crime, in other words, to procure an abortion, or to administer an abortifacient, unless fetal movement (or quickening) was present at that time. Even if the woman was quick with child, the court noted, the crime was only a misdemeanor.²²⁰ Abortion was not a crime in America, in short, absent the presence of fetal movement which typically did not occur until midway during the second trimester. Only in England, by virtue of Lord Ellenborough’s statute, was abortion deemed a felony before fetal movement.²²¹ But, by the time this statute was enacted, the United States was well on its way to distinguishing itself (as much as possible) from British law.

Early American anti-abortion statutes sought not only to protect women from administration of abortifacients that were poisonous, or otherwise deleterious to their health, but also to protect them from so-called quack physicians that administered

²¹⁹ *Id.* at 20-45.

²²⁰ *Commonwealth v. Bangs*, 9 Mass. 387 (1812).

²²¹ Lord Ellenborough’s Act was an omnibus crime bill enacted by the British Parliament in 1803. This act, which made a number of offenses capital crimes, sought to make it a capital crime to induce an abortion by any method before quickening. *Mohr*, *supra* at 23.

surgical abortions with almost no training. When Sara Grovesenor died after a surgical procedure administered by John Hallowell, an uneducated and untrained self-described “physician” in Pomfret, Connecticut, in 1742, Grovesenor’s paramour escaped prosecution altogether and Hallowell was prosecuted, not for performing the abortion itself, but for the death of his patient. During the next century, as state laws restricted the extent to which non-regular physicians could practice surgical abortion, the eye was always on protecting the health of the mother (as opposed to the health of the fetus) if not protection of profits of burgeoning medical professionals from untrained outsiders.²²²

The *Bangs* case was only, technically, binding only on Massachusetts, but its principles were cited in a variety of jurisdictions by other American courts. In *Mitchell v. Commonwealth*, for instance, a Kentucky appellate court reversed a criminal conviction and a \$375 fine imposed against one, George Mitchell, for administering a “deleterious potion inducing an abortion in an unwed mother” because the indictment failed to include an allegation that the mother was “quick with child.” In New Jersey, the State Supreme Court ruled “[i]t is not murder to kill a child before it be born, even though it be killed in the very process of delivery.” It was immaterial, the Court held, whether life commenced at the time of conception. “In contemplation of law, life commences at the moment of

²²² Id. at 20-45. Mohr characterizes this time period as a clash between “regular” practitioners and “quack” practitioners. Indeed, as discussed supra, the formalization of the medical profession and creation of the American Medical Association (AMA) were integral to regulating abortion services in the late eighteenth and early nineteenth centuries; Dayton, supra, at 36; In the end, the so-called “doctor” who administered the abortion was given twenty-nine lashes while the young man who impregnated the girl, and obtained the “doctor,” was not prosecuted. Id. at 47.

quickenings.”²²³ The point at which abortion became illegal, therefore, was sometime during the mid-point of the second trimester.

Abortions may have been relatively uncommon at the outset of the nineteenth century, but according to the research of several historians, its incidence literally exploded by the onset of the mid- nineteenth century. James Mohr reaches this conclusion in his book, *Abortion in America*, by examining the number of medical journals and newspaper advertisements of the time which advertised, in one form or another, the availability of abortion services. The fact that periodicals advertised abortions, as well as abortifacients and the professionals who provided such services, Mohr concludes, demonstrates that abortion services were widely available during the nineteenth century and that abortion providers were rarely, if ever, prosecuted. One provider in particular, an English immigrant, Ann Lohman, who promoted herself under the pseudonym of Madame Restell, made a considerable fortune providing abortion services despite arrests by authorities.²²⁴

Demographers of the nineteenth century noted a precipitous drop in fertility during the mid and latter part of the nineteenth century suggesting there was no true crackdown on either birth control, abortion or the sale of abortifacients until the latter part of the nineteenth century. Indeed, until such time as passage of the federal Comstock laws, and the mini-state Comstock laws, nobody paid much attention to either contraception or abortion in the United States. It was only during the Gilded Age, when

²²³ *Mitchell v. Commonwealth*, 78 Ky. 204 (Ky. App. 1879); *State v. Cooper*, 51 Amer. Dec. 248 (N.J. 1849).

²²⁴ Mohr, *Abortion in America*, at 46-85.

the excesses of capitalism caught the attention of labor reformers, that the “excesses” of sexual behavior also caught the attention of social reformers and restrictions on contraception and abortion began to appear. The timing of these two movements towards regulation was not coincidental.

At roughly the same time “muckrakers” like Ida Tarbell and Upton Sinclair exposed abuses in the oil and meat-packing industries (respectively), and agitated for legislation to curtail their excesses, social reformers targeted vice and sex in post-bellum America. The influx of people to big cities, and resultant transformation of the United States from a largely rural, agrarian, society to an urban, industrial, society was perceived by many to have brought an end to the bucolic “innocence” phase of antebellum life and, in turn, engendered a more licentious, contemporary, society. Efforts by social reformers like the Young Men’s Christian Association (YMCA), various temperance organizations and, later, societies for control of vice, targeted urban landscapes in an attempt to turn back the clock on social reform. Contraception and abortion was simply collateral damage resulting from the efforts of men like Anthony Comstock to control and limit sexual activity in general and that of women in particular.²²⁵

Historians rarely accept the notion that any one person is responsible any one change over time and, so it is tempting to reject (as overblown) the argument that Anthony Comstock, and the state laws that bear his name, was responsible for this social change. Other factors—like the professionalization of the American Medical Association (AMA) and its wish to drive non-professionals from the practice of obstetrics—played a large part in the enactment of anti-privacy legislation but Comstock and his fellow, social

²²⁵ Janet Farrell Brodie, *Contraception and Abortion in 19th Century America* (Ithaca: Cornell University Press, 1994) 253-275.

purifiers, played an enormous role in criminalizing practices which heretofore were perfectly legal in this country for centuries. In enacting the federal Comstock law, moreover, the federal government banned not just sale of birth control devices through interstate commerce but also banned the mere the exchange of information on contraception and abortion—something which today would be struck down as a clear violation of the First Amendment, and something that would later be raised in the *Baird* case as it wound its way through the federal courts, but was upheld as constitutional at that time. The anti-vice campaigns of Anthony Comstock and his followers, therefore, were as significant to the rise of the *regulatory state* in the private sphere as social and labor reformers were to the rise of such regulation in the economic sphere in the latter half of the nineteenth century.

This is not to suggest there was no opposition to these laws or women just passively accepted regulatory control over their bodies. To the contrary, many women fought back to re-take their bodily property rights. The JANE organization in Chicago, for instance, provided a compassionate and safe—albeit clandestine—atmosphere in which a woman could obtain an abortion. A founding member learned from her boyfriend (a medical school student) how to perform an abortion and she, in turn, taught others how to do the procedure as well. Ironically enough, the organization was raided only once and that was just before the *Roe* decision was handed down. Politicians and police alike needed such an organization to send their girlfriends and mistresses whenever the need arose. Other organizations, such as the Association to Repeal Abortion Laws (ARAL) directed women to foreign providers. Activists like Rowena Gurner and Patricia Magginnis personally investigated, and then subsequently monitored,

a list of safe physicians over the border in Tijuana, Mexico. Doctors were anxious to remain on this “list,” so as to increase business, and thus had an incentive to provide a sterile, medically-sound and compassionate environment.²²⁶

The existence of these surreptitious organizations went a long way toward showing women were not going to simply accept the regulatory state’s denial of their rights sitting down. But, it is one thing to defy the law and quite another to formulate a legitimate reason to oppose what Martin Luther King, Jr. would denounce as an “unjust law.” That formulation was eventually provided by feminists like F.W. Stella Brown, a Briton who, as early as 1915, argued for “absolute freedom of choice” for women and that abortion was an “absolute right.” In 1933, William J. Robinson, an American physician, argued women had a right to their own bodies and, as a result, all abortion laws should be repealed. Although these laws addressed the immediate issue of abortion, only, I will argue in subsequent chapters these ideas champion not just a woman’s autonomy over her own uterus, but also a general human right to autonomy of the body. Because of the intrinsic and extrinsic property interests one has in one’s own body, I maintain, that there can be no economic liberty in a free-market system in the absence of bodily autonomy. Thus, the ability to women to control their own reproductive system is absolutely intrinsic to the perpetuation of our capitalist system.²²⁷

²²⁶ [Kaplan, *The Story of Jane*]; Leslie J. Reagan, “Crossing the Border for Abortions: California Activists, Mexican Clinics, and the Creation of a Feminist Health Agency in the 1960s,” *Feminist Studies*, 26 (Summer 2000); 323-348.

²²⁷ Garrow, *Liberty and Sexuality*, supra at 272-273.

B. Privacy, Abortion, and *Roe v. Wade*

As discussed above, contraception and abortion faced few federal or state regulations until the latter half of the nineteenth century. There was no federal or state recognition that conception marked the beginning of life at the time of the founding and, thus, there was no need to regulate birth control or abortion until well into the nineteenth century. The notion the regulatory state even had any business inserting itself into the private sphere in this manner would not come until later in the century with an influx of religious beliefs into these concepts. Many founders and legal commentators in antebellum literature would no doubt be amazed by the extent to which both the federal and state governments inserted themselves into the private decision-making of private individuals.

On January 2, 1973, the Supreme Court issued its decision in the anxiously awaited *Roe* case. After disposing of several technical legal issues, Justice Blackmun, writing for the majority came to the ultimate question in the case which was whether the Texas law was constitutional. The Court held it was not. In so ruling, the Court correctly noted that anti-abortion laws were “of relatively recent vintage” and, at the time the Constitution was drafted and ratified, women “women enjoyed a substantially broader right to terminate the pregnancy” than she did in 1973. “[the] right of privacy,” the Court concluded, “whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”²²⁸

As noted previously, however, for all the uproar *Roe* has engendered in nearly forty years, the ruling is actually quite limited. First, it only returns abortion jurisprudence to what it was at the time of ratification of the Constitution. This is something conservatives, who tend to favor original meaning, should favor. Second, the Court rejected the argument I would make which is that a woman should be recognized as having far greater rights in her bodily property. As to the issue of whether a woman's right was "absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses," the Court came down on the side of the regulatory state. "Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive." The right to an abortion was "not unqualified" the Court held. Only in the latter third (trimester) of gestation could states ban abortion altogether. On the pivotal issue of whether a fetus constituted a "person," so states could regulate to protect it under the Fourteenth Amendment, the Supreme Court answered in the negative. Although this went a long way to restoring the law to what it had been before a rash of anti-abortion laws in late nineteenth and early twentieth centuries, it also provoked a long-line of anti-abortion agitation (which continues to this day) insisting life begins at conception rather than fetal movement which was the standard in Anglo-American jurisprudence.²²⁹

²²⁸ *Roe*, 410 U.S. at 129, 140, 153.

²²⁹ *Id.* at 153, 163-165. The issue of whether a fetus was a "person" for purposes of the Fourteenth Amendment is much more important than my recitation of the *Roe* holding would indicate. The Constitution provides, inter alia, that no state shall deny and "person" life, liberty or property without due process of law. Amend. XIV, U.S. CONST. If a fetus is a person, then it logically follows that the state can erect whatever barriers it

Suffice it to say that nobody—not even abortion proponents—were ever happy with the *Roe* decision. To abortion opponents, this was the epitome of judicial activism—a substitution of judicial policy preferences for the will of the people as expressed through their elected representatives. “Legal scholars,” even liberal ones, were plunged into a rhetorical hell of trying to justify the decision as anything but a return to the dreaded doctrine of substantive due process. Laura Kalman, characterizes this as an “epistemological crisis”—or, more appropriately, an orgy of handwringing—as legal historians sought to eviscerate the reasoning of *Roe* and distance themselves from what was perceived to be a re-implementation of the discredited doctrine of substantive due process. If *Roe* had no sound foundation in the constitution, their reasoning went, then neither would racial desegregation in cases like *Brown v. Board of Education*.²³⁰ Liberals in the 1960s and 1970s, in short, saw racial injustice as a more important issue than gender injustice and the latter would have to take a back-seat to the former. If abortion was justified on such an ephemeral basis, this would throw racial desegregation into doubt as well.

But, for a few—perhaps only myself—*Roe* was nothing but an exceedingly modest attempt to restore the status quo to what it had been only a generation or two before. In restricting regulation of abortion to the second trimester, the Supreme Court, essentially, restored state law to what it had been at the time of the founding. Abortion could not be banned outright until a time roughly coinciding with quickening or fetal

wants to deprivation of life of that fetus. But, if the person is not a fetus, as I will argue later in this chapter, then the state cannot afford it constitutional rights which supercede the life in being (e.g. the mother).

²³⁰ Ely, *Democracy & Distrust*, 15-21; Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) 59.

movement. This was well and good for those who insisted on bringing an originalist interpretation of the Constitution and would have frozen our development of Constitutional law at the precise moment the Constitution was ratified and became law. Where the Court fell short—in my opinion—was in its failure to characterize abortion (or privacy, more generally) as an absolute right of individual autonomy. But, in the *Roe* decision, women were not afforded autonomy over their own body and this is why I refer to the decision as “modest.”

Other critiques, besides mine, can also be found among feminist legal scholars. Sandra van Burkleo argues many criticize the Court’s decision as being grounded in the more amorphous “right to privacy” as opposed to the Equal Protection Clause of the Fourteenth Amendment. As Ruth Bloch observes, for all its benefit, *Roe* fails to address “that the capacity to become pregnant places and unequal burden on women.” Others criticize the decision for doing nothing to lessen the control of husbands, fathers and male physicians over reproductive rights. Though I decline to pass judgment on any of these, because I have a different perspective as a man than many of these scholars have as women, I nevertheless maintain that more liberalism (rather than less) is the solution to the problem. Women have as much right to the operations of their own body as men do to theirs and, accordingly, the solution to the problem is to recognize individual and bodily autonomy for everyone rather than just a select few.

I also recognize that, like other property restrictions, there are some out there who would argue that restrictions on abortions are necessary for promotion of the *salus populi*. While this may be true, I have yet to see a viable argument to that effect. Fire code or zoning regulations may have benefitted neighboring land owners in the early

nineteenth, and late twentieth, centuries. But how would such regulations on a uterus benefit its next-door neighbor? How does it benefit one property owner when a neighboring property owner is prevented from aborting an unwanted pregnancy? More importantly, how is the property owner injured if the abortion is permitted? This is the irony in the conservative opposition to abortion. Restrictions placed on abortion are, oftentimes, far more deleterious of property rights than restrictions placed on real or chattel property.

C. The History of Abortion after *Roe V. Wade*

The high-water mark of abortion rights, for our purposes here, was not the *Roe* case but, rather, *Planned Parenthood v. Danforth*²³¹. That case involved a Missouri statute which, like many after *Roe*, required spousal consent prior to abortion of a fetus. Parallels between this and coverture laws are so obvious they almost need not be said. That a husband would need to consent to an abortion, or the use to which his wife body was kept, was about the same as the need for his consent for his woman to work outside the house or to keep her earnings for such labor. Indeed, the fact that state positive law would be called into effect to protect the right of the husband was about as indicative of coverture as possible. Spousal consent, for all intents and purposes, reified the ownership of the husband in the body of the wife and it is difficult to imagine how, granting an absolute veto on abortion, was any different from the sort of absolute veto over delivery granted by state law prior to that point. The Supreme Court, to its credit, agreed.

It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage

²³¹ *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the “interest of the state in protecting the mutuality of decisions vital to the marriage relationship.

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.”²³²

Though the Supreme Court ruled in favor of the woman, in this case, the fact that it expended so much of its reasoning in doing so, is almost counter to its point and lends credence to the very idea the husband has control over his wife’s body. Even worse, the Court’s diversion into this area of reasoning all but telegraphs to the reader that the Court takes seriously any law giving the male veto rights over bodily decisions made by the female. Although coverture is, ostensibly, no longer a part of American common law, how much control by a husband will be accepted over the body of his wife? Indeed, how much control of the state over the body of the resident is acceptable? These are the kinds of questions that should be asked, not just by pregnant women or their spouses, but anyone who believes in bodily autonomy and the proposition that government (be it state or federal) has absolutely no business regulating in this area.

²³² Id. at 71.

CHAPTER VI
CONTEMPORARY ASSERTIONS OF OWNERSHIP IN THE BODY
(1990 TO PRESENT)

The reluctance (or even failure) of the United States Supreme Court to consider a right of privacy as being anchored in either a *penumbra formed by emanations* of other rights from the Bill of Rights, or as guaranteed by the Ninth Amendment to the United States Constitution as would be the argument of this author, the fact remains that American history and American law nevertheless refuses to treat the “body” as anything else but a repository of property rights even if it refuses to recognize it as a matter of law. As noted earlier in this dissertation, men sell sperm, women sell eggs and surrogates rent out their wombs on a variety of occasions. Many other bodily tissues are sold on the open market even if the law forbids it.

This is the drawback of addressing this issue solely from an issue of legal history and why I emphasize that it must be reviewed from the basis of not only history and philosophy and law but also practical reality. As explained below, whether the legal system like it or not, the fact remains that component parts of the human body have been commodified if not in the law at least in the economy. The law has simply not kept up with reality.

A. Privacy and Contemporary Claims of Right to the Body

*Now what I contend is that my body is my own, at least, I have always so regarded it.*²³³

John Wood of South Carolina was in a plane crash in 2007 that not only claimed the life of his father but also necessitated the amputation of his leg below the knee. No doubt, like many, Wood did not take the loss of limb well and insisted he wanted to be buried (or cremated) as a *whole* man with the amputated leg included with the rest of his body. Accordingly, he instructed the surgeon removing his leg to return it to him. The surgeon complied but, later, Wood fell on hard times and was forced to put most of his possessions into a storage unit. He wrapped up his severed leg, carefully placed it inside a barbecue smoker and then put the smoker into a rented storage unit for safe-keeping. Wood's financial hardships only worsened and he, subsequently, defaulted on payment of rent for the storage unit and its contents were auctioned-off to pay for that rent.

Some of those contents, including the smoker with the severed leg, were acquired by Shannon Whisnant. Upon opening the smoker, and finding the leg, a startled

²³³ Mark Twain as cited in "Mark Twain, Osteopath: Appears at Public Hearing Before Assembly Committee," *New York Times*, page 1 (28 Feb. 1901). America's famed humorist appeared before the state Committee on Public Health to speak in favor of his right to attend an osteopathic doctor. A bill to license them to practice in New York was opposed by the New York County Medical Society. Twain intoned he believed "we ought to retain all our liberties. We can't afford to throw any of them away." *Id.* "If I do [my body] harm through my experimenting it is I who suffer not the state." *Id.* Twain's remark that his body is his own foreshadows arguments that would be made later that century and beyond.

Whisnant contacted authorities out of concern that the gruesome discovery was evidence of a possible crime. Police presumably traced the leg back to Wood, learned of its origin and subsequently assured Whisnant it was not the evidence of a criminal act. So assured, Whisnant wanted the leg back so he could put it on display with the intent of charging an admission fee for the “pleasure” of viewing a severed limb. Wood, having learned what had happened to it, however, wanted his leg back so he could be buried with it. The conflict between these two men came down to the pivotal question of who, if anyone, could claim ownership rights to Wood’s severed body part. Was Wood’s leg simply another piece of *chattel* property, like the barbecue smoker itself, legally acquired by Whisnant at auction? Or, was it something more than property which could not be bought and sold?

This question—like all other weighty matters of American jurisprudence—was relegated to the judiciary for ultimate resolution. Unfortunately, the legal forum that eventually ruled on this matter was neither a state nor federal court but, apparently, *The Judge Mathis Show* (a self-described courtroom “reality” series on television). Noting both men were probably enjoying the publicity from this macabre incident more than anything else, “Judge” Mathis ordered the leg to be returned to Wood but ordered Wood to pay Whisnant compensation. It is not clear whether this order was actually complied with, nor is it clear just how binding court-television rulings are on the parties involved, but the audience of this “reality” show was given a glimpse into an issue which carried far more significance than they probably realized at the time.²³⁴

²³⁴ For background information on the Wood/Whisnant case, see Patricia J. Williams, “Whose Body is it Anyway,” *The Nation*, (25 June 2012) 9; “Judge Mathis: Man can

As farcical as the facts of this case sound, they nevertheless raised very important questions as to the ownership rights in one's own body. As discussed in Part II, property and contract are important unenumerated rights in the American civil liberty constellation. They played a significant role in Anglo-American history as well as the history of the Enlightenment and they were certainly at the forefront of American thinking when the Constitution was drafted and ratified. But, two centuries is a long time. Words change as do the meanings attributed to those words.

Furthermore, as I discussed earlier, the concept of owning property rights in the body fell into disfavor by the latter part of the nineteenth century and midpoint of the twentieth century. These kinds of ownership rights, though, did not pass to the people of those bodies affected but, instead, passed to the state. Governments, state and/or federal, began to exercise control over the human body and any claims that such exercise was contrary to the principle enshrined in the Declaration of Independence or Constitution was dismissed as so much "legal argle-bargle."²³⁵

To whom do our bodies, or even the distinct and severable parts our bodies, belong? Can we claim property rights in our bodies? Can those rights, assuming they

keep amputated leg," at abclocal.go.com/wtvd/story?section=news/national_world&id=5737378 (accessed 14 Feb. 2013). A British Broadcasting Corporation (BBC) news report suggests the resolution of the matter might have been slightly less dramatic than the one on *Judge Mathis*. The BBC reported that once police were satisfied the leg was not part of a criminal investigation, it was sent to a funeral home until Wood could pick it up. Whisnant tried to get the funeral home to release the limb to him, but they refused. North Carolina Pair Feud Over Leg, news.bbc.co.uk/2/hi/americas/7024124.stm (accessed 14 Feb. 2013).

²³⁵ I borrow this phrase from Associate Supreme Court Justice Antonin Scalia in *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Scalia, J. Dissenting). Although Justice Scalia did not use this phrase in reference to property rights in the body, per se, he has used it with regard to arguments dealing with concepts not expressly enshrined in the Constitution, like same-sex marriage.

indeed exist, be sold or leased to others? The answers to these questions have very important philosophical, political, economic and constitutional ramifications for us today. Furthermore, these questions become increasingly more complex with the passage of time as advances in medical science have—for better or worse—led to greater and greater commodification of body parts. Today, few would question simple body tissues like plasma, sperm or eggs can be sold in the open market. But, what about more complex tissues like human organs? Can those tissues also be sold in an arms-length transaction? Furthermore, what of a transaction which does not encompass an actual sale of human tissue but is for something less like, for instance, the rental of a body part? Specifically, how should surrogacy contracts, which involve a short-term lease of women's uteri as opposed to a permanent sale of body tissue, be treated? Should these sorts of contracts be treated the same way that leases of other real or chattel property interests are treated? These are the questions to which I turn in this chapter of my dissertation.

The early chapters of my dissertation argued that institutions of chattel slavery, coverture and familial patriarchy literally gave white men recognizable and enforceable property interests in slaves as well as wives and children. From the middle of the eighteenth century to the middle of nineteenth century, however, those rights were lost. Consequently, the rhetoric surrounding them faded from our national discourse. Indeed, by the 1950s, it is difficult to find evidence of anyone who expressly claimed to own a property interest in the body of another. But, this does not mean that the idea of ownership in a human body disappeared entirely. People still exhibited some vague notion they owned some form of inchoate, or undefined, property interests in their own bodies. There simply existed no real vocabulary to express that right. Part of that lack of

vocabulary stemmed from the rejection of ownership rights in others. Part of it also stemmed, however, from a rejection of substantive due process discussed earlier. Property, like liberty of contract—indeed like the right of privacy—is an unenumerated right and, after the demise of *Lochner v. New York*, recognition of such unenumerated rights in the Constitution fell out of favor both politically and theoretically. Property, contract and any other unenumerated right is now under fire from whatever place on the political spectrum voicing an objection thereto.

Important issues of public policy like abortion, same-sex marriage or bodily autonomy fit into the rubric of *liberty* or *equal protection* as guaranteed by the Fifth or Fourteenth Amendment to the Constitution of the United States. Unfortunately, what is oftentimes too easily overlooked is the rhetoric of property rights as a source for these liberties. *Property*, as denoted earlier in this dissertation, is the polestar from which all other rights in Anglo-American constitutionalism flow and the absence of ownership rhetoric in our current discourse on privacy issues—from abortion to same-sex marriage—illustrates the disconnect of contemporary constitutional discourse from that of the Enlightenment and founding eras.

My contention in the ensuing chapters is to advance the argument that the idea of *privacy* has replaced the idea of *property* with regards to our collective sense of ownership and control of our own bodies. Before making that argument, however, in this chapter, I make the argument that the notion of property rights in ourselves still exists. Regardless of terminology assigned thereto, or the hermeneutics of a particular word, we nevertheless understand to our core that we have some degree of control over what happens to our own bodies and, at least in some circumstances, that control should not be

given to third persons. This is both the essence of American property rights, in general, as well as the notion that there exists within each of us a certain degree of bodily autonomy that remains free from any government intervention

This chapter is devoted to studying the various ways in which property rights are still asserted in bodies outside the triangulated rhetoric of slavery, coverture and patriarchy. I begin this study with the philosophical problems inherent in treatment of corpses. On the one hand, Anglo-American common law dismissed the idea that dead bodies either were property or could own property. But, on the other hand, by not recognizing corpses were of value to outside third-parties (e.g. grave robbers) or the family of the decedent itself, Anglo-American law allowed untold indignities to be visited upon the cadavers of dead relatives without recompense and deprived surviving family members of any financial windfall that occasionally grew from exploitation of the cadaver. The deceased may not, legally, be recognized as an economic value to anyone, but the realities of nineteenth and twentieth century medicine forced both society and the courts to recognize those interests as, at the very least, *quasi-property*.

The status of a human cadaver in a grave-robbing nineteenth century world, however, pales in comparison to the value of severable parts of human anatomy in twentieth and twenty-first centuries. Who owns the tissues and cell-lines which, through the wonders of modern medicine, can save lives or provide research for scientists who can, at least, prolong lives? In an age where organ transplants can mean the difference between life and death, should people be allowed to sell their organs on the open market? Some of these questions are, admittedly, ethical and well beyond the scope of my dissertation. But, the mere fact I pose them, however, is proof-enough the human body

and its various components have been commodified. Whether courts or legislatures recognize them as such, the fact remains that tissues, organs and even genes are valuable economic units bought and sold on the open market every day. State and federal law may refuse to recognize these economic transactions but, as I argue in this chapter and the next, a failure to recognize the transaction is largely superfluous. The owner of these body parts nevertheless views them as valuable products that each, individual, body introduces into the stream of commerce.

1. Ownership of Corpses

Before actually addressing the issue of ownership rights in one's own body, I first pause to look at property interests in the human corpse. It may seem counterintuitive to begin a chapter on property rights in our own bodies with this particular issue but I have several reasons for doing it here rather than elsewhere in the dissertation. First, with the demise of slavery and coverture, and the transformation of the cultural status of children, this is one area of law and history where property rights have, to varying extents, still been asserted in the body of the *other*—or, at least the body of a deceased *other*. Second, over time, the stigma of treating a corpse as property has diminished and as such allowed for increasing rather than decreasing recognition of it as an economic unit as was the case with slaves, women and children. Finally, with the exception of surrogacy arrangements, the rest of this chapter is concerned with tissues severed or withdrawn from the body. The contested history of ownership of those tissues has grown alongside, if not directly out of, the claim of property rights to human cadavers. Therefore, I begin the chapter with this issue.

Historically, Anglo-American common law always treated a corpse as *res nullius*, or the property of no one. Part of the reason for this, explains Norman Cantor, is that burial or any other disposal of human remains was strictly within the purview of clergy and ecclesiastic courts for many centuries. Families had no say in the matter and, thus, no *res* in which to assert an ownership interest. When secular courts took jurisdiction over these matters in seventeenth century England, there was no change in the legal status of the body. Early Anglo-American jurists declared dead bodies did not have the legal status of property—without ever specifying what legal status they did have—but proceeded, in many cases, to treat a cadaver as if it was chattel anyway.²³⁶

The seminal case on English legal status of a corpse does not really discuss that status at all but, rather, theft of shrouds from those corpses. Sir Edward Coke, Chief Justice of England’s King’s Bench, reported on the case of a William Haine who “digged [*sic*] up the graves of divers [*sic*] several men, and of one woman, and took the winding sheets from the bodies and buried the bodies again.” Coke noted that “[t]he property of the sheets was in the executor, administrators” or others handling the estate. “[F]or the dead body,” Coke explained, “is not capable of any property.”²³⁷ Coke went on to compare a cadaver to a lump of earth that could not be the subject of property claims

²³⁶ Norman L. Cantor, *After We Die: The Life and Times of the Human Cadaver* (Washington, D.C.: Georgetown University Press, 2010) 47-49. Though English common law refused to recognize a corpse as property, until 1780, British law allowed a deceased’s creditors to seize the corpse and hold it to extract payment from family members of debts owed them by the decedent. This is very similar to the way a creditor might seize chattel or real property pledged as collateral to secure a debt. *Id.* at 240-241.

²³⁷ Edward Coke, *Institutes of the Laws of the Laws of England*, III:110.

itself. As Ngaire Naffine notes, this is the origin of the *res nullius* rule that dictated the legal status of a corpse for centuries in English and American law.

This was the view transmitted down to Blackstone and, eventually, imported to the American colonies. In describing the English law of “things,” Blackstone wrote “though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes” nor could any civil action be brought against someone who disturbed those remains. A grave robber’s theft of the burial shroud could be prosecuted as a felony, or a civil action could be maintained by the executor who owned a property interest in that shroud. The owner of the soil in which the body was buried could also sue for trespass when a body snatcher disturbed it. But, citing Coke, Blackstone agreed that the human cadaver was *res nullius*.²³⁸

Naffine points out that many countries which follow the English common law tradition continue to cite the *res nullius* doctrine, or some derivative thereof, but then usually proceed to treat the corpse as it was property anyway.²³⁹ There is no clear consensus in American jurisprudence as to the exact legal status of a corpse. Because property law and disposal of a corpse are both matters of state law in this country, we have fifty jurisdictions that make their own decisions on these matters and a federal system that will only get involved if there appears to be a constitutional deprivation of property. But, the clear trend of the last century has been a drift toward recognizing at least degree of ownership rights in dead bodies. There are two reasons for this.

²³⁸ Blackstone, *Commentaries*, III:429.

²³⁹ Ngaire Naffine “But a Lump of Earth?: The Legal Status of the Corpse,” in *Courting Death: The Law of Mortality*, ed. Desmond Manderson (London: Pluto Press, 1999) 102-103.

First, as medicine professionalized over the course of the eighteenth and nineteenth centuries, the question of whether a corpse was *legally* recognized as property became increasingly irrelevant. The proliferation of medical schools, and a growing public fascination with anatomy—both inside and outside of the medical profession—led to a surge in demand for cadavers for dissection. Where there is demand, a market will almost always develop to meet it. Grave robbing/ body snatching became an increasing problem in Great Britain and America. Confident they could not be tried for felony theft, as a body was not property, grave robbers saw little disincentive in snatching newly buried bodies and selling them to medical schools. Indeed, so great was the demand of schools for cadavers, if grave robbers could not keep up, medical students sometimes took matters into their own hands and exhumed the recently deceased themselves.²⁴⁰

Corpses may not have been recognized as *legal* property insofar as Coke and Blackstone were concerned, but they certainly held economic value for someone. Legal recognition

²⁴⁰ Id. at 95-102; Michael Sappol, *A Traffic of Dead Bodies: Anatomy and Embodied Social Identity in Nineteenth Century America* (Princeton: Princeton University Press, 2002) 44-70. These activities were sufficiently numerous, and sufficiently well-known by the public, that “Doctors’ mob” riots against physicians and medical schools were occurring as early as the eighteenth century in cities like New York and Baltimore. Id. at 145. In 1847, Samuel Craddock wrote to his sister that, when fellow students at an upstate New York medical school to exhume the body of a “drunken Irishman [who] struck his head on the pavement and killed himself . . . they were shot at by someone who was there to watch the grave.” The students tried again on several other nights but, once again, there was someone there to guard the grave and shoot any body snatchers. Id. at 81-82. As with so many other aspects of American racism, grave robbing fell particularly hard on slave, and later freedmen, communities. Black bodies were routinely harvested from black cemeteries during the eighteenth, nineteenth and even twentieth centuries to provide cadavers for research and for dissection in medical school anatomy classes. See Todd L. Savitt, “The Use of Blacks for Medical Experimentation and Demonstration in the Old South,” 48 *Journal of Southern History* 331-348 (1982); Robert J. Shawn, “Prelude and Aftermath of the Doctor’s Riot of 1788: A Religious Interpretation of Black and White Reaction to Grave Robbing,” 81 *New York History* 417-456 (2000); Rebecca Skloot, *The Immortal Life of Henrietta Lacks* (New York: Random House, 2010) 166.

of property rights in the corpse was, thus, largely irrelevant. A black market in their trade gave them value irrespective of the law. In eventually treating cadavers as property to some degree, legal theory was merely catching up to economic reality.

The second reason American jurisprudence moved away from the *res nullius* theory of English common law was that, without recognizing some degree of ownership interest in a corpse, aggrieved families had no recourse when wronged. A general maxim of American tort law is that for every wrong there is a remedy. If a body was simply a lump of earth as Coke believed then a family has no right of recovery for misfeasance or nonfeasance with regard to that lump of earth. It takes little in the way of imagination to conceive a scenario where an aggrieved child or widow would turn to courts for help but, without acknowledging some degree of property interest in the deceased, nothing could be done.

One of the first cases to address the issue in this country was *Pierce v. Proprietors of Swan Point Cemetery* in 1872 where the Rhode Island Supreme Court was called upon to determine if a state court of equity could exercise jurisdiction over a suit brought by a decedent's daughter after disinterment of her father's body from a grave where it had laid for thirteen years. The daughter asserted her father's remains were her property and she wanted those remains returned to their original resting place. The pivotal question in the case was whether there existed a property right in the corpse of the decedent. If there did not, then a court of equity had no authority to consider the case. In answering that question, the Supreme Court of Rhode Island cited the pertinent English precedent discussed above. The Court noted the difference between U.S. and English common law in that ecclesiastic jurisdiction over burial existed neither in this country nor in that state.

Still, it was unwilling to depart from English precedent and, so, declared the decedent's remains were not property—or, at least not property in the ordinary sense of the term.²⁴¹

“[T]he body is not property in the usually recognized sense of the word, yet we may consider it as a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity.” Though calling it *quasi-property*, the Court was quick to point out “the person having charge of it cannot be considered as [being] the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it[.]”²⁴² If the Court meant to circumvent a theory of ownership in the decedent's remains, invocation of the trust metaphor was a bad choice. A trust is simply a situation where a trustee holds property for the benefit of another (the beneficiary). By invoking the metaphor of a trust, the Court in *Pierce* reinforced the notion that the decedent's remains could be treated as property.

In *Louisville N.R. Co. v. Wilson*, the Georgia Supreme Court was called upon to determine if a widow had a claim against a railroad company which, after being hired to transport a coffin containing her husband's remains, left that coffin on a platform (overnight) where it was subject to rain and other elements. The widow could clearly recover for rain damage to the coffin and burial shroud. But, could she maintain an action for damages against the railway company for “great humiliation, shame and mental suffering.” The court held she could. After remarking that “[a] corpse in some respects is the strangest thing on earth,” the court went on to cite the ruling in *Pierce* and

²⁴¹*Pierce v. Proprietors of Swann Point Cemetery*, 10 R.I. 287 (R.I. 1872).

²⁴² *Id.*

conclude that the railroad could not treat the decedent, on the one hand as property capable of being shipped by a common carrier but then, on the other hand, deny it was property when mishandled and the widow sought damages.²⁴³ In short, just as economic realities transformed what was once *res nullius* into valuable property irrespective of its legal nomenclature, society's growing litigiousness and expansion of tort law in nineteenth century America asserted pressure on the legal system to change. Coke's lump of earth was now regarded as quasi-property.

The *quasi-property* nomenclature stuck. In 1911, Arkansas lawyer W.C. Rodgers wrote an article formally characterizing property rights in a cadaver as being *quasi-property*. A human body after death, he explained, held a unique position which, on one hand, exhibited certain elements of property but, on the other hand, was clearly not property.²⁴⁴ This characterization, remains today,²⁴⁵ though is quickly being rendered obsolete by advancements in modern medicine. A federal Court of Appeals ran headlong into this reality in *Brotherton v. Cleveland* where a wife, knowing her husband's

²⁴³ *Louisville & N.R. Co. v. Wilson*, 51 S.E. 24 (1905).

²⁴⁴ Stuart Banner, *American Property: A History of How, Why and What We Own* (Cambridge: Harvard University Press, 2011) 241.

²⁴⁵ I do not mean to suggest a *quasi-property* theory has been accepted everywhere. See e.g. *Carney v. Knollwood Cemetery Assn.*, 514 N.E.2d 430, 435 (Ohio App. 1986)(calling the "quasi-property fiction" both "ancient" and "discredited") or that it has not proved problematic even for jurisdictions which have adhered to it. See e.g. *Bauer v. North Fulton Med. Ctr.*, 527 S.E.2d 240, 244 (Ga. App. 1999)("quasi property right in a corpse is not pecuniary in nature nor should it be); *Roach v. Stern*, 653 N.Y.S.2d 532, 534 (Sup. 1996) (the "legal fiction" of quasi-property extends only to the body of the deceased and to cremated remains). The theory remains problematic even to its proponents though, as discussed above, the legal treatment of corpses is almost superfluous given that it has been treated as a valuable commodity in Anglo-American society since the eighteenth century.

aversion to organ donation, refused to allow any “anatomical gifts” to be taken from his body after death. Apparently unaware of that refusal, a coroner harvested his corneas under Ohio law allowing removal of such tissue without consent of a surviving spouse so long as the person removing the tissue is unaware of any objection. The Court held that whatever rights the widow held in the body of her deceased husband, that interest rose to the level of a “property interest” for purposes of protection under the Fourteenth Amendment to the United States Constitution regardless of how it might have been treated under state law. “The human body is a valuable resource,” the Court aptly observed, and establishing rights in that resource has been, and will continue to be, modified by scientific advancement.²⁴⁶ Characterization of this sort was prophetic at the time and, in the two plus decades since *Brotherton*, it has only proven too true as I discuss in the material that follows.

Many contemporary scholars continue to argue that the corpse as a whole, rather than the sum of its parts, should still not be treated as property. Norman Cantor posits only that a state’s reasons for refusing to recognize a corpse as property are “defensible” though he never explains why except to say such refusal would have collateral benefits under state law like prohibiting creditors from holding a dead body hostage until debts are paid. A prohibition against that action, as well as other nefarious activities, however, could easily be accomplished by some very simple state statute. Stuart Banner suggests that “[c]alling the body a kind of property seemed to desecrated the notion of being human.” This is a noble sentiment, to be sure, but ignores economic history and reality that has existed since the days of grave robbing. Human bodies, whether we like it or

²⁴⁶ *Brotherton v. Cleveland*, 923 F.2d 477, 481-482 (6th C.A. 1991).

not, are valuable assets—either in the strict financial sense of the term or in a sentimental sense of the term—and refusing to recognize that fact appears to give those who would exploit that property a leg-up over those who claim it.²⁴⁷

Ngairé Naffine, though, hits upon the real problem with this issue in my estimation. Any frank reconsideration of the corpse's status as *res nullius* must take place in light of the “legacy of slavery”²⁴⁸ in America. To that I would also add the legacy of coverture and a time when children were treated as mere economic factors in household economies. But, if the nineteenth and twentieth centuries taught the arguable flaw in this argument, however, is that slavery, coverture and patriarchy in general denied or inhibited the accrual of wealth to the *life in being* which accrued it. This is not the case in with regard to a cadaver where, obviously, the life in being no longer exists. A corpse has no ownership interest of itself but, to its family, those interests can be inestimable in terms of sentimental value or, to the less sentimental of those amongst us, in financial value to the extent the severable body parts could be used as a repository of spare parts. The pivotal question in all of this is whether we recognize the world as it exists or whether we lament for the world as it ought to be. Bodies after death have been treated by the courts as property whether we like it or not. More importantly, however, state legislatures have not stepped in to counteract treatment by the courts thereby giving such treatment a stamp of approval.

²⁴⁷ Cantor, *After We Die*, 168-169; Banner, *American Property*, 240.

²⁴⁸ Naffine, 103

2. Ownership of Living Human Tissue

Body parts from living, or dead, human beings have been a mainstay of American life since long before *America*, as an entity, even existed. Internal organs and blood were a mainstay of Mayan, Aztec and various other Mesoamerican religious rituals well-before Columbian contact and after that, even in North America, bone, teeth, hair and other items from human bodies were occasionally used as some sort of ornamentation by many indigenous tribes. Europeans settlers on the American continent were only the latest to use components from the bodies of the dead for commercial, ornamental or practical purposes. Moreover, such uses were generally accepted without any sense of the moral opprobrium that manifested itself with regard to use of other body parts in later generations.

Newspapers during the nineteenth and twentieth centuries, for instance, advertised for women who were willing to sell their hair to make wigs. This transaction invited no protest nor, apparently, did later advertisements for lactating mothers to sell breast milk. Both commodities were very much in demand and the free market introduced a segment of society willing to meet that demand in return for compensation.²⁴⁹

²⁴⁹ Banner, *American Property*, 241-248. Indeed, what high school student at one time or another has not read the classic short story of Della who sells her magnificent hair to a wig maker for twenty dollars so she can buy a watch chain for husband, Jim, only to discover he sold his prized watch to buy combs for Della's hair. O. Henry, "The Gift of the Magi," in *The Complete Works of O. Henry* (Garden City: Garden City Books, 1937) 8-12. It was the perfectly acceptable practice of selling one's hair that formed half the plotline for the classic American short story *The Gift of the Magi*. New York Times classified advertisements, many predating publication of O. Henry's story, can be found where families solicit services of a "wet nurse" as well as advertisements by women offering to work in such a capacity themselves.

Later, as medical science advanced, markets also developed for blood and plasma necessitated not only for surgery but also for emergency, and trauma treatment in hospitals. Skin grafts also became widely available for treatment of burn patients thereby creating a market for human skin as well. Blood and skin, though, were perceived as presenting something more personal than hair, or apparently breast milk, prompting both ethicists and the legal system to find an open market for these body tissues more problematic. In the early 1950s, Gussle Perlmutter was admitted to Beth David Hospital in New York for treatment of a medical problem during which she was given blood contaminated with the jaundice virus causing her to contract hepatitis. She sued the hospital, not for negligence but under a theory that the blood given to her was a product sold in the stream of commerce and, because it was tainted, violated state law that a product sold carried an implied warranty of fitness. In other words, Perlmutter argued the blood infused into her body was every bit as much an item of chattel property as a pill or something else like a car or toaster. A majority of the New York court ruled against her finding the blood given her by the hospital was only an “incidental service” subordinate to the primary service provided for “care and treatment.” A dissenting judge, however, found little to distinguish the purchase of blood in this instance from the purchase of food in a restaurant.²⁵⁰ If blood were like food purchased in a restaurant, then it was mere chattel property. The majority of *Perlmutter* rejected that approach but a close read of

²⁵⁰ Banner, *American Property*, at 243-245. *Perlmutter v. Beth David Hospital*, 123 N.E.2d 792, 795 & 797-798 (Froessel, J. Dissenting) (1954). The majority opinion in *Perlmutter*, though, suggests the Court may have been more concerned with the potential liability of all hospitals as there was no way then to detect for the jaundice virus in the blood and the majority decline to treat hospitals as “virtual insurers” of any “bad blood” given to its patients. *Id.* at 795.

the opinion reveals the majority was much more worried about making hospitals absolute insurers of the integrity of the blood supply they used than they were about treating such blood as a commodity in the stream of commerce.

The *Perlmutter* case was decided roughly a generation before the aforementioned *Brotherton* case but each of them speak to the same issue which is how to regulate the market for human tissue. Whether the tissue was blood, as in *Perlmutter*, or a cornea as in the case of *Brotherton*, the inescapable fact is that these body parts have economic value in the open market even if the American legal system is slow to take those markets into account and enforce property rights in body components. Federal and state legislatures showed themselves equally slow to act and, when they did, it was to prohibit the commodification of body components rather than to regulate a market which, in fact, already existed.

In 1984, the United States Congress passed, and President Reagan signed, the National Organ Transplantation Act (NOTA) which, in part, was meant to circumvent the formation of an interstate market in transplantable organs. Improved surgical techniques, and advances in drugs to counteract tissue rejection made organ transplants increasing more feasible as a standard medical practice. Most of NOTA was directed at building a nationwide network to facilitate organ transplants but a small part of that law also criminalized buying, and selling, transplantable organs.

The Senate Labor and Human Resources Committee expressly stated its belief that “human body parts should not be viewed as commodities.” A prohibition on the buying and selling of human organs was “directed at preventing the for-profit marketing of kidneys and other organs.” A violation of NOTA was thus criminalized and, for a

violation, could bring up to a \$50,000 fine or five years imprisonment or both. “[B]lood and blood derivatives,” however, were expressly exempted from the purview of federal law. The distinguishing characteristic for Congress between blood and other tissues/organs was that the former could be “replenished” and its donation did “not compromise the health of the donor.”²⁵¹

If the intent of Congress was to protect the health of the donor, though, why was there no prohibition on not-for-profit sales of organs? Part of the answer to this lies in economics and the very real possibility of economic exploitation. Nobel Prize-winning geneticist, Joshua Lederberg, said at a symposium in 1963 that the rapid pace of medical advances would soon impose “intolerable economic pressures on transplant sources.”²⁵² Indeed, as Russell Scott succinctly puts it, many opponents to the enforcement of property rights in the body do so on the basis that “under free enterprise, only the poor will sell body parts and only the affluent will be able to buy them.”²⁵³ There is no indication, however, that a private market for transplantable organs would significantly slow, or even stop, public donation to tissue banks thereby eliminating a supply for the less affluent.

Moreover, if it was fear of economic exploitation that inhibited recognition of a commercial market for these tissues, and the enforcement of property rights therein, history lends considerable evidence to suggest that this proverbial ship already sailed a

²⁵¹ 4 U.S. Code, Congressional and Administrative News (98th Congress, 2nd Session 1984) 3975, 3978, 3982-3983, 2992.

²⁵² Scott, *The Body as Property*, 182.

²⁵³ *Id.* at 183.

long time ago. Henrietta Lacks, an African-American woman, was born to a poor family in Maryland on August 1, 1920, and died of cervical cancer at the young age of thirty-one. Her life, and contribution to medicine, might have slipped into oblivion but for the work of Rebecca Skloot who detailed—in *The Immortal Life of Henrietta Lacks*—the woman’s contribution not only to medical science but also to the multi-billion dollar American bio-technology industry which profited, and continues to profit, from the remnants of her body. When Lacks first detected her cancer tumor, she asked her husband to take her to Johns Hopkins Hospital in Baltimore for further examination and treatment. While Johns Hopkins, and its’ so-called “night doctors”—physicians who were oftentimes suspected of having performed medical experiments on ill-informed and unsuspecting “black folks” in the community—was viewed with fear and dread within the Maryland African-American community, it was also one of the very few hospitals at the time which would treat black patients in the segregated Jim Crow south during the 1950s.²⁵⁴

Medical science to that date had not yet found a strain of replicating cells for use in laboratories until Lacks developed her own particularly aggressive form of cervical

²⁵⁴Skloot, *The Immortal Life of Henrietta Lacks*, 18, 86 & 168. Johns Hopkins, a Quaker and proto-abolitionist, was born into a wealthy (tobacco) planter family in 1795. He later increased his family’s fortune exponentially through shrewd investments in railroads, banks and liquor. He never married, had no children and, shortly before his death in 1873, bequeathed \$7 million to start a medical school/hospital. The terms of his bequest, however, instructed his trustees that the hospital was to provide medical care to indigents regardless of, among other things, “color.” Id. at 166. Though instructed to provide medical care for free, physicians of the time period also considered an implicit consent for medical testing as *quid pro quo* for that treatment. For further information on “night doctors” and the use of slaves and, later, freedmen for medical experimentation and training see generally Todd L. Savitt, “The Use of for Medical Experimentation and Demonstration in the Old South,” 48 *The Journal of Southern History* 331-348 (1982).

cancer. A biopsy of those cancer cells, Skloot reported, continued to replicate themselves at an almost unbelievable rate which caught the attention of both the scientific and medical community. Neither Lacks, nor her husband, ever signed a release form or gave permission for those cells to be the subject of further study and experimentation let alone for sale to other medical facilities. In fact, they had no idea these cells were grown, harvested and sold to laboratories around the world the same as any other rare and valuable scientific commodity. But, were these cells of any true scientific or economic value? As it turns out, the answer was yes and the emerging field of biotechnology cashed in on them handsomely. When it came time to test a polio vaccine, the biotech industry geared up for mass manufacture of so-called *HeLa* (a name taken from the first two letters of her first and last names) cells taken from Lack's diseased cervix. The benefit of the HeLa Cells for this project was that they were (1) particularly susceptible to the Polio vaccine and, at the same time, (2) replicated themselves far faster than any other cells involved in the research. A cure for Polio was eventually discovered with help from the HeLa cell strain. Still, as her descendants point out, they received no economic benefit whatsoever from her contribution to medical science whereas the pharmaceutical industry did rather well. Polio is all but eliminated in the western world but most of Lacks's descendants cannot ever afford health insurance for themselves.

Should the Lacks family have received compensation of some sort? There are two reasons for answering that question in the negative. First, the cells were a boon to medical science and mankind. Skloot reports that HeLa cells not only travelled into space as part of a NASA experiment, but also were instrumental in testing cancer chemotherapies, devising in-vitro fertilization and finding treatments for Leukemia,

Influenza and Parkinson's disease. The argument can be made that humanity should profit from these achievements this rather than a single individual. But, if there is validity to this argument at all then bio-tech companies should not profit either and they have made considerable sums of money harvesting the cellular remains of a woman who has been dead for over half a century. Johns Hopkins claims it never profited from HeLa cells nor did it follow anything other than accepted practices at that particular time in conducting a biopsy on Henrietta Lacks in the 1950s.²⁵⁵ That may well be true but, as Skloot reports, as of 2010, a company named Invitrogen sells various products made from the HeLa line from \$100 to \$10,000 per vial. Similarly, "American Type Culture Collection" sells HeLa cells for up to \$256 per vial. In short, cells harvested from Lacks's diseased cervix are a proverbial cash cow that has been enjoyed by almost everyone but the heirs of the woman who provided those cells.

Second, disregarding what we now know is the scientific value of the HeLa cell line, there is an initial knee-jerk reaction to prevent commodification of this material so as to protect Lacks, her family and others similarly situation from economic exploitation. This would be of particular concern, here, when a poor black family sells biological material to what is (essentially) an all-white biotech industry. By preventing her from selling an interest she owned in her own cancer cells, the argument might go, Lacks would not be subject to exploitation by those who might manipulate her poverty and

²⁵⁵ Id. at 57, 194, 235. That procedure, however, retains painful reminders of the racist aspect with which medical science and research was administered at the time. Not to single out Johns Hopkins, but that hospital, and other hospitals like it, equated the acceptance of medical treatment with agreement to treat the person as an aspect of medical research. In other words, the hospital and others like it viewed unapproved testing and experimentation as the *quid pro quo* for being treated for medical ailments.

relative lack of bargaining power during the Jim Crow era. Setting aside for a moment the rank paternalism of this reasoning, a refusal to acknowledge commodification of HeLa cells, as a legal fact, allowed the biotech industry to exploit it as an economic fact at the expense of Lacks and her descendants. Nobody would argue that, if this biological material had been chattel or real property, Lacks's descendants would have a claim of entitlement to the economic benefit of the property. But, the political, legal and moral refusal to recognize the body as property—an economic fact irrespective of whether law and government recognizes it—arguably does more to exploit the family and heirs of those property owners than anything else.²⁵⁶

In the early part of 2012, an entirely new chapter was opened up on the body of Henrietta Lacks. Scientists announced they mapped the human genome of the HELA cells and then posted that information online where it could be accessed by anyone. As it was in the twentieth century, so too in the twenty-first century, the question that must be answered is whether the genome mapping done by scientists is of private property, belonging to the Lacks heirs, or whether it is now public property—in the public domain, as it were—and can be accessed by anyone for any reason. The temptation, for this writer, anyway, is to fall back on the familiar theories of race and gender that posit that HELA property has been stolen from the Lacks heirs whom, as mentioned above, would typically be viewed as entitled to some sort of recompense for this biomedical discovery.

²⁵⁶Skloot reports that Lacks was not the only one who was exploited at the hands of the biotech industry. John Moore, an Alaskan surveyor, underwent an emergency splenectomy for Leukemia. Unusual proteins in his cancer cells were harvested without his knowledge, patented by a biotech company and were eventually valued at more than \$1 billion. Moore sued his doctors and became the first individual to legally “stake a claim” to a property ownership in his own tissue. *Id.* at 199-203.

But, unfortunately, the appropriation of biomedical technology without approval of the owners of that property has been way too pervasive to assign it a gender or racial prejudice. If anything, class rather than race or gender, would seem to be the common denominator in the appropriation of biomedical technology without recompense to the original owners of that information.²⁵⁷

3. Surrogacy and the Body as Rental Property

If the narrative of HELA cells, and the demand for transplant organs prove nothing else, they at least show the human body is a valuable asset which has been both mined for scientific research as well as scavenged for transplantable tissue. But, one aspect of property rights in the body that has not yet been explored in this dissertation is the right (power) to lease the body. It is important to remember, as discussed in my introduction, that ownership of a *res* does not equate to a physical ownership of the *res* itself but, rather, various interests in that *res*. Thus far in my dissertation, I have looked at only two of the proverbial *bundle* of sticks of ownership rights: (1) the power to possess the *res* as manifested by white patriarchal control over bodies of children, wives and slaves, as well as (2) the power to exclude anyone else from control of the *res* as manifested in arguments over privacy. If we indeed own property rights in our own bodies, as I maintain in my introduction, then it is worth considering whether other rights from the so-called *bundle* of rights associated with property ownership has ever been shown to exist. Surrogate parenthood—particularly, gestational surrogacy—exposes and

²⁵⁷ Rebecca Skloot, “The Immortal Life of Henrietta Lacks, the Sequel,” *New York Times*, 24 March 2013.

reveals an entirely new narrative on bodily ownership and introduces into the calculus of bodily rights the liberty to lease the res thereby giving the human body even greater similarity to chattel or realty leased in the ordinary course of business.

Before I begin that argument, however, I am compelled to define my terminology. By *surrogacy*, I mean the procedure in which a woman is artificially inseminated with sperm from another man who is oftentimes, but not always, married to someone other than the surrogate and intends for the surrogate mother to carry the fetus to gestation and deliver it to him for purposes of child-rearing. The surrogate (biological mother) contributes the egg as genetic material to a fetus but is intended by everyone else to the arrangement to have no parental relationship with the fetus at all. The surrogate is, nevertheless, the biological mother and also has a claim to the custody and control of the child once born. I also use another term, *gestational surrogacy*, by which I mean a process (like in-vitro fertilization) where the surrogate mother provides no genetic material to a conceived fetus but agrees to carry it to birth. A gestational surrogate, in other words, simply rents out a uterus for that time-period which is necessary to carry the fetus to term.

Scientific contribution to non-traditional parenthood was ubiquitous in the twentieth century. Artificial insemination began with farm animals but the technology soon spread to human beings with the offer of relieving the pain of infertility that afflicted many couples. Louise Brown, the first so-called “test tube baby” was born in 1978 and, though the genetic product of both parents, she was conceived in the laboratory *in vitro*. Infertility research provided not only hope to couples who could not conceive children in the traditional method, but also created a market for the very materials

necessary to achieve procreation. Commercial markets thus developed for both young men and young women—almost all of which were exclusively white—who sought to market sperm and eggs in the growing commerce of infertility.²⁵⁸

The market in those materials was, no doubt, uncontroversial, until the case of *In re Baby M* in the 1980s thrust the notion of surrogate parenthood into popular consciousness. In February of 1985, William Stern and Mary Beth Whitehead entered into a surrogacy contract in which Whitehead agreed to be inseminated with sperm from Stern and carry the fetus to term. Once the child was born, Stern’s wife would adopt the baby and Whitehead and her husband were to, respectively, take the necessary steps to relinquish parental rights and refute a presumption of paternity. Once this was done, Stern would pay Whitehead \$10,000.²⁵⁹

A girl, “Baby M,” was born on March 2, 1986, and though Whitehead initially surrendered the child pursuant to the contract, she became inconsolable and begged for the child’s temporary return. Fearful for her mental state, the Sterns relinquished the girl. After that, Whitehead refused to surrender custody back to the Sterns thus prompting William Stern to file suit to enforce the contract. The New Jersey trial court ruled for the Sterns and found the surrogacy contract enforceable for two reasons. First, citing *Lochner v. New York*, and the long discarded doctrine of *liberty of contract*, the court ruled the parties had a constitutionally protect interest in negotiating as to the fundamental right to decide whether to “bear and beget” a child. Second, by denying the

²⁵⁸ For a concise history on the commercial market for eggs and sperm, see Rene Ameling, *Sex Cells: The Medical Market for Eggs and Sperm* (Berkeley: University of California Press, 2011) 52-83.

²⁵⁹ *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

surrogate (woman) the opportunity to sell her procreative material, but at the same time allowing a male to sell his, violated the Equal Protection Clause of the Fourteenth Amendment.²⁶⁰ That the trial court would invoke liberty of contract to allow the bargaining of a component part of the right to privacy (the decision of whether to bear children) in return for a quid pro quo suggests that the trial court judge (at least) perceived a clear philosophical linkage between property, privacy and contract. But, he was apparently the only one to see that link.

The New Jersey Supreme Court unanimously reversed that decision and held the surrogacy contract invalid. Part of that ruling was based on the Supreme Court's finding the contract interfered with, or violated several statutes unrelated to the issue of surrogacy. But, on the pivotal question of the contract's enforceability, the Court found that would be a violation of public policy. "This is the sale of a child, or at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here." The Court went on to note that, while the Sterns were not rich and the Whiteheads were not poor, there was a clear financial incentive. Whitehead volunteered to be a surrogate in order to give another couple the gift of life, but she also admitted she needed the \$10,000 fee to take care of her own family. "There are, in a civilized society, some things that money cannot buy." In

²⁶⁰*In re Baby M*, 525 A.2d 1128, 1165 (N.J. Super.Ct. 1987). As to the equal protection part of this ruling, the court was speaking in general terms. William Stern obviously had not sold his sperm in this case but such sales were allowed everywhere including the state of New Jersey. Although New Jersey had no positive law (statute) that banned surrogacy, the court expressed a judicial ruling to that effect in this case would essentially treat men differently, and allow them greater rights, than women in the sale of reproductive materials – essentially commodifying sperm and eggs as property.

New Jersey, the Court held, “the surrogate mother’s agreement to sell her child is void.”²⁶¹ The New Jersey Supreme Court addressed neither the liberty of contract issue nor the equal protection issue which played such a prominent role in the trial court decision.²⁶² Because it did not, there is no clear indication whether the Supreme Court simply thought the trial court was off-base with its decision or whether it found the public policy concerns overwhelmed the bases for the trial court’s decision.

Because *In re Baby M* did not involve a solely gestational surrogacy, there was also no discussion of the right of Whitehead to lease her uterus. The transfer of her genetic material was also involved and that, as well as the financial aspect of the contract, clearly troubled the Court. Still, the use of property rhetoric by the Court is telling. The Supreme Court compared the surrogacy arrangement to a sale of the child. A *sale* connotes a transfer of chattel or realty pursuant to contract and the court’s use of that word in reference to the Baby M clearly indicated it thought the child was being bought and sold much like livestock or a slave a century and a half earlier. More importantly, though, the Supreme Court’s language that this was the “sale of a mother’s right to her child” harkens back to *the rights in property and property in rights* rhetoric employed by

²⁶¹ 537 A.2d at 1248-1250. Although Stern and Whitehead both went on to assert various other constitutional rights associated with privacy, none of them argued a property right inherent in the child.

²⁶² As noted in a prior chapter of this dissertation, the liberty of contract principle fell into disfavor during the New Deal and, thus, the trial court left itself open to criticism for its reliance on *Lochner v. New York*. I have found at least one critic who pounced on this problem citing the United States Supreme Court for the proposition “there is . . . no such thing as absolute freedom of contract.” Patricia H. Werhane, “AGAINST the Legitimacy of Surrogate Contracts,” in *On the Problem of Surrogate Parenthood: Analyzing the Baby M Case*, ed. Herbert Richardson (Lewiston: Edwin Mellen Press, 1987) 21-30. “Should a contract, any contract, be legally or morally binding even when it is entered into voluntarily by both parties when and if it entails selling, renting, or indenturing a human being?” *Id.* at 24

James Madison. John Phillip Reid, it should be from my first chapter, argued Anglo-Americans owned/possessed a property interest in their rights under the British Constitution. We see similar rhetoric employed by the New Jersey Supreme Court in the *Baby M* case to describe Whitehead's rights as a mother more than two centuries later.

Indeed, there are many important rhetorical observations to be gleaned from *In re Baby M* but perhaps the most important is the procedural disposition by the Court. The New Jersey Supreme Court never disputed that there were important property interests at issue in the case. Indeed, the Court expressly accused the surrogacy contract as one which conveyed a property interest in the minor child from the Whiteheads to the Sterns. It is this interest which is important from the case. The Court never once argued the interest did not exist. Rather, the Court struck down the surrogacy contract itself and ruled that such matters could not be the matter of such contracts to begin with.

As noted in the first chapter of this dissertation, American law has consistently whittled away at *liberty of contract* and this whittling reached its zenith during the Great Depression and the New Deal. If Congress, or the courts could step in and regulate the extent to which labor contracts could be regulated during the 1930s, it should come as no surprise Congress would try and regulate these contracts as well. On May 14, 1987, Rep. Tom Luken of Ohio introduced legislation into Congress known as *The Surrogacy Arrangements Act of 1987* by which he intended to ban surrogacy contracts altogether. It is important to remember surrogacy contracts involved two interests, which are pivotal to this dissertation. On the one hand, they involve property interests in a surrogate mother that are sold in the case of traditional surrogacy (i.e., genetic material if a surrogate mother is artificially inseminated) and, on the other hand, lease of the womb if all that is

involved is gestational surrogacy. This is important because the Luken bill only addressed surrogacy in its traditional sense rather than gestational surrogacy. In short, Lukens did not deny that lease of a uterus was a valuable property right in and of itself nor did he contest that what happened was the conveyance of genetic material from one person to another. To the contrary, the point of Lukens' bill was to prohibit the functionality of the surrogacy contract. Why is this distinction important? Because Lukens never denied the status of these contracts as properties but, rather, contested women were not sufficiently capable of negotiating them away by contract in the first place.²⁶³

The bill was referred to his own House Subcommittee on Tourism, Transportation and Hazardous Materials where, ultimately, it died.²⁶⁴ But, before its death, Luken held hearings, which, not unexpectedly, overwhelmingly featured witnesses who favored banning, and even criminalizing, commercial surrogacy contracts. A federal ban on surrogacy contracts was, in the end, never passed. Still, the anti-surrogacy rhetoric employed at the federal hearings is fascinating. While de-legitimizing contracts embracing this practice, those against surrogacy implicitly acknowledged surrogate mothers were selling a valuable commodity even if they disagreed as to the precise nature of the commodity being sold.

²⁶³ The issue of whether a contracting party is sufficiently competent to contract away the subject of the contract is one that this dissertation has addressed before and has been the subject of numerous scholarly publications. The overwhelming legal authority of late has been that surrogacy contracts are void not only for being against public policy but also that they overreach.

²⁶⁴ <http://www.govtrack.us/congress/bills/100/hr2433#related> (accessed 14 March 2013).

Luken himself, in opening remarks, made clear his views that as he sought to ban the transfer of a property interest. Even if state law had not yet acted to negate acquisition of such a property interest, Luken noted, Congress would intervene to make sure they did not.

It is reported that babies are being snatched from their mother's arms immediately after birth by bounty hunting process servers armed with a piece of paper, a surrogacy contract. If commercial surrogacy transactions are allowed to continue, these private arrangements will produce worse results than the black market area of adoption that we know too well. The breeding of human beings for transfer of ownership creates a new class of people whose lineage and ownership reflect our society's worse biases in class, greed and gender.²⁶⁵

Luken made clear it was not the existence of these arrangements, in general, he sought to ban but, rather, the "commercialization of such arrangements." By nodding to the commercial value of such contracts, he impliedly recognized that (irrespective of state or federal law at the time) Americans had increasingly entered such contracts to exchange interests that they considered valuable. As with grave robbing in the era of medical school expansion, body parts—and in this case, rental of body parts—were valuable economic interests whether legally recognized or not.

Representative Luken also noted, albeit mistakenly, the *Baby M* case was "the first legal case since the passage of the 13th amendment [*sic*] wherein a U.S. Court has ordered the consummation of a contract for the conveyance of title to a human being." *In re Baby M*, as stated above, did not uphold the surrogacy contract. Moreover, the gist of the contract was not the conveyance of a human being as Rep. Luken would have preferred to classify it, but rather the conveyance of her genetic material by the biological

²⁶⁵ Id.

mother. The father of the girl, after all, was not a southern slave owner, as in Lukens's analogy, but rather a parent himself who sought termination of parental rights of the mother the same as a maternal recipient of donated sperm. Rep. Tom Tauke of Iowa summed up his side of the problem perfectly:

[This issue] raises the question of whether or not human beings are property that can be conveyed. It also raises the question of whether or not the act of creation is a service which can be sold. If we conclude that human beings are property that can be conveyed and that the act of creation is a service that can be sold, that obviously has profound implications not only for the status of human beings in our society but also for the society itself[.]²⁶⁶

Lukens' objective of imposing a nationwide standard on surrogacy throughout the United States failed. His 1987 bill languished in committee until it died and, when he reintroduced the very same bill into the next congress, it too denied in committee. Legalization of surrogate parenthood arrangements was thus left to the states. But, whether legally recognized or not, was largely beside the point. Both the national and state regulatory schemas recognized the existence of such contractual arrangements. Rental of reproductive organs was—whether states like it or not—a *fait accompli* and the question to be answered in twenty-first century was not whether to recognize the practice but how, and to what extent, to regulate it.²⁶⁷

In the end, Congress never banned surrogacy contracts leaving the matter up to the states and a number of jurisdictions have acted to ban them. A handful of states, though, have enacted regulatory frameworks under which legal surrogate contracts may be entered. The sticking point for many in the surrogate motherhood debate was not so

²⁶⁶ *Id.* at 7.

²⁶⁷ <http://www.govtrack.us/congress/bills/101/hr275> (accessed 14 March 2013).

much employment of the surrogate as an incubator for the fetus, although this caused no small degree of consternation among both traditionalists and feminists,²⁶⁸ but that the fetus carried the surrogate's genetic material thus surrogacy arguably comparable to *baby selling*. Development of in-vitro fertilization, however, removed that objection. The surrogate was no longer transferring her parenthood claims over her baby to the natural father and his wife. Indeed, the fetus has no genetic material from the surrogate mother. Thus, as Bree Kessler quips, "surrogacy now is not the surrogacy of the Baby M" era decades ago. Kessler analyzed a 2008 Newsweek report about a significant number of military wives who contracted to be surrogates to supplement family income while a husband was overseas fighting in the Middle East. While acknowledging there remained potential for abuse, Kessler notes state sanction of surrogacy allows private citizens the agency to act within what they perceive to be their own economic best interests to alleviate risks of poverty.²⁶⁹ Contemporary surrogate mothers, in other words, view the renting of their uteri as being little different from rental of various real estate interests like apartments or farmland.

²⁶⁸ Opponents of surrogacy arrangements, which include many feminists who would otherwise argue in favor of a woman to control her own body, argue such contracts exploit the economically vulnerable. See e.g. Henrik, Kjeldgaard Jorgensen, "Paternalism, Surrogacy and Exploitation," 10 *Kennedy Institute of Ethics Journal* (2000) 39-58; Laura R. Woliver, "Reproductive Technologies, Surrogacy Arrangements, and the Politics of Motherhood," in *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, ed. Martha Albertson Fineman and Isabel Karpin (New York: Columbia University Press, 1995) 346-359. Certainly, this is the impression one gets from the written statement of Mary Beth Whitehead during Congressional hearings. "The economics of surrogacy of surrogacy in this country are simple: The sperm donors are well off and the women they hire to bear the children generally are not." Statement of Mary Beth Whitehead, Hearings, 32.

²⁶⁹ Bree Kessler, "Recruiting Wombs: Surrogates as the New Security Moms," in 37 *Women's Studies Quarterly* (2009) 167, 168.

While lawmakers and ethicists may wish it otherwise, the cold hard fact remains that history has shown that the human body continues to be a proverbial *treasure-trove* of many valuable, physiological, resources. Advancements in medical science and biogenetic engineering only continue to emphasize this point. Just as eighteenth and nineteenth century grave-robbers (in both Great Britain and America) benefitted from the professionalization of medicine and its need for human cadavers, medical research laboratories in both twentieth and twenty-first century America benefitted from all the tissue and/or genetic material harvested from patients who, oftentimes, received no notice let alone compensation whatsoever for the benefit their bodies provided to the greater advancement of science in general or medicine in particular. We need look no further than the descendants of Henrietta Lacks for proof that bodily tissues (in her case, the renowned HELA cells) were valuable in both the economic and scientific sense of that term. Still, for all the profit made from biotech research based on experimentation from Lacks's cancer cells, her family has received no compensation and, as one descendant expressly noted, the family cannot even afford health insurance of their own. If the reason public policy makers refuse to recognize the valuable property interests in the bodies of persons is to prevent exploitation of the poor, it would seem to me that such exploitation has already occurred.

Further, the Lacks case emphasizes the extent to which race and gender play a part in denying acknowledgement of property rights to African-Americans in general, and women of color in particular. Semen donors, as noted above, continue to be paid for their services and (for the most part) are mostly white medical students. Female egg donors, likewise, are largely white and enjoy the economic benefit of selling biological material

in the free market. Fearing women of color will be exploited, however, the law views the sale of their bodily economic interests as exploitative and thereby denies them not only the agency they should otherwise have over their own body but also denies them the claim to economic value therein. Lacks and her relatives collected no royalties, let alone the free health care they desired from Johns Hopkins University Medical School which surreptitiously obtained those cells from their ancestor in the first place. If Johns Hopkins has not profited from those cells, at the very least, bio-tech industry associated with it has obscenely profited.

NOTA and SSA also show that the federal government, at the very least, viewed body tissues as property rights in and of themselves or Congress would not have tried to regulate their trade in order to protect the owners of such rights. When Congress acted to restrict the trade of bodily organs, or use of a surrogate mother, their concerns may well have been based in the morality of those transactions but the very fact that they legislated in those areas confirmed that the interests upon which legislation was being drafted passed on the economic—and, thus, property interests—of those matters upon which the legislation was passed. In short, Congressional action—though it would have denied the existence of property rights in these areas—confirmed their very existence simply by legislating upon them.

More importantly, however, for purposes of this dissertation, federal government action in the case of NOTA and SSA, as well as private (in)action in the case of Johns Hopkins University and Henrietta Lacks, indicates a clear—albeit, clearly contested—consensus that human body tissues may constitute valuable property rights which should have arguably been recognized in the private sphere if not in the public. If those rights

are not recognized in the owner from which the tissue was derived then, at least arguably, some ownership interest should be recognized in theirs of the owner. Recognition of such an interest reinforces the idea that there exists a sort of property—hence, privacy—interest in one’s own body.

B. Property, Contract, and Same-Sex Marriage

*Conservatism cries out we are going
to destroy the family.²⁷⁰*

On May 18, 1970, Richard John (Jack) Baker and his partner, James McConnell, walked into the District Court of Hennepin County, Minnesota, and applied for a marriage license. The astonished clerk, who surely thought the two young men had lost their minds, turned them down on grounds that state law only allowed marriage licenses to opposite sex couples. Jack Baker was not shy about controversy—having been an “out” student body president at the University of Minnesota at a time when many states criminalized same-sex intimacy—so, the young law student promptly filed a lawsuit asking for an order directing the clerk to issue them a marriage license. Not surprisingly, he lost at the trial level. His appeal to the Minnesota Supreme Court was the first same-sex marriage case to reach a high court anywhere in the United States and, again, not surprisingly, he lost.

²⁷⁰ Elizabeth Cady Stanton, “Home Life” in *The Elizabeth Cady Stanton-Susan B. Anthony Reader: Correspondence, Writings, Speeches*, ed. Ellen Carol Dubois (Boston: Northeastern University Press Rev. Ed. 1992) 132-138.

While judicial decisions on same-sex marriage, today, produce lengthy opinions giving thorough consideration to arguments on both sides, the Minnesota Supreme Court refused to even take the case seriously, brushing off Baker's many constitutional arguments in just a few pages. The Court found no "irrational or invidious discrimination" in the state's marriage statute and, in an opinion already dripping with condescension, dismissed any similarity between Baker and McConnell's situation to the recent United States Supreme Court decision striking down anti-miscegenation laws. After all, the Court said, there is a "commonsense" distinction between marriage restrictions based on race and those based on gender.²⁷¹

This was not the end of the story. Ever the enterprising law student, Baker found another way to legalize their relationship and had his partner file a petition to adopt him which was granted in 1971 by a (presumably) sympathetic judge in Minneapolis. Despite McConnell losing a librarian's position at the University of Minnesota, and Baker receiving heightened scrutiny when he applied to take the state bar examination two years later, the end-result was worth it to the young men. Baker, who was from out-of-state, finally obtained his sought-after \$300 quarterly discount on law school tuition as his non-student partner (and now "father") was already a Minnesota resident.²⁷²

²⁷¹ *Baker v. Nelson*, 191 N.W.2d 185, 186, fn. 2., (MN. 1971). The United States Supreme Court turned down Baker's appeal finding there was no "substantial federal question." *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 L.Ed.2d 65 (1972). For background information on Jack Baker, see *Long Road to Freedom: The Advocate History of the Gay and Lesbian Movement*, ed. Mark Thompson (New York: St. Martin's Press, 1994) 54.

²⁷² The Law: Adopting a Lover, *Time* (Sep. 6, 1971); Homosexual Wins Fight to Take Bar Examination in Minnesota, *New York Times* (Jan. 7, 1973) 55.

More than four decades later, our contemporary debate over same-sex marriage is typically framed as a dialectic that pits equal protection arguments against a Judeo-Christian tradition which frames marriage as a social status to regulate procreation of children. But, as I argue in this chapter, that binary overlooks another, older, facet to marriage that is largely absent from our contemporary debate. That facet is the same liberty of contract and freedom of property rights we have discussed so far. Baker and McConnell, undoubtedly, had many reasons for wanting to marry, but the explanation they gave *Time Magazine* in 1971 cited the aforementioned tuition discount and inheritance rights. Then as now, whatever religious or social attributes it may connote, marriage also bestows very real, very important, economic benefits. The recent flurry of same-sex marriage cases relies largely on equal protection claims and I do not dispute that these are valid arguments. More and more people in this country, and particularly those in the judiciary, realize that that equality of treatment means just that – that all people should be treated under the laws unless there are legitimate reasons to refrain from doing so and nobody (to my knowledge) has ever advanced a plausible argument for failing to apply that principle in this context. Indeed, the United States Supreme Court, in a fractured five to four decision, recently concluded barring same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment.²⁷³ While the *Obergefell* opinion is to be celebrated by those of us who believe equal treatment under the law is a prime imperative of American Constitutionalism, particularly after passage of the Fourteenth Amendment in 1868, there may also be some (including this writer) who

²⁷³ See *Obergefell v. Hodges*, 135 S. Ct. 207 (2015).

regrets there was nothing (even an ancillary reference) to property rights in the context of same-sex marriage.²⁷⁴

Overwhelming societal research, as I discuss later in this chapter, recognizes the almost incontestable existence of a “wealth effect” that follows from marriage and the pooling of resources between married couples. Although I do not deny that the availability of those benefits to same-sex couples is a violation of equal protection rights,

²⁷⁴ Oddly enough, one of the few references to property rights in the whole same-sex marriage debate came from a couple opposed to its recognition. Phillip and Sandra Unruh filed, a self-described opposite-sex married couple, filed a motion on October 22, 2014, to intervene in a challenge to a Kansas ban on same-sex marriage laws in *Kail Marie v. Robert Moser, MD.*, U.S.D.C. for the District Court of Kansas, Case No. 14-CV-2518. The Unruhs argued, in pertinent part, they had (1) a “marriage contract” under Kansas law, (2) they have an “inalienable property right in their marriage that is protected by the 5th Amendment to the United States Constitution [and] the Kansas Constitution” of which they could not be deprived without Due Process of Law, and (3) any change to Kansas law would amount to “a taking of their property rights in marriage without [D]ue [P]rocess of Law. See Motion to Intervene in Marie v. Moser, <http://www.scribd.com/doc/244022349/2-14-cv-02518-13> (accessed 1 Jul. 1915). While the merits of the Unruhs’ motion are arguable, at best, it is surprising that it took an opponent to same-sex marriage to actually raise the issue of the property rights rather than a proponent. On the other hand, two days after their motion was filed below, the District Court denied them the opportunity to intervene. Among other things, the Court ruled that it doubts “whether plaintiffs can show that their marriage constitutes a protectable property interest under the Fifth and Fourteenth Amendments to the United States Constitution or that this case’s disposition will impair their ability to protect that interest.” See Memorandum and Order, United States District Court for the District of Kansas, https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2014cv2518-18 (accessed 11 July 2015). While this writer may agree with the latter part of the District Court’s ruling, he disagrees with the first part of that ruling. I have argued, throughout this dissertation that marriage is a contract and, further, the contract of marriage is bound up in the creation and maintenance of extrinsic property interest. I also fail to see how the Unruhs are subject to diminution of property rights in their own marriage if same-sex marriage is to be permitted. But, in a nation devoted to protection of property rights, they should have been allowed to make that argument.

my major concern in this chapter (as in all previous chapters of this dissertation) is that they inhibit formation of property rights. Baker and McConnell sought not to enforce their interpretation on anyone else but to take advantage of federal and state economic benefits extended to married couples.

This section will analyze our current debate over same-sex marriage within the larger context of contract and property rights we have already discussed. Specifically, I will argue “traditional marriage,” as a religious institution, has no long-standing tradition *per se* in this country and that, for most of our Anglo-American history, marriage was thought of as a civil contract. To the extent marriage contracts allow for the creation and ordering of private property interests, they are largely indistinguishable from any other commercial contracts in a free market society. Marriage contracts have some differences from ordinary commercial contracts, of course. The parties cannot simply walk away from a marriage contract as they can a contract to sell real estate or chattel. Divorces also required, first, an act of Parliament, then later, an act of the state legislature, and later still, approval from state courts. Still, marriage contracts and the marital relationship share many striking similarities to commercial relations that exist in our free-market system.

Nobody seriously suggests, of course, that anyone in the late eighteenth century would have countenanced marriage between two people of the same gender. About the only consistent “tradition” to Anglo-American marriage is that it was a relation entered into between members of the opposite sex. But, that is only because a same-sex alternative would have never occurred to anyone in the first place. This is not surprising. Our current knowledge of sexual orientation—as something separate and distinct from

the sex act itself—is only a product of nineteenth and twentieth century study. Therefore, when the Massachusetts Bay Colony deemed sexual relations between two men punishable by death, they never meant to exterminate an entire subculture of society but only to prohibit a certain behavior that would impede procreation of more colonists.²⁷⁵

In any case, to the extent contemporary opposition to same-sex marriage is grounded on the argument that it violates “traditional marriage,” I will show our notions of marriage have changed so many times over the centuries it is difficult to ascribe any “tradition” to that relationship at all. This is particularly true in the confines of Anglo-American history. Indeed, our very conception of “marriage” continues to shift back and forth between a status (sanctioned either by secular authorities or the state) and a private contractual arrangement. Today, American society leans more toward the former than the latter. The reason for this is that contract and property rights themselves are not valued as highly as they once were and we have become increasingly complacent with government (federal, state or local) regulation of the so-called “private sphere.” Even amongst proponents of same-sex marriage, little if any weight is given to the property and contract arguments. Once again, this can be attributed not only to a loss of importance afforded property rights in today’s society but also the rise of “equal protection” arguments in the latter half of the twentieth century. The purpose of this chapter is to both trace the historicity of these arguments as well as to show that traces of

²⁷⁵ Chapter 19, Section 8 passed by the General Court in 1692-1693 provided if “any man lieth with mankind, as he lieth with a woman, they shall be put to death.” *Acts and Resolves, Public and Private of the Province of the Massachusetts Bay* (Boston: Wright & Potter, 1869) I: 55. Of course same-sex relations was not the only crime meriting execution, so did witchcraft (Section 2), blasphemy (Section 3) and worshipping anyone other than the one “true God,” (Section 1). *Id.*

them can still be found, to one extent or another, in current litigation on same-sex marriage.

Although Anglo-American nomenclature consistently represented marriage as a “contract,” that representation was—of course—little more than a legal fiction. It is perhaps fitting such fiction mimics a “social contract,” Carole Patemen suggests, because women were wholly excluded from the former and never truly a party to the latter.²⁷⁶ Still, the notion of heterosexual marriage as a contractual avatar by and between members of the opposite sex persisted throughout Anglo-American history and was only recently forced back into the conception of “status” by those who wished to exclude others from the very real economic benefits the relationship bestows.

Our knowledge of early English marriage is somewhat sketchy to say the least. Chilton Latham Powell described it as largely adhering to the Roman civil law notion of contract whereas Sir Frederick Pollock and Frederick Maitland point to the Teutonic (Anglo-Saxon) tradition of “marriage by capture” or even “marriage by rape.” These marriages later evolved into a more *civilized* “sale marriage” (whereby consideration was paid by the bridegroom to his intended’s father) which Pollock and Maitland describe as the “usual and lawful marriage.” A sale, of course, is a form of contract and thus all three historians agree English marriage eventually took on that form. But, as the Christian church grew more powerful, Rome sought to exercise control over marriage as part of its “warfare against sins of the flesh.” The Council of Florence (1439) decreed marriage a sacrament and the Council of Trent (1563) decreed a marriage not contracted in the

²⁷⁶ Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) 50-58.

presence of a priest and witnesses was void.²⁷⁷ There is no indication, of course, that the Christian church sought to humanize the relationship between men and women but only to extend its power over the political recognition of marriage.

The Roman Catholic Church's grip over marriage in England was, relatively, short-lived. Even before the Tridentine ecumenical council, the English Reformation was underway. Martin Luther and John Calvin both denied marriage was a sacrament and, if the English Reformation was slow to reject the authority of Rome, "Puritans" were quick to reject the influence of "popery" over all civil marriages. The Marriage Act of 1653 decreed that, to be valid, marriages need only be performed by a justice of the peace. The church was excluded from the marriage process altogether. Indeed, though only truly legal when recognized by civil authorities, marriages were often confirmed in churches. But, both in Puritan England and New England, the only requisite for a valid marriage was a civil contract presided over by a civil authority. Indeed, when the very first marriage was performed in Plymouth, William Bradford noted it was "performed by the magistrate, as being a civil thing." Nowhere in the gospels, Bradford explained, was marriage "laid on the ministers as a part of their office."²⁷⁸

"Our law," pronounced English Jurist William Blackstone in 1765, "considers marriage in no other light than as a civil contract." The religious aspects of marriage were left to "ecclesiastical law" rather than civil law, which was only concerned with

²⁷⁷ Chilton Latham Powell, *English Domestic Relations 1487-1653* (New York: Russell & Russell, 1972) 2; Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Washington D.C.: Lawyers' Literary Club Ed., 1959) 364-366.

²⁷⁸ Powell, *English Domestic Relations*, 12-53; William Bradford, *Of Plymouth Plantation, 1620-1647*, Ed. Samuel Eliot Morison (New York: Alfred A. Knopf, 1970) 86.

whether the parties were willing to contract, able to contract and, in fact, did contract in the proper form required by law. Though Blackstone concerned himself with British law only, the gist of his commentaries—which were more popular here than in his native country—found their way into American treatises as well. Judge Tapping Reeve, proprietor of America’s first law school and author of its first treatise on domestic relations law, wrote that “[t]here is nothing in the nature of a marriage contract that is more sacred than that of other contracts [or] that requires the interposition of a person in holy orders, or that it [marriage] should be solemnized in a church.” Any notion to the contrary, Reeve said, arose “wholly from the usurpation of the church of Rome, on the rights of the civilian.” The Vermont Supreme Court agreed. “Before the days of Pope Innocent III [1198-1216], solemnization of marriage in churches was not known.”²⁷⁹

Just as marriage de-secularized in early America, it also became increasingly more privatized. A suspicion of centralized authority, and a concomitant rise in individualism after independence, explains Michael Grossberg, led to emergence of the “republican family” operating as a “little commonwealth” and eschewing any form of interference by local government. Communal regulation of the household, and by extension, marriage, was taken for granted before the American Revolution, which, as

²⁷⁹ William Blackstone, *Commentaries on the Laws of England*, (Chicago: University of Chicago Press, 1979) I: 421; Tapping Reeve, *The Law of Baron and Femme, of Parent and child, Guardian and Ward, Master and Servant* (Burlington: Chauncey Goodrich, 1846) 195. But, Reeve also opined that “[m]arriages forbidden by the law of God are invalid.” *Id.* at 201; *Overseers of Poor of Town of Newbury v. Overseers of Poor of Town of Brunswick*, 2 VT 151, 159 (VT. 1829). Ransom Tyler, *Commentaries on the Law of Infancy, Including Guardianship and Custody Rights of Infants, and the Laws of Coverture Embracing Dower, Marriage and Divorce, and the Statutory Policy of the Several States in Respect to Husband and Wife* (Albany: William Gould & Son, 1882) 805-808, Sections 611-613.

Ruth Bloch demonstrates, even afforded some recourse to women suffering spousal abuse. It was only during the waning years of the eighteenth century, and early years of the nineteenth, communal authorities grew reluctant to interfere with the “little commonwealths” operating within their communities thereby, as Bloch explains, not only shielding domestic violence from authorities but giving rise to a nascent sense of “privacy.”²⁸⁰

Later treatises, likewise, stressed marriage was a “civil contract,” and the relationship of wife and husband as a civil status. Associate Supreme Court Justice Joseph Story wrote that “[t]he common law of England [and America] considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to ecclesiastical and religious scrutiny.” “No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage[,]” wrote legal scholar James Kent in his *Commentaries on America Law*. “The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law.”²⁸¹ The issues of marriage and contract were so

²⁸⁰ Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1985) 4-23; Ruth H. Block, “The American Revolution, Wife Beating and the Emergent Value of Privacy,” *Early American Studies* (2007) 223-251.

²⁸¹ Ransom Tyler, *Commentaries on the Law of Infancy, Including Guardianship and Custody Rights of Infants, and the Laws of Coverture Embracing Dower, Marriage and Divorce, and the Statutory Policy of the Several States in Respect to Husband and Wife* (Albany: William Gould & Son, 1882) 805-808, Sections 611-613. Tyler also noted, though, that the marital relationship was between one man and one woman. Id; Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions and Judgments* (Boston: Little Brown & Co., 1857) 202; James Kent, *Commentaries on American Law* (Boston: Little, Brown & Co., 1873) IV:100.

intertwined that, for awhile, lawyers even argued a state legislative grant of divorce—the means by which many divorces in early America were granted—violated the Constitution’s prohibition on state impairment of contract. Although the Supreme Court of Connecticut rejected such an argument, not without mentioning that, if it did not, it would throw many previous divorces and subsequent remarriages into disarray, a concurring judge found legislative divorce did, in fact, violate the impairment of contract clause. The United States Supreme Court eventually stepped in and confirmed states have the “absolute right to prescribe the conditions upon which the marriage relation between its citizens shall be created and the causes for which it may be dissolved.”²⁸²

Just as Enlightenment era philosophy cast political relations in terms of a “social contract,” the same philosophy cast the matrimonial relationship in terms of a “marriage contract.” This was largely a legal fiction of course, as men and women were hardly on equal footing when entering these contracts, but it nevertheless shows us the mindset of early legal scholars. Legal and constitutional theory at the scholarly level is one thing; adjudicating marital cases in courthouses of the early republic—before many of the above treatises were even written and existing books such as Blackstone’s *Commentaries* may not even have been available—was something altogether different. Moreover, in dealing with the practical over the theoretical, state courts also had to decide economic issues many theorists could avoid. The Virginia Supreme Court of Appeals in 1790, for instance, not only characterized marriage as a “union of persons” but also a “union of fortunes.” Marriage, thus not only united two people in *holy* matrimony but also

²⁸² U.S. Const. art. I, sec. 10 (“No state shall . . . pass any . . . [l]aw impairing the Obligation of Contracts[.]”); *Starr v. Pease* (CT. 1831), 8 Conn. 541, 548 (Peters, J. Concurring); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

provided a way to arrange their property interests and construct a means by which to acquire property under state law.²⁸³

Property arrangements, particularly in terms of dowry, were oftentimes vital components of the marriage contract. “True” or “counted” dowry to husbands in Louisiana had to be listed in the marriage contract, and then delivered to the future husband in front of a notary and witnesses, to be kept exempt from levy by the husband’s creditors. A marriage contract could even curtail a husband’s rights under Coverture as noted by the Supreme Court of Louisiana in *DeArmas v. Hampton* which ruled a husband could not sell property a marriage contract specified was inalienable. As to the economic rights of the husband, the Vermont Supreme Court held that if the intended wife “during the treaty for marriage, without the knowledge of her intended husband, makes a voluntary disposition of her property, it is a fraud upon his marital rights.”²⁸⁴

Anglo-American history cast colonial marriage in terms of a civil contract both because of the Puritan desire to disassociate itself from the Roman Catholic Church, and its remnants in the Anglican Church, and because the contract metaphor more accurately described the American view of political relations between the colonial periphery and the imperial core. But, that discourse changed again over the course of the nineteenth century. Historians and legal scholars have mined this period of American history and point to a variety of factors that led to the evolution of marriage in Anglo-American society and law. Scholars such as Sandra VanBurkleo explain that legislators and judges

²⁸³*Crump v. Dudley*, 7 Va. 507 (1790).

²⁸⁴*Viales v. Viales Syndic*, 7 Mart. (o.s.) 634, 1820 WL 1354 (LA. 1820); *DeArmas v. Hampton*, 6 Mart. (o.s.) 567, 1819 WL 1365 (LA. 1819); *Thayer v. Thayer*, 14 VT 107, 119 (VT. 1842).

in antebellum America became increasingly uncomfortable with a contract metaphor because, after all, contracts suggested two parties on equal footing with one another and this was inconsistent with the notion of a patriarchal society necessary to rule the household and slaves. Michael Grossberg argues that, while a “republican family,” with its emphasis on egalitarianism and well-defined roles of various family members fit well within the era’s emphasis on individuality, it led to a crisis in society’s view of family stability in post-bellum America. A perceived laxness of morals, both within the marital relationship and without, led to various reforms movements seeking to emphasize both the power of the state to regulate marriage and the importance of the marital relationship to the community.²⁸⁵

In 1827, James Kent described marriage as the only “lawful relation by which [p]rovidence has permitted the continuance of the human race.” Though Kent’s *Commentaries on American Law* imply a religious connotation for marriage, his analysis of the means by which marriage is entered into is strictly contractual. A marriage contract, for instance, cannot be entered into by a “lunatic” or an “idiot,” who lacks capacity to contract, nor may it be entered by force or fraud which vitiates voluntary consent on the other side. Only when marriages are entered into between those of a certain lineal relationship, Kent notes, does cannon law coincide with common law. There is no overriding secular principle that defines a lawful marriage; indeed, like any

²⁸⁵ Sandra VanBurkleo, “*Belonging to the World:*” *Women’s Rights and American Constitutional Culture*, (New York: Oxford University Press, 2001) 68; Michael Grossberg, *Governing the Hearth: Law and Family in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1985) 3-30;

other commercial relationship, a marriage contract is valid only if it complies with the law of the jurisdiction under which the relationship was contracted.²⁸⁶

Slave “marriage,” perhaps, is one place where the contract metaphor retained its salience at least up through abolition. Henry Bibb, a Kentucky slave met his intended, Malinda, in 1833, and was quickly infatuated. After discussing matrimony with her as a “conditional contract,” he just as quickly became disillusioned upon discovering “[t]here is no legal marriage among the slaves of the south.” “A slave marrying according to law,” Bibb wrote, is “a thing unknown in the history of American slavery.” Indeed, as state legislators, and both common law and equity courts, began to carve out a distinctly American jurisprudence of marital relations, slaves were all but overlooked. It was not only slaves like Bibb who continued to view marriage as a contract, but also state lawmakers. Legislators, who could as easily have barred slave marriages by positive law (statute), just as they regulated white marriages, left the subject almost entirely to the common law courts. Some historians cite New England colonies and states as an area where slaves had more rights than in the south. Catherine Adams and Elizabeth Peck, for instance, argue enslaved men and women “had the right to marry but a master retained the right of sale; a slave husband could divorce his wife but he did not have custody rights over his children[.]” New England was a world apart, though, from the rest of the nascent states in respecting at least some parts of African-American marriage.²⁸⁷

²⁸⁶ James Kent, *Commentaries on American Law* (New York: De Capo Press, 1971) II: 65-78.

²⁸⁷ Henry Bibb, *Narrative of the Life and Adventures of Henry Bibb, an American Slave* (New York: Negro University Press, 1850) 36-38; Catherine Adams and Elizabeth Peck,

“[I]n a state of slavery,” a Kentucky appeals court ruled in 1824, “persons of color are incapable of contracting marriage.” Only after emancipation do they possess the requisite legal competence to enter such a contract. The focus on “competency” in this case is important. Much as the law said a *femme covert* was incompetent to contract, or the laws of every state hold a minor is incompetent to contract today, the Kentucky appeals court analyzed the claim of marriage solely as a contract issue (equating a slave on the same level as a child and *femme covert*) rather than relying on state law regulating either slavery or marriage. Though other contemporary state court decisions were not as precise, they follow the same trajectory. The Alabama Supreme court ruled slaves incapable of “contracting marriage,” but did so on the basis the rights and duties of marriage were incompatible with the rights of slave owners. Similarly, in analyzing whether state laws on spousal privilege (barring one spouse from testifying against another in court) several states ruled the privilege did not apply to slave marriages where the participants were not able to contract marriage.²⁸⁸

Slave states tended to borrow the ancient Latin word *contubernium* to describe the matrimonial relationships amongst their slaves. *Contubernium*, in Roman Law, described marital status of slaves. In America, it was adopted to describe a relationship of “co-habitation,” but not a state of lawful marriage which a trial court in New York noted slaves could not legally contract. As New York began the slow elimination of slavery

Love of Freedom: Black Women in Colonial and Revolutionary New England (New York: Oxford University Press, 2010) 104.

²⁸⁸ Frank v. Denham’s Administrator, 5 Litt. 330, 1824 WL 1445 (Ky App. 1824); *Malinda & Sarah v. Gardner*, 24 AL. 719, 723 (AL. 1854); *Coleman v. State*, 14 Mo. 157, 159 (MO. 1851), *State v. Samuel*, 19 N.C. 177, 182 (NC. 1836).

within its boundaries, it was not the courts but the legislature which recognized slave marriages through a law enacted on February 17, 1809. Though cohabitation might be permitted under a doctrine of *contubernium*, ruled the Alabama Supreme Court, the status brought with it no civil rights.²⁸⁹ The marital relation among slaves, therefore, remains as an artifact of how marriage was once regulated in this country. As state legislature moved to impose control over white marriages, through various regulatory schemes, black marriages remained (largely) a concept controlled by common law contract principles. This provides us a rare glimpse into a state of the law which failed to evolve in the nineteenth century thereby reifying the notion of marriage as a civil law contract.

By the close of the nineteenth century, state and local governments were once again imposing themselves into the marital relationship. Joel Bishop wrote in the 1891 version of his treatise that “[n]o man has the absolute right to do as he will, either as against other men or as against the public.” This was not particularly controversial. But, Bishop went on to write that “as in respect of some things, the public good is the overshadowing matter” and persons may not enter into contracts that violate public policy. What kind of contracts might violate public policy? Well, for one, characterizing marriage as an ordinary civil contract. The executed marriage, Bishop opined, was actually a “status”—the rights and responsibilities of which could be regulated by the states.²⁹⁰

²⁸⁹ For a legal definition of *contubernium*, see Black’s Law Dictionary (5th Ed.) (St. Paul: West Publishing, Co., 1979) 298. On application of *contubernium* under state law, see *Jackson ex dem. People v. Lervey*, 5 Cow. 397 (Sup. Ct. N.Y. 1826); *Malinda & Sarah*, 24 Al. at 723.

²⁹⁰ Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* (Chicago: T.H. Flood & Co., 1891) I:1-15.

Thus, in less than two centuries, Anglo-American political and legal thinking had gone from rejecting status as a basis for position in society, to accepting contract as defining that relationship, and then back to status again. However, as property and contract rights faded into the background of constitutional protection during the latter nineteenth century, and early twentieth century, another legal theory—that of equality of treatment under the law—gained strength and, in fact, became the preferred theoretical basis for challenging disparate treatment between same and opposite-sex couples.

Of all the so-called “Reconstruction Amendments,” the Fourteenth Amendment to the United States Constitution (ratified in 1868) is arguably the most important, and unquestionably is the most litigated, constitutional provision today. Section one of that amendment provides, in pertinent part, that no state “shall deny to any person within its jurisdiction the equal protection of the laws.” While the plain text of the “Equal Protection Clause” provides only applies to states, the Supreme Court has ruled similar protections, restricting the federal government, can be found in the Fifth Amendment Due Process Clause.²⁹¹ But, what, precisely, does “equal protection” mean? Neither the state nor the federal government has ever treated everyone completely “equally” and we are probably the better for this as anyone who has ever flown commercial aviation will attest their distrust for allowing a blind pilot. So, how far does the guarantee of “equal protection” go? Who must be treated equally and precisely how far must the guarantee of equality be taken?

²⁹¹ *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964) (“[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’”)

Generations of American law students are taught that those who are similarly situated—for our purposes, here, gay couples and straight couples—must be treated equally unless the government (be it state or federal) has a compelling reason to treat them differently. No statute, at either state or federal level, prohibits same-sex individuals from entering into any other contractual arrangement but that of marriage. The explanation typically given for this prohibition is that marriage, historically, has been an arrangement between partners of the opposite sex. But, is there an historic justification for restricting acquisition of property rights between same-sex couples?

What is curious about the history of the Equal Protection Clause is that it had virtually no history at all for nearly a century after becoming a part of the Constitution. With few exceptions, courts all but ignored the amendment's guarantee of equality and allowed everything from the "separate but equal" doctrine that formed the backbone of Jim Crow to interment of Americans of Japanese descent during the Second World War. "Civil equality," declared John Burgess, "is the first principle of modern justice." But, discussion of the Equal Protection Clause is wholly absent from his 1902 treatise on *Reconstruction and the Constitution, 1866-1876*. Famed Justice Oliver Wendell Holmes even mocked equal protection claims as the "usual last resort of constitutional arguments" when nothing else would work. It was not until 1954, and the seminal case of *Brown v. Board of Education*, that the Equal Protection Clause of the Fourteenth Amendment was, finally, taken seriously. Nearly fifty years after Justice Holmes dismissed equal protection arguments as not worthy of consideration, Justice Potter Stewart observed the clause was now "the Court's chief instrument for invalidating state law." By 1996, the United States Supreme Court acknowledged "[a] prime part of the

history of our Constitution . . . is the story of the extension of constitutional rights . . . to people once ignored or excluded.”²⁹²

This is not to say marriage, and marital issues, were absent from Supreme Court jurisprudence. Though a right to marry is never mentioned explicitly in the Constitution, the United States Supreme Court has discussed its importance on a number of occasions. Though subject to regulation by state legislatures, the Court noted in 1887, “[m]arriage [creates] the most important relationship in life.” Marriage and procreation, commented the Court in 1941, are “fundamental to the very existence and survival of the race.” Indeed, the marriage relation creates problems of large social importance which includes protection of property interests and enforcement of marital responsibilities. Finally, after more than a century of commentary, the Court recognized the existence of marriage as a fundamental, albeit unenumerated right in the 1966 case of *Loving v. Virginia* which struck down anti-miscegenation laws that barred interracial marriages.²⁹³

There can be no doubt that the Equal Protection Clause is a compelling argument for advocates of same-sex marriage. After all, equal treatment of all peoples is something this nation has aspired to, whether we have reached it or not, and carries the connotation

²⁹² John W. Burgess, *Reconstruction and the Constitution, 1866-1876* (New York: Charles Scribner’s Sons, 1902) 70; for the comments of Justice Holmes, see *Buck v. Bell*, 274 U.S. 200, 208, 47 S.Ct. 584, 71 L.Ed. 1000 (1926); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873 (1954); for a review of the history of Equal Protection jurisprudence prior to *Brown*, see John E. Nowack, Ronald D. Rotunda and J. Nelson Young, *Constitutional Law* (St. Paul: West Publishing, 1986) 523-574; *Zablocki v. Redhail*, 434 U.S. 374, 395, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (Stewart, J., Concurring); *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

²⁹³ *Maynard v. Hill*, 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1887); *Williams v. North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 143 A.L.R. 1273, 87 L.Ed. 279(1942); *Loving v. Virginia*, 388 U.S. 1, 11-12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1966).

that no person (or group of persons) should be afforded a privilege not afforded to everyone else. But, as the Equal Protection Clause gained currency in Supreme Court review, the notion of marriage in terms of “liberty of contract” and property rights faded into the background. This is unfortunate because there is little in our constitutional culture that carries the same weight as the right of free people to create and arrange property interests as they see fit without approval of government at either the state or federal level. Thus, while Jack Baker and James McConnell applied for a marriage license in 1970 for economic reasons, contemporary same-sex marriage cases typically come before state high courts based on the Equal Protection Clause arguments rather than the question of fundamental property rights.

The *Baker v. Nelson* decision in 1972 may not have encouraged same sex couples to fight for marriage rights but neither did it wholly discourage them either. A lesbian couple who fought denial of a marriage license around the same time as Baker and McConnell received roughly the same treatment when a Kentucky court rejected their various arguments in less than two pages concluding they were not entitled to a marriage license “because what they propose is not marriage.”²⁹⁴ Court cases continued to pop-up

²⁹⁴ *James v. Hallahan*, 501 S.W.2d 588, 590 (KY App. 1973). The following year a court in Washington rejected the Equal Protection argument advanced by two men but at least took their many arguments seriously and carefully considered them. The court also noted that restricting marriage to opposite sex couples was clearly related to the public interest in affording a favorable environment to raise children. See *Singer v. Hara*, 522 P.2d 1187, 1196-1197 (WA. App. 1974).

here and there, around the country, during the 1980s²⁹⁵ and into the 1990s²⁹⁶ but the results were always the same.

Consequently, when Hawaii became the first state to rule in favor of same sex marriage in 1993, that ruling was like a Tsunami from the Pacific that crashed into the mainland causing jubilation in same-sex marriage proponents and striking terror in the hearts of its opponents. The ruling in *Baehr v. Lewin* was actually quite narrow. Same-sex marriage, said the Hawaii Supreme Court, was not implicit in the concept of ordered liberty nor did failure to recognize it violate fundamental principles of liberty and justice under either the United States or Hawaii constitutions. Indeed, rather than adhere to previous federal jurisprudence recognizing an overall right of marriage, the Hawaii Supreme Court—as had many previous state courts—qualified the right as being one to “same-sex marriage” and indicated it was not inclined toward recognition of a “new fundamental right.”²⁹⁷ But, that aside, the Court ruled, the Hawaii Constitution banned discrimination based on sex and the prohibition against issuing a marriage license to

²⁹⁵ See e.g. *DeSanto v. Barnsley*, 476 A.2d 952 (PA. Super. 1984) (ruling that two men could not form a “common law” marriage and thus a domestic relations court properly dismissed a divorce complaint one of them filed.)

²⁹⁶ See e.g. *Dean v. District of Columbia*, 653 A.2d 307, 331 (ruling “same sex marriage” is not a fundamental right.)

²⁹⁷ Judicial focus on the right in question as being “same sex marriage” rather than simply “marriage” is reminiscent of the rhetorical sleight of hand by Justice White in *Bowers v. Hardwick*, 478 U.S. 186, 190, 192 (1985) where he phrased the right in question as one to commit “homosexual sodomy.” Eighteen years later in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) Justice Kennedy pointed out that such phrasing “demeaned” the claim at issue which was, in fact nothing more than a liberty (privacy) claim of whether consenting adults could engage in non-commercial sex acts in the privacy of their own home.

same-sex couples appeared to violate that ban thereby rendering it unconstitutional under the state constitution.²⁹⁸

The *Baehr* case was a clear victory for proponents of same sex marriage because it changed the dynamic of the playing field. No longer could courts simply brush aside constitutional challenges to laws restricting marriage to opposite sex couples. But, in two ways, that victory was pyrrhic as well. First, the prospect of same sex marriage galvanized opponents both in Hawaii and the continental United States. Hawaiians later amended their Constitution to restrict marriage to opposite sex couples. Half a world away, in Washington DC, the United States Congress passed and President Clinton signed the Defense of Marriage Act (DOMA). The Tsunami was effectively stopped, at least for awhile.

Another failure of the *Baehr* case was that it was decided on the basis of a state constitutional clause banning discrimination. While that is all well and good, the court's decision effectively rendered Equal Protection (or similar arguments) the battlefield on which the marriage wars would be fought. Liberty of contract and the freedom to acquire property, however, are far older than the Fourteenth Amendment. Further, as I will show later, the property rights at issue in marriage are quite valuable and deprivation of those

²⁹⁸*Baehr v. Lewin*, 852 P.2d 44, 50, 54-67 (HA. 1993). Though most of the Court's reasoning was analogous to traditional equal protection arguments, it still recognized the marital partnership is something to which both parties "bring their financial resources" and marriage connotes a variety of property, tax and other economic benefits. *Id.* at 58-59. Same sex marriage never went into effect in Hawaii. The case was remanded to the trial court to see if the state could prove a compelling interest for denying marriage to same sex couples. On remand, the trial court concluded that the state could not prove such an interest and entered an injunction prohibiting denial of marriage licenses to same sex couples. *Baehr v. Miike*, CIV. No. 91-1394 (HA C.C 1996) 1996 WL 694235. That ruling was later stayed, however, and before the stay was lifted Hawaii amended its Constitution to prohibit same sex marriages.

property rights, either by federal or state governments, impedes not only creation of personal wealth as well as national capital formation, it is an even older affront to founding principles.

Property (money) was cited as one justification by Congress in passing in DOMA but only in the context of preserving the government's property. The House Judiciary Committee, for example, cited the protection of "scarce" government resources as the fourth of its four purposes for sending DOMA to the full House. Citing veteran's benefits as an example, the committee explained that if it did not codify a definition of marriage as one man and one woman into federal law, a veteran in a same-sex marriage could ask for increased benefits for a dependent same sex spouse. Federal benefits are extended to married couples, according to the House Committee, to "promote, protect, and prefer the institution of marriage" and recognition of same sex marriages ran counter to that objective. Such protection of the public fisc, however, still took a backseat behind defense of (1) traditional marriage, (2) traditional morality and (3) state sovereignty and democratic self-governance as reasons for making DOMA law.²⁹⁹ In July, 2010, that portion of DOMA which defines marriage as the union of one man and one woman for purposes of federal law was declared unconstitutional as having no rational basis for support and being based on nothing more than prejudice. The Plaintiffs in *Gill v. Office of Personnel Management* were all federal workers who either wanted to obtain medical or other benefits for their same sex partners or who wanted to obtain benefits on behalf of a deceased same-sex partner. Attorney General Eric Holder announced the Justice

²⁹⁹ House Judiciary Report No. 104-664 accompanying H.R. 3396 (Jul. 9, 1996) in 5 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 104th Congress, 2905-2923.

Department will not appeal that ruling, punting the ball squarely into the court of Congress where Speaker John Boehner has stated it will be defended.³⁰⁰

Despite lip service to the economic benefits of marriage in legislative history on DOMA or the District Court's decision in *Gill*, It should come as no surprise that the few states which have so far ruled in favor of same-sex marriage have done so through a state constitutional equivalent of the Fourteenth Amendment Equal Protection Clause. The most recent state case to do so, Iowa, in *Varnum v. Brien*, was based on the state constitutional guarantees of equal protection. The Iowa Supreme Court even went so far as to announce it would apply "heightened scrutiny" to legislative classifications based on sexual orientation – a status even the United States Supreme Court consistently refuses to apply.³⁰¹ To date, however, the closest any state high-court has come to citing property rights as basis for allowing same-sex marriage was the Massachusetts Supreme Court in *Goodridge v. Department of Public Health* in 2003. Despite its noting that "[a]bsolute equality before the law is a fundamental principle of [the commonwealth's] constitution," the Court also noted marriage provides an abundance of legal, financial and social benefits as well as imposes some "weighty" financial obligations. Still, equal treatment not property carried the day as the Court ruled that there exists a "liberty" in marriage and an absolute equality of marriage before the law.³⁰² Equal protection

³⁰⁰*Gill v. Office of Personnel Mgt.*, No. 09-10309-JLT (U.S.D.C. Mass. 2010);

³⁰¹*Varnum v. Brien* (IA 2009), 763 N.W.862, 875-902.

³⁰²*Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (MA. 2003). Still, the Court noted, civil marriage in the commonwealth had always been a "secular institution" and the marriage license itself granted many valuable property rights including a number of state economic benefits premised on the marital contract. See *Id.* at 955-960.

arguments under state or federal constitutions thus seem to have carried the day with regard to arguments on same sex marriage. Whether that trend continues, however, remains to be seen—particularly in light of the attention afforded to economic and property rights by the District Court in *Gill*.

The same-sex marriage debate currently playing itself out in California reveals contract and property arguments have not entirely given way to “equal protection” type arguments. In February 2004 San Francisco caught the nation’s attention when it began issuing marriage licenses to same-sex applicants. State law only allowed such licenses to be issued to opposite sex couples but San Francisco Mayor, Gavin Newsom, based on rulings in other states, concluded that the California law violated equal protection guarantees in that state’s constitution. The Mayor thus asked the City Clerk to implement a system for allowing licenses to issue to same-sex couples and the clerk readily complied. Lawsuits were filed almost immediately to stop the practice and, later that year, the California Supreme Court ordered the San Francisco City Clerk to cease issuing the licenses in contravention of state law.³⁰³

The sole question before the Court in 2004 was whether a county official could issue marriage licenses that did not comply with California law. Not surprisingly, the Court answered in the negative and held county officials had no authority to take it upon themselves to determine the constitutionality of a statute they had a ministerial duty to enforce. In so ruling, however, the Court emphasized it was not ruling on a substantive constitutional right of marriage. This case, the Court noted, was no different than one

³⁰³*Lockyer v. City and County of San Francisco*, 95 P.3d 459 (CA. 2004).

that might be brought against a recalcitrant city clerk elsewhere in the State who refused to comply with the State's domestic partnership laws simply due to personal antipathy against domestic partnership.³⁰⁴

The substantive constitutional question of marriage was squarely placed in front of it, however, in the 2008 case of *In re Marriage Cases*. The California Supreme Court began its review of the state statute mandating opposite-sex only marriage by describing marriage as a “fundamental,” “inalienable,” “civil right.” This right—although not expressly set out in the state's constitution—could nevertheless be found in the explicit constitutional guarantee of privacy as well as the state's “due process clause.” Marriage, the Court observed, was more than just a relationship stamped with the imprimatur of state approval. It also encompassed “a core set of basic legal rights” including, among many others, “mutual rights and responsibilities” toward one another. What the Court clearly meant in this phrase was the reciprocal duties of support—in short, a property interest—that is only acquired through a marriage or other form of contract.³⁰⁵

Turning then to the Equal Protection Clause of the State Constitution, the Court went farther than any other had done to date and found “sexual orientation” was a “suspect class,” which in legal parlance means that any statute which treats one orientation different from another will be subject to “strict scrutiny.” A “strict level” of scrutiny all but guarantees a law will be found unconstitutional and California's opposite-sex only marriage statute was no exception to that rule. California was unable to justify

³⁰⁴ The Court's reasoning can be found at *id.*, 465-480, and its explanation of the narrowness of the issue before it can be found at *id.*, 463-464.

³⁰⁵ *In re Marriage Cases*, 183 P.3d 384, 399, 419-420 (Cal. 2008).

its disparate treatment and, thus, the Court ordered that marriage licenses must be issued to same-sex couples who met all other marriage requirements under law.³⁰⁶

Same-sex marriage was thus legal in California as of the date of that decision—May 15, 2008. But, the window of opportunity was not there for long. A ballot initiative was quickly put together in time for the general, presidential, election of 2008. California’s Proposition 8 (Prop. 8) asked the voters whether the state constitution should be amended to restrict marriage to opposite-sex couples only. The initiative passed during the November election. Prop. 8 was immediately challenged in California courts but that challenge went nowhere.

Clearly having grown weary of the issue,³⁰⁷ the California Supreme Court ruled Prop. 8 was a legal amendment to the state constitution. The ballot initiative, according to the Court, carved out a limited exception to the state’s equal protection, due process and privacy guarantees. Same-sex couples had not really lost any substantive legal rights—presumably referring to domestic partnership laws which were still in effect—they simply lost access to use the word “marriage” to describe their relationships. But, the Court declined to invalidate those marriages which had been contracted during the six month window during which they were legal. Those couples who wed during that window, the Court held, acquired “vested property rights” as lawfully married spouses. Those rights included, among other, certain “employment benefits, interests in real property, and inheritances.” A retroactive application of Prop. 8 would disrupt thousands

³⁰⁶ Id. at 442-452, 453.

³⁰⁷ *Strauss v. Horton*, 207 P.3d 48 (CA. 2008). The Court complained it was forced to review this issue for the “third time in recent years” and announced its decision here as the “third chapter of this narrative.” Id. at 49.

of actions taken in reliance on California law before the election and would throw property rights into disarray destroying the legal interests and expectations of innumerable couples and families and potentially undermining the ability of citizens to plan their lives according to the law as it had previously been determined.³⁰⁸

The latest salvo in the California battle over same-sex marriage came in *Perry v. Schwarzenegger* in August, 2010, when the United States District Court for the Northern District of California ruled Prop. 8 was unconstitutional as violative of both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Much like the California Supreme Court ruled in *In re Marriage Cases*, the federal District Court found Prop. 8 constitutionally deficient under any standard of federal equal protection review. The Court also ruled that sexual orientation was a suspect class and legislative distinctions based on that classification should thereafter be subject to heightened scrutiny.³⁰⁹

The issue of marriage as a civil contract was given scant attention in Judge Walker's opinion and, even then, only in reference to evidence from a defense expert, David Blankenhorn, of the "Institute for Marriage Values," which the Court found lacking in credibility. Blankenhorn characterized marriage as having "six dimensions." The first of these dimensions was as a "legal contract" and the second was as a "financial partnership." An opponent of same-sex marriage himself, even Blankenhorn conceded

³⁰⁸ Id. at 75, 78, 122. At least one Justice disagreed with the majority's decision to uphold Prop. 8 observing that "requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution[.]" The majority's holding "not only allows same sex couples to be stripped of the right to marry . . . it places at risk the state constitutional rights of all disfavored minorities." Id. at 129 (Moreno, J. Concurring in Part and Dissenting in Part).

³⁰⁹ *Perry v. Schwarzenegger*, U.S.D.C. (N.D. CA) Aug. 10, 2010, 117-135 (unreported).

these two dimensions, as well as the other four, operated the same for gay unions as for straight ones. While the opponents of Prop. 8 were no doubt delighted with a defense who contradicted himself in this area, Judge Walker ultimately found Blankenhorn “unreliable” and gave his opinions “no weight.”³¹⁰

What the *Perry* decision lacked in contract analysis, however, it more than made up for in its recognition of the economic aspect of marriage and its status of a means by which to create property and to protect wealth. Citing research by University of Massachusetts, Amherst, economist Lee Badgett, Walker pointed to various socio-economic reasons for recognizing same-sex marriage including, but not limited to, protection of property—particularly, in the context of income, taxation and other economic benefits. California domestic partnerships afforded some relief from the disparity of treatment between same-sex and opposite-sex marriage but did nothing to address economic problems such as higher taxes and reduced access to health insurance.³¹¹

³¹⁰ *Id.* at 39-51.

³¹¹ *Id.* at 86, 90 & 91. The year before she testified in *Perry*, Badgett published results of her research examining European same-sex marriage in an attempt to extrapolate what results may be in this country. Badgett found Americans more concerned with “the legal and material benefits of marriage” than our European counterparts, but this may also be the result of a greater European social safety net, combined with a greater emphasis on property rights in this country. In any event, Badgett cites both practical economic benefits emanating from marriage, such as the claim of a non-earning spouse on joint property, as well as more theoretical concerns like specialization of labor, reducing transaction costs and taking advantages of economies of scale. See M.V. Lee Badgett, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (New York: New York University Press, 2009) 43, 127, 178-181.

Marriage, the court noted, is the foundation of the private realm of property transmission. Indeed, “marital status” affects property, tax policy and inheritance rules. Plaintiffs in *Perry* sought recognition of their marriage, the Court noted, in order to obtain (among other things) the “mutual obligation” associated with marriage.³¹² In short, the parties to that marriage contract sought to impose an obligation of support between the two of them and pledged their respective properties as collateral to support that pledge. Romantic allusions aside, there is little difference between this arrangement and any other commercial obligation of support incurred by the two parties. Though Judge Walker spent little time on the property rights created by, or associated with, marriage, those rights must be considered in a free-market capitalist society that gives primacy to creation, ownership and protection of private property. The economic benefits of marriage are too numerous to list, let alone discuss, and I will not attempt to do so here. But, there are a few broad generalizations which merit consideration for those already concerned with the diminished importance of private property in a post-*Lochner* world.³¹³

First, there are many incorporeal—or inchoate—property interests states allow legally wedded spouses to claim in one other. One of the more important of these is the reciprocal duty of support. At common law, husbands were required to provide their

³¹²*Perry*, supra, at 70, 113-114.

³¹³ Economists noted that there are “more than 1,000” property and tax benefits conferred by federal law alone including benefits under Social Security, the right to make gifts tax free and the ability to file joint income tax returns. Richard H. Thaler, “Gay Marriage Debate is About Money Too,” *New York Times* (19 Feb. 2012) Bus. Section pp. 3. The irony, of course, is that opposite-sex couples complain of the marriage “penalty” in the tax code whereas same sex couples, deprived of the opportunity to pool joint deductions from “adjusted gross income,” would welcome application of that “penalty.”

wives with (e.g. food, clothing and shelter). This duty was a vestige of Coverture and became increasingly anachronistic in light of numerous changes to state domestic relations laws during first and second wave feminism. Some state courts responded by abolishing the duty of support altogether, thus leaving it to legislatures to impose statutory reciprocal duties on both spouses, whereas other state courts simply extended the common law duty of support to the wife by adjudication.³¹⁴ So, for instance, if one spouse is gravely ill, and without insurance or the financial means to pay for medical care or support, the other spouse is then required by law to provide whatever is feasibly possible for medical treatment before federal and state Medicaid programs kick-in. This duty of support not only benefits the dependent spouse, thus making it a valuable property interest in itself, but it also protects the property of the general public. Given state budget crises of the last few years, requiring a domestic partner with means to care for the other domestic partner without means, helps preserve the public fisc. This reciprocal legal duty of support is not imposed on unmarried couples in general³¹⁵ or on same sex couples in particular.³¹⁶ Opposite-sex paramours can easily obtain the benefit through marriage but, except in a handful of states, it is not available to same sex couples.

³¹⁴ American Bar Association, *Your Legal Guide to Marriage and Other Relationships* (Chicago: ABA Public Education Division, 1989) 16. On the common law duty of men to support their wives, see *Jones v. Jones*, 18 Me. 308, 312-313 (1841); *Shelton v. Pendleton*, 18 Conn. 417, 422-423 (1847); *Clark v. Lott*, 11 Ill. 104, 113-116 (1849). For an excellent legal history on the transformation of the husband's duty into a spousal reciprocal duty, see *Medical Business Associates, Inc. v. Steiner*, 183 A.D.2d 86, 90-98, 588 N.Y.S.2d 890 (N.Y.A.D. 2nd 1992).

³¹⁵ *Elden v. Sheldon*, 46 Cal.3d 267, 275, 758 P.2d 582 (1988).

³¹⁶ *Phillips v. Wisconsin Personnel Commission*, 167 Wis.2d 205, 220, 482 N.W.2d 121 (1992).

Most states allow non-married couples to acquire reciprocal benefits of support through contracts, but drafting such an arrangement might not occur to people and, even if it did, not everyone has the financial means to retain a lawyer to draft the proper document(s).

Another important property interest that one spouse has in the other is the right to hold a third party tortfeasor liable for negligent injury which deprives them of “consortium” in that other spouse. Spousal consortium claims under most state laws usually extend to such intangible elements as comfort, companionship, love, affection, sexual relations and the many other benefits that come from marriage. American common law long held that husbands could sue third parties who deprived them of a wife’s consortium. But, again, as a remnant of coverture, states were slow to recognize the existence of that right in the wife although most states have now done so either by statute or court decision.³¹⁷ Suffice it to say, however, because there exists no reciprocal duty of support between unmarried couples, and because the extent of their relationship and assessment of damages is too speculative, unmarried same-sex couples cannot bring an action for loss of consortium.³¹⁸

³¹⁷ D. Richard Joslyn, “Wife’s Right of Action for Loss of Consortium,” 36 *Annotated Law Reports* (1971) 900-931.

³¹⁸ On the definition of consortium, and the elements of loss of consortium claims under state law, see generally *Gail v. Clark*, 410 N.W.2d 662, 667-668 (IA. 1987). On the refusal to extend loss of consortium claims to unmarried same-sex partners because of the remoteness of their relationship, see *Elden*, *supra* at 278-279. The New Jersey Supreme Court even denied a claim for loss of consortium brought by a wife due to injuries to her husband that occurred two months before their marriage. “[E]ntitlement to recovery for loss of consortium, “ the Court ruled “is based on the plaintiffs’ interest in their relationship with one another” and the existence of a legal marriage at the time of the injury was the only means by which gage the existence of that relationship.” *Childers v. Shannon*, 183 N.J.Super. 591, 594, 444 A.2d 1141 (N.J.Super. 1982).

A related right is that of a spouse to sue a tortfeasor for infliction of “wrongful death” on the other spouse. All states have enacted, in one form or another, wrongful death statutes that permit a surviving spouse to sue for money damages when the other spouse is killed as a result of the negligence of a third party. But, those statutes also specify those actions may only be brought by a surviving spouse and, in a case where there is no surviving spouse, and no surviving children, the right passes back to the decedent’s parents.³¹⁹ No state permits an unmarried same-sex partner to bring such a lawsuit. Neither a wrongful death suit, nor a loss of consortium claim, are problematic in states that recognize same-sex marriage. But, in those states where it is not recognized, a dependent spouse can be left without any means of support when the other spouse is injured or killed. It is also worth noting that, while states may allow unmarried couples to create a reciprocal duty of support contractually, no contract can ever override state restrictions on who can assert a loss of consortium claim or bring wrongful death actions.

These are but a few of the incorporeal property rights spouses acquire relative to one another as a result of the marital relationship. Just as important, if not more so, is the “wealth creation effect” of marriage. Simply put, a legal marriage creates a new, conjoined, economic unit which can facilitate a far greater accumulation of economic assets than is enjoyed by unmarried couples even those who are cohabiting. Institutionalized relationships of this sort allow for division of labor, pooling of income and economies of scale that simply are not present in single economic unit households. Though the same benefits may arguably come from mere cohabitation, without legal marriage, Linda J. Waite and Maggie Gallagher argue that this is not so because the

³¹⁹ Victor E. Schwartz, Kathryn Kelly & David F. Partlett, *Prosser, Ward and Schwartz’s Torts* (New York: Foundation Press, 2000) 566-576.

legally binding marriage contract gives each spouse the security needed to specialize and invest in each other over the long run. Cohabiting, unmarried, couples tend to be more uncertain of the future of the relationship and hesitate to specialize or commit to take care of the other person financially. Waite and Gallagher conclude that “being married in itself seems to encourage the creating and retention of wealth” or, at the very least, married couples are less likely to fall into poverty. By contrast, for unmarried cohabitants, the length of the relationship has no effect on wealth accumulation. Indeed, marriage counselors during the twentieth century preached that getting married, and staying married, was the key to economic stability and entry into the middle class. The converse is also true. A 2011 study by the Pew Charitable Trusts found that never-married women were sixteen to nineteen percentage points more likely to be downwardly mobile than married women and men were six to ten percentage points more likely to be downwardly mobile if they never married. The Family Service Association of America (FSAA) even ran advertisements equating marriage with middle class homeownership and suggested its natural opposite was unemployment and social instability. “Marriage is a means of getting and staying out of poverty,” argues Rich Lowery of *National Review*. “The poverty rate for single-parent families is six times that of married families.”³²⁰ It

³²⁰ Thomas J. Stanley, *The Millionaire Mind* (Kansas City: Andrews McMeel Publishing, 2000) 235; Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier and Better off Financially* (New York: Doubleday, 2000) 26-39, 97-114; Gregory Acs, Downward Mobility From the Middle Class: Waking up From the American Dream, The Pew Charitable Trusts (September, 2011) 11, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Pew_PollProject_Final_SP.pdf (accessed 11 September 2011); Rebecca L. Davis, *More Perfect Unions: The American Search for Marital Bliss* (Cambridge: Harvard University Press, 2010) 9, 30-31, 81-83; Rich Lowery, “Just Not the Marrying Kind,” *Time* (5 March 2012) 13.

stands to reason that if the greater society was benefitted economically by encouraging opposite sex couples to marry, the same would be true of same sex couples.

The constitutionality of same sex marriage, not to mention the basis under which it would be deemed unconstitutional, is still very much up in the air.³²¹ The *Perry* case is currently before the federal Ninth Circuit Court of Appeals. As expected, the briefs (including numerous amici briefs) focus primarily on Equal Protection argument and virtually ignore the contract and economic issues which, as noted above, are critically important to a free-market society such as ours that champions both the creation and retention of private property. The *Gill* case is also on appeal and it remains to be seen how, and on what basis, DOMA is declared to be unconstitutional. Although conservative factions in this country continue to press for traditional *Judeo-Christian* view of marriage, the second decade of the twentieth century has also seen the rise of the self-proclaimed “tea party” movement which supposedly rejects any government intervention into private lives of American citizens and favors, instead, individuality and the primacy of private property. If the so-called “tea party” elements are true to their own ideals, this would suggest a rejection of government intrusion that blocks the acquisition and protection of private property. If the so-called “tea party” elements align with conservative principles, however, this would tend to show they are not as loyal to their anti-government base as previously believed.

³²¹ That said, however, I am very much aware that the swift-changing pace of same-sex marriage may arguably render this chapter moot by the time I defend this dissertation. Still, I would predict the decision of the United States Supreme Court will be based on the concepts of Equal Protection and/or Liberty as those terms from the Fourteenth Amendment have come to be delineated. Although I do not necessarily object to that reasoning, the Court has not (outside of the Windsor ruling) given any credence to the issue of property rights.

To be sure, even in the absence of same-sex marriage laws, couples of any stripe can resort to the principles of contract to protect them in their relationships. Last Wills and testaments, for instance, can take the place of intestacy statutes and living wills can even designate the individual to make final medical decisions in a crisis. But, the availability of these options presume both a knowledge of such alternative arrangements and a means by which to obtain them (i.e., hiring a lawyer). Many same-sex couples, like their opposite-sex counterparts, will never even think to have these arrangements set out ahead of time or may not have the financial wherewithal to achieve them. “Gay marriage” was not even seriously considered when their opposite-sex counterparts began to consider ante-nuptial agreements to alter traditional marriage arrangements imposed on them by state law. Numerous States were slow to recognize the validity of such agreements—a byproduct of the contemporary thinking that contracts between employers and employees were unenforceable—but, over time, courts have acquiesced in the validity of these agreements. Same-sex couples may, of course, implement them but they do not have the same force and effect as those arrangements entered by same-sex couples.³²²

The gay marriage debate must also be considered in light of passage of the “Marriage Equality” law in New York in summer of 2011. For the first time in history, gay marriage legislation was enacted by a state where the Republican party controlled a part of that state’s legislature. Though passage of any equality mandate, whether based on race, gender, sexual orientation or even national origin, should be commended in any

³²² William H. Hohengarten, “Same-Sex Marriage and the Right of Privacy,” 103 *Yale L.J.* (1994) 1495-1531, 1499.

circumstance, the fact is that New York all but completely overlooked the effect this arrangement would have on property rights, now, and creation of property rights in the future.³²³ The economic effect of gay marriage, though, is no secret. Social recognition of such relationships are all well and good but, when asked a number of Long Island same-sex couples cite “legal barriers,” “joint bank account[s]” and other such “realistic” planning as the reason to celebrate the new law in New York. Not only is there an economic benefit to same-sex couples themselves, but recognition of these unions also spurs economic growth for New York amongst those businesses which hope to attract gay couples to the Empire State to enter matrimony. Even state and local coffers will benefit, in the short term, from what is expected to be an immediate “surge” in applications to marry across New York.³²⁴

Marriage means a number of different things to a number of different people, including a very real, very sacred, secular status that is inextricably tied up with religious connotations. That belief is certainly worthy of preservation and churches should never be required to recognize same sex marriage. But, the fact remains Anglo-American legal tradition, from the Reformation to American colonization, treats that status as a secular contract and a means by which to arrange property interests of parties to that union.

³²³ The press release of New York Governor Andrew Cuomo stressed same-sex and opposite-sex couples were to be treated the same for purpose of New York Domestic Relations Law. See “Governor Cuomo Announces Passage of Marriage Equality Act,” (24 Jun. 2011) <http://www.governor.ny.gov/press/06421passageofmarriageequality> (accessed 28 Jun. 2011).

³²⁴ Victor Manuel Ramos, “Same-Sex Marriage: LI Gays Share Their Stories,” *Newsday* (27 Jun. 2011) A35; “Gay Weddings Mean Big Business,” <http://money.cnn.com/galleries/2011/smallbusiness/1106/gallery.gay> (accessed 29 Jun. 2011); Nicholas Confessore and Michael Barbaro, “At Clerk’s Offices, Girding for More Weddings: New Same-Sex Marriage Law in New York Expected to Bring Influx of Couples,” *New York Times* (26 Jun. 2011) A20.

These issues are lost to our contemporary discourse, however, because of the fundamental constitutional and social changes which occurred in the twentieth century. The first change was a vastly diminished importance placed on both contract and property rights during the post-*Lochner* rise of the welfare state. This was America's transition from "classical" liberalism, with its emphasis on individual rights, to "New Deal" liberalism, which emphasized individual protection from the vicissitudes of economic fluctuation. The second change in the twentieth century that resulted in diminished attention to individual property rights was the long-overdue advent of Equal Protection jurisprudence as a means to achieve social justice. Nobody can seriously argue that, while protection of private property is all well and good, it neither achieves racial equality nor ends gender inequality that plagued the United States for most of its existence. Given that a truly free-market society requires absolute equality of economic interests and an emphasis on private property rights, the absence of equality, simply does not serve the interests of anyone in this country. Be that as it may, a rejection of private property is neither feasible in the U.S. nor is it a practical point of departure on the debate as to whether accumulation of economic interests is a way to overcome discrimination between people. In short, there is a place in our current debate over same-sex marriage for the numerous property and contract arguments that were so prevalent for most of America's history.

There is little doubt in my mind that a rational person would refuse to accept anything from this thesis. Ownership of property rights in the body? Where did that come from? One's ownership of rights in their own body, from where do we get that? It is nothing short of ironic that anyone who champions a free market and free enterprise

would ever align themselves with a legal-political culture which affords a degree of economic value to particular transactions with which many Americans would prefer not to recognize at all. The sale of body tissue, beginning with blood and sperm, and proceeding to the renting of human uteri as a means by which to carry on reproduction for couples who are infertile, or prefer not to carry a fetus to term (for one reason or another), are all clear examples of the “body” being used by those who own it to make a profit. Surrogate mothers rent their wombs; sperm donors sell their genetic material. In short, despite the extent to which we deny it, our bodies (or at least some parts of our bodies) are no doubt economic assets which we possess and from which we should be able to extract some degree of financial support when sold, rented or leased. Such practices should not be undermined or devalued, but should (instead) be acknowledged for the economic benefit they have brought to society and will continue to bring to society.

Should genetic material of people like Henrietta Lacks be allowed to enrich a few corporate interests at the expense of a family who would have enjoyed some profit had their ancestor’s DNA been an oil or gas lease rather than a patented human genome? What is the difference between aggressively replicating cancer cells and oil/gas deposits subject to modern technology of fracking? Recognition of property interests, I submit, are greatly variable not just along racial divisions but also along class divisions. Would exploitation of the Lacks genome, for example, have continued had the donor been white, male or wealthy? I contend it would not but this is simply a matter of speculation.

Similarly, on the issue of same-sex marriage, coupling of parties have always shown combination of *intrinsic* property (meaning the parties themselves) have led to

creation of *extrinsic* property in the form of the “wealth effect” of marriage. Neither property, nor contract, as mentioned earlier in this dissertation, are expressly enumerated within the Constitution and, thus, they carry lesser safeguards against infringement than enumerated rights. Still, whatever one’s opinion of property and contract as unenumerated economic rights, the fact that these intrinsic property values are so important to creation of extrinsic property value, warrant their valuation even if not recognized explicitly as extrinsic property rights. The arguments and decision in the Windsor case indicate at least some acknowledgement of property right and contract rights even though the cases subsequent thereto seem more focused on Equal Protection guarantees of the Fourth Amendment rather than protection of property rights.

CHAPTER VII

CONCLUSION

*[T]he only dependable foundation of personal liberty is the economic security of private property.*³²⁵

There is, as I have argued in this dissertation, no real distinction between the existence of private property and the existence of individual liberty interests in the body. They are, in fact, one in the same and were treated the same from the founding until today. The only reason this sounds strange to contemporary listeners is because of the existence of what I characterize in my introduction as a *lost rhetoric* of Anglo-American property rights. This phrase is neither meant as a mere rhetorical convention, nor is it intended as a twentieth century remnant (or twenty-first century attack) against the principles of socialism by those for whom, unfortunately, have no idea of the evil against which they wish to inveigh.

As Francis Fukayama tells us, modern history ended with the disintegration and defeat of the Soviet Union in 1991.³²⁶ What I mean to recall here, instead, is not that Anglo-American principles that property and individuality were merged for most of our history even if proponents of the former never truly acknowledged the importance of the

³²⁵ *Snell v. Wyman*, 281 F.Supp. 853, 871 (D.C.N.Y. 1968).

³²⁶ [Get citation]

latter. In short, for various reasons—both moral and otherwise—many opponents of the collective merging of property that produced economic benefits argued it benefitted a regime. Furthermore, to the extent the two concepts were ever acknowledged, few of their adherents realized the significance of property rights to the exercise of individual property rights in the body.

To argue that property in the economic context should be free from government restraint, but then to argue for government regulations affecting both reproductive rights and same-sex marriage, is to ignore that property exists in both the economic sense (real property or personal property) and in the individual, and more modern, sense of contractual relations. Regulation of *intrinsic* property, whether in the form of restricting reproductive rights, or even in prohibiting same-sex marriage, inhibits creation of *extrinsic* property. A failure to recognize the extrinsic ownership of property, either as it applies in the case of same-sex marriage, or in the case of sale/rental of bodily functions like surrogacy or the sale of same-sex organs or services like surrogacy, ignores the concept of capital formation which is intrinsic to a property-based, free-market, society.

Intrinsic property, in short, promotes the growth of extrinsic property. Whether there exists a moral approbation to the former, affecting the growth of the latter, is little more than the argument as to whether a chicken affects the egg, or vice versa. Formation of capital, in a capitalist system, requires that there exist an economic system wherein accumulation of capital and its growth are facilitated, or at least not inhibited, by the government. Recognition of the human body as being external property, and then acknowledging its results—through one form of sale or another—thereby allows the

consideration of the human body as property and thus remains true to the notion that property and contract both feed into the notion of privacy.

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