The Private Rights of Organizations:

The Tangled Roots of the Family, the Corporation, and the Right to Privacy

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Buried within the well known arguments of the 1819 U.S. Supreme Court case *Dartmouth College v. Woodward* lies an intriguing analogy between corporations and marriages. Both institutions, argued an attorney for the state of New Hampshire, owed their legal existence to the government, and therefore the government retained the right to change the ways in which they were legally defined. At stake in the case was a New Hampshire law that altered the college’s royal charter by changing the composition of its corporate board. The plaintiffs charged that this statute violated the contract clause of the Constitution, a claim that New Hampshire’s attorney countered by comparing the state’s action to a grant of divorce. Divorces, he observed, “unquestionably impair the obligation of the nuptial contract” by changing “the marriage state, without the consent of both the parties,” but the enactment of divorce legislation was clearly within the purview of state government. “Surely,” he asserted, “no one will contend, that there is locked up in this mystical clause of the constitution a prohibition to the States to grant divorce.” The charge that New Hampshire violated the Constitution when it modified the college’s charter was, in his view, equally spurious. Corporations, like marriages, were civil institutions which “every society has an inherent right to regulate as its own wisdom may dictate.”

The Supreme Court, of course, found against New Hampshire. Determining that Dartmouth College was a private corporation and as such protected by the contract clause of the Constitution, the Court ruled that New Hampshire could not unilaterally alter the

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1 Attorneys’ arguments in *Dartmouth College v. Woodward*, 17 U.S. 518 (1819).
composition of Dartmouth’s board or any other aspect of the college’s charter. The Court’s strong assertion of the inviolability of corporate charters did not mean that state governments lost their control over corporations as a matter of actual practice.

Legislatures soon found that they could get around the Court’s ruling by inserting clauses into charters that reserved their right subsequently to alter the contract’s terms. Nonetheless, as we will show in this essay, the Dartmouth decision marked a significant transition in American law. In insisting on the contractual rights of corporations as private organizations, the Court helped to formalize a broader transformation that was restructuring the government’s relationship to private organizations, including both corporations and families.

In contrast to the attention that historians have given to Dartmouth’s ruling about corporate contracts, the New Hampshire attorney’s secondary point about marriage contracts has received little notice. Although it is tempting to view his analogy to divorce as purely rhetorical, both Chief Justice Marshall in his opinion for the Court and Justice Joseph Story in his concurring opinion took pains to reverse the underlying logic by interpreting the analogy differently. For them, the key point was that marriage vows established the couple as a private organization with the same right of protection from state interference as corporations. Marshall pointed out that divorce laws did not operate to impair marriage contracts, but merely allowed a court “to liberate one of the parties”

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from a contract that had “been broken by the other.” “When any State legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other,” he added, “it will be time enough to inquire, whether such an act be constitutional.” Story agreed, remarking that divorce laws were like statutes “regulating remedies in other cases of breaches of contract” and as such “may be the only effectual mode of enforcing the obligations of contract.” If the legislature were to dissolve a marriage contract “without any breach on either side, against the wishes of the parties,” he was “not prepared to admit” that that this action “would not entrench upon the prohibition of the constitution.”

Pushing his version of the analogy further, Story asserted that it was “not easy to perceive” why the dissolution of a marriage contract “duly solemnized” should not fall within the constitutional prohibition in the same way “as any other contract for valuable consideration.” With this revealing turn of phrase, Story’s commitment to the private, contractual basis of marriage ran up against his belief in the prescriptive rights of husbands over their wives. Any legislation that allowed a wife to annul a marriage without her husband’s consent would be prohibited by the Constitution because “a man has just as good a right to his wife, as to the property acquired under a marriage contract.” To divest him of this right “without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate.”

As we read this passage today, Story’s departure from the discussion of marriage as a private contract between equals clearly undercuts the force of his analogy. And yet, this same elision enables us to perceive another parallel between marriages and

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corporations that Story and the other justices at best only dimly recognized: that the internal governance of corporations was hierarchical in much the same way as the internal governance of families. Indeed, the inequality that Story took for granted in the relationship between husband and wife was in many ways similar to the inequality that characterized the relationship between controlling and non-controlling members of corporations. As we will show, moreover, the principle that the Supreme Court articulated in *Dartmouth* that corporations have private rights worked to reinforce these inequalities, just as Story’s explication of the private rights of the marriage relation rapidly devolved into a defense of the rights of the husbands over their wives.

The analogies drawn in *Dartmouth College* between the marriage contract and the corporate contract open the way to a broader historical consideration of two important developments in nineteenth-century America that are clearly related but rarely considered together. The first is the emergence of an ideal of privacy; the second, an ideology of laissez faire. Although there are large literatures on both of these subjects, they rarely intersect. The literature on privacy mainly focuses on the family and has been preoccupied to a large extent with the concept of domesticity and separate spheres. The literature on laissez faire focuses on the economy and has debated the extent to which

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government intervened in the economy to regulate business activity. As the *Dartmouth*
arguments indicate, however, the notions of familial privacy and private enterprise that
developed in the nineteenth century also have surprising affinities. An examination of the
ways in which American courts drew institutional boundaries around both the family and
business helps to bring these two literatures together. By tracing the early legal
demarcation of an institutionally defined “private domain,” it also becomes possible to
perceive how the history of the family and the history of business made remarkably
similar contributions to a distinctively American interpretation of privacy rights.

Our research suggests that families and business corporations increasingly took on
quasi-governmental functions in the half century following the American Revolution.
During the colonial period local officials had regulated the internal affairs of these
organizations in the name of the King, but the anti-governmental thrust of the Revolution
presented these collectivities with an opportunity to claim the right to govern themselves.
Their assertions of autonomy broadened the definition of private rights to encompass the
rights of organizations. At the same time, they helped to delineate a new kind of
public/private divide within American law, effectively placing large areas of economic
and personal life beyond the reach of the state. The foundation of the government’s
regulatory authority, its police powers, remained largely intact, but now only the most
egregious violations of the law could justify interfering in the internal affairs of families
and corporations.

The emergent nineteenth-century recognition that organizations had private rights
advantaged some of their members at the expense of others. Those in dominant

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8 Contrast, for example, William J. Novak, *The People’s Welfare: Law and Regulation in
Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); and Herbert
positions—especially male heads of households and directors of corporate boards—benefited from their ability to wield these rights in the name of the group. However, as the organizational rights of families and corporations increasingly trumped the individual rights of their members, those in subordinate positions, such as wives and minority shareholders, lost ground. With the state no longer willing to intervene in these organizations to protect their interests, they became increasingly vulnerable to abuse.

As the nineteenth century gave way to the twentieth, wives, minority shareholders, and others in similar positions made increasing demands on the state for protection, asserting that their rights should now take precedence over those of the collectivities to which they belonged. Even as rights became more individualized and egalitarian, however, the earlier claims of organizations to autonomy continued to affect their legal development. Indeed, when the Supreme Court formulated a new Constitutional right to privacy in the late twentieth century, it drew upon precedents defending the private rights of families and corporations rather than those of the individuals within them. As we suggest in the epilogue, this history goes far toward explaining the peculiar way in which individual privacy rights have come to be defined in the contemporary United States.9

The evidence at the core of our argument comes from early nineteenth-century state appellate court cases, important legal treatises, and major Supreme Court decisions. Both the domestic and the corporate legal histories of the period furnish abundant examples of individuals who sought remedies in the courts for damage done to them by more powerful individuals within their households or businesses. Our study concentrates mostly on two types of abuse: violence against wives and financial injuries to minority shareholders. In both sets of cases plaintiffs probed the limits of judicial willingness to intercede within families and corporations at a time when the relationship between the state and non-governmental institutions was gradually being redefined. As a group the cases highlight the courts’ increasing deference in post-revolutionary America to the privacy of familial and corporate relationships and their consequent refusal to discipline interactions between husbands and wives or among corporate shareholders. It is not our contention that actual instances of domestic and corporate abuse became more common as a consequence of this refusal. Instead, our aim is to document the notable contraction of remedies offered by the legal system and the simultaneous convergence of familial and corporate law around a common principle of organizational privacy.

The Transition from Early Modern Patriarchy

During the early modern period most descriptions of the internal organization of British families, like churches and other social institutions that involved ordinary people, stressed a vertical structure of authority with the head of the household at the top. Husbands dominated wives, parents dominated children, and masters dominated servants. In theory, the household head, like the bishops of the church or the officers of
corporations, wielded powers delegated to them by the King (as well as prescribed by
God). According to this top-down system of government, the royal state legitimately
extended its reach into these institutions and could intervene in their internal governance.

The growth of royal power in the sixteenth and seventeenth centuries also
increased the power of heads of families. Individual householders of lesser status were
able to assert greater control over members of their own households as they broke free of
feudal obligations to local noblemen and the clergy. Changes in English property laws,
especially the Statute of Wills of 1540, expanded the rights of small landowners to sell
their lands and design their legacies. Fathers could more easily disinherit their children;
husbands could, if they wished, more easily restrict what they left to their widows. In
religion, the Reformation’s depreciation of the sacred status of the clergy and the King’s
displacement of the Pope resulted in a greater emphasis upon religious practice and
education within the home. Household heads assumed a quasi-priestly as well as a quasi-
monarchical function within the family.

For several reasons, this growing power of heads of households was if anything
greater in the British American colonies than in England. Most importantly, perhaps, the
far more extensive land ownership in America gave a larger proportion of men the means
to exert leverage over the next generation through the control of inheritance. The

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10 For a synthetic description of this development as applied to all Europe, see Pavla Miller, The Transformation of Patriarchy in the West, 1500-1900 (Bloomington: Indiana University Press, 1998), pp. 13-40.

11 For an excellent survey of these developments see Shammas, History of Household Government in America.


13 On the intergenerational dynamics between farmer fathers and sons, see Anne S. Lombard, Making Manhood: Growing Up Male in Colonial New England (Cambridge: Harvard University Press,
relative weakness of other disciplinary organizations like schools, craft guilds, poorhouses, orphanages, standing military units, and jails also strengthened the authority of household heads.\textsuperscript{14} Local officials generally placed the indigent (including young children) with families, where they assumed the status of indentured servants at minimal cost to the community.\textsuperscript{15} In many areas outside New England even churches remained scarce for generations.\textsuperscript{16} Individuals almost all received their supervision, their skills, their religious education, and their sustenance within the bounds of the household.

And yet, as in England, women and children of propertied families in early America still enjoyed certain privileges that at times gave them autonomy from their husbands and fathers. Children could sign their own service contracts, testify in court, and sit on juries.\textsuperscript{17} Women could use equity law to maintain separate property from that of their husbands, and both women and children, particularly in the Southern colonies, could inherit entailed property that curtailed the ability of the heads of their households to

\textsuperscript{14} The multi-functionality and centrality of the colonial family in the absence of other institutions is stressed in Bernard Bailyn, \textit{Education in the Forming of American Society} (Chapel Hill: University of Carolina Press, 1960). As Shammas emphasizes in her \textit{Household Government}, the centrality of the family boiled down to supremacy of household heads.


\textsuperscript{16} In early New England the institutions of church and state wielded comparably more authority than elsewhere in the colonies, supplementing and reinforcing the authority of heads of households, but their power was undercut after the Restoration. Valuable works on this subject include Edmund S. Morgan, \textit{The Puritan Family} (Rev. edn.; New York: Harper and Row, 1966); Mary Beth Norton, \textit{Founding Mothers and Fathers: Gendered Power and the Forming of American Society} (New York: Random House, 1996); Gloria L. Main, \textit{Peoples of a Spacious Land: Families and Cultures in Colonial New England} (Cambridge: Harvard University Press, 2001); and Shammas, \textit{Household Government}.

\textsuperscript{17} Holly Brewer, \textit{By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority} (Chapel Hill: University of North Carolina Press, 2005).
Most importantly, governments throughout colonial America still possessed the right to discipline heads of households who were derelict in meeting their responsibilities and even, in extreme situations, to deprive them of legal authority over their wives, children, servants, and slaves.  

The egalitarian spirit of the American Revolution permanently diminished status differences among adult (white) males and broke apart the integrated hierarchical ordering of authority that, during the colonial period, had run from the head of state down into the family through the person of the household head. No longer could it be as easily assumed that free men near the bottom the social order could not reliably perform their duties as heads of households and hence needed to be overseen by superiors. Even though property requirements for the franchise remained largely in place, the revolutionary premises of individual natural rights and popular sovereignty dissolved most class-based legal distinctions between adult white men. As the Revolution elevated the position of ordinary male citizens, deferential attitudes towards the rich and the powerful diminished, and ordinary men felt entitled to act autonomously in what they increasingly regarded as their private domains.

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The revolutionary experience not only promoted the ideal of equality but fostered a profound suspicion of government. The distrust of British rule carried over into distrust of all (even republican) government, a legacy of the Revolution that became a permanent feature of American political ideology. Turning away from the heroic idea of disinterested citizenship, literary and religious culture increasingly idealized marriage and family as an alternative site of morality and tranquility set apart from the corrupt machinations of politics. Along with this idealization came sentimentalized portrayals of women and children as innocent and pure, images that had already become staples of upper and middle-class polite fiction and prescriptive literature in the late colonial period. But the widening gap between this idealized view of private life and the suspicion of public life, if anything, undermined the few attempts to extend equal civil and political rights to members of the household other than the male head. The egalitarianism of the Revolution did, to be sure, result in the abolition of slavery in the North, where the institution was weakest, and it produced greater educational opportunities for women and children. But neither the belief in natural rights nor the sentimentalization of domesticity did much in the short run to change the hierarchical organization of the household itself.

By undermining the justification for government intervention in the internal affairs of most households (the exception remained in the case of men who belonged to ethnic or racial groups deemed inferior), the egalitarian and libertarian ideas of the


Revolution gave rise to a new model of society in which the state would perform a more limited set of functions that were complementary to, rather than continuous with, household “government.” While heads of households, as citizens and voting participants in politics, ostensibly represented their dependents in government, they were no longer as clearly the agents of government. The Revolution in this sense produced an asymmetrical division between, on the one hand, the loss of the King’s inherent right to rule over the people and, on the other, the continuation of the inherent right of masters and patriarchs to rule over slaves, servants, wives, and children. Older customs and laws upholding the authority of adult white men in their homes remained largely in tact, while the authority of government to intervene on behalf of victimized dependent family members declined.23

The Colonial Law of Spousal Abuse

The most striking example of this change is the treatment of spousal abuse. Under the English common law of the late seventeenth and eighteenth century abused wives possessed a right to charge their husbands with the crime of breach of the peace, a right that differed from the legal options available to other victims of violence.24 Felony laws theoretically protected any subject of the King who fell victim to murder,

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manslaughter, mutiliation, or other extreme physical injuries. Lesser acts of violence, however, tended to be treated as matters to be settled between individuals rather than as crimes against the state. Prosecutions of those accused of assault and battery were initiated by private parties rather than by the government even when the court exacted its own small fine. Scarcely ever were assailants put in jail unless there were aggravating circumstances like attempted robbery. The main remedy that English law extended to victims of assault was the right to launch private suits to seek monetary compensation for their injuries.25

In the case of a married woman injured by someone outside the household, the rules of coverture entitled only the husband to seek payment for damages. The legal disabilities of married women also prevented abused wives from suing their husbands. The possibility of “suing for the peace,” however, meant that the laws of marital coverture did not entirely divest them of their rights as subjects of the King. For centuries battered wives, unlike abused servants or children, had been given the right to go to a local magistrate and orally report the beating (or even the threat of a beating). If the official was persuaded by the account of the violence, he was obliged to issue a warrant that imposed bonds or sureties to guarantee the “peace” or the good behavior of the husband.26 As in other charges of breach of the peace, the peace being maintained was that of the King’s realm, not the household per se. Whereas assault and battery involving men tended to be viewed as a “private wrong,” the theoretical victim of a wife-


26 Going back at least to the authoritative sixteenth-century treatise by Anthony Fitzherbert, as well as to reported English case law from the first half of the seventeenth century, legal authorities stipulated that wives who suffered maltreatment could “have the peace” against their husbands. Such sources are cited by Blackstone, *Commentaries*, Book I, Ch 15, p. 433, and Book III, Ch. 8, 139.
beating was the kingdom or the commonwealth rather than the wife as an individual, and
her suit for the peace was a criminal rather than a civil action. In seventeenth-century
New England a few colonies went a step beyond this common law prohibition of wife
beating by passing additional criminal statutes that subjected husbands who struck their
wives to potential incarceration and corporeal punishment.27 The act of hitting one’s wife
thus carried a political meaning often ignored in the legal response to ordinary fights
between men.28 Just as husbands possessed legal authority as agents of government, the
household was fundamentally viewed as an extension of the state.

Of course none of these laws meant that there was effective enforcement; nor is it
possible to gauge how much wife beating occurred. Justices of the peace left no formal
records of their impromptu discretionary decisions, and the formal right of a beaten wife
to sue for the peace neither supplied her with the needed courage to exercise that right nor
guaranteed that her local justice would be sympathetic. The few wife-beating cases that
made it to trial under the New England laws were most likely only the tip of an iceberg.29
In the mid-eighteenth century Sir William Blackstone wrote that the English “lower rank”
persisted in the belief that wife-beating remained a husband’s “ancient right” long after
the courts had established its illegality.30 How far a husband could go in “moderately” or
“reasonably” correcting (or “chastising”) his wife remained ambiguous. The majority of
legal commentators whose works were printed in the American colonies, however,
exempted from felony charges masters disciplining servants (or slaves) and parents

27 Pleck, Domestic Tyranny.
28 Edwards, “People’s Sovereignty and the Law.”
29 On the paucity of cases, see Lyle Koehler, A Search for Power: The “Weaker” Sex in
Seventeenth-Century New England (Urbana: University of Illinois Press, 1980), pp. 49, 137; Dayton,
Women Before the Bar, pp. 136-7.
30 Blackstone, Commentaries, Book 1, Ch 15, p. 443.
disciplining their children—but not husbands beating wives. The very existence of this right stemmed from her status as a royal subject of higher status than either children or laborers. The underlying legal logic held that the family was part of the public domain and that the state’s delegation of power to the male head did not change the fact that the basic welfare of its members was ultimately the responsibility of the King.

Although the colonial conception of family government legitimated judicial interference in the actions of household heads, it also worked to reinforce family ties by rendering them binding and compulsory. A married woman might be able to enlist the protection of government to restrain her abusive husband, but she had little ability to leave the marriage on the grounds of his cruelty. Since the Middle Ages English ecclesiastical courts had recognized cruelty in addition to adultery and desertion as a legitimate basis for requesting a legal separation, but after the Reformation such cases became increasingly rare.

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31 The mid-eighteenth-century English treatise writer Matthew Bacon, *New Abridgement of the Law* (London: E. and R. Nutt, 1736), Vol. I, p. 285, whose work was available (but not printed) in the colonies, wrote that the husband “may beat her, but not in a violent or cruel manner.” We surveyed ten justice of the peace manuals (not including seven reprints) printed in eighteenth-century America between 1722 and 1799, and only three mentioned the possibility of wives being legally chastised. All three were noncommittal, using language borrowed verbatim from the English jurist William Hawkins to report that “some say” that a husband may in a “reasonable manner” chastise his wife. See Richard Burn, *An Abridgement of Burn's Justice of the Peace* (Boston: Greenleaf, 1773), p. 29; *Conductor Generalis: or The Office, Duty and Authority of Justices of the Peace* (New-York: Printed by John Patterson, 1788), p. 32; and [John Fauchereaud Grimké, comp.], *The South-Carolina Justice of Peace* (Philadelphia: R. Aitken & Son, 1788), p. 24.


have been dissolved on the grounds of cruelty alone until the late eighteenth century. At most, cruelty was charged in combination with adultery or desertion, or departed wives raised abuse as a counter-charge when husbands initiated suits on the grounds of desertion. 34 Even the Puritans, who were unique in allowing full divorce with the right to remarry, virtually never ended marriages for reasons other than desertion or adultery. The separate Puritan legislation making wife beating a crime was arguably not only to protect women but to provide a stronger legal framework for officials to correct the abusive behavior of irresponsible husbands within the context of lasting marriages. Everywhere in the colonies legal exit from marriage required, in effect, that the marriage was already over: several years of abandonment or, in the case of men making adultery charges against married women (seldom was it the reverse anywhere), the potential of illegitimate children. American colonists rarely if ever defended wife beating as the husband’s marital right, but they expected marriages to endure despite the abuse.

The Early Nineteenth-Century Law of Spousal Abuse

As government retreated from the regulation of family life after the Revolution, courts became less likely to perceive wife abuse as a distinctive violation of the public order and more as a matter of dispute between unequal individuals. Men who beat their wives now faced a greater possibility of court-ordered divorce with alimony and of prosecution for assault and battery which could result in fines and even imprisonment. Technically, at least, abused women gained access to more types of legal recourses, and


the range of punishments to which abusive husbands might be subjected extended beyond that of being bound to the peace. The greater likelihood of violent husbands facing criminal charges for assault and battery, however, had less to do with a response to domestic violence than to a more general tendency to treat lesser acts of physical aggression, including fights between men, more seriously. Whereas minor injuries to individual men were previously ignored or relegated to civil suits, they now came to be treated more frequently as criminal misdemeanors to be tried and punished by the state.

The criminalization of male-on-male violence stands in sharp contrast to the concurrent changes in the treatment of wife-beaters. Although some local magistrates continued to exercise their traditional authority to hear complaints of abused wives and to decide whether to issue warrants to their husbands, their power to determine the outcome of such cases steadily declined over time. In part this development needs to be set in the context of a larger structural transformation of the American court system in the decades after the Revolution: the lower judiciary lost much of its former independence, becoming more accountable to juries and to state appellate courts; and professional police and prosecutors gradually assuming more responsibility for reporting crimes and bringing them to courts. A particularly graphic demonstration of the attrition of the older remedy of suing for breach of the peace can be found in early nineteenth-century changes to justice of the peace manuals. Whereas almost half of the manuals at the beginning of the century included passages on a wife’s right to sue for the peace, the proportion fell

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steadily over time until references to this remedy almost completely disappeared during the second half of the century. ³⁷ An 1839 opinion of the Vermont Supreme Court commented directly on the unavailability of this remedy in the course of adjudicating a case of a husband who had threatened to ambush and kill his wife. The Court acknowledged that at common law “the person threatened can swear the peace against the offender, and obtain redress in that way,” but, since “this mode of preventive justice has not been much resorted to, if, indeed, it exists in this state,” the justices instead considered whether the man’s offense should be classified as an assault and battery (despite his not having yet acted on his threat) or a breach of the peace (since the threat had been made not to his wife directly but to other people in the community). In this case, a divided Court ruled that, on balance, the husband’s real crime was breaching the peace because many “good citizens of the state” had been terrified when encountering the armed man’s “tumultuous and offensive carriage.”³⁸

More typically threats against wives occurred inside the home, and such cases were no longer perceived by courts as violations of the public order. Instead, wife beating in the nineteenth century became incorporated into the enlarging category of criminal assault and battery. Despite the similarity of the charge, however, assaults by husbands on their wives were rarely treated as seriously as fights between men. For a husband to be charged and convicted, the level of violence typically needed to reach the threshold of threatened death or permanent injury. Compared to the older procedure of suing for the peace, with its more informal reliance on the discretion of the local magistrate and the

³⁷ Bloch’s study, with John Dixon, of a large sample of these tests, found that 44 percent of the manuals contained the language in 1800-09, 30 percent in 1830-39, 10 percent in 1850-59, and none in 1880-89.
implied threat to the wider community, a battered wife bore in addition a much larger
burden of presenting physical proof.

Unless their lives were at risk, the injuries abused wives suffered as individuals
seemed of little significance compared to the higher priority of keeping the state out of
the family. Judges faced with domestic violence might deplore it and even (in the case of
wives more than children) recognize its illegality, and yet refuse to act against it out of
respect for familial privacy. As an 1838 article in a legal magazine extravagantly
summed up the prevailing attitude of the courts, it was as if “the punishment of death”
applied to all who “interfered in the quarrels of man and wife. Experience, that tutor of us
all, has taught us, that judges, jurors, and other officers of the court, are the only sufferers
from such accusations.” Families were screened by the courts from legal intervention
by a “curtain,” according to a favorite phrase of nineteenth-century jurists, and the benefit
of preventing minor physical injuries paled in significance to keeping that curtain
closed.

Some justices took the private rights of the family a step further and justified wife
beating as a means for the husband to maintain familial governance. It is debatable
whether the infliction of corporeal violence upon a wife (as distinct from restraint and
confinement) had ever been sanctioned in English law, and yet a number of early
nineteenth-century American legal authorities asserted that husbands still enjoyed a
“traditional” right to chastise their wives physically. Thanks largely to a bizarre 1824

39 As quoted in Lawrence Friedman, Crime and Punishment in American History (New York:
40 On the key connection between wife beating and familial privacy, see Reva B. Siegel, “The
Rule of Love’: Wife Beating as Prerogative and Privacy,” Yale Law Review, 105 (June 1996), pp. 2117-
2207; and Laura F. Edwards, Gendered Strife and Confusion: The Political Culture of Reconstruction
(Urbana: University of Illinois Press, 1997). Examples of the “curtain imagery” include State v. Black, 60
NC (Win.) 262 (1864); State v. Rhodes, 61 N.C. 453 (1868); State v Oliver, 70 N.C. 60 (1874); Abbott v.
Abbot, 67 Me. 304 (1877).
decision by the Mississippi Supreme Court, the notion that striking a disobedient wife could be legal took on a new life. Justice Powhatan Ellis’s confused opinion allowed that a husband could beat his wife punitively so long as he used an implement no wider than his thumb. Ellis attributed this “rule of thumb” to legal precedent when it actually seems to have derived from an irreverent caricature of a judge printed in the late eighteenth-century English press. Somehow the joke became a piece of legal folklore that circulated as far as Mississippi and became lodged in Ellis’s memory. His casual use of precedent also enabled him to distort Blackstone as having presented the corporal punishment of wives as an enduring feature of the English common law when, as we have seen, Blackstone considered it a point of English pride that precedent-setting seventeenth-century judicial decisions had prohibited it.

Despite the errors riddling Ellis’s argument, the view that the common law permitted husbands to punish their wives physically received judicial support in several other nineteenth-century court decisions and legal writings, particularly in the South. In a decision similar to Bradley, the Court of General Sessions in Delaware in 1838 ruled that a husband was only indictable for “undue or excessive battery of his wife, either in degree or with improper means.” A series of rulings between 1850 and 1880 by the Supreme Court of North Carolina took especially permissive positions towards men who

42 Henry Angsger Kelly, “Rule of Thumb and the Folklaw of the Husband’s Stick,” Journal of Legal Education, 44 (September 1994), pp. 341–65. Kelly traces this lineage and exposes the mythology underlying the so-called “rule of thumb.” Kelly is less reliable, however, in his insistence that medieval and early modern common law had all along protected wives from serious abuse and that nineteenth-century courts followed this earlier pattern. Cases that reveal a continuing belief in the “rule of thumb” after Bradley include the lower court decision reversed by State v. Rhodes, 71 N.C. 453, in 1868 and the judge’s comments in the 1874 case of State v Oliver, 70 N.C. 60.
43 Even using this fallacious reasoning, the Mississippi Court agreed that the batterer, Calvin Bradley, was guilty—not because he beat his wife, but because he made no attempt to prove that the beating was justified by her misbehavior.
44 State v. Buckley, 2 Del. (2 Harr.) 552 (1838),
inflicted injuries on their wives. Summarizing the difference between the standards for assault inside and outside of marriage, North Carolina’s Chief Justice Nash in 1852 acknowledged that a “light” slap on the cheek or “any touching of the person of another in a rude or angry manner” qualified as an assault and battery in ordinary circumstances, but he insisted that this standard “cannot” in “the nature of things” apply to husbands and wives.\footnote{State v Hussey, 44 N.C.123. In the Rhodes case (71 N.C. 453) Judge Reade similarly starts with opinion with the observation, “The violence complained of would without question have constituted a battery if the subject of it had not been the defendant’s wife.”} In \textit{State v. Black}, Chief Justice Pearson determined in 1864 that a husband could not be convicted of a battery on his wife unless “he inflicts a permanent injury or uses such excessive violence or cruelty as indicates malignity or vindictiveness.”\footnote{State v. Black, 60 N.C. (Win.) 262 (1864).} The language used by Pearson to justify the chastisement of wives, without “malice” or “vindictiveness” echoed similar judgments about the permissible beatings of children and slaves.\footnote{On children, see Pleck, \textit{Domestic Tyranny}, pp. 76-77. Most cases of child abuse until late in the century involved teachers, not parents (for example, the precedent setting 1837 case, \textit{State v. Pendergrass}, 19 N.C. 365, in which the violence needed to cause permanent damage or be inflicted merely to gratify “evil passions”). In the case of slaves, few masters were ever held accountable, but attacks were occasionally judged sufficiently “malicious,” “wonton,” and “cruel” to warrant criminal charges. Thomas D. Morris, \textit{Southern Slavery and the Law, 1618-1860} (Chapel Hill: University of North Carolina Press, 1996), esp. pp. 178-179, 196-203; Andrew Fede, “Legitimized Violent Slave Abuse in the American South, 1619-1865,” \textit{The American Journal of Legal History} 29 (1985): 93-150.} The rules of coverture added still more force to his argument: “A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself.”\footnote{State v. Black, 60 N.C. 262.} In three subsequent cases the North Carolina bench similarly determined that injuries were too
“trifling” to warrant the verdict of assault against a husband even if the violence was, in itself, illegal.49

The Southern location of this permissiveness towards wife beating comes as no surprise to historians familiar with the Southern paternalistic defense of slavery and the weakness of the women’s rights movement in the South. What is more surprising is that significant numbers of jurists in the North also lent credence to the husband’s right of chastisement. Partly in response to Bradley and other Southern decisions, a debate opened up on the right of physical chastisement that persisted until late in the nineteenth century. On one side were many Northern writers who joined Blackstone in repudiating wife beating. The first major American treatise on the law of marriage, Tapping Reeve’s Law of Baron and Feme of 1816, celebrated the colonial history of his state of Connecticut where “the right of chastising a wife is not claimed by any man.” Without commenting on other parts of the United States, Reeve admitted that he found it “difficult to ascertain, with exactness, what power the husband has over the person of his wife,” but expressed “much doubt” that the prevailing common law “would indulge the husband in correcting a wife on the same ground … [as] a servant or a child.”50 Several northeastern appellate decisions in the 1820s and 1830s more categorically denied the husband’s right of chastisement. In 1824 the Pennsylvania court relegated the practice to a bygone era along with other “barbarous” customs of the old common law, such as the use of the ducking stool to punish scolds.51 Important opinions issued in New York and New Hampshire in the 1830s similarly invoked the current “moral sense of the community” to

49 State v. Rhodes, 61 N.C. 453 (1868); State v. Mabrey 64 N.C. 592 (1870); State v. Oliver 70 N.C. 60 (1874).
50 Tapping Reeve, Baron and Feme (New Haven: Oliver Steele, 1816), p. 65.
51 James v. Commonwealth, 12 Serg. & Rawle 220 (PA, 1824).
condemn the right of chastisement as wrong regardless of what “the old books may say on the subject.”

More equivocal was James Kent, the Chancellor of New York, who in his major treatise, *Commentaries on American Law*, expounded the doctrine that, “as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person.” Kent did not sanction the infliction of outright violence but, conforming to the principle laid out in *Lord Leigh’s Case* of 1674 and citing several other English opinions, held that a husband may “put gentle restraints upon her liberty, if her conduct be such as to require it.” The Philadelphia legal scholar Francis Wharton similarly spoke to both sides of the issue in his 1846 *Treatise on the Criminal Law of the United States*. He held that “the tendency” in current criminal courts was to deny husbands the right to chastise their wives, but he also reported the precedent of *Bradley*, without repudiating it, to illustrate the wide range of American opinion. *A Treatise on the Right of Personal Liberty* by Ohio lawyer Rollin C. Hurd, published in Albany, New York, in 1858, devoted a chapter to “The Husbands Supposed Right of Chastisement.” Hurd himself denied its legitimacy, but he, too, made a similar point about the lack of consensus in the United States by citing both *Bradley* and an 1822 Kentucky decision as countenancing “the husband in the exercise of [his]

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53 James Kent, *Commentaries on American Law* (New York: O. Halsted, 1832), Vol. 2, p. 180. This passage was not in the first edition of volume 2 published in 1827. Hartog identifies both Kent and Reeve as being unusual in their support of equity principles in a context where the common law rule of coverture generally reigned supreme (*Man and Wife in America*, p. 21). Equity law in the nineteenth century does not seem to address the abuse of wives, however, except in the context of separation and divorce. Despite his modulated position, Kent was cited in *Fulgham v. State*, 46 Ala. 143 (1871), as an authority who had endorsed the husband’s right of chastisement.

The “Declaration of Sentiments” issued by the first women’s rights convention in Seneca Falls in 1848 included the acceptance of wife beating as one of the outrages perpetuated upon women by the common law. Women’s rights advocate Elisha Hurlbut, a justice on the New York Supreme Court, similarly used Kent’s endorsement of physical restraint as an illustration of what was wrong with existing law, adding sarcastically that “the good old common law” even permitted wife beating with “a rod not larger than the thumb.” In 1891 Irving Browne, a prominent legal writer in Troy, New York, contrasted the nineteenth-century history of American and English law on wife beating. Observing what he called the “curious fact” that the right of husbands to beat their wives had been “much more discussed and even judicially recognized” in the United States than in England, he drew no regional distinction between the North and the South.

Efforts to try abusive husbands in court were also handicapped by lingering questions about the eligibility of wives to testify against their husbands. In 1799 the attorney representing a Pennsylvania man who had thrown his wife in a fire argued that “it is now settled” under the English rules of coverture that a woman could not be “admitted for or against her husband.” He lost the case, but a long-lasting debate over the extent to which spouses enjoyed immunity against each other’s testimony continued well into the nineteenth century. One of the gray areas in this dispute proceeded from the

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59 *Pennsylvania v. James Stoops*, in *Addison’s County Court Reports; or Reports of cases in the County Courts of the Fifth Circuit* (Washington [Pa.]: John Colerick, 1800), pp. 381-384.
widespread acknowledgement that the English common law traditionally allowed an abused wife to sue for the peace by going to her local justice of the peace, and yet many legal writers considered her testimony in a court trial to be another matter. Only when she was the sole witness, ruled the South Carolina Court in 1811, following some English authorities, could she be called as a witness against her husband. ⁶⁰ In the North state courts continued to ponder the limits of a wife’s testimony at least into the 1830s. In what became widely known as “Soule’s Case,” the Maine Supreme Court in 1828 ruled definitively in favor of a wife’s right to testify against an abusive husband, a decision that was frequently cited by later American jurists as having settled the issue.⁶¹ And yet, in 1834 the Maine Court ruled that a wife suing for divorce on the grounds of cruelty could not admit evidence from his previous trial for assault and battery because of her testimony against him. Since it appeared “that there was a trial in the case, and that the wife was a witness, the record was not admitted.”⁶² In North Carolina arguments denying the wives’ right to testify against husbands who assaulted them continued to be heard until at least the Civil War, with the court ruling in important cases in 1852 and 1864 that a wife could do so only when the violence was “excessive” or caused permanent injury.⁶³ That some authorities suggested that the injury had to be actual physical violence (battery) for the wife to testify and not merely a credible threat of it (assault) similarly raised the barrier higher for abused wives than for others facing similar dangers.⁶⁴

⁶² Woodruff v. Woodruff, 11 Me 475 (1834).
⁶³ State v. Hussey, 44 N.C. 123 (1852); State v. Black, 60 N.C. (Win.) 262 (1864).
⁶⁴ As late as 1904 many state statutes on spousal immunity, including those of California, Idaho, Nevada, North Carolina, made an exception in cases of abuse only when there had been actual “violence”
When considering cases of divorce on cruelty grounds, nineteenth-century courts similarly adhered to restrictive definitions of what kinds of behavior were sufficiently “cruel” to justify ending a marriage. The widespread judicial opinion that to qualify for divorce an act of cruelty had to be life-threatening or lead to permanent injury was asserted already by the Massachusetts Supreme Court in *Warren v. Warren* in 1807. Jurists making this point often cited the highly conservative standard of cruelty defined in the English separation case, *Evans v Evans* of 1790. In an influential ruling of 1819 based extensively on Evans, Chancellor Kent reluctantly granted a separation to a wife who had suffered repeated and extreme violence at the hands of her husband but tacked on a proviso insisting that the ruling was only “a very inconvenient suspension” of the marriage and that reconciliation should follow once the “wounds of deadly hate” had healed. New York, which did not permit absolute judicial divorce in cases other than adultery until 1967, was exceptionally conservative compared to other northern states. But when it came to determining what kind of behavior could be defined as cruelty, New York’s decisions in the early nineteenth century were little different from those of other states. After the Connecticut legislature added “extreme cruelty” as grounds for divorce

(wheras the crime of assault which required only the realistic threat of violence evidently did not qualify for the exception). A list of the relevant statutes is conveniently contained in John Henry Wigmore, *A Treatise on the System of Evidence ... including the Statutes and Judicial Decisions of All Jurisdictions of the United States* (Boston: Little Brown, 1904), Vol. 1, § 488 (esp. pp. 593-629).


in 1843, for example, an appellate court decision interpreted this language to mean “savage, barbarous, inhuman,” “of that character as to be intolerable, not to be borne.” Citing the Massachusetts *Warren* case of 1807, *Evans* from England, and Kent’s *Commentaries* in support of their decision, the four judges on the panel divided three to one in ruling in 1845 that forced sex and confinement, even when the wife’s health might be unintentionally damaged, did not qualify as “legally cruel.” In Pennsylvania the high court in 1857 and 1860 twice reversed a divorce decree made by lower court juries in favor of Elizabeth Richards whose husband had twisted her nose. The high court agreed the husband’s violence was deplorable, but objected to the breakup of the marriage because the wife could not prove that it had rendered her life intolerable. Accusing the lower court of “misplaced chivalry,” the appellate judges strenuously denied that “all unlawful and barbarous acts” justified ending “the most sacred of human relations.” “That which will sustain an indictment for an assault and battery will not justify a divorce.”

Without condoning the right of chastisement, Northern courts were especially likely to overlook the violence of husbands whose anger was aroused by their wives’ provocative behavior. As the Massachusetts Court held in a precedent-setting separation case of 1808, “There must be extreme cruelty, without the fault of the wife, to authorize the Court to liberate her from the control of her husband.” The view that a judgment of cruelty depended on the wife not being “at fault” held sway for decades. As Norma Basch’s recent study of divorce has amply documented, even when women sued on

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69 *Shaw v. Shaw*, 17 Conn. 189 (1845).
grounds of adultery, they needed to present themselves in a stereotypical Victorian framework as the innocent, self-sacrificial victims of arbitrary, tyrannical men. In cases of marital violence, abusive husbands tended to be viewed as legitimately exercising of their right to rule unless their wives seemed appropriately passive. In an 1836 divorce case in New Hampshire, the court verbally censured a husband for beating his wife with a horse whip and throwing her into the cellar—recognizing that “at this day the moral sense of the community revolts at the idea that a husband may inflict personal chastisement upon his wife”—and yet denied her the divorce because of her “masculine” “rebellion against his authority.” The Chancellor of New York in 1840 ruled that the defense of a man being sued by his wife for a legal separation could contain many (even contradictory) points, including both the denial of any harsh treatment and its justification as a response to any “misconduct on her part which was calculated to irritate or provoke him, or to excite his jealousy, or alienate his affections from her” Even in the Northern states where there was little recognition of the right of chastisement within criminal law, the acceptance of “irritation” or “provocation” as a legitimate defense against charges of cruelty applied essentially the same reasoning to suits of separation and divorce.

In the South, where the right to chastisement received the strongest support, justifications for wife abuse were essentially the same when violent husbands were sued for separation on cruelty grounds as when they were charged with assault and battery. In 1862 the North Carolina Court refused to grant a legal separation to a battered wife, arguing that if the husband had “submitted” to her unruly behavior instead of severely

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72 Basch, *Framing American Divorce*; also Hartog, *Man and Wife*.
73 *Poor v. Poor*, 8 N.H. 307 (1836).
74 *Hopper v. Hopper*, 11 Paige Ch. 46 (1840). As late as 1899 this case stood as precedent, according to the *Index to the Digest of the New York Chancery Reports* (1899), pp. 231.
beating her with a switch and a horse whip, he would have lost not only his self-respect but the respect of his family and his neighbors. “The wife must be subject to the husband,” and therefore the husband has the legal power to use force “to make the wife behave herself and know her place.”75 As the preceding Northern cases suggest, however, it would be a mistake to see this view as altogether unique to the South. A relatively late decision by the Supreme Court of Maine in 1877 illustrates the continuing cross-fertilization of judges in both regions. Unanimously ruling against a divorced woman who sought to sue her ex-husband for injuries she had incurred during the marriage, the Court acknowledged the “gradual evolution” of English and American law towards the view that “the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever.” But the opinion went on to stress the limits of this legal change and to defend the continuing inability of wives to sue their husbands for damages. The institution of marriage itself, the justice asserted, operates perpetually to “discharge” “all wrongs between man and wife.” He then invoked the oft-quoted words of a North Carolina justice, “it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”76 By then it was widely understood that it was more important to protect the privacy of the family than to counter the overweening power of husbands and the continuing disabilities of wives.

76 Abbott v. Abbot, 67 Me. 304 (1877). The Maine opinion quotes from State v. Oliver, 70 N.C. 60 (1874). The memorable phrase seems to have originated, however, at least as early as 1864 in State v. Black, 60 NC (Win.) 262.
The Parallel History of Family Government and Corporate Governance

Much the same hesitation that prevented judges from intervening in what they saw as “private” domestic relationships also led them to refuse to intervene in the internal affairs of corporations. In the *Dartmouth College* case, as we have already seen, U.S. Supreme Court Justices Marshall and Story turned the tables on the attorney for New Hampshire by suggesting that state divorce laws allowing a woman to escape from a marriage contract that her husband had not already broken would run afoul of the Constitution’s contract clause. The justices then went on in their opinions to articulate a new division between public and private in the realm of corporations. For them the key boundary was encapsulated in the distinction between regulation and what they called “visitation.” The *Dartmouth* decision had little to say about government regulation; it seemed obvious to the justices that corporations, like all units of society, were subject to the police powers of the state. The more difficult question was whether the state had the right of visitation—that is, whether it could intervene in the corporation’s internal affairs. By answering this question in the negative, the court formalized a growing body of law that made the governance of private corporations a private matter. Like family government, corporate governance moved largely beyond the reach of the state.

If the state could not intervene in the internal affairs of these organizations, however, then the people who made them up could not call upon the state to protect their interests. An important consequence of the *Dartmouth* decision, therefore, was to make corporations the bearers of rights that trumped those of their individual members and, as a corollary, to leave shareholders who lacked power in these organizations more vulnerable to abuse. In the decades following the American Revolution, in other words,
minority shareholders in corporations increasingly found themselves in much the same position as wives in families. Like wives, moreover, they discovered that the state was only willing to take action to protect them when the abuse to which they were subjected reached egregious levels.

**Corporations and the State before Dartmouth College**

As we have seen, most formal human relationships in England during the early modern period were structured hierarchically along lines of authority that radiated downward from the King. Corporations were part of this great chain of authority. In theory if not in actual fact they were the King’s creations, and he often treated them as such, asserting his control over various aspects of their operations. As was the case of families, however, the autonomy of corporations was actually growing during this period, though the process by which this occurred was quite different. The English Civil War had weakened the King’s power over corporations, particularly those that constituted local government in many parts of the realm, and the Glorious Revolution had formalized this loss of authority, establishing the principle that the monarch could not alter or revoke a corporate charter so long as the corporation faithfully adhered to its terms. This principle technically did not apply to Parliament. British constitutional theory still held Parliament, if not the King, to be “omnipotent.” Because of strong opposition to government intervention in corporate affairs, however, Parliament generally avoided such
a “shock to public opinion” and refrained from revoking corporate privileges without compensation.77

Beginning in the 1690s a series of legal cases etched the restrictions on monarchical authority into English law.78 The earliest and most important, Phillips v. Bury, involved the rector of Exeter College, who had been relieved of his duties by the local bishop and sued in the Court of the King’s Bench to regain his post.79 The three puisne (associate) judges on the court found in the rector’s favor, but Lord Chief Justice Holt disagreed, and Holt’s judgment was confirmed by the House of Lords. Although governmental corporations were subject “to the general and common laws of the realm,” Holt declared, charitable corporations like the college were “entirely private” and “wholly subject to the rules, laws, statutes and ordinances which the founder ordains, and to the visitor whom he appoints, and to no others.” The bishop of Exeter had been appointed visitor of the college and therefore had supervisory authority over its personnel and activities. His decisions were final. Despite the view of the puisne judges that “the common law will not permit any person grieved to be without remedy,” Holt asserted “that the founder having created the bishop visitor, the justice of his proceedings was not examinable in this court, or any other.”80


78 See the cases cited in Rex v. Passmore, 3 T. R. 199 (1789).


80 Phillips v. Bury, 1 Ld. Raym. 5.
According to Sir William Blackstone, “all subsequent determinations [were] conformable” to this leading case.81 Summarizing the state of the law some seventy years later, Blackstone acknowledged that “the founder of all corporations in the strictest and original sense is the King alone,” but he distinguished between the original founder (the fundatio incipiens) and the founder who provided the corporation with its initial resources (the fundatio perficiens). In a civil corporation, the King played both roles, but in a charitable corporation, the roles were split.82 The King was the fundatio incipiens, and the endower the fundatio perficiens. Because corporations were composed of individuals “subject to human frailties,” there had to be some power of visitation to ensure that the human beings who had charge of its affairs did not “deviate from the end of their institution.” In a private corporation this power resided with the original endower and not the King. Either the founder, his heir, or his designated appointees served as visitor. No one else could play this role or interfere with the judgments of the visitor.83 Only in a civil, or public, corporation did the King occupy the position of visitor.

This distinction between visitation in public and private corporations would become especially important in the new United States. In the wake of the Revolution, state legislatures did not always show the same restraint that Parliament had exercised about tampering with the charters of existing corporations. Many corporate charters, like that of Dartmouth College, had been granted by the crown, and legislators did not feel

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81 Blackstone, *Commentaries*, Book 1, Ch. 18, p. 471.
82 Blackstone’s distinction between civil and charitable (or eleemosynary) corporations was not the same as Marshall’s later distinction between public and private corporations. His civil category, for example, included trading companies as well as governmental corporations.
83 Blackstone, *Commentaries*, Book 1, Ch. 18, pp. 467-69. In reality, the situation was more complicated, because charitable corporations could have a unitary structure with no separate visitor. See Campbell, “Dartmouth College as a Civil Liberties Case,” pp. 658-60.
themselves constrained to adhere to their terms.84 In the turbulence of the period, moreover, the composition of the various state legislatures often changed dramatically from one election to the next, and sometimes one assembly sought to undo the actions of its predecessor, including repealing grants of corporate charters. Such actions were especially likely where hot-button political issues were concerned, such as the enactment of public works projects, the chartering of banks, and the disestablishment of churches. Storms of protest against the special privileges embodied in a corporate charter awarded to some group could induce a legislature to alter or take back the grant. After the Virginia assembly chartered the Richmond James River Company in 1804, for example, a deluge of complaints from owners of small boats led the legislature to amend the charter over the objections of the company and exempt small boats from having to pay tolls.85 The legislature also intervened in a dispute between urban and rural members of the Mutual Assurance Society against Fires on Buildings of the State of Virginia, passing an act in 1800 that helped the rural segment gain control of the company by declaring that legislators would represent all absent members at general meetings.86 In Massachusetts, complaints that the original 1784 charter of the Massachusetts Bank was too expansive led the General Court to pass an “Addition” in 1792 that placed greater limits on the

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84 Even Justice Story admitted that “upon a change of government … such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished.” Terrett v. Taylor, 13 U.S. 43, 51-52 (1815). Others pushed the point much further. For example, counsel for the state in the Dartmouth College case argued that “a regal grant, with a regal and colonial policy, necessarily became subject to the modification of a republican legislature, whose right, and whose duty it was, to adapt the education of the youth of the country to the change in its political institutions. It is a corollary from the right of self-government.” Dartmouth College v. Woodward, 1819 U.S. LEXIS 330, 111. See Campbell, “Dartmouth College as a Civil Liberties Case,” pp. 670-88.


bank’s operations. Similar criticism of the Bank of North America, on which the Massachusetts Bank had been modeled, induced the Pennsylvania legislature to repeal the bank’s charter in 1785. In 1787 a politically reconfigured legislature passed another, though this time more restrictive, act of incorporation for the bank.

A number of other legislative efforts to tamper with corporate charters grew out of the religious disputes of the time, which were often deeply bound up with partisan politics. In 1784, for example, the Virginia legislature passed an act incorporating the Episcopal Church, but in 1786 the new legislature responded to the movement for disestablishment by repealing the act of incorporation. Disestablishment also led to an effort, spearheaded by Thomas Jefferson, to amend the charter of the College of William and Mary to shift control of the institution from the Anglican Church to the government. After Harvard’s Board of Overseers became increasingly Unitarian and Federalist in the early nineteenth century, a Federalist state legislature passed a statute changing the makeup of the Board so as to perpetuate Unitarian/Federalist dominance. When Democratic Republicans subsequently took control of the statehouse, they repealed the statute. King’s College (Columbia) in New York, Yale College in Connecticut, the College of Philadelphia in Pennsylvania, the University of North Carolina, and, of course,

89 Terrett v. Taylor, 13 U.S. 43 (1815).
90 This effort failed to pass the legislature, but Jefferson was later elected to the college’s board of visitors, a position that allowed him to reform the institution from within. Campbell, “Dartmouth College as a Civil Liberties Case,” pp. 671-72.
91 Cambell, “Dartmouth College as a Civil Liberties Case,” pp. 676-78.
Dartmouth College in New Hampshire all faced similar legislative meddling during this period.\footnote{Campbell, “Dartmouth College as a Civil Liberties Case,” pp. 680-91.}

When they abrogated or otherwise tampered with corporate charters, legislatures were effectively claiming for themselves the unfettered sovereignty that Parliament had obtained as a consequence of the Glorious Revolution. Not all of these interventions led to litigation, but when they did judges often displayed a reluctance to accept this expansive interpretation of legislative authority. Perhaps the most extreme opposition was articulated by a Massachusetts court, which declared in 1806 in a case involving a turnpike corporation that “rights legally vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.”\footnote{Wales v. Stetson, 2 Mass 143, 146 (1806).} This position was essentially the one taken later by the U.S. Supreme Court in Dartmouth College, except that the Massachusetts court did not qualify its declaration by applying it only to private corporations.

More generally, the courts constrained the powers of state legislatures in the same way as British courts had constrained those of the King—that is, by asserting that legislatures only had unfettered authority over “public” corporations. How the distinction between public and private corporations should be drawn was, however, the subject of considerable disagreement.\footnote{It should be emphasized that there were two sides to the process of working out this distinction. On the one hand, certain corporations were increasingly regarded by the courts as private and not subject to legislative interference. We focus on this side in our discussion. On the other, corporations regarded as public were increasingly losing any autonomy they had had from state government. On this aspect of the process, see Joan C. Williams, “The Invention of the Municipal Corporation: A Case Study in Legal Change,” American University Law Review, 34 (Winter 1985), pp. 369-438; and Hendrik Hartog, Public} The Virginia Supreme Court deadlocked over this issue, for
example, in a lawsuit that grew out of the incorporation and subsequent dis-incorporation of the Episcopal Church. The Bill of Rights of the Virginia Constitution included a provision that prevented the legislature from granting charters of incorporation except in exchange for public services. This provision led at least some of the judges on the bench to conceive of most (if not all) corporations chartered in the state as public by their very nature. Thus St. George Tucker justified his opinion against the Church’s incorporation on the grounds that “where the legislature creates an artificial person, and endows that artificial person with certain rights and privileges, either in respect to property, or otherwise, this must be intended as having some relation to the community at large.” Tucker went on to claim that “if such creation, or endowment, be either unconstitutional, or merely impolitic, and unadvised,” the legislature “is competent to amend, or repeal its own act.”95 A few years later, in a case involving the Mutual Assurance Society, Virginia Justice Spencer Roane took the public interest argument even further. Acts of incorporation, he asserted “ought never to be passed, but in consideration of services to be rendered to the public.” If the incorporators’ promise to provide a public service was fraudulent or if circumstances changed so that the service was no longer needed, a subsequent legislature had the right to revoke the privilege: “It is the character of a legislative act to be repealable by a succeeding legislature.” A legislature cannot limit the power of its successor “on the mere ground of volition” but only “from a state of things involving public utility.”96

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95 *Turpin v. Locket*, 10 Va. 113, 156 (1804).

The *Dartmouth College* case should be seen within the context of this post-revolutionary controversy over the definition of public versus private corporations. Whereas the Virginia justices Tucker and Roane viewed corporations as intrinsically public, the Supreme Court of New Hampshire drew the line differently. It, too, defined “public corporations,” like Dartmouth, as those devoted to “publick purposes,” but it also recognized private corporations, devoted instead to “private beneficial interest,” as a perfectly legitimate category. The two types of corporations could be readily distinguished from one another because the purpose of private corporations was to earn a profit from “making canals, turnpike roads and bridges; also banking, insurance and manufacturing companies, and many others.” In private corporations the beneficial interest “is vested severally” in the members, “according to their respective shares,” and may be sold and transferred. Hence the “property and immunities” of private corporations undoubtedly stood “on the same ground with the property and immunities of individuals.” By contrast, incorporators of public corporations had “no private beneficial interest, either in their franchises or their property” of the organizations they created. “All publick interests are proper objects of legislation; and it is peculiarly the province of the legislature, to determine by what laws those interests shall be regulated.”97 The legislature might not be able to tamper with a private corporation, but it faced no such restriction in its dealings with public corporations.

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Private Corporations and the Right of Visitation

In overturning the ruling of the New Hampshire Court, the Dartmouth decision effectively reigned in state legislatures by declaring that they, unlike Parliament, did not possess boundless powers over corporations but rather had to acknowledge the superior authority of the Constitution. For the contract clause of the Constitution to apply to the case at hand, however, Marshall and the other justices in the majority first had to demonstrate that Dartmouth College was a private corporation. As Marshall acknowledged, “the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions.” If the college was a public corporation, then “the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.”98 It was only with respect to private corporations that legislatures’ powers were limited.

Marshall recognized that states chartered corporations to achieve publicly desirable ends. “The objects for which a corporation is created are universally such as the government wishes to promote,” and the expected public benefits were “in most cases, the sole consideration of the grant.” But, he declared, these objects and benefits did not make corporations public entities. Although Dartmouth College had been founded for a publicly desirable charitable purpose, the men who organized it had endowed it with their own funds. They had applied for a corporate charter simply to enable them better to achieve their ends, because the corporate properties of “immortality” and “individuality” enabled “a perpetual succession of many persons” to act “as a single individual” and “hold property without the perplexing intricacies, the hazardous and endless necessity, of

perpetual conveyances for the purpose of transmitting it from hand to hand.” The mere fact that the college was incorporated did not change its nature. If “a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer … how is it, that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country?”

Marshall did not cite any case law for this assertion, but his repeated description of Dartmouth College as a “private eleemosynary institution” was an implicit reference to the English precedents asserting the private status of charitable corporations. In his concurring opinion Justice Bushrod Washington made the reference explicit, using these cases to distinguish the government’s expansive authority over civil (public) corporations from its much more limited powers with respect to eleemosynary (private) corporations. Although a public corporation, he declared, could be “controlled, and its constitution altered and amended by government, in such manner as the public interest may require,” the case of an eleemosynary corporation like Dartmouth College was “entirely different.” The college was “the creature of private benefaction for a charity or private purpose.” It was “not competent for the legislature to interfere” in its governance. A charitable

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100 Dartmouth College v. Woodward, 17 U.S. 518, 636-67. This point was underscored by Story in his concurring opinion. What mattered, Story asserted, was who founded the corporation and with what funds. If the founders were individuals and the funds came from their own savings, the corporation was private—“as much so, indeed, as if the franchises were vested in a single person” (pp. 668-69). On Story’s definition, see R. Kent Newmyer, “Justice Joseph Story’s Doctrine of ‘Public and Private Corporations’ and the Rise of the American Business Corporation,” DePaul Law Review, 25:4 (Summer 1976), pp. 825-41.
corporation “is endowed and founded by private persons, and subject to their control, laws, and visitation, and not to the general control of the government.”

Story similarly drew on English precedents in his opinion, claiming that they assigned the right of visitation of a charitable corporation to “the founder and his heirs,” unless the founder “at the time of the endowment” assigned the right to another person, who then exercised that right “in exclusion of the founder’s heirs.” In cases where the “trustees or governors” were incorporated to manage the charity, “the visitatorial power is deemed to belong to them in their corporate character.” Dartmouth College had this type of organization, and so oversight of the college rested entirely and exclusively with its board of trustees. To say that the trustees alone had visitatorial power, however, did not mean they were beyond the law. They were still subject, like everyone else, “to the general law of the land.” They could still be stripped of their corporate franchises “by misuser or nonuser,” and they were subject to the “general superintending power of the Court of Chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trusts to redress grievances, and suppress frauds.” If the trustees of the college had been guilty of gross fraud or had abused their positions of trust, a court of equity could “take away the trust from the corporation, and vest it in other hands.” But absent such a finding, the court could not interfere in the college’s affairs. Neither it nor any other arm of government

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102 Dartmouth College v. Woodward, 17 U.S. 518, 673-75. Campbell claims that Story deliberately misstated the law (see “Dartmouth College as a Civil Liberties Case,” p. 663), but I think that it would be more correct to say that he simplified a complex set of precedents involving distinctions between corporations with separate visitors and those with unitary structures. Certainly, contrary to Campbell’s assertion, Story recognized the authority that a chancery court would exercise over the college. See below.
103 Dartmouth College v. Woodward, 17 U.S. 518 675. As Mary Sarah Bilder has shown, there was a long tradition of reviewing corporate articles to make sure they were not “repugnant” to the law. See “The Corporate Origins of Judicial Review,” Boston Law School Legal Studies Research Paper 106 (2006).
could, without the consent of the trustees, “alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to, or diminish, the number of the trustees, or remove any of the members, or change, or control the administration of the charity, or compel the corporation to receive a new charter.”

In a corporation like Dartmouth College, the trustees were more than just the governing body of the corporation. They were the means by which this “artificial, immortal being” acted and expressed its will. Addressing himself to the test that the New Hampshire court had used to determine that the college was a public corporation, Marshall acknowledged that the Dartmouth trustees had no beneficial interest in the charter themselves. But, he added, neither did any other human being: “The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest …. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a Court of justice.” The beneficial interest belonged instead to the corporation itself. All these other parties were represented by the corporation, which as “the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal.” Only the corporation could assert these rights, but because the corporation was not a human person, it could only assert them by acting through its governing board. The attempt by the state of New Hampshire to alter the governance structure of the college was an attack on the corporation itself, not on any

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human person. As an “invisible, intangible” being, however, the corporation could only
defend itself through the medium of its trustees.106

Marshall recognized that this view of the rights involved had the effect of
entrenching power structures that emanated “from a regal source” and might “partake of
the spirit of their origin.”107 Dartmouth College, after all, had a royal charter. But he
dismissed this consequence with a rhetorical flourish. “Reasoning a priori,” Marshall
asserted that it was logical to assume that the original trustees were “learned and
intelligent men” who would “select learned and intelligent men for their successors; men
as well fitted for the government of a college as those who might be chosen by other
means.” If his reasoning was in error, he claimed (perhaps disingenuously), “public
opinion” would offer a sufficient corrective. Moreover, the danger of this regal heritage
would lessen over time as increasing numbers of new corporations were founded by
republican legislatures.108

Marshall’s reassurances notwithstanding, the effect of the Dartmouth College
decision, in combination with the body of precedents on which it drew, was to entrench
hierarchical structures of power inside corporations. The trustees (or directors) at the top
of these hierarchies assumed powers that in important respects were analogous to those of
husbands and fathers within households. As both families and corporations laid claim to
the mantle of privacy in the early nineteenth century, they became bearers of rights that
increasingly took precedence over those of their members. Society delegated the
administration of these organizations (and the defense of their rights) to the husbands and
directors who headed them, but these men did not always use their authority well. As we

have already seen, however, judges refused to meddle in the internal affairs of private households to protect battered wives or children except in the most extreme cases. They would prove just as reluctant to intervene in private corporations to redress the grievances of minority shareholders.

**The Early Nineteenth-Century Law of Corporate Shareholder Abuse**

In 1842 the Phoenix Bank of Massachusetts failed after lending large sums to its president and other directors. Joseph Smith, a stockholder in the bank, sued the directors for misfeasance and for nonfeasance of their official duty. The council for the defense countered that Smith did not have standing to sue. If the bank’s officers had misbehaved, it was the corporation’s rights that were affected, not those of the individual stockholders, and only the corporation might initiate a suit.\(^{109}\) Writing for the Massachusetts Supreme Court, Chief Justice Lemuel Shaw agreed, declaring that “there is no legal privity, relation, or immediate connexion, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of a bank on the other.” The directors, he went on, “are not the bailees, the factors, agents or trustees of such individual stockholders.” Their obligation was instead to the bank as “a corporation and body politic, having a separate existence as a distinct person in law.” Neither Smith nor any of the other individual members of the corporation had the “right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability.” Even if all the stockholders joined together, they could not take action, because “they are not the legal owners of the

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property, and damage done to such property is not an injury to them.” The owner was the corporation “in whom the whole stock and property of the bank are vested.” It was the injured party, the legal person whose rights were at stake. Consequently, the appropriate remedy was for the corporation “to obtain redress for injuries” by suing to recover damages.110

Shaw did not cite any case law in support of his ruling, but his decision fit squarely within the train of precedents that ran from *Bury v. Phillips* to *Dartmouth College v. Woodward*.111 These cases made the corporation, not the people who made it up, the bearer of the rights laid out in its charter. They also made the corporation’s trustees (or in the case of a business corporation, its board of directors) the only body that could defend those rights. These precedents posed a serious problem if controlling shareholders used their power in the corporation to feather their own nests, as Joseph Smith claimed the directors of the Phoenix Bank had done. Only the corporation had standing to sue in a court of law, and the corporation could only act through its board—that is, through the very directors that Smith had accused of abusing their positions.

Smith’s only remedy was to assemble a new majority of stockholders that would depose the existing board and elect a new one in its place—something that was highly unlikely he could do.

In dismissing Smith’s suit, Shaw admitted that the remedy that the law offered was “a theoretic one” and “perhaps often inadequate,” but he did not offer Smith an

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111 The wording of Shaw’s opinion suggests that he thought the reasons for finding against the plaintiff obvious: “That similar grievances have existed to a great extent, and in numberless instances, where such an action would have presented an obvious and effective remedy, affords strong proof, that in the view of all such suffering parties, and their legal advisers and guides, there was no principle on which such an action can be maintained.” *Smith v. Hurd*, 53 Mass. 371, 383. The case was apparently the first of its kind in the U.S. A British court confronted a similar lawsuit and came to essentially the same conclusion a few years earlier in *Foss v. Harbottle*, 2 Hare 461 (1843).
alternative. In New York and a few other states with chancery courts, however, shareholders in Smith’s position did have one other option, though as we will see it was a pretty meager one: they could seek redress of their grievances by suing in equity. Over time, this option spread to other jurisdictions until by the late 1850s differences across states in stockholders’ access to equity proceedings had largely been eliminated. Even in Massachusetts, a series of acts passed from 1855 to 1857 gave the state’s courts the necessary jurisdiction.

As Story had noted in his concurring opinion in the *Dartmouth College* case, chancery courts had a general supervisory power over private charitable corporations in cases where the trustees behaved fraudulently. As the number of private business corporations grew during the early nineteenth century, the supervisory authority of these courts was gradually extended to cover them as well, giving shareholders a potential remedy against abuse. The first authoritative statement of this principle came in an 1832 decision written by New York’s chancellor, James Kent, who declared that the directors of a business corporation were trustees of its property. Kent recognized that, if the

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114 Convergence was accelerated by the U.S. Supreme Court’s determination in *Dodge v. Woolsey* that courts of equity “have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits … if the acts intended to be done create what is in the law denominated a breach of trust.” 59 U.S. 331, 341 (1856).
117 *Robinson v. Smith*, 3 Paige 222 (1832). According to Bert S. Prunty, Jr., Kent had first articulated a similar idea in a dictum in the 1817 case of *Attorney General v. Utica Ins. Co.* Prunty also traced the idea to two other New York chancery cases that preceded *Robinson v. Smith* and to an Ohio case...
directors/trustees abused their position, the rights affected were those of the corporation, but he asserted that the stockholders also had a joint interest in the corporation’s property. Because the corporation was unlikely to sue in its own name to protect its rights when it was controlled by the same directors who were perpetrating the fraud, he provided the stockholders with a potential solution. Declaring that a chancery court “never permits a wrong to go unredressed merely for the sake of form,” he indicated that the stockholders might, after demonstrating that the corporation was so controlled, file a bill in their own names, “making the corporation a party defendant.”

Although this procedure quickly became an established remedy for aggrieved stockholders, the courts continually reasserted the fundamental principle that the rights at stake were those of the corporation itself and not its members. The stockholders’ rights were merely derivative and could be exercised only when the corporation was so much under the control of the parties engaged in the fraud that it could not act to protect its own interests. In the language of an often cited decision by a Maine court, whatever wrongs the officers committed were against the corporation and “no corporator can assume its right to obtain redress.” If the stockholders were injured by the officers’ fraudulent acts, they should take “measures to have the corporation obtain redress for them.” Only after making “proper exertions” and demonstrating that the corporation was “incapable” of taking action or had “improperly or collusively refused to do it,” could they proceed on

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118 Robinson v. Smith, 3 Paige 222, 233.
their own behalf. Then they “might perhaps” obtain redress by making the corporation “a party defendant.”

Although judges subsequently claimed that “courts of equity [were] swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities,” in most cases minority shareholders found it difficult to obtain satisfaction. Indeed, their situation was very similar to that of wives seeking divorces. There was an available legal remedy, but they faced substantial hurdles when they tried to pursue it. Not only did minority shareholders have to demonstrate to the satisfaction of the court that “suitable redress is not attainable through the action of the corporation” because “the corporate action is under the control of such parties” as are “charged with the wrong,” but they had to show that the corporation’s refusal to take action was fraudulent—that the directors were not simply pursuing policies at variance with those that minority shareholders thought should be adopted. Because “intelligent and honest men differ upon questions of business policy, … a corporation, acting by its directors, or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted.” If the refusal was simply a matter of business judgment, the courts would not be willing to intervene—even if the corporation had sustained heavy losses as a result of the directors’ decisions. “Directors acting in good

119 Hersey v. Veazie, 24 Me. 9, 12-13 (1844). See also Cunningham v. Pell, 5 Paige 607 (New York, 1836); Forbes v. Whitlock, 3 Edw. Ch. 446 (New York, 1841); Smith v. Poor, 40 Me. 415, 422 (1855). Prunty (“Shareholders’ Derivative Suit,” p. 989-92) argues that stockholders’ rights were not initially regarded as secondary but only became so as a result of a later series of cases in which stockholders challenged transactions between corporations and outsiders. We think that Prunty misreads Robinson v. Smith by not seeing it in the context of Dartmouth College and the history of the concept of visitation.


faith and with reasonable care and diligence, who nevertheless fall into a mistake, … are not liable for the consequences.”123

This so-called “business judgment rule” enabled the courts to define most of what went on inside corporations as private matters that were of no concern to anyone but the parties involved. The courts would only intervene, a New York appeals court reminded plaintiffs, in cases that involved egregious fraud. Because “the powers of those entrusted with corporate management are largely discretionary,” the courts cannot interfere “unless the powers have been illegally or unconscientiously executed, or unless … the acts were fraudulent or collusive and destructive of the rights of the stockholders.”124 The burden of proof, moreover, was on the shareholders bringing the suit. As the Massachusetts Supreme Court explained, “it is always assumed until the contrary appears, that [directors] and their officers obey the law, and act in good faith towards all their members.”125

This insistence that corporations’ internal affairs were private and that stockholders could not call upon the courts to intervene on their behalf affected the reach of even such well established legal principles as the rule that contracts tainted by conflicts of interest were voidable. This rule was an absolute one and included contracts that otherwise were completely reasonable, so that, in the words of a Michigan justice, it is “immaterial …whether there has been any fraud in fact, or any injury.”126 There was no question, moreover, that the rule extended to contracts entered into by corporate officers

125 Dunphy v. Traveller Newspaper Association, 146 Mass. 495, 497.
126 Flint & Pere Marquette Railway Company v. Dewey, 14 Mich. 477, 487-88 (1866). This opinion was quoted approvingly in European & North American Railway Company v. Poor, 59 Me. 277 (1871), and both cases were cited as important precedents by the U.S. Supreme Court in Wardell v. Railroad Company, 103 U.S. 651 (1880).
on behalf of their enterprise. As U.S. Supreme Court Justice Stephen Field declared in a railroad case in 1880, “Directors of corporations … are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect.”\textsuperscript{127} The very next year, however, the Court qualified this statement, ruling that contracts involving self-dealing did not justify a suit per se, but only “where the board of directors, or a majority of them, are acting for their own interest, \textit{in a manner destructive} of the corporation itself, or of the rights of the other shareholders” or where “such a \textit{fraudulent} transaction \ldots will result in \textit{serious} injury to the corporation, or to the interests of the other shareholders” (our emphasis).\textsuperscript{128} In other words, the Court sanctioned applying what was in effect a reasonableness standard to cases involving conflicts of interest.

Earlier state court decisions, cited by the justices in their 1881 opinion, underscore the extent to which the courts’ unwillingness to intervene in corporations’ internal affairs effectively gave controlling shareholders all benefit of doubt. For example, in a frequently cited 1850 Rhode Island case, \textit{Hodges v. New England Screw Company}, the state Supreme Court refused to oblige a shareholder’s attempt to invalidate the sale of assets by one corporation to another that was controlled by essentially the same people. The court found the plan “judicious, and for the interest of the Screw Company,” declaring that “we are the more confirmed in this conclusion, when we recollect that the directors owned a large majority of the capital stock of the Screw

\textsuperscript{127} \textit{Wardell v. Railroad Company}, 103 U.S. 651, 658 (1880).
\textsuperscript{128} \textit{Hawes v. Oakland}, 104 U.S. 450, 460 (1881). The shift away from an absolute prohibition against self-dealing by corporate officers was noted with puzzlement by Harold Marsh, Jr. (“Are Directors Trustees?” Conflict of Interest and Corporate Morality,” \textit{Business Lawyer}, 22 [Nov. 1966], pp. 35-76), who asserted, “One searches in vain in the decided cases for a reasoned defense of this change in legal philosophy, or for the slightest attempt to refute the powerful arguments which had been made in support of the previous rule” (p. 40). The mystery largely disappears, however, when the cases are viewed in terms of the legal history of stockholders’ derivative suits.
Company.” Any action they took that harmed the company would not only “reduce the plaintiff’s stock” but “in the same proportion … the value of their own.” Similarly, in *Faud v. Yates* (1870), the Illinois Supreme Court found nothing wrong with a partnership agreement entered into by three stockholders of the Chicago Carbon and Coal Company who held a majority of the corporation’s stock, even though their agreement guaranteed them control over the board of directors and their partnership leased the company’s coal lands and operated its mines. In the view of the court, “The record wholly fails to disclose any injury to the other shareholders—any waste of the property.” Nor was there a conflict of interest. “As shrewd, skillful and prudent men,” the partners were simply “desirous of increasing the investment, and making the stock more valuable. Their interests were identical with the interests of the minority shareholders.”

These cases bear out the warning imparted by the Michigan Supreme Court in *Flint and Pere Marquette Railway v. Dewey* in 1866: If self-dealing contracts “were held valid until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption.” The train of logic that led to this outcome rested on two fundamental principles: first, that most corporations, though creatures of the state, were private entities; and second, that they, and not their shareholders, were the bearers of rights. Although corporations like all legal persons were subject to the general police powers of the state, these principles meant that as a

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129 *Hodges v. New England Screw Co.*, 1 R.I. 312, 343-44 (1850). This decision was in part justified by the fact that the plaintiff, though he had objected initially to the arrangement, ultimately acquiesced in the transaction and disputed with the majority stockholders over the distribution of shares in the second corporation. See also the rehearing of the case, 3 R.I. 9 (1853).

130 One circumstance that made it easier for the court to come to this conclusion was that the plaintiff was one of the three partners (they had had a falling out) and was not joined in the suit by any of the other minority shareholders. But the court’s assertion that self-dealing does not necessarily involve conflict of interest is striking nonetheless. *Faulds v. Yates*, 57 Ill. 416, 420-21 (1870).

practical matter the internal affairs of these enterprises were beyond the reach of government. Only in the event of gross fraud or abuse of trust would the courts intervene.

States could, of course, have attempted to redress the growing power of the wealthiest stockholders in other ways. The reservation clauses that they routinely inserted in corporate charters theoretically enabled them to pass legislation that increased protections for minority interests in corporations, but they rarely made any use of this power until the second half of the twentieth century.\textsuperscript{132} A significant exception followed the spectacular collapse of a number of large New York insurance companies in the mid-1820s. Revelations that the failures were the result of fraudulent manipulations by those in control of the companies led the state legislature to revise the laws governing “moneyed corporations” in an attempt to prevent any recurrence of the abuses. More significantly for our purposes, the legislature also responded by passing a statute that granted the chancellor “visitatorial” powers over corporations, including the authority to compel them to account for “the management and disposition of the funds and property committed to their charge,” to force them to repay any sums or property “they may have acquired to themselves or transferred to others, or may have lost or wasted, by any violation of their duties,” and to remove from office any directors and officers who abused their trust. This law, which also gave the attorney general the right to instigate

such a proceeding on behalf of the state, remained on the books until it was repealed in 1880.133

More generally, the idea that corporations were private institutions whose internal affairs were beyond the purview of government was so powerful that the only exceptions to this laissez-faire stance involved types of corporations whose activities directly impinged on important public interests. For example, the solvency of banks mattered for the community as a whole—not just for the banks’ stockholders. Banknotes constituted the bulk of the money supply, citizens deposited their savings in banks, and most businesses depended on bank credit, either directly or indirectly, to finance their working capital. Because a bank failure could affect so many people in such a catastrophic way, states sometimes enlisted minority shareholders in their efforts to promote sound banking practices, essentially offering them protection from oppression in exchange for monitoring banks’ lending practices. Hence New York’s “free banking” statute of 1838 included a provision authorizing the chancery court to investigate the affairs of any bank at the request of its shareholders or creditors.134 Similarly, the Massachusetts General Court passed a statute in 1843 granting stockholders who held at least one-eighth of the bank’s shares the right to demand an audit. Additional legislation in 1851 created a board of bank commissioners that had to “make a full investigation of the affairs” of any bank upon request from any five of the institution’s shareholders.”135 These are exceptions


134 “An Act to authorize the business of banking,” passed April 18, 1838. We are indebted to Eric Hilt for calling this statute to our attention.

135 Massachusetts, General Court, Acts and Resolves (1843), pp. 56-58; and (1851), pp. 625-28.
that prove the rule, however. Where there were no vital public interests at stake, minority shareholders typically had no such access to state intervention.

Epilogue

The legal treatment of wife beating in the nineteenth century United States reveals how the post-revolutionary designation of the family as a private domain set apart from the government worked to reinforce the power of husbands over their wives. Similarly, the legal treatment of minority oppression shows how the institutional privacy granted the corporation reinforced the power of the shareholders who possessed control. These striking parallels between the family and the corporation derived from their similar histories as traditionally hierarchical organizations that were essentially cut loose from the supervision of government in the aftermath of the American Revolution. The decline in government control over these organizations was a response to the demands of adult white men for equality and to a pervasive belief that strong state powers subverted individual liberties. But its effect was to reinforce the hierarchical lines of authority within these organizations that had carried over from the earlier period of monarchical and colonial rule. Because wives and minority shareholders now had less direct access to government, they, along with other dependents such as children and slaves, became more vulnerable to abuse.

Over time familial dependents gradually gained legal rights that helped them resist domestic abuse, but the process remains unfinished to this very day. In the second half of the nineteenth century the state courts decisively classified wife beating as a crime, and divorces on cruelty grounds began to be available for mental as well as
physical abuse.136 Beginning in the 1870s several state legislatures went so far as to reinstate corporal punishment for wife beaters on the theory that imprisonment posed too big a threat to family income for wives to come forward to testify, but, not surprising, these draconian laws were short-lived.137 Other legal reforms in the middle and late nineteenth century, such as the state-by-state passage of married women’s property laws and legislation granting female suffrage, helped to undermine the principle of male dominance without, however, directly intervening in domestic relationships.138 Continuing restrictions built into the law until well into the twentieth century greatly limited the options available to victims of domestic abuse. Wives were, for example, unable to sue their husbands (even former husbands) for damages in most states until the 1960s.139 Similarly, until the widespread provision of “no fault” divorce in the late twentieth century, it remained difficult to exit from abusive marriages because of the high costs and cumbersome procedural requirements of divorce. It has been only very recently that efforts to address the problem of domestic violence have taken on such sensitive

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137 Pleck, *Domestic Tyranny*, pp. 108-121.
issues as marital rape and child molestation; even today, parents still possess the right to inflict corporal punishment on their children.\textsuperscript{140}

Protectors for minority shareholders were also late in coming. Indeed, it was not until the early twentieth century that states began to look out for their interests by passing so-called “blue sky laws” regulating public offerings of securities. These laws focused narrowly on the problem of fraud in issuing and marketing securities and applied only to corporations whose shares were publicly traded. The Securities and Exchange Commission (SEC), created by the federal government during the New Deal, had a similarly narrow mission.\textsuperscript{141} Only after World War II did states begin to revise their general incorporation laws in ways that gave minority investors in close corporations greater ability to build contractual safeguards into their articles of association or provided them with more effective legal remedies against oppression by controlling shareholders.\textsuperscript{142}

Although governments were increasingly willing in the twentieth century to recognize that individual members of organizations had rights and to intervene in to protect the most powerless members, the long history of respecting the institutional privacy of families, corporations, and other similar associations continued to shape the way in which these individual rights were defined. Nowhere was this more apparent than


in the U.S. Supreme Court’s decision in *Griswold v. Connecticut*. In this 1965 case the Court invalidated a Connecticut statute that made the use of contraceptives a criminal offense on the grounds that the statute was “an unconstitutional invasion of the right of privacy of married persons.”

Although there had been attempts to define an individual right to privacy at least since the late nineteenth century—the most important being Samuel Warren and Louis Brandeis’s famous law review article on the subject—these efforts did not have much impact. Hence in crafting his opinion for the Court, Justice William O. Douglas turned to another set of precedents involving the institutional privacy of collectivities, in particular two 1920s cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. In the first case, the Supreme Court had overturned a Nebraska law forbidding schools from teaching foreign languages to children who had not yet passed the eighth grade. In the second, it struck down an Oregon law requiring parents to send their children to public schools.

The liberal Douglas’s reliance on these two 1920s cases is puzzling for they were written by James C. McReynolds, one of the most right-wing justices ever to serve on the Supreme Court, and were part of long line of cases decided on grounds of what was later called substantive due process. Disavowed by the Court by the time of *Griswold*, this principle symbolized the laissez-faire thrust of the Court in the early twentieth century and had been used to strike down a variety of state regulatory laws on the grounds that

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145 *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1915). On Douglas’s reliance on these precedents, see Minow, “We the Family.”
146 For an excellent analysis of these cases and their historical context, see Barbara Bennett Woodhouse, “Who Owns the Child?” *Meyer and Pierce* and the Child as Property,” *William and Mary Law Review*, 33 (Summer 1992), pp. 995-1122.
the Fourteenth Amendment prohibited states from infringing on citizens’ rights without due process. The logic of substantive due process defined these rights broadly to include a range of natural rights that went well beyond those explicitly enumerated in the Constitution. Thus, according to McReynolds, the liberties protected by the Fourteenth Amendment included “not merely freedom from bodily restraint 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, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”

Unlike Reynolds, Douglas sought to ground the right to privacy in the “specific guarantees in the Bill of Rights.” He rejected the substantive due process arguments that natural rights came from outside the Constitution and that the Court could properly “sit as a super-legislature to determine the wisdom, need, and propriety” of the law. Instead Douglas contended that there are “penumbras” to the Bill of Rights that beyond go beyond the technical language of the Constitution but need to be protected in order to give the Bill of Rights “life and substance.” The right to privacy emanated from such penumbras. Douglas went on to echo the view, expressed more fully by other legal thinkers whom he cited, that the central idea that underpinned the Constitution and the Bill of Rights was “liberty against government” so that “virtually all enumerated rights in

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148 Griswold v. Connecticut, 381 U.S. 479, 482-84. In an earlier case Douglas, in a dissenting opinion, had taken a position that was somewhat closer to the view that the Constitution protected natural rights as well as the rights it specifically enumerated. See Poe v. Ullman, 367 U.S. 497, 516-17 (1961).
the Constitution can be described as contributing to the right of privacy” or, in other words, the right to be let alone.¹⁴⁹

Douglas found McReynolds’ opinions in Meyer v. Nebraska and Pierce v. Society of Sisters useful, for all their failings, because they were defenses of “liberty against government.” The liberties featured in these decisions, however, were primarily those of collectivities. Although McReynolds deployed the rhetoric of individual rights, the cases hinged on the rights of families and corporations. Both his opinions aimed to safeguard families’ abilities to make decisions about how to raise their children without interference from government. “The child is not the mere creature of the State,” McReynolds admonished in Pierce. “Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” For this reason, the Oregon law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”¹⁵⁰ The rights of corporation also played an important role in this case. Indeed, both Pierce and a companion case that was adjudicated at the same time were brought by corporations claiming that their Fourteenth Amendment rights had been infringed by the Oregon statute. Although the Dartmouth precedent did not apply directly—the statutes being litigated were “expected to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations”¹⁵¹—Marshall’s view that private corporations were legal persons with rights became the basis in Pierce, and in other substantive due process cases, for treating corporations as citizens whose


¹⁵⁰ On this point, see especially Woodhouse, “Who Owns the Child?”

privileges and immunities had to be safeguarded against statutes that the Court regarded as “arbitrary, unreasonable and unlawful interference” in their affairs.\textsuperscript{152}

Forty years later the Court was still focused on the rights of collectivities. In a (dissenting) opinion in an earlier case concerning the Connecticut anti-contraception law, Douglas compared the state’s prohibition to the threats that totalitarian governments pose to the primary organizations of which society is composed: “One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State.”\textsuperscript{153} Indeed, it was the rights of these subcommunities that were at stake in virtually all of the cases cited by Douglas in this dissent and also in \textit{Griswold}. In addition to \textit{Meyer} and \textit{Peirce}, they included a number of suits defending households against unreasonable searches that violated their privacy, as well as a case upholding the NAACP’s refusal to turn over its membership lists to the state of Alabama. As if to drive home the point, Douglas concluded his opinion in \textit{Griswold} by grounding the “right of privacy” in the importance of preserving an institution “older than the Bill of Rights”—that is, marriage:

\begin{quote}
Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of
\end{quote}


\textsuperscript{153} \textit{Poe v. Ullman}, 367 U.S. 497, 521-22. Here Douglas was quoting an article by Robert L. Calhoun published the year before, but his point is remarkably similar to the nightmarish alternatives that McReynolds had earlier conjured up: Plato’s Republic, where “the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent”; and ancient Sparta, which moved male children at the age of seven into barracks and, “in order to submerge the individual and develop ideal citizens, … [e]ntrusted their subsequent education and training to official guardians.” \textit{Meyer v. Nebraska}, 262 U.S. 390, 401-2.
life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. 154

Griswold and (sometimes by direct citation, sometimes by implication) Meyer and Pierce would play an important role in a number of subsequent Supreme Court cases, perhaps most notably in the Court’s determination in Roe v. Wade that “a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution” and that the right was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” 155 and the Court’s decision in Lawrence v. Texas that “the State cannot demean” the existence of homosexuals “or control their destiny by making their private sexual conduct a crime.” 156 That the Court would base its abortion and homosexual rights decisions in large measure on Meyer and Pierce is ironic indeed. It has made some proponents of these causes uncomfortable, and it may even have made the rights at stake less secure than they might otherwise be. 157

Certainly, in theory there were other possible ways to ground these rights. When the Court was deliberating the Griswold case, some justices explored alternative rationales for overturning the Connecticut statute. 158 The most important was egalitarian—that the practical effect of the Connecticut law was to make it much more difficult for poor women to gain access to contraception than rich women. Apparently,

158 For a discussion of this background, see David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (Updated edn.; Berkeley: University of California Press, 1998), Ch. 4.
however, they decided that egalitarian ideas were too weak a reed on which to base such an important decision. We would have to agree. This weakness derived in part from the history we have described. For at least a century after the Revolution, the rights of individuals took a back seat to the rights of organizations, with the consequence that egalitarian principles mainly applied to the heads of these organizations, effectively effacing the rights of their subordinates.