

**The Private Rights of Organizations:
The Tangled Roots of the Family, the Corporation, and the Right to Privacy**

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Although most Americans believe they have a fundamental right to privacy, when it comes to defining the bounds of that right—what behaviors it covers and where the government’s authority over its citizens ends—the consensus breaks down. The series of U.S. Supreme Court decisions in the late twentieth century articulating a constitutional right to privacy only added to the confusion.¹ Even many feminists found the Court’s efforts to ground women’s control over their bodies in a right to privacy fundamentally unsatisfying. As Martha Minow has argued, the Court’s shoehorning of precedents into a “mythical” historical narrative produced “an incoherent jurisprudence,” encouraging the deployment of rights rhetoric in the service of “conflicting and inconsistent individual interests.”²

The purpose of this article is to illuminate the sources of this incoherence by analyzing two important nineteenth-century developments that are clearly related but

¹ The key cases are *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); and *Lawrence v. Texas*, 539 U.S. 558 (2003).

² Martha Minow, “We, the Family: Constitutional Rights and American Families,” *Journal of American History* 74 (Dec. 1987): 959-83. The quotes are from p. 959. See also Mary Poovey, “The Abortion Question and the Death of Man,” in *Feminists Theorize the Political*, ed. Judith Butler and Joan W. Scott (New York: Routledge, 1992), 239-56.

rarely considered together. The first is the emergence of an ideal of privacy; the second, an ideology of laissez faire. There are voluminous literatures on both these subjects, but they almost never intersect. The literature on privacy focuses mainly on the family and has been preoccupied to a large extent with the concepts of domesticity and separate spheres.³ Scholarship on laissez faire has revolved almost exclusively around the question of when and to what extent the government intervened in the economy to regulate business activity.⁴ Our aim in this essay is to bring these two literatures together by analyzing the remarkably similar ways in which American courts granted institutional autonomy to both the family and the corporation in the decades following the American Revolution.⁵ We contend that the notions of familial privacy and private enterprise articulated in these decisions contributed in a mutually reinforcing way to a distinctively American interpretation of privacy rights.⁶

³ For valuable analyses of this literature, see Nancy Hewitt, "Beyond the Search for Sisterhood: American Women's History in the 1980s," *Social History* 10 (Oct. 1985): 299-321; and Linda Kerber, "Separate Spheres, Female Worlds, and Woman's Place," *Journal of American History* 75 (June 1988): 9-39.

⁴ 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 Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991).

⁵ The history of other organizations like churches follows a similar trajectory. We are currently exploring this larger pattern in a book-length study about the origins of privacy rights.

⁶ None of the historical scholarship on the Constitutional right to privacy takes this long view or addresses this background of organizational rights, with the partial exception of Minow, "We, the Family," whose stress upon familial rights in the early twentieth century has stimulated our work.

It is important to be clear at the outset that we are not arguing that judges consciously viewed family law and corporate law as interrelated or that in deciding cases involving corporations they drew on precedents from family law or vice versa. Although there were a few important cases where the two branches of law came together (*Dartmouth College v. Woodward* is a good example⁷), for the most part family law and corporate law developed independently. They evolved in parallel, however, because families and corporations had three important features in common. First, both were state-sanctioned organizations invested with larger social missions. Second, both types of organizations originated in contractual agreements—between husbands and wives, on the one hand, and among corporate shareholders, on the other. Third, both types of organizations locked in their members, offering them few avenues of escape or dissolution.⁸

Marriage contracts and corporate charters differed in important ways, of course, but they resembled each other much more than they did other kinds of contracts—for

⁷ *Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

⁸ Divorces, as is well known, were difficult to obtain in the nineteenth century, but it was also hard to dissolve corporations. See Margaret Blair, “Locking in Capital: What Corporate Law Achieved for Business Organizers in the 19th Century,” *UCLA Law Review* 51 (Dec. 2003): 387-455. Although in theory members of corporations could sell off their shares, in practice this option was rarely available because few corporate securities found a ready market on an exchange. See Naomi R. Lamoreaux and Jean-Laurent Rosenthal, “Corporate Governance and the Plight of Minority Shareholders in the United States before the Great Depression,” in *Corruption and Reform: Lessons from America’s Economic History*, ed. Edward L. Glaeser and Claudia Goldin (Chicago: University of Chicago Press, 2006), 125-52.

example, partnerships.⁹ Whereas business people could form and dissolve partnerships at will, the rules for the formation and dissolution of both corporations and marriages were regulated by the states. Partnerships existed only so long as the people who made them up wanted to continue the relationship; corporations, like marriages, were forever.¹⁰ Partnerships were characterized by joint control, unlike corporations and marriages whose hierarchical internal governance systems permitted those at the top to make decisions that were binding on subordinate members. Moreover, both corporations and families were represented in the outside world by their respective heads, and no other member had authority to enter into contracts or otherwise bind the entity. By contrast,

⁹ By the nineteenth century, for example, labor contracts were more like partnership agreements than marriage contracts. Despite what Christopher Tomlins has called the master-servant nomenclature of power, the law treated employers and employees as equals (often to the latter's disadvantage), whereas it subordinated the position of wives in marriages and minority shareholders in corporations. See H. G. Wood, *A Treatise on the Law of Master and Servant Covering the Relation, Duties and Liabilities of Employers and Employees* (Albany, N.Y.: John D. Parsons, Jr., 1877); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993); and Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in England and American Law and Culture, 1350-1870* (Chapel Hill: University of North Carolina Press, 1991).

¹⁰ It was difficult to dissolve even fixed-term corporations before their charters expired, whereas fixed-term partnership contracts generally were not enforceable. See Edwin Merrick Dodd, *American Business Corporations until 1860: With Special Reference to Massachusetts* (Cambridge: Harvard University Press, 1954), 139-40, 184-85, 191-92, 361; and Lamoreaux and Rosenthal, "Corporate Governance."

any member of a partnership could act on behalf of the firm and even incur debts on its behalf without the consent or knowledge of the other members.¹¹

The similarities between marriage contracts and corporate charters meant that families and corporations posed analogous legal problems to judges in the early American republic. Previously the law had granted local officials considerable powers to regulate the internal affairs of these organizations in the name of the King, but in the post-Revolutionary period both families and corporations claimed the right to govern themselves. As judges contended with these increasing assertions of autonomy, they delineated a new public/private divide within American law, effectively placing large areas of economic and personal life beyond the reach of the state. Although the foundation of the government's regulatory authority, its police powers, remained largely intact, now only the most egregious violations of the law would justify interfering in relationships inside these organizations.¹²

¹¹ Partners could sign agreements that restricted unilateral action or imposed a hierarchical management structure, but these contracts were not enforceable against unknowing third parties (for example, lenders). Naomi R. Lamoreaux, "Constructing Firms: Partnerships and Alternative Contractual Arrangements in Early-Nineteenth-Century American Business," *Business and Economic History* 24 (Winter 1995): 60-62; and Lamoreaux and Jean-Laurent Rosenthal, "Legal Regime and Contractual Flexibility: A Comparison of Business's Organizational Choices in France and the United States during the Era of Industrialization," *American Law and Economics Review* 7 (Spring 2005): 42-43.

¹² For a somewhat similar view of household autonomy that follows a different chronology, see Carole Shammas, *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002). More at odds with our interpretation is Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985).

One important consequence of this change was that families and corporations effectively became bearers of rights that trumped those of the people who made them up.¹³ Individuals in dominant 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, while those in subordinate positions, such as wives and minority shareholders, lost legal ground, leaving them increasingly vulnerable to abuse. It is not our contention that actual instances of domestic violence and corporate exploitation became more common as a consequence of the courts' increasing deference to the autonomy of these organizations. Rather our aim is to document the notable contraction of remedies offered by the legal system—first by describing the avenues open to wives and minority shareholders in the colonial and revolutionary periods, and then by analyzing a series of nineteenth-century developments that effectively left victims of familial and corporate abuse without legal recourse. Our account demonstrates that by the middle of the nineteenth century familial and corporate law converged around a common principle of organizational privacy. It is this principle, we argue, that shaped the peculiar way in which individual privacy rights have come to be defined in the contemporary United States.

¹³ For a related argument about how rights in the U.S. Constitution originally pertained to collectivities, see Akhil Reed Amar, *The Bill of Rights* (New Haven: Yale University Press, 1998).

The Integrated Hierarchies of Early Modern England and its Colonies

According to early modern English law, most human relationships were structured hierarchically along lines of authority that radiated downward from the King. The vertical configuration of this integrated hierarchy was most obvious in the case of the church, where the King was the titular head of the bishopric, but the heads of families and corporations similarly owed their power ultimately to the monarch, whose interests they were expected to serve. If they failed to fulfill their duty to the state, the government had the right to intervene in these organizations to insure that they did.

The authoritarian rule of heads of families depended on the extensive legal support that this top-down system of government provided. The law of coverture, for example, stipulated that a woman's property was automatically transferred to her husband upon marriage. Household heads also enjoyed extensive legal powers to command obedience from their subordinates. The criminal law excused fathers and masters who injured or even mistakenly killed their children or servants in the course of administering discipline; conversely, women and servants who killed their husbands or masters could be charged with the crime of "petit treason" and suffer extra torture in addition to the death penalty. In return for these and other powers, household heads were expected to provide support for their dependents, an obligation that extended beyond room and board to the entitlement of widows to dower thirds from estates. Governments throughout colonial America, as in England, possessed the right to discipline men who were derelict

in meeting their responsibilities and even, in extreme situations, to deprive them of legal authority over their wives, children, and servants.¹⁴

Government regulation of corporations was even more extensive. Corporations could not be formed during this period without an explicit grant of authority from the King or from a body to which the King had delegated the right to charter corporations. Such grants of authority always concentrated the power to act on behalf of the organization and to manage its affairs in the hands of a specific individual or group of individuals. The details varied according to the particular type of corporation being chartered (incorporated borough, college, trading company, and so on), but all corporations were expected to fulfill whatever purpose the King had in chartering them. If they did not, the King had a variety of legal ways of compelling obedience, including instituting a *quo warranto* proceeding to abrogate a corporation's charter.¹⁵

¹⁴ These well-known rights and duties are conveniently summarized in Ralph A. Houlbrooke, *The English Family, 1450-1700* (London: Longman, 1984), 17-26; and Shamma, *History of Household Government*, 24-27. On responses to domestic abuse we have relied heavily on the invaluable survey by Elizabeth Pleck, *Domestic Tyranny: The Making of American Social Policy against Family Violence from Colonial Times to the Present* (New York: Oxford University Press, 1987). For instances of court intervention in the colonial period, also see Cornelia Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789* (Chapel Hill: University of North Carolina Press, 1995); Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996).

¹⁵ Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), Book 1, Ch. 18; Stewart Kyd, *A Treatise on the Law of Corporations* (London: J.

The place of the family and the corporation in the social order was not static during the early modern era, and changes in each organization's relationship to the state to some extent increased its autonomy and enhanced the powers of its head. Within the family, for example, 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, so that fathers could more easily disinherit their children and husbands could, if they wished, restrict what they left to their widows.¹⁶ The power of family patriarchs also grew as a consequence of the Protestant Reformation, which decreased the authority of the clergy and encouraged laymen to conduct worship and provide religious education within the home.¹⁷ In the North American colonies heads of households gained even greater authority. The far more extensive land ownership gave a larger proportion of men the means to exert leverage over the next generation through the control of inheritance.¹⁸

Butterworth, 1793), Vol. 1, 320-30; Bruce A. Campbell, "Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy," *Kentucky Law Journal* 70 (issue 3, 1981-82): 643-706.

¹⁶ Carole Shammas, Marylynn Salmon, and Michel Dahlin, *Inheritance in America: From Colonial Times to the Present* (New Brunswick: Rutgers University Press, 1787), 23-30.

¹⁷ Christopher Hill, *Society and Puritanism in Pre-Revolutionary England* (Rev. edn.; New York: Schocken Books, 1964), 443-81; Gordon J. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes, Especially in Seventeenth-Century England* (Oxford: Basil Blackwell, 1975).

¹⁸ Philip J. Greven, Jr., "Family Structure in Seventeenth-Century Andover, Massachusetts," *William and Mary Quarterly* 23 (Apr. 1966): 234-56. Also see Anne S. Lombard, *Making Manhood: Growing Up Male in Colonial New England* (Cambridge: Harvard University Press, 2003); Daniel Vickers,

Moreover, families gradually became more independent of external regulation as a consequence of the relative weakness of disciplinary institutions like schools, craft guilds, poorhouses, orphanages, standing military units, and jails.¹⁹

The autonomy of corporations also increased during the early modern period. The English Civil War weakened the King's power over corporations, particularly those that constituted local government in many parts of the realm, and the Glorious Revolution formalized this loss of authority, making the charters of the incorporated boroughs sacrosanct and establishing that charters of charitable corporations could not be arbitrarily altered or revoked by the crown.²⁰ This latter restriction did not apply to "civil" corporations, a category that at the time included trading and other business companies; nor did it apply to Parliament, whose powers were supreme. Nonetheless, although Parliament continued to intervene in the affairs of the so-called "monied" corporations—the Bank of England, the South Sea Company, the East India Company,

Farmers and Fishermen: Two Centuries of Work in Essex County, Massachusetts, 1630-1850 (Chapel Hill: University of Carolina Press, 1994), esp. 64-72.

¹⁹ The multi-functionality and centrality of the colonial family in the absence of other institutions is stressed in Bernard Bailyn, *Education in the Forming of American Society* (Chapel Hill: University of Carolina Press, 1960). As Shamma emphasizes in her *History of Household Government*, the centrality of the family boiled down to supremacy of household heads.

²⁰ Blackstone, *Commentaries*, Book 1, Ch. 18, 471; Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Ithaca: Cornell University Press, 1983), 28-29; Jennifer Levin, *The Charter Controversy in the City of London, 1660-1688, and its Consequences* (London: Athlone Press, 1969); Campbell, "Dartmouth College."

and the other great trading companies—that financed the government’s budget, it preferred to avoid the “shock to public opinion” that tampering more generally with corporations would provoke.²¹

In the colonies corporations were even more likely, by dint of their distance from the metropole, to be left alone than those in England. The big exceptions of course were the chartered colonies themselves. In the late seventeenth century Charles II and James II moved to revoke the charters of Massachusetts and the other New England colonies regarded as Puritan strongholds. Parliament reinstated the charters after the Glorious Revolution but imposed significant modifications that gave the British government an ongoing role in colonial affairs. This series of events also imperiled the status of those corporations—mainly, but not exclusively, towns—that the chartered colonies had created without explicit permission from the King. With the exception of a few special corporations such as Harvard College, however, Parliament allowed the existing charters to stand. Subsequent grants of incorporation were subject, like all colonial legislation, to royal approval, but once this approval was granted the corporations were for the most part left to their own devices.²²

²¹ The quote about public opinion is from Chief Justice John Marshall’s decision in *Dartmouth College v. Woodward*, 17 U.S. 518 at 643. See Armand Budington DuBois, *The English Business Company after the Bubble Act* (reprint of 1938 edn.; New York: Octagon Books, 1971), 120-22, 196-98.

²² Jason Kaufman, “Origins of the Asymmetric Society: Political Autonomy, Legal Innovation, and Freedom of Incorporation in the Early United States,” unpublished paper, 2006; Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations*. Cambridge: Harvard University Press,

Despite these trends towards institutional autonomy, the law in the seventeenth and eighteenth century still set significant limits on the power wielded by the heads of families and corporations. A particularly striking example of the government's right of intervention affected the treatment of spousal abuse. Under the English common law a battered wife possessed a right to charge her husband with the crime of breach of the peace by going to her local magistrate and orally reporting 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.²³ Whereas assaults and batteries involving men tended to be viewed as matters to be settled between individuals rather than as crimes against the state, the theoretical victim of a wife-beating was the kingdom or the commonwealth and her suit for the peace was a criminal rather than a civil action.²⁴ 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

1917), vol. 1, 3-29; Andrew McFarland Davis, *Corporations in the Days of the Colony* (Cambridge: John Wilson and Son, 1894).

²³ Parts of the following argument also appear in Ruth H. Bloch, "The American Revolution, Wife Beating, and the Emergent Value of Privacy," *Early American Studies* 5 (Fall 2007): 223-51.

²⁴ Laura Edwards, "The People's Sovereignty and the Law: Defining Gender, Race, and Class Differences in the Antebellum South," in *Beyond Black and White: Race, Ethnicity, and Gender in the U.S. South and Southwest*, eds. Stephanie Cole and Alison M. Parker (College Station: Texas A&M University Press, 2004), 3-34.

potential incarceration and corporeal punishment.²⁵ The underlying legal logic held that the family was part of the public domain. Just as the husband possessed legal authority as an agent of government, the wife had recourse to appeal to the state if he misused his power by beating her.

Abused members of corporations had several different avenues through which they could seek redress of their grievances from the state. There were a variety of writs they could employ under specific circumstances to bring their cases before the common law courts (for example, the writ of *mandamus* could be used to compel a corporate officer to perform his duty with respect to a shareholder). More generally, members could seek injunctions in Chancery against corporate officers who took improper advantage of their positions of authority or misappropriated company funds.²⁶ They could also appeal directly to Parliament or, in the colonies, to the appropriate legislative body. For example, disgruntled stockholders petitioned Parliament to investigate corporate mismanagement and breaches of trust in cases involving the Company of Mine Adventurers, the Hudson's Bay Company, the York Buildings Company, the Charitable Corporation, and the East India and South Sea Companies.²⁷ In the colonies New Englanders flooded their legislatures with petitions complaining about being locked into

²⁵ Pleck, *Domestic Tyranny*, 20-31.

²⁶ DuBois, *English Business Company*, 123-25; Roscoe Pound, "Visitorial Jurisdiction over Corporations in Equity," *Harvard Law Review*, 49 (Jan. 1936), 369-95; Campbell, "*Dartmouth College*."

²⁷ For similar appeals to other government bodies, see DuBois, *English Business Company*, 122-27, 198-205.

parishes or towns that did not meet their needs and seeking the right to secede from these organizations and form new ones.²⁸

Of course the mere existence of these legal remedies for spousal abuse and minority oppression in corporations did not mean that there was consistent enforcement; nor is it possible to gauge how much wife beating or shareholder abuse actually occurred. Justices of the peace left no formal records of their impromptu discretionary decisions, and the few wife-beating cases that made it to trial under the New England laws were most likely only the tip of the iceberg.²⁹ Outside of New England the number of cases and petitions involving disgruntled members of corporations that reached the courts and legislatures was also small.³⁰ And yet it is clear that these available remedies for corporate and marital mistreatment were widely recognized as effective in both England and America. In the most highly publicized instance of corporate corruption of the eighteenth century, for example, Parliament confiscated the estates of directors of the

²⁸ See, for examples, Richard L. Bushman, *From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765* (Cambridge: Harvard University Press, 1967), 54-72; and Kenneth A. Lockridge, *A New England Town: The First Hundred Years* (New York: W. W. Norton, 1970).

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), 49, 137; Dayton, *Women Before the Bar*, 136-37. However, better English evidence indicates that ordinary women typically used the procedure. See Jennine Hurl-Eamon, *Gender and Petty Violence in London, 1680-1720* (Columbus: Ohio State University Press, 2005).

³⁰ DuBois, *The English Business Company*, 125-27.

South Sea Company for the benefit of the company.³¹ When Harvard College got into financial difficulties in the mid-seventeenth century, the Massachusetts General Court restructured the college's administration, shifting control over its finances to the Board of Overseers.³² The right of beaten wives to sue for the peace was similarly affirmed in two high profile English cases tried before the King's Bench in the late seventeenth century, *Lord Leigh's Case* and *King v. Lord Lee*.³³ In the 1760s, William Blackstone's authoritative *Commentaries on the Laws of England* referred to both these cases as evidence for the "polite" treatment of women in England, and legal manuals for local justices printed in colonial America typically noted the right of a beaten wife to seek the peace.³⁴

³¹ DuBois, *The English Business Company*, 122.

³² Samuel Eliot Morison, *Harvard College in the Seventeenth Century* (Cambridge: Harvard University Press, 1936), Vol. I, 302-5.

³³ Henry Ansgar Kelly, "Rule of Thumb and the Folklaw of the Husband's Stick," *Journal of Legal Education* 44 (September 1994): 355.

³⁴ Blackstone, *Commentaries*, Book 1, Ch 15, 443. Of ten manuals surveyed, seven mentioned this right: Richard Burn, *An Abridgement of Burn's Justice of the Peace* (Boston: Greenleaf, 1773), 29; *Conductor Generalis: or The Office, Duty and Authority of Justices of the Peace* (New-York: Printed by John Patterson, 1788), 32; and [John Fauchereaud Grimké, comp.], *The South-Carolina Justice of Peace* (Philadelphia: R. Aitken & Son, 1788), 24; William Simpson, *The Practical Justice of the Peace* (Charleston, S.C.: Robert Wells, 1761), 247; François X. Martin, *The Office and Authority of a Justice of the Peace* (Newbern, N.C.: Francois-Xavier Martin, 1791), 144; Collinson Read, *Precedents in the Office of a Justice of Peace* (Philadelphia: Hall and Sellers, 1794), 4; William Waller Hening, *The New Virginia Justice* (Richmond: T. Nicolson, 1795), 430.

Transformations of the Revolutionary Era

The American Revolution broke apart the integrated hierarchical ordering of legal authority that, during the colonial period, had run from the head of state down into the family and the corporation through the heads of these organizations. The revolutionary premises of individual natural rights and popular sovereignty reduced status differences among adult white males and undercut the assumption that men of the common sort could not be trusted reliably to perform their duties as heads of households. At the same time, the profound suspicion of government that developed over the course of the Revolutionary era undercut faith in the state's ability to play a supervisory role over organizations within its domain. As deferential attitudes towards republican as well as royal governments diminished, heads of households and corporations felt entitled to act autonomously in what they increasingly regarded as their private domains.³⁵

For a time there were hints that the Revolution would bring more radical change by challenging the hierarchical character of the relationships within households and corporations. A few leaders like Judith Sargent Murray and Charles Brockden Brown criticized the subordination of women, and some even greeted Mary Wollstonecraft's *Vindication of the Rights of Women* warmly upon its publication in 1792. Encouraged by the rising ideal of companionate marriage and the related view of wedlock as a contract

³⁵ Gordon S. Wood, *The Radicalism of the American Revolution* (New York: A. A. Knopf, 1991); Wood, *The Creation of the American Republic, 1776-1887* (Chapel Hill: University of North Carolina Press, 1969); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1967).

between equals, a few states passed new legislation granting absolute divorce on the grounds of adultery and desertion (although not yet, significantly, cruelty).³⁶ Concerns about the inadequacy of female education led to the proliferation of female academies. Moreover, for a short time in the 1790s and early 1800s, a few property-owning women and blacks in New Jersey even took advantage of what appeared to be their right to vote.³⁷

By the late 1790s, however, the backlash against the French Revolution had severely tarnished the reputations of Wollstonecraft and other women's rights advocates, and New Jersey's brief expansion of the franchise ended abruptly amidst cries of political corruption.³⁸ What remained of the push towards female equality was the widespread literary and religious idealization of women, marriage, and family as sources of morality that were set apart from the distasteful machinations of politics.³⁹ The few successful

³⁶ Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (Berkeley: University of California Press, 1999). On the rise of more egalitarian ideals of marriage, also see Mary Beth Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* (Boston: Little Brown, 1980).

³⁷ The best full-length study of women and revolutionary ideology is still Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University North Carolina Press, 1980). On the rise of more egalitarian ideals of marriage, also see Norton, *Liberty's Daughters*.

³⁸ Rosemary Zagarri, *Revolutionary Backlash: Women and Politics in the early American Republic* (Philadelphia: University of Pennsylvania Press, 2007), esp. 164-180.

³⁹ On the ideal of domestic privacy, see, for example, Jan Lewis, *Pursuit of Happiness: Family and Values in Jefferson's Virginia* (New York: Cambridge University Press, 1983); and Ruth H. Bloch,

reforms that benefited women, like improved education and greater possibilities for divorce in cases of desertion, were justified almost exclusively in terms of women's familial duties rather than rights. Older customs and laws upholding the authority of adult white men in their homes remained largely in tact after the American Revolution, while the idealized view of private life undermined the rationale for government oversight.⁴⁰

There was also a brief period after the Revolution when it seemed that government would play a more interventionist role in corporate affairs. Most existing corporations had been chartered by the crown, and legislators did not feel obligated to acquiesce in the terms that the King and Parliament had set. 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 grants of corporate charters passed by its predecessor. Such actions were especially likely where hot-button political issues, like the disestablishment of churches were concerned, or where special privileges granted to transportation companies or banks touched off storms of protest. For example, the Virginia legislature passed an act incorporating the newly disestablished Episcopal Church in 1784, but two years later it responded to

Gender and Morality in Anglo-American Culture (Berkeley: University of California Press, 2003), esp. 136-66.

⁴⁰ Joan R. Gundersen, "Independence, Citizenship, and the American Revolution," *Signs* 13 (Autumn 1987): 59-77; Edwards, "People's Sovereignty"; and Holly Brewer, "The Transformation of Domestic Law," in *Cambridge History of Law in America*, eds. Christopher Tomlins and Michael Grossberg (New York: Cambridge University Press, 2007), 490-550.

protests against this special status for the Church by repealing it.⁴¹ Similarly, after the Virginia assembly chartered the Richmond James River Company in 1804, a deluge of complaints resulted in an amendment exempting owners of small boats from the toll.⁴² In Pennsylvania, the intensely political controversy over the Bank of North America led a hostile legislature to repeal its original charter in 1785 and then a newly elected assembly in 1787 to pass a second one with more restrictive provisions.⁴³ Colleges throughout the new nation, including Harvard, Yale, King's College (Columbia), William and Mary, and Dartmouth, also faced legislative meddling in their charters.⁴⁴

Like the more radical arguments for women's rights, however, this assertion of the power of state legislatures to revoke and alter corporate charters proved short lived, a victim of a renewed commitment to the protection of private property rights in the wake of the Revolution. The Constitution itself was part of this backlash, of course, and as early as Washington's first administration federal judges used the limits on the state authority demarcated in Article I to overturn statutes that abrogated contracts or deprived

⁴¹ *Terrett v. Taylor*, 13 U.S. 43 (1815).

⁴² Bruce A. Campbell, "John Marshall, the Virginia Political Economy, and the *Dartmouth College* Decision," *American Journal of Legal History* 19 (Jan. 1975): 45-46.

⁴³ Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly* 50 (Jan. 1993): 76-77; Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton: Princeton University Press, 1957), 53-64; Andrew M. Schocket, *Founding Corporate Power in Early National Philadelphia* (DeKalb, Ill.: Northern Illinois University Press, 2007), 49.

⁴⁴ Campbell, "Dartmouth College," 676-91.

citizens of their property without appropriate compensation.⁴⁵ Under Chief Justice John Marshall the U.S. Supreme Court cemented this defense of private property with a series of decisions invoking the contract clause of the Constitution to prevent states from rescinding land grants (*Fletcher v. Peck*), repealing perpetual tax exemptions (*New Jersey v. Wilson*), releasing borrowers from debt obligations (*Sturges v. Crownshield*), and (of particular interest for our purposes) tampering with corporate charters (*Dartmouth College v. Woodward*).⁴⁶

At stake in the *Dartmouth* case was a New Hampshire law that restructured the college's board of trustees. The Supreme Court ruled that Dartmouth College was a private corporation and as such protected by the contract clause of the Constitution. Hence the New Hampshire legislature could not alter the composition of Dartmouth's board or any other aspect of the college's charter without the corporation's acquiescence.⁴⁷ 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

⁴⁵ See Wood, *Creation of the American Republic*; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990); and James W. Ely, Jr., "The Marshall Court and Property Rights: A Reappraisal," *John Marshall Law Review* 33 (Summer 2000), 1023-61.

⁴⁶ *Fletcher v. Peck*, 10 U.S. 87 (1810); *New Jersey v. Wilson*, 11 U.S. 164 (1812); *Sturges v. Crownshield*, 17 U.S. 22 (1819); and *Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

⁴⁷ *Dartmouth College v. Woodward*, 17 U.S. 518.

terms.⁴⁸ Nonetheless, 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 both corporations and families.

Privatizing the Corporation and the Family

During the first half of the nineteenth century corporations and families broke free of much of their earlier dependence on the states. The rules of entry and exit for both types of organizations became somewhat more relaxed as states passed general incorporation acts and extended earlier provisions for marital separation to allow for complete divorce. More significantly for our story, however, governments became increasingly indifferent to what went on within these organizations. Only in unusual circumstances, when families or corporations aroused public condemnation (during the bank wars of the Jacksonian period, for example, or, later, during the polygamy crisis in Utah), did their internal arrangements attract renewed interest from legislatures and the courts. Although members of these organizations were still liable for the commission of

⁴⁸ Actually, the debate over the application of the contract clause to corporations had begun long before the *Dartmouth* decision, and some states were already adding reservation clauses to charters. See Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Chicago: Quadrangle Books, 1948), 236-53. On the effects of the decision, see also William P. Wells, "The Dartmouth College Case and Private Corporations," *Report of the Ninth Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1886): 229-56.

gross acts of fraud or felonious violence upon one another, the state increasingly regarded these organizations as private and turned a blind eye to conflicts among their members.⁴⁹

In the case of corporations this process began soon after the Revolution, as judges confronted the problem of where to draw the line between public and private corporations. As in the colonial era, securing a corporate charter required a special act of the legislature, and there was still a general consensus that legislatures should only grant charters to achieve some publicly desirable end.⁵⁰ But whether having a public purpose made a corporation a public entity subject to the unfettered legislative control enjoyed by Parliament provoked considerable disagreement. On the one hand, some Virginia justices took the extreme position that acts of incorporation “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

⁴⁹ For somewhat differing interpretations of the exit and entry rules pertaining to marriage, see Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000); and Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2000).

⁵⁰ Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy* (Rev. edn.; Cambridge: Harvard University Press, 1969); Hartz, *Economic Policy and Democratic Thought*; Johann N. Neem, “Politics and the Origins of the Nonprofit Corporation in Massachusetts and New Hampshire, 1780-1820,” *Nonprofit and Voluntary Sector Quarterly* 32 (Sept. 2003): 344-65.

privilege.⁵¹ On the other hand, New Hampshire's high court opined that corporations might serve a public purpose but still be considered private if they aimed to earn profits for their members. Since the beneficial interest in private corporations was "vested severally" in the members, who were able to sell and transfer their shares, the "property and immunities" of private corporations stood "on the same ground with the property and immunities of individuals." If the incorporators had "no private beneficial interest" in the institution, as was the case with Dartmouth College, it was a public corporation whose governance remained "the province of the legislature."⁵²

In overturning the New Hampshire court's ruling in the *Dartmouth College* case, the U.S. Supreme Court resolved such disagreements by greatly broadening the definition of private corporations to encompass all entities not funded by the government. Although Dartmouth served a publicly desirable charitable purpose, the men who had organized it had endowed it with their own funds and had applied for a corporate charter simply to enable them better to achieve their ends, because the corporate attributes 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 the

⁵¹ The quote is from Justice Spencer Roane's opinion in *Currie's Administrators v. The Mutual Assurance Society*, 14 Va. 315, 347 (1809). See also Campbell, "John Marshall," 49-55.

⁵² *Dartmouth College v. Woodward*, 65 N.H. 473, 628-31 (1817).

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.”⁵³

Although states could retain their regulatory control over private corporations by inserting reserve clauses into charters, the *Dartmouth* decision nonetheless raised fears that corporations would become autonomous bastions of economic and political power. As the Jacksonian publicist William Gouge later put it, corporations were “incompatible with equality of rights.”⁵⁴ Although some critics proposed abolishing corporations entirely, so many upwardly mobile men wanted to form them that in most states the solution instead was to broaden access to the corporate form. During the antebellum decades a majority of states (ranging from Maine in the North to Florida in the South to California in the West) passed laws that eliminated the element of privilege that inhered in corporations by making charters available to anyone who met a set of basic requirements and paid a fee.⁵⁵ The egalitarian underpinnings of these acts are apparent in

⁵³ The last quote is from Story’s opinion and the others are from Marshall’s. *Dartmouth College v. Woodward*, 17 U.S. 518, 636, 668-69. On this point, see also 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 (Summer 1976): 825-41.

⁵⁴ Quoted in James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University Press of Virginia, 1970), 30. See also Schocket, *Founding Corporate Power*, esp. Ch. 2.

⁵⁵ Hurst, *Legitimacy of the Business Corporation*, 13-57; and Susan Pace Hamill, “From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations,” *American University Law Review* 81 (Oct. 1999): 81-180.

the many provisions that constrained the economic power of corporations. Most of the laws, for example, required corporations to specify in their charters the maximum amount of capital they could raise and the type of business in which they would engage, forbidding them from increasing their capital or moving into any other activity without first securing shareholders' unanimous consent and amending their charters.⁵⁶ Laws for specific kinds of corporations often included additional regulations. For example, the so-called "free" banking laws enacted beginning in the late 1830s required banks to meet minimum capital requirements and limited their ability to open branches.⁵⁷

An important consequence of this movement toward general incorporation was the gradual erosion of the idea that corporate charters required a public-interest justification. Although some politicians would continue throughout the century to invoke the principle that corporations served the public good, as a matter of practice corporations were increasingly conceived of as ordinary private enterprises. Even before the passage of general incorporation laws, legislatures' greater willingness to grant charters had set this process in motion. For example, although some applicants for bank charters continued in the 1820s and 1830s to cite the public interest in their petitions, an increasing number merely provided a list of participants and a brief statement that the undersigned wished to organize a bank.⁵⁸

⁵⁶ Hurst, *Legitimacy of the Business Corporation*, 44-45.

⁵⁷ Larry Schweikart, "U.S. Commercial Banking: A Historiographical Survey," *Business History Review* 65 (Autumn 1991): 606-61.

⁵⁸ Naomi R. Lamoreaux, *Insider Lending: Banks, Personal Connections, and Economic Development in Industrial New England* (New York: Cambridge University Press, 1994), 28.

Once there was no longer any need to demonstrate broad community support to secure a charter, the process of forming and investing in a corporation became increasingly private. Early corporations had gone to great lengths to encourage broad participation in their ventures, advertising their initial stock offerings in newspapers and taking subscriptions in public locations, including market buildings, court houses, and taverns.⁵⁹ By mid-century the vast majority of corporations never even made a public offering of their stock but rather were conceived from the very beginning as what we would today call “close” corporations. Typically the lists of incorporators on applications for charters now included only a small number of names—often the minimum required to obtain a charter.⁶⁰ Even in sectors such as banking, where organizers sought outside investors, it was increasingly common for a small number of individuals to divide the initial offering among themselves and then gradually sell off shares to small investors in a series of private transactions.⁶¹

⁵⁹ Sally F. Griffith, “Rituals of Incorporation in Ante-bellum Civic Life,” *Mid-America* 82 (Winter/Summer 2000): 51-70. See also John Majewski, *A House Dividing: Economic Development in Pennsylvania and Virginia Before the Civil War* (New York: Cambridge University Press, 2000), 111-40; and Majewski, Christopher Baer, and Daniel B. Klein, “Responding to Relative Decline: The Plank Road Boom of Antebellum New York,” *Journal of Economic History* 53 (March 1993): 106-22.

⁶⁰ See, for example, the microfilm records of business corporations chartered in Massachusetts under the 1851 general incorporation law. These are available in the office of the Corporations Division of the Secretary of the Commonwealth.

⁶¹ Lamoreaux, *Insider Lending*, 18-22.

As corporations became ordinary private enterprises with little to distinguish them from enterprises that did not take the corporate form, the justification for state interference in their internal affairs disappeared.⁶² Not that governments gave up any of their regulatory authority. States routinely inserted reservation clauses into corporate charters, and incorporated enterprises still had to conform, as Justice Story put it in his *Dartmouth College* opinion, “to the general law of the land.”⁶³ When it came to relations among their own members, however, corporations—like single proprietorships and business partnerships—were now largely left to their own devices. Indeed, the only exceptions to this laissez-faire stance involved types of corporations whose activities directly impinged on important public interests. For example, because the solvency of banks mattered for the community as a whole, states sometimes enlisted minority shareholders in their efforts to promote sound banking practices, essentially offering them protection against abuse 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.⁶⁴ Similarly, the Massachusetts General Court passed statutes in 1843 and 1851 granting

⁶² It should be noted that the flip side of this process was that entities regarded as public (local governments, for example) were losing whatever autonomy they had had from state government. See Joan C. Williams, “The Invention of the Municipal Corporation: A Case Study in Legal Change,” *American University Law Review* 34 (Winter 1985): 369-438; and Hartog, *Public Property and Private Power*.

⁶³ *Dartmouth College v. Woodward*, 17 U.S. 518, 675.

⁶⁴ “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.

stockholders who held at least one-eighth of a bank's shares the right to demand an audit and creating a board of bank commissioners charged with making "a full investigation" upon request of any five of a bank's shareholders."⁶⁵ By contrast, where no vital public interests were at stake, minority shareholders had no such access to state intervention.

Compared to corporations, families aroused little political concern during the Revolutionary era, and their legal status underwent scarcely any change in its aftermath. The only significant exception was the slight liberalization of divorce—a step that technically weakened the power of the state to enforce the permanence of marriage but was so limited that it provoked little controversy. The egalitarian impulse of the Revolution affected families for the most part indirectly, through the augmentation of the status of adult white men positioned at the heads of households. In the decades after the Revolution American judges would repeatedly face situations of domestic conflict that required decisions about whether to intervene in families to break up marriages or punish household heads for abusing their power. Increasingly, these judges invoked the privacy of the family to justify non-intervention in much the same way as American law of the post-revolutionary period came to privatize the internal affairs of corporations.

The changing treatment of male-on-male assault is of particular relevance to our story because of its direct comparability to the treatment of violence within the family. Until the early nineteenth century the government paid little attention to fights between men. The main remedy that traditional English law extended to victims of assault was the

⁶⁵ Massachusetts, General Court, *Acts and Resolves* (1843), 56-58; and (1851), 625-28.

right to launch private suits to seek monetary compensation for their injuries.⁶⁶

Assailants were scarcely ever put in jail unless there were aggravating circumstances like attempted robbery. Between about 1800 and 1840, however, American law criminalized male-on-male violence. Government prosecution of assault and battery became more common, and assailants were more likely to receive prison sentences. Nineteenth-century criminal law also notably expanded the grounds of legitimate self-defense, departing from the English “rule of retreat” that had traditionally required victims of violence to flee from attacks whenever possible.⁶⁷ Both by increasing the penalties and by granting some rights of retaliation to the victims themselves, post-revolutionary American law increased the protection of male citizens against ordinary acts of violence.

But the expanding rights of American men also worked to insulate violence within the family from the state. In the decades after the Revolution American legal authorities became less likely to perceive wife beating as a breach of public order, and the older remedy of “suing for the peace” fell gradually into disuse.⁶⁸ The steady attrition of the practice can be traced through the multiple editions of justice of the peace manuals that appeared the early nineteenth-century. 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

⁶⁶ Blackstone, *Commentaries*, Book IV, Ch. 1, 6, Ch. 15, 217-18, Ch. 27, 356-57; Peter King, “Punishing Assault: The Transformation of Attitudes in the English Courts,” *Journal of Interdisciplinary History* 27 (Summer 1996): 43-74.

⁶⁷ Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* (New York: Oxford University Press, 1991).

⁶⁸ Edwards, “People’s Sovereignty”; Bloch “American Revolution, Wife Beating.”

proportion fell steadily over time until references to this remedy almost completely disappeared during the second half of the century.⁶⁹ An 1839 opinion of the Vermont Supreme Court commented directly on the unavailability of the traditional procedure in the course of adjudicating a case of a husband who had threatened to ambush and kill his wife. The Court observed that at common law “the person threatened can swear the peace against the offender, and obtain redress in that way,” but noted that “this mode of preventive justice has not been much resorted to, if, indeed, it exists in this state.” The court instead considered whether the man’s offense should be classified as assault and battery even though his wife was not yet injured, or (as they finally concluded) breach of the public peace since the threat was made on the street in front of other people.⁷⁰

In contrast to the colonial era, when the designation of abuse as a “breach of the peace” gave wives a special remedy in recognition of their subordinate position within marriage, marital violence now increasingly fell into the larger category of assault and battery with more stringent requirements for witnesses and physical evidence.⁷¹ Moreover, when husbands were charged with assault and battery against their wives, the

⁶⁹ A study by Bloch with John Dixon found that 44 percent of a large sample of manuals contained the language in 1800-09, 30 percent in 1830-39, 10 percent in 1850-59, and none in 1880-89.

⁷⁰ *State v. Benedict*, 11 Vt. 236 (1839).

⁷¹ Several local studies have documented this gradual and uneven shift. For example, Allen Steinberg, *The Transformation of Criminal Justice, Philadelphia, 1800-1880* (Chapel Hill: University of North Carolina Press, 1989); Stephanie Cole, “Keeping the Peace: Domestic Assault and Private Prosecution in Antebellum Baltimore,” in *Over the Threshold: Intimate Violence in Early America*, eds. Christine Daniels and Michael V. Kennedy (New York: Routledge, 1999), 148-69.

injuries their wives suffered as individuals seemed of little significance compared to the higher priority of keeping the state out of the family. In 1844 an Alabama opinion placed a premium on protecting domestic privacy when dismissing the possibility that a beaten wife had been coerced by her husband to testify on his behalf. “The State could certainly have no interest in exposing to the public gaze, a matrimonial dispute, which those, most, if not solely, interested in, were willing to bury in oblivion.”⁷² Justice Edwin Reade of North Carolina provided an unusually detailed exposition of the conservative political theory behind this division between the family and the state, maintaining that “family government is recognized by law as being as complete in itself as the State government is in itself.” Reade acknowledged that families were ultimately subordinate to the state but insisted that intervention occur only in the most extreme situations “requiring the strong arm of the law.”⁷³ According to a phrase repeatedly used by nineteenth-century jurists in both North Carolina and Maine, families were screened by the courts from legal intervention by a “curtain.” The benefit of preventing minor physical injuries paled in significance to keeping that curtain closed.⁷⁴

⁷² *State v. Neill*, 6 Ala. 685 (1844).

⁷³ *State v. Rhodes*, 61 N.C. 453 (1868).

⁷⁴ 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): 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).

Because the corporation and the family fell into separate categories of the law, the courts rarely articulated the intertwined logic of corporate and familial rights to privacy. Legal authorities frequently pointed out that marriage was a contract in some ways similar to a labor or business contract, but such comparisons typically limited their focus to the voluntary, binding agreements that initiated the relationship.⁷⁵ A little noticed argument in the *Dartmouth* case between the Supreme Court justices and the attorney for New Hampshire was therefore unusual in using the similarity between marriages and corporations to debate the permissible degree of state intervention in both relationships. Comparing the legislature's attempt to reorganize the college to a grant of divorce, New Hampshire's attorney began the exchange by observing that divorces "unquestionably impair the obligation of the nuptial contract" by changing "the marriage state, without the consent of both the parties." Yet "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 equally spurious. Corporations, like marriages, were government-created civil institutions which "every society has an inherent right to regulate as its own wisdom may dictate."⁷⁶

⁷⁵ Marriage was also considered a "status" as well as a contract. Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1999), 180-86.

⁷⁶ Attorneys' arguments in *Dartmouth College v. Woodward*, 17 U.S. 518.

Countering this argument on behalf of state intervention, both Marshall and Story insisted that marriage vows established couples as private organizations with the same right of protection from state interference as corporations. As Marshall pointed out, divorce laws did not operate to impair marriage contracts, but merely allowed a court “to liberate one of the parties” 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.” Unless the original contract had been broken, the state could no more interfere in marital relationships than it could in those of corporate shareholders.⁷⁷

Consequences for Subordinates in Hierarchies

The Supreme Court justices’ construction of marriage as a contract between equals revealingly broke down, however, when Story further developed the idea that marriage contracts, like corporate charters, were constitutionally protected. It was “not easy to perceive,” he asserted, 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 displayed his underlying commitment to husbands’ prescriptive rights over 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

⁷⁷ *Dartmouth College v. Woodward*, 17 U.S. 518, 629, 696.

to the property acquired under a marriage contract.” To divest a husband 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.”⁷⁸ This view of husbands’ rights posed no problem for the analogy between marriages and corporations, however, for the justices underlying conception of corporations was similarly hierarchical. Marshall acknowledged that the Court’s strict application of the Constitution’s contract clause could have the effect of entrenching in corporations power structures that emanated “from a regal source” and might “partake of the spirit of their origin.” But he found it 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.”⁷⁹ The implication was that men could be trusted to rule their domains with a benevolent hand, whether those domains were corporations or families.

The reality, of course, was that men could not always be trusted. Yet the greater autonomy of corporations and families meant that their subordinate members increasingly found themselves without legal remedy when they fell victim to abuse. Within families, the legal treatment of wife beating again affords a vivid illustration of the way in which the growing reluctance of the state to interfere in the internal affairs of these organizations reinforced their hierarchical character. Not only did judges often invoke familial privacy when acquitting men who were accused of assault and battery on their

⁷⁸ *Dartmouth College v. Woodward*, 17 U.S. 518, 696-97.

⁷⁹ *Dartmouth College v. Woodward*, 17 U.S. 518, 648-50.

wives, but the previously discredited notion that it was legal to beat a disobedient wife took on a new life. As we have seen, it is debatable whether the infliction of corporal violence upon a wife (as distinct from restraint and confinement) had ever been sanctioned in English law, and yet a number of nineteenth-century American legal authorities asserted that husbands enjoyed such a “traditional” right. In a particularly zealous opinion of 1824, Justice Powhattan Ellis of Mississippi gave credence to the so-called “rule of thumb” that allowed a husband to beat his wife punitively so long as he used an implement no wider than his thumb.⁸⁰ Only slightly less extreme were arguments made in several other nineteenth-century court decisions and legal writings, particularly in the South, holding that the common law permitted husbands to inflict physical punishment on their wives. For example, the Court of General Sessions in Delaware ruled in 1838 that a husband was only indictable for “undue or excessive battery of his wife, either in degree or with improper means.”⁸¹ 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.⁸²

⁸⁰ *Bradley v. State*, 1 Miss. 156 (1824). Also see Bloch, “American Revolution, Wife Beating,” pp. 245-48; Kelly, “Rule of Thumb.”

⁸¹ *State v. Buckley*, 2 Del. (2 Harr.) 552 (1838).

⁸² *State v. Hussey*, 44 N.C.123 (1852).

The Southern location of this permissiveness towards wife beating comes as no surprise to historians familiar with the 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 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. Tapping Reeve's *Law of Baron and Feme* of 1816, for example, celebrated the colonial history of his state of Connecticut where "the right of chastising a wife is not claimed by any man."⁸³ In the 1820s and 1830s, several northeastern appellate decisions also categorically denied the husband's right of chastisement.⁸⁴ Yet the very necessity of these rulings points to the fact that more disagreement over wife beating existed after the Revolution than in the colonial period, when law books routinely referred to the right of a threatened or beaten wife to sue for the peace. Even those reformers who most vigorously opposed wife beating tended to discuss the husband's right of chastisement as though it were a settled

⁸³ Tapping Reeve, *Baron and Feme* (New Haven: Oliver Steele, 1816), 65.

⁸⁴ For example, *James v. Commonwealth*, 12 Serg. & Rawle 220 (Pa., 1824); *Perry v. Perry* 2 Paige 503 (1831); *Poor v. Poor*, 8 N.H. 307 (1836). Later New Jersey and Massachusetts opinions that ruled against the right of chastisement are stressed in Rollin C. Hurd, *A Treatise on the Right of Personal Liberty* (Albany: W.C. Little, 1858), 25-28; and Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce* (Boston: Little Brown, 1858), 373-74.

fact that such a common law right existed.⁸⁵ A few eminent Northern legal writers of the nineteenth century took far less critical positions. James Kent, the Chancellor of New York, endorsed a husband's right to impose "gentle restraints" on a wife, and the Philadelphia criminal treatise writer Francis Wharton neutrally cited Southern cases supporting chastisement to illustrate the lack of consensus in the United States.⁸⁶ In 1891 Irving Browne, a prominent legal writer in Troy, New York, reflected on 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.⁸⁷

Even without explicitly condoning the right of chastisement, Northern courts were likely to overlook the violence of husbands whose anger seemed a response to their wives' provocation. Even as state legislatures began to pass statutes permitting divorce in cases of cruelty in the first half of the nineteenth century, the view that a favorable judgment depended on the wife's patient forbearance of her husband's mistreatment held

⁸⁵ Hurd, *Treatise on the Right of Personal Liberty*, 25-28; Elisha P Hurlbut, *Essays on Human Rights and their Political Guaranties* (New York: Greeley & McElrath, 1845), 162-63. Also see the "Declaration of Sentiments" issued by the first women's rights convention in Seneca Falls in 1848, in *Major Problems in Women's History*, ed. Mary Beth Norton (Lexington, Mass.: D. C. Heath, 1989), 204.

⁸⁶ James Kent, *Commentaries on American Law* (New York: O. Halsted, 1832), Vol. 2, 180. Others cited Kent as an authority who upheld the husband's right of chastisement. See *Fulgham v. State*, 46 Ala. 143 (1871); and Francis Wharton, *A Treatise on Criminal Law of the United States* (Philadelphia: James Kay, Jun. and Brother, 1846), 314-15.

⁸⁷ Irving Browne, "Wife-Beating and Imprisonment," *American Law Review* 25 (July-Aug. 1891): 557.

sway. According to a precedent-setting Massachusetts opinion 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.”⁸⁸ In 1836 the New Hampshire 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 a divorce because of her “masculine” “rebellion against his authority.”⁸⁹ The Chancellor of New York in 1840 ruled that any “misconduct on her part which was calculated to irritate or provoke him, or to excite his jealousy, or alienate his affections from her” automatically disqualified a wife’s charge of cruelty.⁹⁰ As Norma Basch’s study of divorce has amply documented, even when women sued on grounds of adultery, they needed to present themselves in stereotypical Victorian fashion as the innocent, self-sacrificial victims of arbitrary, tyrannical men.⁹¹

Compared to the older procedure of suing for the peace, with its more informal reliance on the discretion of the local magistrate, the nineteenth-century remedies of assault and battery and divorce also required more proof of serious physical injuries. In the words of North Carolina Chief Justice Pearson in 1864, a husband could not be convicted of a battery on his wife unless “he inflicts a permanent injury or uses such

⁸⁸ *French v. French*, 4 Mass. 587 (1808).

⁸⁹ *Poor v. Poor*, 8 N.H. 307 (1836).

⁹⁰ *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), 231.

⁹¹ Basch, *Framing American Divorce*; also Hartog, *Man and Wife*.

excessive violence or cruelty as indicates malignity or vindictiveness.”⁹² In three subsequent cases the North Carolina bench similarly determined that injuries were too “trifling” to warrant guilty verdicts against the husbands even if the violence was, in itself, illegal.⁹³ In the North, when courts began to rule on suits for divorce on the grounds of cruelty, they also routinely interpreted “cruelty” as requiring a very high threshold of violence.⁹⁴ The widespread judicial opinion that 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 1807.⁹⁵ After the Connecticut legislature added “extreme cruelty” as grounds for divorce 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.”⁹⁶ In Pennsylvania the high court in 1857 and 1860 twice reversed a divorce decree made by lower court juries in favor of a wife whose husband had twisted her nose, justifying its ruling with the simple statement,

⁹² *State v. Black*, 60 N.C. (Win.) 262 (1864).

⁹³ *State v. Rhodes*, 61 N.C. 453 (1868); *State v. Mabrey*, 64 N.C. 592 (1870); *State v. Oliver*, 70 N.C. 60 (1874).

⁹⁴ On the subject of cruelty in divorce, see Basch, *Framing American Divorce*; Nelson M. Blake, *The Road to Reno: A History of Divorce in the United States* (New York: MacMillan, 1962); Robert L. Griswold, “Law, Sex, Cruelty, and Divorce in Victorian America,” *American Quarterly* 38 (Winter 1986): 721-45; Jane Turner Censer, “‘Smiling through Her Tears’: Ante-Bellum Southern Women and Divorce,” *American Journal of Legal History* 25 (Jan. 1981): 24-47; and Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill: North Carolina University Press, 1998).

⁹⁵ *Warren v. Warren*, 3 Mass. 321 (1807).

⁹⁶ *Shaw v. Shaw*, 17 Conn. 189 (1845).

“That which will sustain an indictment for an assault and battery will not justify a divorce.”⁹⁷

The “curtain” that shielded the family from the state meant that women could obtain protection from abusive husbands only in the most egregious cases of physical violence. The privatization of the corporation had similar consequences, so that courts would only intervene to protect minority shareholders in the worst cases of fraud. Equity courts had long exercised a general supervisory power over private charitable corporations in cases where trustees behaved fraudulently. As the number of corporations grew during the early nineteenth century, this jurisdiction was gradually extended to cover business corporations.⁹⁸ Although access to equity would seem to have given aggrieved shareholders a remedy against abuse, the courts treated their interests as secondary or “derivative” and, and as in the case of families, put the rights and wellbeing of the organization before those of its subordinate members. If a corporate officer behaved fraudulently, the primary victim in the eyes of the court was the corporation. The stockholders who suffered personal injuries lacked direct access to the courts. Only after making “proper exertions” and demonstrating that the corporation was “incapable”

⁹⁷ *Richards v. Richards*, 1 Grant 389 (Pa, 1857); *Richards v. Richards*, 37 Pa. 225 (1860), quote at 226.

⁹⁸ Key cases include *Robinson v. Smith*, 3 Paige 222 (1832); and *Dodge v. Woolsey*, 59 U.S. 331 (1856). See also Bert S. Prunty, Jr., “The Shareholders’ Derivative Suit: Notes on its Derivation,” *New York University Law Review* 32 (issue 5, 1957): 980-94; and William J. Curran, “The Struggle for Equity Jurisdiction in Massachusetts,” *Boston University Law Review* 31 (June 1951): 269-96.

of taking action because it was under the control of the abusive parties could they proceed on their own behalf.⁹⁹

Although judges claimed that “courts of equity [were] swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities,”¹⁰⁰ in most nineteenth-century cases minority shareholders found it difficult to obtain satisfaction. 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,”¹⁰¹ but they had to show that the corporation’s refusal to take action was fraudulent—that the directors were not simply pursuing policies with which they happened to disagree. 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.”¹⁰² 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

⁹⁹ *Robinson v. Smith*, 3 Paige 222, 233; and *Hersey v. Veazie*, 24 Me. 9, 12-13 (1844). See also *Cunningham v. Pell*, 5 Paige 607 (N.Y., 1836); *Forbes v. Whitlock*, 3 Edw. Ch. 446 (N.Y., 1841); *Smith v. Poor*, 40 Me. 415, 422 (1855).

¹⁰⁰ See, for example, *Dunphy v. Traveller Newspaper Assoc.*, 146 Mass. 495, 149 (1888).

¹⁰¹ *Brewer v. Boston Theatre*, 104 Mass. 378, 387 (1870).

¹⁰² *Dunphy v. Traveller Newspaper Assoc.*, 146 Mass. 495, 497-98.

of the directors' decisions. "Directors acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, ... are not liable for the consequences."¹⁰³

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 serious fraud. But 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."¹⁰⁴ 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."¹⁰⁵

This insistence that corporations' internal affairs were private and that stockholders could not call upon the courts to intervene affected the reach of even such well established legal principles as the absolute rule that contracts tainted by conflicts of interest were voidable. This rule was an absolute one and covered contracts that otherwise were completely reasonable, so that, in the words of a Michigan justice, it was

¹⁰³ *Hodges v. New England Screw Co.*, 3 R.I. 9, 18 (1853). See also *Hodges v. New England Screw Co.*, 1 R.I. 312 (1850).

¹⁰⁴ *Leslie v. Lorillard*, 110 N.Y. 519, 532 (1888).

¹⁰⁵ *Dunphy v. Traveller Newspaper Association*, 146 Mass. 495, 497.

“immaterial ... whether there has been any fraud in fact, or any injury.”¹⁰⁶ There was no question, moreover, that the rule extended to contracts entered into by corporate officers 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.”¹⁰⁷ The very next year, however, the Court qualified this statement, ruling that contracts involving self-dealing would justify suits only “where the board of directors, or a majority of them, are acting for their own interest, *in a manner destructive* of the corporation itself, or of the rights of the other shareholders” or where “such a *fraudulent* transaction ... will result in *serious* injury to the corporation, or to the interests of the other shareholders” (our emphasis).¹⁰⁸ 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 gave controlling shareholders all benefit of doubt. In a frequently cited 1850 Rhode Island case, *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

¹⁰⁶ *Flint & Pere Marquette Railway Company v. Dewey*, 14 Mich. 477, 487-88 (1866). For cases building on this precedent, see *European & North American Railway Company v. Poor*, 59 Me. 277 (1871); and *Wardell v. Railroad Company*, 103 U.S. 651 (1880).

¹⁰⁷ *Wardell v. Railroad Company*, 103 U.S. 651, 658.

¹⁰⁸ *Hawes v. Oakland*, 104 U.S. 450, 460 (1881).

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 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.”¹⁰⁹ Similarly, in *Fauld 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.”¹¹⁰

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.”¹¹¹ The train of logic that led to

¹⁰⁹ *Hodges v. New England Screw Co.*, 1 R.I. 312, 343-44 (1850).

¹¹⁰ *Faulds v. Yates*, 57 Ill. 416, 420-21 (1870).

¹¹¹ *Flint & Pere Marquette Railway Company v. Dewey*, 14 Mich. 477, 488.

this outcome rested on two fundamental principles: first, that business corporations 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 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.

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 reinforced 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 controlling shareholders. 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 strengthen 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 day. In the second half of the nineteenth century the state courts decisively classified wife beating as a crime, and divorces on grounds of cruelty began to be available for mental as well as physical abuse.¹¹² 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.¹¹³ 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.¹¹⁴ Similarly, until the widespread provision of "no fault" divorce in the late twentieth century, it remained difficult for women to escape from abusive marriages because of the high costs and cumbersome

¹¹² The most decisive rulings that criminalized wife beating were in the 1870s: *Fulgham v. State*, 46 Ala. 143 and *Commonwealth v. McAfee*, 108 Mass. 458 (1871). Robert L. Griswold, "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790-1900," *Journal of Social History* 20 (Autumn 1986): 127-48.

¹¹³ Hartog, *Man and Wife*; Stanley, *From Bondage to Contract*; Richard L. Chused, "Married Women's Property Law: 1800-1850," *Georgetown Law Journal* 71 (June 1983): 1359-1425; Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930," *Georgetown Law Journal* 82 (Sept. 1994): 2127ff.

¹¹⁴ Carl Tobias, "Interspousal Tort Immunity in America," *Georgia Law Review* 23 (Winter 1989): 359.

procedural requirements of divorce. Only very recently have efforts to address the problem of domestic violence taken on such sensitive issues as marital rape and child molestation; even today, parents still possess the right to inflict corporal punishment on their children.¹¹⁵

Protections 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.” These statutes 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 reach.¹¹⁶ 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.¹¹⁷

¹¹⁵ Pleck, *Domestic Tyranny*, 164-203; Martha Minow, “What Ever Happened to Children’s Rights?” *Minnesota Law Review* 80 (Dec. 1995): 267-98; Jill Elaine Hasday, “Contest and Consent: A Legal History of Marital Rape,” *California Law Review* 88 (Oct. 2000): 1373-1505.

¹¹⁶ Edward M. Cowett, *Blue Sky Law* (Boston: Little, Brown and Co., 1958); and Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, and Alfred E. Kahn* (Cambridge: Harvard University Press, 1984), 153-209.

¹¹⁷ See F. Hodge O’Neal, “Close Corporations: Existing Legislation and Recommended Reform,” *Business Lawyer* 33 (Jan. 1978): 873-88; and Robert W. Hillman, “The Dissatisfied Participant in the

Although governments were increasingly willing in the twentieth century to recognize the rights of individual members of organizations, including those of the most powerless, the long history of respecting the institutional privacy of families and corporations 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 1965 decision, in *Griswold v. Connecticut*, invalidating a Connecticut statute that criminalized the use of contraceptives on the grounds that it was "an unconstitutional invasion of the right of privacy of married persons."¹¹⁸ 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.¹¹⁹ 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*.¹²⁰ 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

Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporation," *Minnesota Law Review* 67 (Oct. 1982): 1-88.

¹¹⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹⁹ Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (Dec. 1980): 193-220. On the long run impact of Warren and Brandeis's ideas, see the symposium on "The Right to Privacy One Hundred Years Later," in *Case Western Reserve Law Review* 41 (issue 3, 1991).

¹²⁰ *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."

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. They were also part of long line of cases decided on grounds of the laissez-faire principle later called substantive due process.¹²¹ Disavowed by the Court by the time of *Griswold*, this principle had been used to strike down a variety of state regulatory laws on the grounds that 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."¹²²

¹²¹ Barbara Bennett Woodhouse, "'Who Owns the Child?' *Meyer* and *Pierce* and the Child as Property," *William and Mary Law Review* 33 (Summer 1992): 995-1122; Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University Press of Kansas, 1998).

¹²² *Meyer v. Nebraska*, 262 U.S. 390, 399.

Unlike McReynolds, 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.¹²³ 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 the Constitution can be described as contributing to the right of privacy” or, in other words, the right to be let alone.¹²⁴

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.” What Douglas failed to acknowledge was that the liberties featured in these decisions were primarily those of collectivities, not individuals. Although McReynolds deployed the rhetoric of individual rights, the cases hinged on the rights of

¹²³ *Griswold v. Connecticut*, 381 U.S. 479, 482-84. In an earlier case Douglas had come 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).

¹²⁴ The quotes are from William M. Beaney, “The Constitutional Right to Privacy in the Supreme Court,” *Supreme Court Review* (1962): 212-51. See also Erwin N. Griswold, “The Right to be Let Alone,” *Northwestern University Law Review* 55 (May-June 1960): 216-26.

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."¹²⁵ 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"¹²⁶—Marshall's view that private corporations were legal persons with rights lay the foundation for the later substantive due process cases that treated corporations as citizens whose privileges and immunities had to be safeguarded against "arbitrary, unreasonable, unlawful" statutes interfering in their affairs.¹²⁷

Forty years later the Court was still focused on the rights of organizations. In a (dissenting) opinion in an earlier case concerning the Connecticut anti-contraception law,

¹²⁵ On this point, see especially Woodhouse, "Who Owns the Child?"

¹²⁶ *Pierce v. Society of Sisters*, 268 U.S. 510, 535.

¹²⁷ *Pierce v. Society of Sisters*, 268 U.S. 510, 535.

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."¹²⁸ 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 *Griswold*. In addition to *Meyer* and *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 *Griswold* by grounding the "right of privacy" in the importance of preserving an institution "older than the Bill of Rights"—that is, marriage:

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 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.¹²⁹

The opinions in *Griswold*, *Meyer*, and *Pierce* would play an important role in a number of subsequent Supreme Court cases establishing Constitutional privacy rights,

¹²⁸ *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 nightmarish alternatives that McReynolds had earlier conjured up. See *Meyer v. Nebraska*, 262 U.S. 390, 401-2.

¹²⁹ *Griswold v. Connecticut*, 381 U.S. 479, 486.

perhaps most notably *Roe v. Wade* and *Lawrence v. Texas*. In *Roe*, the Court determined 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.”¹³⁰ In *Lawrence v. Texas* the decision held that “the State cannot demean” the existence of homosexuals “or control their destiny by making their private sexual conduct a crime.”¹³¹ That the Court would base its abortion and homosexual rights decisions in large measure on *Meyer* and *Pierce* is, to say the least, ironic. 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.¹³²

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.¹³³ 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, 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

¹³⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

¹³¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹³² See especially Minow, “We, the Family”; and Poovey, “Abortion Question.”

¹³³ 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.

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.