Liberal Privacy and Women: A Broken Promise

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Acknowledgements

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The United States prides itself in being a forward-thinking nation. It points proudly to its laws, its governmental stability, its Constitution, and its history of embracing traditionally excluded peoples and folding them within the nation’s professed dedication to individual liberty and equality. The United States is a liberal nation. Its liberal foundations, best expressed by John Locke, lead to the development in America of a liberal legal system. Yet, liberalism is a theory without women. Women are, for the most part, simply ignored, or assumed to be within the home and not needing the guarantees and protections liberalism afforded to men. In the United States, however, women have become very present in the public realm, and also in law. What happens when women enter into a legal and philosophical system that was formed in their absence? Can liberal notions be applied to women in such a way as to encourage freedom and equality? The tension between liberalism and women and how that tension is played out in liberal law is the tension that I seek to address in this thesis.

The liberal notions that formed the founding principles of the United States did not incorporate women. Liberalism promised increased liberty and security to each individual through limited government and consent. The liberal idea of limited government ultimately created a dichotomy of life. Liberalism split men into two different people: one was the public man concerned with public matters of law and politics. The other was a private man who found true expression and fulfillment in a part of life inviolable, free from government intrusion. These were the promises of liberalism to the individual, autonomous and rational men that comprised society.

Yet liberalism was a philosophy devoid of women. Women have traditionally been relegated to the private realm, but without the liberty that liberalism finds so appealing about the
private realm. For women, the private has not been a space of self-expression and self-development, but a space of oppression. It has also been the only place for a women to find fulfillment since they did not have a public existence until relatively recently. Can the promises of liberalism extend to women though the theory was designed by and for men? Can privacy be a vehicle for liberation instead of oppression? Can women use the liberal notion of privacy as articulated in constitutional interpretation as a vehicle for equality?

In order to investigate these questions, I first begin with a look at the kind of Liberalism that influenced the Founders and wove its way into American law. For me, the primary voice of American liberalism is John Locke. His *Two Treatises on Government* demonstrate many key liberal ideals, such as focus on the individual, personal autonomy and limited government. For Locke, securing property and physical safety were the primary vehicles for liberty. Individual liberty free from government intrusion was not simply a matter of common sense, it was a natural right of man according to God’s natural law. God gave man the freedom to pursue his own desires free from state control as long as his actions did not harm the common good. Already with Locke, there is a dichotomy between the private realm held sacred and the public realm which is controlled by the Legislature.

These liberal ideas found resonance with the American founders since they had read Locke and felt his theory to suit their contemporary circumstances. As the authors of American law, the founders wove the liberal principles (and their contradictions) into the Declaration of Independence and then into the Constitution. Some of these principles, however, like the importance of the individual and the necessity of a split between the public and private spheres of life were not explicitly singled out for protection in the Constitution. Yet, as foundational principles, they were never far from constitutional law. I will trace the implicit liberal notion of
privacy in early constitutional adjudication and how it was defended as part of natural rights and natural law notions.

Then I will look at a shift in liberal thought, represented by John Stuart Mill. Though the foundations of liberalism remained the same, the reasons for their protections shifted away from natural law notions and towards utilitarianism. His defense of liberty, privacy and individual autonomy rested not on natural law and God, but on utility. Since they are both liberals, Locke and Mill both uphold the principles of autonomy and liberty, but Locke justified his liberalism with God, while Mill used practicality and utility. Though their reasons for such foundational moral principles are different, their key concerns remained the same. Those liberal concerns ultimately depend upon and construct two different worlds: one private and one public. Mill’s utilitarianism, however, was not an effective legal mechanism in protecting the public/private distinction at the heart of American politics and law. Law, as a system based on abstract principles, could not use utility to protect liberalism. As such, the law remained committed to liberal privacy notions but lacked a mechanism to protect those notions. I will look at how the Court constructed the constitutional doctrine of substantive due process as a textual grounding for liberal principles that were not explicitly mentioned in the Constitution.

I will then trace how substantive due process eventually gave form to the right of privacy—an unenumerated right that allows people to be free not only in their physical homes and property, but also allows people freedom to make fundamental life decisions. The notion of privacy was unspoken but implicitly understood in liberalism as the realm of life where men can develop their talents according to their preferences and find true self expression as an individual. The private sphere was where liberty was absolute so people could be free in their most intimate relationships and activities. Substantive due process put the public/private dichotomy of
liberalism into the Constitution, thereby making it part of American law. This mechanism also became the most commonly used constitutional vehicle for the advancement of women’s rights through increasing equality and reproductive freedom.

Finally, I will show how the legal understanding of privacy is problematic for women’s rights. Yet many of the feminist critiques of constitutional privacy are actually indicative of a tension between the larger liberal principles held dear by Americans and women’s equality. Despite some very valuable feminist critiques, I believe women can find a place within the liberal discourse of privacy and can use liberalism in order to achieve social, political and legal equality.
Liberalism and John Locke

Liberalism is a theory developed during the English Enlightenment. Like most theories, liberalism is not one coherent body of beliefs, but it does have some basic common tenets. All liberal theories begin with a primary focus on the importance of the individual and the natural equality of all individuals.

Liberals are concerned to protect individual freedom against the power of the state and the power of other individuals or institutions…They value legal and political equality, seek to ensure opportunities and to protect individuals’ economic welfare and independence.¹

For liberals, human freedom is fully achieved when in a state of noninterference. The best and most human lives are those where individuals make their own decisions and live according to their personal preferences free from unwarranted intrusion. Government is instituted in order to preserve the lives and freedom of the individual members of the society. Thus, the best government is one that does not interfere with the lives of its people. Yet some interference is necessary in order to protect the lives of citizens. The goal for liberalism is to find the proper balance between government regulation and individual liberty. This ultimately creates a division in society between what the government can control (the public) and what the government cannot control (the private).

Liberalism…holds the human individual to be the pre-eminent moral concern, and hence the limiting factor in justifying the authority of state power. It claims that a just state must protect a zone of privacy for each person, such that s/he is allowed a realm of freedom of conscience and action to develop her/his own conception of the good, free of interference by others, including the state. Liberals have typically construed this zone of privacy as the domain of free choice.²

Liberal theories thus depend on a public/private division in society. Ultimate human freedom can only happen with the absence of government, thus government must be absent from the most important and fundamental aspects of the lives of its citizens. It is in this private realm that autonomous individuals make free choices and exercise their rightful liberty.

Though there are quite a few liberals, from Hobbes and Rousseau to Rawls, John Locke’s liberalism is perhaps the best account the kind of Liberalism that became American liberalism. Lockean logic fundamentally shaped the principles upon which the United States were built. Thus, to understand American liberalism and the liberalism that became the basis of American law, one must investigate the liberalism of John Locke.

For Locke, men naturally exist before government or society in the State of Nature. The State of Nature is

A State of perfect Freedom to order their Actions within the Bounds of the Law of Nature, without asking leave, or depending upon the Will of other Man. A State also of Equality, wherein all the Power and Jurisdiction is reciprocal, no one having more than another.3

Thus, in the State of Nature, men are free to do what they will without interference from others as long as their actions comport with the Law of Nature, the law set down by God for man to follow. As Nicholas Wolterstorff notes:

Divine law is ‘that Law which God has set to the actions of Men, whether promulgated to them by the light of Nature, or the voice of Revelation.’ Locke had no doubt whatsoever that there is a law that is divine. ‘That God has given a Rule whereby Men should govern themselves, I think there is no body so brutish as to deny,’ he says. ‘God has a right to do it, we are his Creatures…for no body can take us out of his hands.’4

For Locke, Natural Law is God’s law and men are obligated to follow it since they are creatures of God. The reason God gave man should teach him that the first law of nature is that, because all are “equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.” Thus, the first Law of Nature is for man to preserve himself because he is the product and workmanship of God. Because all men are equal, and all equally the workmanship of God, one should also not harm others. Men may act as they please in the State of Nature as long as they abide by this Law.

Thus as long as they adhere to the dictates of reason and natural law, men are free to do as they choose. Among these natural liberties is the acquisition and enjoyment of property. Men are free to do what they will with their own “Lives, Liberties and Estates, which I call by the general Name, Property.” Locke’s definition of property is rather expansive. He grounds liberty in property. It includes not only one’s physical property, but also one’s life and liberty. This notion of liberty creates a space of noninterference. Man cannot be disturbed in his life, property or liberty when it does not affect others. Thus, activities that occur in isolation of other people are free from interference. Such activities are private, having no significant effect or bearing on the community, the public. It is crucial to note that Locke’s notion of property and liberty, like liberalism in general, requires a division in society between a private realm of noninterference and a public realm that affects and is shaped by the community as a whole.

Unfortunately, the State of Nature is very insecure for two primary reasons: men do not always follow natural law and when one does break the Law of Nature, there is no objective arbiter to dole out punishment. As Robert Goldwin notes: “In the state of nature, all men have

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5 Locke, 270-271.
6 Locke, 350.
the power to judge what is necessary to their preservation.”7 When all men judge for themselves, some men will not follow reason and will try to attain the property of others without right.

Locke states:

The enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit this Condition, which however free, is full of fears and continual dangers…to united for the mutual Preservation of their Lives, Liberties and Estates.8

Because men cannot always count on each other to follow Natural Law, and leave men to their Natural Liberty, men leave the State of Nature and enter society for the sole purpose of protecting their “Lives, Liberties and Estates.”

The only way whereby any one devests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and united into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.9

Men give up their Natural Right to execute the Law of Nature to the commonwealth so that the power of the many can be consolidated into a legislature that will codify natural law and make settled, known forms of punishment for breaking the laws.

What is key when entering society is that although men give up their power to execute Natural Law to the Legislature so that it can author laws, they do not give up their natural right to liberty in its entirety. By giving up their liberty to execute the law of nature, men increase their freedom. As Locke notes:

The end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, A Liberty for every Man to do what he lists:…But a Liberty to dispose, and order, as he lists, his Person, Actions,

8 Locke, 350.
9 Locke, 330-331.
Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.¹⁰

Law, therefore, provides the security needed for men to exercise their right to their property even more freely. Even after government comes into existence, and after a legislature functions to make law and punishment, men not only retain, but actually increase their liberty to use and order their lives, actions, possessions, their *entire* property, as long as laws do not prohibit it. Again, one can see here the division of society between a public and a private sphere. Laws exist to restrain the public and the state from interfering with a person’s private liberty and property. When the state and its laws restrain people from interfering with one another’s private spaces and activities, the whole society is better off because people have more liberty in their private lives. The purpose of law is to protect the private sphere.

For Locke, this government never has unlimited power due to the nature of the social contract. A proper and legitimate government for Locke is a *limited* government and exists only to preserve property. As Goldwin states:

> The natural powers of men in the state of nature are transformed by compact into the political powers of civil society. These political powers are limited, however, by the purpose for which they were made. Since the purpose was to remedy the uncertainty and danger of the state of nature by providing settled laws for the protection of the property of all the members, the exercise of unlimited power is not and cannot be considered political power. ¹¹

The government only has the powers expressly given up by the consent of the people. Since the people entered into society to protect their lives and property, protecting the lives and property of the citizens is the only legitimate action of the newly established government. Legitimate government power is never absolute power.

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¹⁰ Locke, 306.
¹¹ Goldwin, 454.
Thus, the only proper end of government is to protect the physical safety of the people and protect the security of their property. Any other exercise of the government would be illegitimate and on the border of tyranny. Again one sees the notion that the private realm is a realm of noninterference. No legitimate power can prevent a man from utilizing his liberty as he chooses so long as those decisions do not affect other people, whereby they become public actions and therefore legitimately controllable. Thus government cannot infringe upon the private lives of citizens because one’s private life is one’s own property and should be protected by the government. According to Locke’s liberalism, then, a person’s liberty to act as he/she desires, part of a person’s property, should be uninhibited by the government as long as that person acts within reason and does not jeopardize the safety or property of others. This right to use one’s property, including life and action in Locke’s expansive definition of property, is a right that exists before government, and cannot be surrendered even when people do decide to join in a commonwealth because to give up that right would be to destroy the very purpose of government.

Note here the value Locke, and liberals in general, attach to the public/private distinction. For Locke, the private realm is natural. It is man’s natural state to be an individual, free from the intrusion of others. The private realm exists before society and before the public realm. Privacy and personal liberty are the principles that enable men free use of their property, free expression of their thoughts and free action based on their personal desires. The private, individuated realm is where men act as men and find self-actualization. The public is a necessary evil. It is a space

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12 Locke, 357.
needed only to control those who would abandon reason and seek to interfere with the private lives and properties of others. Thus, privacy is a good thing and the private realm is essential to living a human life for Locke and liberals in general.\footnote{Yet, one should also notice that women are completely absent from Locke’s theory. Locke uses male-oriented language and male pronouns. Such language makes one question whether Locke’s theories are to be applied to only men or to both women and men.}
Locke and the American Founding

This liberal notion of privacy found resonance with the American founders. Although there is much debate among scholars regarding the extent of Locke’s influence on the American Revolution and the American Founding, much in the Declaration of Independence, the Federalist and anti-Federalist Papers and the Constitution echo liberal Lockean notions regarding liberty and natural right from the *Second Treatise on Government*. While Lockean ideas are very present in the American founding documents, Locke’s political theory was not the only theory to influence the Founders. Issac Kramnick, “found four ‘distinguishable idioms’” at the time:

‘republicanism,’ ‘Lockean liberalism,’ ‘work-ethic Protestantism,’ and ‘state-centered theories of power and sovereignty.’ And he cautioned: ‘None dominated the field, and the use of one was compatible with the use of another by the very same writer or speaker. There was a profusion and confusion of political tongues among the founders. They lived easily with that clatter; it is we two hundred years later who chafe at their inconsistency.’

While Locke was not the sole philosophical influence during the American founding, what is of concern here is that his liberalism contributed to the founding, and found expression in the Declaration of Independence, the Federalist and anti-Federalist Papers, and ultimately in the Constitution.

The Declaration of Independence, authored by Thomas Jefferson, is one of the primary documents of the founding. It asserted for the first time that the British colonies were free and independent states. Jefferson’s explanation of the reasons why the colonies were leaving the Crown contained the Lockean notion of natural rights nearly verbatim. Not only does Jefferson

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explicitly mention the freedom “which the Laws of Nature and of Nature’s God entitle”15 the colonists, Jefferson states

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.16

That God created all men equal echoes Locke’s liberal notion of equality in the State of nature. Jefferson’s understanding of the proper ends of government, “to secure these rights, Governments are instituted among Men, deriving their just powers from…the governed” derive from Locke’s liberal theory of the social contract. Men enter government and form government by their own consent in order to gain security and the protection of their rights, which are “Life, Liberty and the pursuit of Happiness.” This last phrase is Locke’s notion of property nearly verbatim. Thus, Jefferson understood that the primary reason for government is the protection of liberty, which is grounded in the notion of property. Jefferson had even been accused of lifting certain passages straight from the Second Treatise.

Richard Henry Lee… ‘charged it [the Declaration] as copied from Locke’s treatise on Government.’ Jefferson…saw no need to deny the charge: ‘I did not consider it as any part of my charge to invent new ideas altogether and to offer no sentiment which had ever been expressed before…My aim was simply to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent…It was intended to be an expression of the American mind.’17

One can see from Jefferson’s own words that he not only drew much inspiration from Locke, but he did not find it problematic that he directly used Locke’s notions in the Declaration. Also interesting is Jefferson’s claim that the Declaration was meant to be a piece of common sense, something to which every person could agree. Jefferson could speak this language because

15 Declaration of Independence.
16 ibid.
17 Huyler, 3.
every body already believed it to be true. Not only was the Declaration an effusion of common sense, but it was “an expression of the American mind.” Liberal notions of Natural Law and Natural Right were not only Lockean notions, but became American notions.

Locke’s influence can also be seen in the Federalist and anti-Federalist papers. While the Federalist and anti-Federalist Papers were both crucial to early American political thought, the essays primarily dealt with debating the actual mechanics of the proposed constitution and were not as steeped in political philosophy as Locke’s Second Treatise or the Declaration of Independence. Huyler believes that the “absence of philosophical rigor” in the Federalist Papers was not due to “haste…and the immediate and pressing purpose of winning Americans to the side of adoption,” but that “there was generally a good deal that the contending parties were able to stipulate to.”18

In other words, the Federalists and anti-Federalists already agreed upon the underlying political principles of the time. Those underlying principles were liberal principles. The Federalists and anti-Federalists did not have to negotiate the fundamental nature of property or liberty. They did not have to negotiate the nature of a liberal limited government. The basic premises of liberalism and Locke’s Second Treatise were accepted truths at the time of the ratification battle. Again, Huyler notes that “what permeates the debate over every proposed mechanical feature of the Constitution is the perceived tendency of these features to preserve or encroach upon the liberties of the people as individuals and citizens of a new-modeled republic.”19 Thus, it was not the liberal philosophy of the new government which caused division, but the mechanics devised to protect the already accepted rights and liberties belonging

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18 Huyler, 265.
19 Huyler, 260.
with the people. These liberal preoccupations are hinted at in both the Federalist and Anti-federalist papers.

In Federalist 14, Madison explained why a new unified government is necessary for the original thirteen colonies. His reasons were nearly identical to Locke’s:

We have seen the necessity of the union as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the old world.  

As with Locke, here Madison proclaimed that the main purpose for the new government was physical security. This security was ultimately intended to increase the liberties of the people. What is also important to note is that Madison “like Locke, understood property in the broadest sense.” When addressing property in the *National Gazette*, Madison explained that property, besides

That dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual…a man has property in his opinions and the free communication of them…[in] his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

When Madison speaks of protecting property, he intends for the protection of all the aforementioned attributes of humanity that allow individuals to express their individuality through an indefeasible liberty. The fundamental right to use one’s property at one’s discretion is also a part of property and it is the government’s primary purpose to protect property in all of these many forms. Thus government must not only protect physical property, but also a person’s liberty to express himself and act as he desires as long as he does not infringe upon the rights and

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21 Huyler, 262.
22 ibid.
liberty of others. In this way, Madison understood the newly proposed constitution as serving the very purposes described by liberals and Locke. Here, as with Locke, one sees that this notion of liberty requires the protection of a private realm, where men hold their personal religious views and opinions and act upon those views is a valuable realm of liberty. His property, the property he has in his actions, opinions and individual choices, are very dear and precious to him, not to be intruded upon at the whims of others.

Madison and Hamilton in The Federalist Papers also explain how this government will be a limited government, just like the form espoused by Locke. Madison notes that “its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic.” Again, Madison recognized the liberal division between the public realm and the private realm. Here, Madison assured the people that the new proposed general government would only be concerned with “enumerated objects” which concern only public matters. It can only be concerned with public matters since those are the only powers granted to it by consent of the people. As with Locke’s liberalism, the people of the new American nation surrender nothing to the government except by consent. Since the people did not give the new government license to control their personal lives, the new government has no such power. Hamilton states again the purpose of the government merely as “to regulate the general political interests of the nation” as opposed to other governments which “has the regulation of every species of personal and private concerns.” Hamilton makes this comparison to stress once more that the new government will not be concerned with private affairs but will only be concerned with the “general political interests of the nation.” Clearly, Locke’s liberalism was influential for the

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23 Madison, “Federalist 14” 65.
24 ibid.
26 ibid.
Framers, whether conscious or not, and they incorporated much of his theory when drafting the new American government. The liberal notion of the divide between a public and private sphere was crucial in order to create a legitimate society. Liberal principles of inviolable privacy were taken as the proper foundation for the new government.

The anti-Federalists demonstrate the same liberal Lockean concern for liberty and property as the Federalists; they are, however, doubtful that the new constitution is able to protect such liberties as the Federalists proclaim. Brutus in particular demonstrates the anti-Federalist fear that the newly proposed constitution will not uphold and protect the natural rights and liberties of the citizens. In one essay, Brutus actually gives a summary of Locke’s *Second Treatise*, explaining the state of nature, the dangers of the state of nature, and how that leads people to form a legitimate government that will be primarily concerned with the safety and liberty of its people:

In a state of nature every individual pursues his own interest; in this pursuit it frequently happened, that the possessions or enjoyments of one were sacrificed to the views and designs of another; thus the weak were a prey to the strong, the simple and unwary were subject to impositions from those who were more crafty and designing. In this state of things, every individual was insecure; common interest therefore directed, that government should be established, in which the force of the whole community should be collected, and under such directions, as to protect and defend every one who composed it.27

This reference to Locke’s state of nature is undeniable. Brutus also explicitly mentions the law of nature when describing the necessity of consent in forming a government. These concerns for liberty and property are the same liberal concerns as espoused by the Federalists. Their disagreements circled not round the proper ends of government, but whether the newly-proposed constitution could adequately meet the agreed ends.

After much debate, the United States Constitution was ratified. Since Locke’s liberalism influenced the Declaration of Independence, the Federalist papers and the anti-Federalist papers, it is no surprise that the same Lockean notions found their way into the new Constitution. The Founders not only utilized Locke’s liberal theories when drafting the new government, but also enshrined those theories in the final version of the United States Constitution. As early as the preamble of the Constitution, the influence of Locke’s liberalism can be felt. The Preamble states:

We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.  

The goals of insuring “domestic tranquility” and providing for “the common defense” clearly echo Locke’s notion regarding the proper ends of government. This is a statement describing the reasons for the authoring of a new constitution, and also the proper ends of that constitution. Such ends are for the peace and security of all, the same goals held dear in Locke’s liberalism and liberalism in general, because such goals best protect people’s property. This is done to “promote the general welfare” and “secure the blessings of liberty.” Again, the goal of government is to protect property so that people may have increased freedom to act as they please in their private lives and use their property as they see fit.

The Bill of Rights appended to the Constitution also exuded a Lockean essence of the rights to life, liberty and property. The Third, Fourth and Fifth Amendments all demonstrate the influence of Lockean logic, and the liberal notions of privacy the Founders wished to protect. The Third Amendment, which prohibits the government from quartering troops in a person’s

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28 United States Constitution.
The house, illustrates again the sanctity of property.\textsuperscript{29} A man’s home is his private property, and the government cannot use or abuse it without his consent. The Fourth Amendment, which provides that people will “be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”\textsuperscript{30} again shows that the Founders believed in a liberal notion of privacy. A person is secure not only in his physical house, but in all forms of property, including himself and his effects. The Third and Fourth Amendments are explicit guarantees to the people that there is a private realm separate from the public and that the value of this private realm is such that its protection is the primary function of government. The Fifth Amendment nearly quotes Locke verbatim when it describes that a person may not be “deprived of life, liberty, or property, without due process of law.”\textsuperscript{31} Locke mentions several times in the Second Treatise that the proper ends of government are to secure life, liberty property. Each aspect is a fundamental natural right held by each man not only in the state of nature, but also when joining the commonwealth. The Founders recognized these three as fundamental and God-given rights and so explicitly protected them governmental interference. Since these principles formed the foundation of the new government, they soon began to shape the interpretation of the Constitution, and the development of American law.

\textsuperscript{29} Third Amendment to the United States Constitution.
\textsuperscript{30} Fourth Amendment to the United States Constitution.
\textsuperscript{31} Fifth Amendment to the United States Constitution.
Natural Rights and Constitutional Interpretation

Once the new Constitution was ratified, the liberal Lockean ideas of privacy and the private/public split that influenced the Founders became permanently embedded in the new government. Locke’s brand of liberalism, including notions of natural law thus became part of a legal document to be interpreted by the newly established judiciary. As demonstrated, liberal precepts inundated nearly every part of the Constitution, and, since the Judiciary interprets the Constitution, were very present in the Supreme Court’s early cases. It is therefore not surprising that when interpreting a natural rights document (the Constitution) the Supreme Court used and relied upon the notion of natural rights. Starting with Calder v. Bull (1798), Justice Chase employed the social contract principles prevalent at the time to express the already accepted notion of limited government. In Calder, the question at hand was whether a Connecticut law, which invalidated a man’s will after the will had been previously approved was an ex post facto law.32 The Court ruled that Connecticut could not enact legislation to change a will that had already been legally validated. In his opinion, Justice Chase stated,

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty.”33

Justice Chase adopts Locke’s liberal notions of liberty in his opinion. Governments are not omnipotent and are to “promote the general welfare.” Governments are not to interfere with life that does not affect the general welfare. The Court’s acceptance of a fundamental sphere of privacy stems from liberalism. This liberalism is Lockean in its language in that Justice Chase sees these limits on legislatures as part of “fundamental” or natural law. Here, the Court also

33 Ibid, emphasis added.
recognizes that privacy and liberty create prohibitions on government action even when those
rights are not explicitly stated. They are assumed to be natural and fundamental. Chase
emphasized the founding belief that the powers of the federal government, and the governments
of the states were inherently limited, whether explicitly through their written constitutions, or
implicitly through the notion of privacy and natural rights. *Calder*, though merely expressing a
commonly held belief at the time, set a precedent for recognizing the rights of citizens and the
limits of government, even when not expressly stated.

Though *Marbury v. Madison* (1803) is renowned for Marshall’s establishment of judicial
review, this opinion contains similar notions as those espoused in *Calder*. In *Marbury*, Chief
Justice Marshall had to decide whether the Supreme Court could issue a writ of mandamus under the Judiciary Act of 1789 which granted the Court authority to issue such writs. Marshall determined that the Constitution never granted the Court the power to issue such writs in its jurisdictional powers and so that specific part of the Judiciary Act was void. In this decision, Marshall demonstrated the continuing notion of natural rights as inherent the social contract through his phrasing and appeal to “The very essence of civil liberty.” The word “essence” describing liberty here, indicates again that there was a fundamental aspect to the principle of liberty deriving from a natural source (for the Founders, God), that included securing rights (whether explicit or implicit) whose existence preceded the Constitution.

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34 Judicial review is the practice whereby the Court is able to invalidate congressional legislation if it conflicts with the Constitution. In essence, judicial review is the method by which the Judiciary is able to check the power of the legislature and ensure that the legislature and executive are bound by the Constitution.

35 A writ of mandamus is an order to force a public agency to comply with the law. In this case specifically, Mr. Marbury wanted the Court to issue a writ forcing Secretary of State James Madison to deliver Marbury’s commission for a judgeship granted by previous president John Adams under the Judiciary Act of 1800.


37 ibid.
The liberal Lockean natural rights language in court opinions was prevalent into the early 1800s. In 1815, the Court reviewed the case *Terrett v. Taylor*,\(^{38}\) which involved a Virginia law asserting the legislature’s right to the property of the Episcopal churches in the state.\(^{39}\) Once again, this case did not rest on explicit constitutional provisions, but on the liberal principles of limited government and natural law. Justice Story stated that his opinion rests “upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals.”\(^{40}\) Justice Story explicitly mentioned “natural justice,” a natural law construct, and the “fundamental laws” of free governments. This indicates again that the Court accepted Locke’s presumptions that there is a notion of justice and law given by God separate from and preceding statutory law. There is a set of objective standards with which law must comply, but also constitutions must comply. Elsewhere in his opinion, Justice Story mentioned that the right of property is “equally consonant with the common sense of mankind and the maxims of eternal justice.”\(^{41}\) Such language serves as further evidence that Justice Story is talking about liberal principles informed by natural law, knowable by reason and common sense, and unchangeable through time. It is the natural standard to which laws and constitutions must comport.\(^{42}\) Despite its use in early constitutional cases, natural law jurisprudence eventually became unpopular. Although Lockean presumptions about the divine origins of the right of liberty and sphere of privacy fell out of favor, the basic liberal principles espousing the protection of privacy and liberty continued on in constitutional interpretation.

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\(^{38}\) *Terrett v. Taylor*, 13 U.S. 43 (1815).

\(^{39}\) ibid.

\(^{40}\) ibid.

\(^{41}\) ibid.

\(^{42}\) Notice here the absence of women and gender. Since the Constitution and the Supreme Court adapted a liberalism (Locke’s liberalism) that was void of women, their interpretation and construction of liberal laws are also void of women.
The Fall of Natural Rights Adjudication

Though the Lockean logic of privacy and liberty based on natural rights was accepted as true by the framers and formed the basic philosophical grounding for the Constitution, the era of natural rights jurisprudence (but not liberal jurisprudence) came to an end around the 1820s.43 The main reasons for its decline were technological innovation, the search for stability, and the nature of constitutional jurisprudence.

As technology and science progressed in the first quarter of the nineteenth century, it became clear that there was a conflict between notions of natural law and science. As John W. Salmond noted, “As far as secular science is concerned, the history of the doctrine of natural law is for the most part a chapter in the history of human error.”44 Science was predicated on the secular, not the divine. It was based on experimentation and found its basis in empirical study. Natural law, though based on reason, was dependent on a notion of God. Natural law did not have the empirical foundation that lent so much credit to scientific progress. Appealing to God was no longer sufficient for a society looking for data and experiment to influence their lives.

Natural Rights and Natural Law also fell into disfavor because the doctrine was a radical doctrine. Natural law was “an invitation to insurrection and a persistent cause of anarchy.”45 The doctrine had been used to justify two of the most dramatic events in history: the American Revolution and the French Revolution. Much blood was shed in both revolutions, and there was a desire among Europeans and Americans for stability within government. Charles Grove Haines notes that, “Politically the [natural rights] doctrine was used to justify not only political democracy but also the free right of the people to change their governments—namely, as a

44 John W. Salmond as quoted in Haines, 76.
45 Carl Becker as quoted in Haines, 65.
sanction for the right of revolution.”

Desiring security, natural law notions changed from a doctrine of inalienable rights bestowed by God, to a natural law based in the history and traditions of people. By claiming history and culture as a society’s “nature,” natural rights could still be discussed (and it had to be part of any American discourse given its place in the founding and the Constitution), but could work for stability and reinforce the status quo. Haines notes that:

The historic method which grew in favor in history and in politics admitted that rights were founded in nature but identified nature with history and affirmed that the institutions of any nation were properly but an expression of the life of the people. By a change in the definition of nature the former concepts were made the basis for anti-revolutionary philosophies.

As the definition of nature shifted from what God created to what a people had traditionally done, natural rights and natural law became a doctrine that encouraged people to look to the past for making decisions in the present. This shift had the effect of “narrowing the scope of the law of natural thinking and in giving the term a rigidity which tended to support the existing legal order.” Natural law was no longer abstract principles bestowed by God, but a listing of the behaviors a culture had lived by throughout its personal history. Turning to tradition instead of God forces the United States to look to its tradition: a liberal tradition predicated on a distinction between the public and private realms. Looking to tradition in this way enhances the importance of liberalism and privacy because they were the founding values of the nation.

Natural rights and natural law notions fell out of favor with the Supreme Court as well. With the discrediting of natural law jurisprudence in American culture, legal critics began to charge:

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46 Haines, 66.
47 Haines, 69.
48 Haines, 72.
49 The turn to tradition to find natural rights foreshadows the use of tradition in privacy jurisprudence once privacy becomes an explicitly protected constitutional right.
That there is no textual or historical warrant for reading such a principle [natural law] into the Constitution. If by some feat of intellectual legerdemain it is possible to do so, it is still claimed to be impossible to locate principles of natural law that can serve as rules of decision in any particular case without resorting to one’s personal preferences about the issues in question.  

Without a textual grounding in the Constitution and without any promise that cases would be decided consistently and objectively under natural law standards, the Court began shifting away from a natural rights jurisprudence. Though the Court could no longer appeal to natural law and natural rights principles to protect liberalism in their decisions, they could not abandon liberal principles altogether due their entrenched place not only in the founding of the government, but also in decided and settled law. Natural rights jurisprudence, whereby the Court protected liberal privacy and liberty by appealing to God and the “natural order” died. Though natural rights fell out of favor with the advent of new scientific advances and a cultural swing to conservatism, the liberal principles underlying natural rights could not be avoided. Liberal principles, premised on a dichotomy between the public and private spheres of life thus became protected through a look to tradition instead of a look to God. These principles had to stay in tact because they were so inextricably linked to the American government and the American ideal; they were the cornerstone of the American republic.

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John Stuart Mill: Same Liberal Conclusions, Different Foundations

John Stuart Mill is the liberal theorist who best reflects this change in strategies used to defend liberal principles. Like Locke, Mill was a liberal. Like liberals, he believed that individuals are the fundamental units of society. Autonomous individuals need liberty in order to seek happiness and to form a good society. Like Locke and other liberals, Mill vehemently believed in the necessity of having a private realm distinct from a public realm. For Mill, the private realm was a realm of self-expression, personal freedom and ultimate humanity. Yet, unlike Locke and other natural law theorists, Mill does not find liberal principles to be derived from God. They are a product of reason and utility. Thus, Mill’s theory represents the importance of protecting liberal principles while using reasons other than natural law. For Mill, the best recourse for the continued protection of liberalism was utilitarianism. Though an Englishman, John Stuart Mill’s work *On Liberty* was exemplary of the American trend of the time to protect the principles of liberalism without the natural law foundation in God or in inherent human principles.  

John Skorupski notes that for Mill and his contemporaries, the error of Enlightenment *philosophes* was to trust too much in the invariance and resilience of ethical sentiments. They “believed them to be more deeply rooted in human nature than they are; to be not so dependent, as in fact they are, upon collateral influences.”

Mill did not believe in a natural law or an unchangeable human nature in which God inhered natural rights. For Mill, what people ascribed to human nature was more a reflection of circumstances and the society in which one lived. John Robson observes that Mill thought the particular variable manifestations of human nature should not be taken as fixed characteristics of universal human nature. From the study of history, [Mill] says, one

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comes to appreciate “the astonishing plurality of our nature, and the vast effects which may under good guidance be produced upon it by honest endeavour.”

Mill found through his experiences that an immutable, permanent human nature did not exist. The existence of many different kinds of people and kinds of societies led him to believe that human nature is not fixed, but conditioned by society. He reasserted this belief in his *Autobiography* when he sought to “attack at the very root,” the prevailing tendency “to regard all the marked distinctions of human character as innate, and in the main indelible, and to ignore the irresistible proofs that by far the greater part of those differences, whether between individuals, races or sexes, are such as not only might but naturally would be produced by differences in circumstances.”

There is little doubt that Mill considered “human nature” and “natural law” to be the effects of societal circumstances, able to evolve and change with time.

These problems with abstract natural law and natural rights are avoided with utilitarianism. Mill’s rejection of abstract principles and desire to ground a liberal ethics in the real, mutable experiences of people lead Mill to utilitarianism. Wendy Donner defines utilitarianism this way:

> Utilitarianism makes utility or intrinsic value the foundation of morality. Utilitarianism “evaluates actions in terms of their utility” rather than in terms of any intrinsic properties of the actions. Utilitarianism is distinguished from moral theories which hold that certain kinds of acts are right or wrong in themselves, and we are obliged to perform them or refrain from doing them for that very reason.

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54 Mill’s *Autobiography* as quoted in Robson, 340.

55 Read: natural law

56 Donner, Wendy. “Mill’s Utilitarianism,” in *The Cambridge Companion to Mill*, edited by John Skorupski, 256 (Cambridge: Cambridge University Press, 1998). What is interesting to note is that Mill’s form of utilitarianism was not the classic form of utilitarianism espoused by Bentham. Traditional utilitarianism determines outcomes based on the greatest good for the greatest number of people. This philosophy, however, would justify many kinds of intrusions into people’s liberty. Mill took utilitarianism and made the individual the primary focus instead of the society as a whole. Thus, his is an individuated utilitarianism.
For Mill, then, morality is determined by utility or usefulness. There are no abstract principles by which to judge actions. Actions are determined moral or immoral according to whether they are useful and increase happiness, or are harmful and decrease happiness. Thus, utilitarianism becomes focused on the effects and ends of actions and not the means.

This utilitarianism is the basis of Mill’s *On Liberty*. Though he completely disagrees with the notions of natural law and natural right, he comes to some similar conclusions as John Locke and other liberal theorists: that self-preservation is the first concern for men and that liberty is the second. The best summation of Mill’s argument, stated by Mill himself, explains:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others...The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.57

Here one can see in Mill the liberal preoccupation with preserving a private realm separate and untouchable from the public realm. As with other liberals, Locke included, a person is completely free to do as he wills with his life and in his actions, as long as his actions and decisions do not concern others. Only actions that affect other people can be deemed public and susceptible to regulation and government intrusion. In private, individual affairs, “his independence is, of right, absolute.” Mill, like all liberals, finds the individual as the basic unit of society and finds that individual “sovereign” over “his own body and mind.” As Alan Ryan notes:

> Mill’s concern for individual liberty rested both on a doctrine of self-protection and on a doctrine of self-development. We have two great needs that rights protect: the first and most basic is for security, and the second is for room to expand and flourish according to our own conception of what that entails.58

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57 Mill, 13.
Note here that Mill defends a similar notion of privacy as that espoused by Locke and general liberal theory. Physical security is needed in order for people to live their fully human lives in the private. The private realm of liberty is where a person has the freedom of self-development, where a person can make important life decisions for their own personal flourishing and happiness. “Mill ranks liberty as coming second only to the means of subsistence. With liberty must be placed the desire to choose one’s own mode of life.” Mill’s notion of liberty a liberal notion which requires freedom of conscience. Mill believes that because people have no innate knowledge,

All individuals must be free, and should be encouraged, to consider new opinions and to consult experience in their own lives, to conduct experiments in living—however unpopular, however much disliked by other people. We cannot know a priori, and custom cannot tell us, what is good for us: the only way we can find out is by trying and seeing; hence the importance of freedom, and the emphasis on individuality.

Mill stresses liberty for the sake of self-development, while Locke stresses liberty for the enjoyment of property. Though their reasons are different, each places liberty in a position of great importance. This liberty can only be exercised without restraint from the public society or government. Thus, one sees that Mill, like Locke and liberalism in general, depends on a distinction between the public and private realms of life. The private realm of liberty allows for man’s self-development and enables him to live a truly human existence. Not only is the private realm necessary in Mill’s theory, as in liberal theory in general, but the private realm is a realm of virtue. It is the higher and more worthwhile realm since it allows for the actualization of

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59 Robson, 340.
individual potential. It is the realm of the truly human, while the public is a realm necessary only for the preservation of the private realm, nothing more.

Mill’s basic premise is that a person’s liberty to act and say what he/she will is *absolute* unless those actions or speech physically harm someone or strip them of their rights to freedom and property.61 As Mill states succinctly, “Over himself, over his own body and mind, the individual is sovereign.”62 This again is very reminiscent not only of Locke’s “life, liberty and property,” but of liberalism in general. Only if a person has full power over himself and his activities, can a person develop himself to his highest capacity and his highest happiness.63

Mill’s utilitarianism demonstrates one way to defend liberal principles, while Locke’s natural law represents another method. Neither method, however, was suitable for American Constitutional jurisprudence. The Supreme Court is the governmental body that constructs the boundaries between the public and private through constitutional interpretation and it is the body that defends the liberal principles inherent in the Constitution. Though they had used natural rights principles early in constitutional adjudication to protect liberalism, it had proven insufficient. Though Mill’s defense of liberal principles seemed more pragmatic, his utilitarianism could not find a voice within law. Law is a realm dependent upon tradition, precedent, and judging based on abstraction from concrete reality in order to create a legitimate and long-lasting body of law instead of utilitarianism’s method of weighing competing interests. The Supreme Court had to protect liberalism, and the private/public distinction somehow, since they were the basic principles underlying the American experiment. Ultimately, they chose to defend American liberalism through the text of the Constitution, in the due process clause.

61 Mill, 13.
62 ibid.
63 Mill, 58.
The Birth of Substantive Due Process

Though natural rights adjudication became widely disregarded and utilitarianism was inconsistent with the practice of law, the defense of implicit liberal principles not enumerated in the Constitution turned up every once in awhile in cases dealing with personal liberty and privacy. *Boyd v. U.S.* (1886) was one of those cases that echoed notions of natural rights and the idea that fundamental rights included some level of personal liberty, a sphere of human existence untouchable by the government, or the majority. The Supreme Court in this case invalidated an act under the Fourth and Fifth Amendments that considered a person guilty if he/she did not produce documents to be used against him/her in court. In this case the Court appealed to a liberal notion of privacy when quoting Lord Camden:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his *indefeasible right* of personal security, *personal liberty*, and private property.64

Lord Camden, and therefore Justice Bradley, recognized that the right to be secure in one’s property, though expressly stated in the Constitution, evolved from a more fundamental and expansive right of personal liberty. Bradley also appropriated Camden’s broad interpretation of personal liberty and privacy when he instructed future courts to interpret rights and liberty broadly:

> Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.65

Justice Bradley’s deep commitment to the defense and security of the private realm is evident. He understands that the liberal dichotomy between public and private is necessary to protect the

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65 ibid.
liberty Americans hold dear. Unfortunately, however, one can see Justice Bradley struggling with his defense of these principles. He instructs future courts to interpret constitutional provisions broadly, hoping that broad interpretation will protect the privacy rights not explicitly mentioned in the Constitution. Bradley can only hope future justices will follow his request, because there is no explicit constitutional provision to support his belief in the sanctity of the private realm.

Not only is Bradley advocating for a broad interpretation of explicit rights, he understands that the rights enumerated in the Constitution reflect greater, more fundamental principles of privacy and liberty. His last sentence is a “substance” argument which reemerges with substantive due process. In essence, he stated that rights are not merely the words on the page but have a substance to them, a “spirit” that reflect the natural rights from which explicit rights derived. It is a recognition that words mean more than simply their face value. They hold meaning and indications of the principles which led to their authoring and incorporation in the Constitution. Since enumerated rights are just explicitly stated derivations of liberal principles, one must construe enumerated rights liberally in order for their base principles to be functional and efficacious.

Together with the Third Amendment, preventing the quartering of troops in people’s homes without consent, and the Fourth Amendment, which protects people and their homes from unwarranted searches and seizures, Boyd recognized a natural right of spatial privacy. The Constitution protects only spatial privacy explicitly. The kind of relational privacy found in liberal theory is not mentioned anywhere in the Constitution. Though the Court followed just this restrictive notion of privacy, through the doctrine of substantive due process, discussed

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66 Third Amendment to the United States Constitution.
67 Fourth Amendment to the United States Constitution.
below, the Court expanded the notion of privacy to encompass not only the physical space of a person’s home, but also his intimate relationships. Substantive due process enabled the Court to protect the liberal dichotomy between public and private through legitimate means: in the text of the Constitution itself.

Not until the late 1800s and early 1900s did the Court find a textual way to protect liberal principles: substantive due process. The *Slaughterhouse Cases* in 1869 witnessed the birth of substantive due process. The Louisiana legislature had passed a law granting a corporation a monopoly on slaughterhouses. When a number of Louisiana butchers were then left without jobs, they challenged the statute under the new civil war amendments, the Thirteenth and Fourteenth Amendments. The majority opinion, authored by Justice Miller, decided that the civil war amendments were strictly for the “freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” What is important in this case, however, is the dissent of Justice Bradley, who first established substantive due process when he stated that, “Their right of choice is a portion of their liberty; their occupation is their property.” Justice Bradley’s definition of property is expansive and also a liberal notion. Not only is physical property protected by the Constitution under the Third, Fourth and Fifth Amendments, but also the “right of choice.” Since the butchers’ right of choice (part of their constitutionally protected property) had been interfered with, their liberty had been compromised. For Bradley, the Louisiana statute was illegitimate and in violation of due

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68 *Butchers’ Benevolent Association v. Cresent City Livestock Landing & Slaughterhouse Co.*, 83 U.S. 36 (1869). Afterword referred to as the *Slaughterhouse Cases*.
69 ibid.
70 ibid.
process, despite the fact that the law was procedurally valid.\textsuperscript{72} Bradley protects liberty as understood by liberal theorists like Locke, Mill and the Founders. That liberty includes more than simply the right to have privacy in one’s physical property. Liberty also encompasses the important activities that make life worthwhile, like seeking an occupation. The exercise of such liberty requires a private realm untouchable by the government. Though one’s liberty of choice and liberty of occupation were not rights explicitly protected in the Constitution, Justice Bradley notes that such fundamental principles do not need explicit mention in order to merit protection:

Even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words.\textsuperscript{73}

Even though the Constitution does not explicitly name some of the liberal principles upon which the nation was founded, those principles, simply because they are founding principles, deserve constitutional protection. Without the protection of such principles, the entire American system would become incoherent.

In the \textit{Slaughterhouse Cases}, substantive due process was simply the constitutional musings of a justice in a dissent. Not until \textit{Allgeyer v. Louisiana} (1897)\textsuperscript{74} was the notion of substantive due process flushed out and used as the determining factor in a case. In \textit{Allgeyer}, Louisiana enacted a statute imposing fines on persons who effected marine insurance with companies that had not complied with Louisiana law.\textsuperscript{75} Allgeyer was fined for such a violation and challenged the statute under the Fourteenth Amendment. In a unanimous decision, the Court determined that

\textsuperscript{72} To label a law procedurally valid is to say that it was made according to all the stipulated procedures governing the proper mechanics of making law. For instance, it was a law made by a legitimately elected legislature, and went through the proper ratification process.

\textsuperscript{73} \textit{Slaughterhouse Cases}.

\textsuperscript{74} \textit{Allgeyer v. Louisiana}, 165 U.S. 578 (1897).

\textsuperscript{75} ibid.
The liberty mentioned in that amendment [the 14th] means...the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.76

One can see in this case the protection of liberal privacy with a textual foundation. Justice Peckham articulated an expansive notion of privacy, including the Lockean and Mill notions of the freedom to use one’s faculties, to choose how one will live one’s life and the freedom to enter into private contracts as one chose. Yet none of these rights were explicitly mentioned in the Constitution. Thus, Justice Peckham clothed these natural rights with the “liberty” of the due process clause of the Fourteenth Amendment.77

Allgeyer changed the interpretation of due process and expanded it to include a substantial component. Not only does due process have a procedural aspect, but there is also substance to the clause, meaning that “life, liberty or property” includes more than mere mechanical procedure and more than one’s physical home. To adhere the “liberty” aspect of the Fourteenth Amendment with substance is to dictate that there are such aspects of a person’s life (his liberty) that neither the federal government nor the states may regulate or control, no matter what procedures are followed. This is to say that the natural right notion of liberty and personal autonomy as expressed in the early cases of the Supreme Court is protected by due process, though the rights are not explicitly written in the Constitution. In this way, the Court was able to find a textual, and therefore legitimate, basis for protecting foundational liberal principles.

76 ibid.
77 The Fourteenth Amendment’s due process clause states, “Nor shall any State deprive any person of life, liberty, or property, without due process of law.” Until Allgeyer, due process was considered procedural; the court could not take someone’s land, for instance, without just compensation and without going through the appropriate legal channels. In other words, procedural due process forced the government (and the states with the ratification of the Fourteenth Amendment) to follow the correct legal procedures when depriving a person of “life, liberty or property.”
Substantive due process thus became the way to ground liberalism’s expansive notion of privacy in the text of the Constitution. The original Constitution and its amendments had only protected spatial privacy. Yet the liberal notions upon which the nation was founded require a broad conception of privacy which includes not only one’s property, but one’s important life decisions. The Court thus authored liberal privacy notions into the enumerated rights encompassed in the Fourteenth Amendment. In this way, liberal privacy notions became a legitimate part of the Constitution and substantive due process became the primary tool for the Court’s protection of liberal privacy.

Beginning in the late 1920s and early 1930s, the Court began to use substantive due process to protect personal liberty and the natural rights that formed the backdrop of the early Court’s notion of rights.78 *Meyer v. Nebraska* (1923) was one of the first cases to use substantive due process to protect an as-of-yet unarticulated notion of privacy. In *Meyer*, the Court struck down a statute that prohibited schools from teaching any language aside from English until children were in the 8th grade. The majority struck down this statute under the due process clause of the Fourteenth Amendment, saying that “liberty:”

> denotes 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.79

Here, one sees traces of the liberal notion of privacy which understands privacy as a realm of liberty for the pursuit of happiness. *Meyer* not only recognizes the liberal notion of rights beyond the control of the state, but begins to name the rights that qualify as natural, including

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78 Originally substantive due process was used to protect economic liberty in the form of liberty of contract. During the Great Depression, however, there became a demand for government economic legislation to help quell the devastating situation. After the death of a Supreme Court Justice and a threat from President Roosevelt, economic substantive due process died out and the due process clause became a vehicle for civil liberties.

acquiring an education, getting married and maintaining a family. Such aspects of life are so private and intimate that they make up part of the natural and fundamental rights that the people retain and exercise without government control. This is liberal logic at its core. Though such rights are not explicitly stated in the Constitution or the Bill of Rights, they are an essential part of life, part of a person’s private life, which should not be regulated by the government. These rights still exist and still limit the authority and power of the government, both state and federal.

*Meyer* was one of the first cases to expand the traditional notion of privacy under the “liberty” of the Fourteenth Amendment’s due process clause beyond the physical borders of one’s home. As stated earlier, the Court originally interpreted the natural right of privacy as simply protecting a person within the spatial bounds of his/her home. *Meyer* began to expand the Court’s understanding of privacy by including a relational dimension of privacy. Though *Meyer* dealt with the education of children outside the home, out in public, the parent-child relation comes under the general notion of “liberty.” Intimate relationships, including marriage and family, extend beyond the physical reaches of one’s house and blend into society. These intimate relations are protected even when outside a person’s home because these relations are private and crucial for individual happiness. Thus, the right of privacy, by containing both a spatial and relational dimension, protects a wider zone of activities which are not necessarily “private” but are not political. Privacy protects non-political activities from government interference. One sees in *Meyer*, then, the Court’s full acceptance of the liberal notion of privacy as an expansive realm of human expression and activities free from government intrusion.

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80 Note here that common law is used as one of the determining factors whether a right is fundamental or not. This demonstrates what was noted earlier: that fundamental rights are not those given by God, but those recognized in the history of society. Since the activities mentioned are part of a liberal understanding of privacy, and the United States is a nation founded on liberal principles, it serves the interest of privacy to look to the liberal history for the expansion of privacy rights.
Justice Cardozo in *Snyder v. Massachusetts* (1934) began developing the standards for determining whether a claimed right was deserving of constitutional protection under the Fourteenth Amendment. In addressing whether a man’s procedural due process rights had been violated because he was not present at the scene of his alleged crime while the Jury was taken to the site, Justice Cardozo explained,

> Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.\(^{81}\)

Within the confines of the particular case, Cardozo’s opinion enabled states to conduct trials as they saw fit as long as they followed due process. Future court’s, however, took the second part of Cardozo’s statement and began to use it to determine what rights deserve constitutional protection. From Cardozo’s statement, rights can be protected under the Fourteenth Amendment if they are “fundamental.” “Fundamental” rights can be determined by tradition and the “conscience of our people.”\(^{82}\) To look to the traditions of the United States and the “principle[s] of justice” rooted there, is a variation of a natural rights argument. As noted earlier, when natural rights became a taboo philosophical discourse, natural rights became synonymous with history. History and tradition determined what was “natural” for a society, not God. That revised notion of natural rights appears here as Cardozo names those rights fundamental as those that are “rooted in the traditions” of Americans. This reliance on tradition becomes the standard rule of interpretation once privacy becomes an explicit constitutional right. Cardozo does not reach to the Constitution to determine which rights are fundamental, but advocates looking to the history and the continuing principles of the American people, which would include the implicit liberal

\(^{81}\) *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97 (1934).

\(^{82}\) ibid.
principles enshrined in the Constitution by the Founders. One can look to the minds and hearts of the American people, and not just the Constitution, to find rights worthy of protection.\textsuperscript{83}

In \textit{Palko v. Connecticut} (1937), Justice Cardozo added another dimension to his earlier mechanism of determining fundamental rights. Here, the appellant, a man who had two trials for the same murder offense, argued that the Fourteenth Amendment placed on the states the same prohibitions placed on the federal government by the Bill of Rights. In other words, he argued that the Fourteenth Amendment should incorporate the entire Bill of Rights so as to make them restrictions on State governments as well.\textsuperscript{84} Though the majority in \textit{Palko} rejected incorporating the entire Bill of Rights into the Fourteenth Amendment,\textsuperscript{85} Justice Cardozo did state,

\begin{quote}
In these \textit{[first amendment situations]} and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.\textsuperscript{86}
\end{quote}

Cardozo supports incorporating the Bill of Rights into the Fourteenth Amendment only when the particular amendment is “implicit in the concept of ordered liberty.” He does not, however, limit such concepts to those described in the Bill of Rights. Thus, while Cardozo may have only intended for certain provisions of the Bill of Rights (namely the first amendment) to be incorporated into the Fourteenth Amendment, he did not settle the question of whether concepts outside the Bill of Rights or unspoken liberal concepts could likewise be “implicit…in ordered liberty.”

\textsuperscript{83} The notion of protecting fundamental rights also began the process of “incorporation” whereby the Supreme Court made the Bill of Rights applicable to the States. Through the Fourteenth Amendment and substantive due process, the Court began to incorporate the Bill of Rights into the Fourteenth Amendment’s restrictions on state governments since the Bill of Rights was the specific expression of natural rights principles.


\textsuperscript{85} They did recognize the “absorption” of the First Amendment’s “freedom of thought and speech,” the Fifth Amendment’s right to trial and due process because “neither liberty nor justice would exist if they were sacrificed,” but not the Sixth Amendment’s protection from double jeopardy (\textit{Palko v. Connecticut}).

\textsuperscript{86} \textit{Palko v. Connecticut}. 
In determining which rights are considered fundamental and worthy of protection, the Court has looked to Justice Cardozo’s construction both from *Snyder* and *Palko* to see whether a right is rooted in tradition or whether it is necessary for the existence of liberty. From the late 1920s until the mid 1960s, this formula was used to slowly increase the kinds of rights deemed fundamental and therefore under the reach and protection of the Constitution. Though *Meyer* emphasized a right to direct a child’s education, the Court began to include the other rights mentioned in *Meyer* (“to marry, establish a home and bring up children…to enjoy those privileges…essential to the orderly pursuit of happiness”\(^87\)) in the list of fundamental rights and further developed their place in constitutional jurisprudence. These rights began to focus explicitly on the family, including marriage and children, and also on reproduction as activities within the intimate private sphere of a person’s life.

Through such cases, liberal notions of privacy became more explicit and developed under the guise of substantive due process. From this substantive due process jurisprudence, the liberal notions of personal liberty and autonomy that had been part of the American understanding of legitimate government and good living began to take shape as a general right to privacy. With a constitutional tool in place, it would only be a matter of time before the liberal notions of privacy would become an explicit right protected by the Supreme Court and the Constitution.

\(^{87}\) *Meyer v. Nebraska.*
Establishing the Right to Privacy

As these cases built on one another, the unspoken notion of liberal privacy that had formed the basis of the American legal system became more present in constitutional discourse. As a body of case law evolved, the development of an implicit notion of privacy continued until it achieved explicit constitutional status in the 1960s. This sphere of personal autonomy was pieced together from one decision until the next until privacy found its first express mention in *Poe v. Ullman* (1961). In *Poe*, a married couple and their doctor challenged a Connecticut statute prohibiting the use of contraceptives. The Court dismissed the case because they determined it was not sufficiently justiciable. Though the Court decided not to rule on the case, Justice Harlan’s dissenting opinion stands out. Harlan addressed the constitutional issues the Court dismissed and stated: “The most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law.” This is the first time privacy becomes expressed explicitly as a “right,” generally including those activities intimate to a person’s home and family. Privacy, for Harlan, encompassed such natural rights as guiding a child’s education, the right of marriage, the right of procreation, the right of a person, in essence, to be left alone in their most intimate affairs. Though Justice Harlan believed the Connecticut statue to be “an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual’s personal life,” his opinion was not the controlling opinion and thus did not become precedent. Despite this, Harlan’s notions of privacy

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88 The Court is restricted from ruling on “test cases” where people create a set up in order to facilitate a constitutional challenge to laws. The Court felt *Poe* was not justiciable because neither the couple nor the doctor had actually been arrested for violating the statute and that Connecticut had not seriously attempted to prosecute anyone under this statute. Also, the Court found that contraception was readily available in Connecticut and that there had been no prosecutions under the statute, therefore, this was not a justiciable case, but only a “test case.”


90 Ibid, Harlan’s dissenting opinion.
were a precursor to the explicit acceptance and recognition of a right to privacy worthy of constitutional protection.

Only four years after *Poe*, the Connecticut statute again found itself challenged in front of the Supreme Court. This case was remarkably similar to *Poe* in that it was another challenge to the Connecticut birth control prohibition, except this time, the Court recognized a justiciable claim. This case, *Griswold v. Connecticut* (1965), was to become the landmark decision which brought natural right and liberal notions of privacy into modern substantive due process, and which has been used since to expand a person’s sphere of liberty. This time around, Justice Douglas incorporated Justice Harlan’s notions of privacy sketched out in *Poe* into the majority opinion. In this way, Harlan’s notions became part of constitutional precedent and settled law. Thus, the right to privacy, which Harlan mentioned in *Poe*, became part of constitutional law and jurisprudence through Justice Douglas.

Justice Douglas justifies the right of privacy through the penumbra of other rights guaranteed in the Bill of Rights. He looks to precedent to find “peripheral rights,” without which, the exercise of explicit rights becomes meaningless.\(^9^1\) Douglas found that the Bill of Rights must be interpreted broadly because a narrow interpretation would “deprive them of half their efficacy, and lead to gradual depreciation of the right, as if it consisted more in sound than in substance.”\(^9^2\) The Court has liberally construed the Bill of Rights in the past to protect many rights not explicitly mentioned, but necessary for the exercise of explicitly guaranteed rights. For example:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice…is also not mentioned.

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\(^9^2\) *Boyd v. US.*
Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.93

Such “peripheral rights” are necessary for the security and exercise of the explicit rights.

Without these penumbral rights, the explicit right becomes a meaningless promise, empty words.

Douglas finds penumbra emanating from many of the rights secured in the Bill of Rights that are necessary to “give life and substance” to the explicit rights.94 The penumbra from these various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one... The Third Amendment, in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment, in its Self-Incrimation Clause, enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’95

The Fourteenth Amendment then makes this construction applicable to the states. Here, the Supreme Court explicitly names as a fundamental right the kind of privacy that liberal governments depend upon and that the Court had danced around since the ratification of the Constitution. Liberalism requires a public and private realm, with all the important, profound life experiences occurring in the private. In Griswold, the Supreme Court acknowledged the value of that privacy, the role it served in forming the philosophical foundation of the nation, and its textual basis in the Bill of Rights. No longer was privacy an unenumerated right.

This construction of “penumbral rights” is a way to textually ground privacy in the Constitution. The newly articulated right of privacy underlies the explicit rights, without which, the explicit constitutional rights would become obsolete. It is a right “so rooted in our

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93Griswold v. Connecticut.
94 ibid.
95 ibid.
tradition,”96 that they must be protected for life to have any meaning. Justice Douglas describes the right of privacy as a right:

older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better of 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.97

Thus, Douglas firmly inserted the liberal notions of limited government and privacy that had underscored Court opinions for generations into the text of the Constitution, thereby giving it an explicit textual foundation. Justice Douglas states that privacy is at the root of the American tradition—and the American tradition is liberal at its core. The private sphere Douglas claimed as worthy of constitutional protection is liberal privacy. It is a “sacred” realm, part of a person’s individual “way of life.”

After Griswold laid the foundation for a right of privacy, the Court further developed the right of privacy and expanded the list of activities considered part of that “privacy” and therefore worthy of constitutional protection. Eisenstadt v. Baird (1972), based on Griswold, expanded privacy to allow non-married individuals to use contraception. Here the Court expanded the right of privacy to incorporate more than the family relations it previously protected: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”98 Eisenstadt, therefore, explicitly included the notion of reproductive decisions in privacy, where individuals, married or not, are free to make decisions regarding their procreative lives. Eisenstadt began the trend of using the newly articulated right of privacy to protect women’s reproductive freedom. By appealing to the

96 Snyder v. Massachusetts.
privacy doctrine, women could have more control over their own bodies and would be able to have the agency to enact the liberal promise of privacy. Reproductive choice was the first step in applying liberal privacy, the realm of free choice and personal expression, to women. Yet, this also began the feminization of the right of privacy. Though privacy has encompassed other issues such as confidentiality of medical records, the right to keep pornography in one’s home, it is most notable for its use in expanding reproductive freedom. This feminization of privacy is a notion that troubles many feminists. This idea will be flushed out later; a foreshadow is sufficient for now.

The Court slowly increased the kind of activities encompassed in “privacy,” culminating with the landmark decision *Roe v. Wade*. *Roe v. Wade* is the case that declared that privacy encompasses a woman’s right to terminate her pregnancy. *Roe* relied on the construction of privacy based on penumbras of the Bill of Rights laid down in *Griswold* as “founded in the Fourteenth Amendment’s conception of personal liberty and restrictions upon state actions.”

This conception of privacy and zones of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Justice Blackmun in *Roe* applied the liberal notion of bodily autonomy to women. If men in liberal society had an absolute right to their bodies, then women must as well. The Court, however, did not declare a woman’s right to have an abortion absolute, and therefore denied that she has absolute control over her body. *Roe* thus demonstrates some of the difficulties of a liberal right to privacy that will be discussed later. For now, it is important to note that liberal privacy applies differently to men and women because a man’s right to bodily autonomy would never involve the death of a fetal being because a man cannot get pregnant.

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100 ibid.
Though the Court said abortion was protected as part of a woman’s right to privacy, Justice Rehnquist, in his dissent, denied that the privacy right could encompass this act because it was not actually private:

A transaction resulting in an operation such as this is not ‘private’ in the ordinary usage of the word. Nor is the ‘privacy’ that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment.\(^{101}\)

Rehnquist, therefore, relies on the spatial dimension of privacy to deny women the right to have an abortion. Since abortions happen outside the home in doctors’ offices, and involve contracts and payment to doctors, hospitals and nurses, abortions are not private in the sense protected by the right to privacy. He also denies that abortion is a fundamental right as defined by Justice Cardozo in *Snyder* as those activities “so rooted in the traditions and conscience of our people.”\(^{102}\) Justice Rehnquist foreshadows the problems with the constitutional notion of liberal privacy, including problems of arbitrarily determining what is public versus private, and problems with various and competing interpretations of American history and tradition.

*Roe’s* companion case, *Doe v. Bolton*,\(^ {103}\) was the first case to utilize *Roe* as controlling precedent in the act of invalidating state abortion restrictions. In *Doe*, the Court struck down Georgia’s nebulous procedural steps needed to obtain a legal abortion. For the present purposes, Justice Douglas’s concurring opinion is more useful. Justice Douglas began his opinion recognizing that the people’s retained rights include “customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of ‘the Blessings of Liberty’ mentioned in the preamble to the Constitution.”\(^ {104}\) In this way, Justice Douglas immediately locates the people’s fundamental and natural rights in the text of the Constitution—

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\(^{101}\) ibid, Rehnquist dissent.
\(^{102}\) ibid, Rehnquist dissent.
\(^{104}\) ibid, Justice Douglas concurring.
using the preamble. He goes on to state that of these rights: “First is the autonomous control over the development and expression of one’s intellect, interests, tastes, and personality,” and “Second is freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.” 105 The notion of complete control over one’s personal development and expression is very reminiscent of liberalism in general and its concerns regarding the need to protect people’s freedom of thought and expression. This “right to be let alone” includes “the privilege of an individual to plan his own affairs, for, ‘outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.’” 106 Again, this notion of personal liberty in one’s private life echoes both Mill and Lockean liberalism. As long as a person is not “plainly” harming another, that person has a near absolute freedom to conduct his affairs as he sees fit. Doe thus affirms the basic holding of Roe, and begins a long string of abortion cases that, while sometimes expanding the right to abortion and sometimes restricting it, always affirm the right to privacy as including abortion.

After Roe and Doe, the Court began dealing with cases concerning whether state restrictions on abortion or contraception violated the principles and framework established by Roe. Case by case, the Court further hashed out what were to be appropriate state actions in regulating contraception and abortion and which regulations were unconstitutional. Even though states tried to challenge Roe year after year, the Court was unwavering in its affirmation for the basic holding in Griswold and Roe. Justice O’Connor reaffirmed the liberal right to privacy as constitutionally constructed in Planned Parenthood v. Casey (1992), a case challenging

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105 ibid, Justice Douglas concurring.
106 ibid, Justice Douglas concurring.
Pennsylvania’s restrictions on abortion. O’Connor notes that this fundamental right of privacy involved

the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy…[and] the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life.  

It is important to note here that the Court understands privacy as a liberal notion of privacy including the ability to make “intimate and personal choices…central to personal dignity and autonomy.” This kind of privacy is very powerful and profound. Through the constitutional right of privacy, the Court explicitly recognizes and grounds liberal understandings into the Constitution and American law. Though the Court struck down Justice Blackmun’s trimester system established in *Roe*, the Court in *Planned Parenthood* upheld the basic premise of *Roe*:

The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a *rule of law* and a *component of liberty* we cannot renounce.  

Thus, while *Planned Parenthood* rejected Blackmun’s trimester system, it upheld and reaffirmed once again the legitimacy of the right of privacy and that a woman’s right to terminate a pregnancy is encompassed by that privacy.

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108 Justice Blackmun created a time framework based on the trimester system of a woman’s pregnancy to determine when a state can regulate abortion and what kinds of regulations were acceptable. He rejected all regulation during the first trimester of pregnancy. After the second trimester and until viability, a state could regulate abortion only to preserve the health of the mother (such as requiring abortions be performed by a licensed physician in a licensed facility). After viability, the state had a compelling interest in preserving the potential life of the unborn and could enact any restrictions the state felt necessary or prohibit abortions all together.
109 *Planned Parenthood v. Casey*, emphasis added.
Constitutional Privacy: Law and the Problem of Women

As demonstrated, the liberal notions that became the foundation of the American government were inextricably part of American law. The liberal notion of privacy had been implicit throughout constitutional history, but only became an explicit constitutional right in 1965. Though the right to privacy has been the main vehicle for women’s rights, a number of feminist theorists and legal scholars find the constitutionally constructed right to privacy problematic, due to its dependence on tradition and inconsistency of application. They also criticize the legal discourse itself as a male centered discourse and therefore unjustly biased against women.

Privacy adjudication, as an offspring of substantive due process, defines fundamental rights as those “so rooted in the traditions and conscience of our people.” Thus, history and American culture determine what should be a fundamental right and what should not be. While considering tradition can be of value because it lends stability and legitimacy to the Court, reliance on tradition also has many setbacks. First, there is no interpretational guide to history. People ultimately interpret history and there is no consensus on what values are rooted in the American tradition. The right of privacy becomes reliant on how a constitutional question is formed and how individual judges interpret tradition. For example most people would deny that the United States has a tradition of allowing homosexual sodomy. Some of those same people would probably agree that America has a culture of not interfering with intimate personal relationships. Yet both questions have been used to address the same issue: consensual sex between two men. Thus, privacy adjudication not only invites but often requires judges to

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110 Snyder v. Massachusetts.
111 These questions address Bowers v. Hardwick and Lawrence v. Texas. Both cases involved the same situation—consensual sex between men. In Bowers, the Court asked the first question which determined the outcome of the case. In Lawrence, the Court decided based on the latter question and answered in the affirmative.
make subjective value judgments. This makes it “unclear what ought to be classified as ‘public’ and what ‘private.’ Privacy is incoherent, or at the least indeterminate.” When the Court can use tradition both to expand and narrow rights, privacy interpretation “seems to conform to the result needed, depending upon which ideological block forms a majority.” Cases become determined by the moral beliefs of judges, rather than by the textual content of the Constitution. Privacy adjudication

Follows no sound methods of interpretation and is therefore neither reliably invocable in cases…nor forecastable in result by anything much but a guess. This kind of non-standard is not good enough for a systematic equity of human rights.

With its reliance on tradition, privacy adjudication is very subjective. Cases are often not predictable because history is an inconsistent method of determining what is fundamental and what is not. The invocation of privacy can be used for very different outcomes, sometimes expanding personal autonomy, and other times shrinking it.

Tradition is problematic not only for its judicial inconsistency, but also because of its fundamentally conservative nature. Privacy “provides no protection for individual freedom per se; it merely requires ongoing adherence to traditional concepts of individual freedom—an inherently conservative (and tentative) endeavor.” Tradition requires a view to the past for application to problems of today. Considering the place of liberty and equality in our tradition, this practice sounds great. But

the basic problem posed by resolving disputes over personal autonomy and legitimate government action based on the way that governments have protected the personal autonomy of its citizens in the past is that it fails to acknowledge the possibility that our

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115 ibid.
traditions involve instances of a pervasive pattern of unjustified violations of individual rights.\textsuperscript{116}

Relying on tradition assumes that one’s tradition is worthy of emulation. Certainly equality and liberty are values worth pursuing, but the United States also has a tradition involving slavery, the internment of Japanese Americans, and the disenfranchisement of half of the population (women without voting power). Some traditions are not worth keeping. Using tradition to judge cases of today leads to the perpetuation of the status quo. It locks into the present characteristics of the past, whether good or bad. If a government has a history of abusing the rights of its people, dependence on tradition would justify the continued abuse of people’s rights today. Privacy, constrained as it is by its reliance on tradition, serves to perpetuate past notions of the extent of legitimate government interference with the freedom of its citizens. And if these traditional norms involve illegitimate exertions of government power, no relief is available under [privacy] that serves only to perpetuate these norms. The current mechanism promises relief only when a government has erected a completely revolutionary restriction on the freedom of its citizens.\textsuperscript{117}

In this way, tradition can be an instrument of retarding liberty and personal autonomy. Acting upon tradition merely because it is tradition can ignore the injustices that had been deemed proper in the past.

John Stuart Mill had the same concerns as the founders. He also was concerned that history, tradition and culture would be a heavy hand upon current societies, preventing social progress. In \textit{On Liberty}, Mill stated,

\begin{quote}
The traditions and customs of other people are, to a certain extent, evidence of what their experience has taught \textit{them}; presumptive evidence, and as such, have a claim to his deference: but, in the first place, their experience may be too narrow; or they may not have interpreted it rightly. Secondly, their interpretation of experience may be correct, but unsuitable to him...Thirdly, though the customs be both good as customs, and
\end{quote}

\textsuperscript{116} ibid.
\textsuperscript{117} ibid.
suitable to him, yet to conform to custom, merely as custom, does not educate or develop in him any of the qualities which are the distinctive endowment of a human being.118

Mill believes that looking to the past can be informative and beneficial, but the past cannot define the experiences of today. A society cannot be beholden to the past when its own experiences lead to different conclusions.

The founding fathers also shared this view of tradition. Alexander Hamilton expressed the need to find a balance between always deciding based on the past and never heeding the lessons of the past:

But why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?119

Societies should consider the lessons of the past but ultimately rely on their own reason and knowledge of present circumstances when making decisions for the whole society. The founders considered this ability to be a great strength of the American nation. Americans, however, betray the wise words of their founders when they rely absolutely on tradition in determining which rights are fundamental and which are not in considering privacy cases.

Ultimately, this reliance on history is problematic for women because women have traditionally been subordinated and held below men in the United States. This is particularly evident in the 1872 case Bradwell v. Illinois.120 Though not a privacy case, one can see how the stereotypical “traditional” role of women prevented Myra Bradwell from achieving equality.

Mrs. Bradwell was an attorney and had undergone all the necessary steps for admission to the

118 Mill, 58-59.
120 Bradwell v. Illinois, 83 U.S. 130 (1872).
bar of Illinois. Illinois denied her admission, and the Court upheld that decision, with Justice Bradley authoring a rather obtuse concurring opinion (by contemporary standards). He supports this decision using tradition: “It certainly cannot be affirmed, as an historical fact, that [seeking an occupation] has ever been established as one of the fundamental privileges and immunities of the sex.” Justice Bradley cites not only tradition, but also the “natural” state of women to expound his opinion.

The civil law, as well as nature herself, as always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.

In this passage one can see the danger of relying on history. Justice Bradley relies on a notion that women have always been wives and mothers and therefore that station is a natural one for them. The founders of common law held the belief, therefore it must be true. He then brings in natural law to legitimate his claim that married women belong in the home, caring for the children. It is “the law of the Creator. And the rules of civil society must be adapted to the general constitution of things.” Nature has selected woman as the sex in charge of domestic harmony and did not give her the capacity to pursue other occupations. Women do not have the constitution necessary for public life because it is raucous and rational. She belongs as a peacemaker in the home, concerned with the occupations that use her emotional capacities.

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121 ibid.
122 ibid.
123 ibid.
best—rearing children and keeping home. Justice Bradley explicitly states that the husband is the “head” and representative in public life. He is the spouse capable of reason, an attribute necessary for public life. He has the “benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.”\textsuperscript{124} The woman is too passionate and emotional for the objective and logical civil life. Thus, tradition and natural law work very well against the advancement of women and their efforts to enter the public realm.

Privacy adjudication is also problematic because “the lines between public and private are ‘socially constructed.’”\textsuperscript{125} The Court prides itself on the liberal notion that once something is considered private and a fundamental right, the government cannot interfere. Though the Court has determined the family to be private, laws inundate private life. “Laws governing marriage, divorce, compulsory education, inheritance—all are as internal as anything can be in the family.”\textsuperscript{126} The law not only interferes with family and private life, it actually shapes and constructs it. As Martha Nussbaum notes:

\begin{quote}
The state constitutes the family structure through its laws, defining which groups of people can count as families, defining the privileges and rights of family members, defining what marriage and divorce are, what legitimacy and parental responsibility are, and so forth. This difference makes a difference: the state is present in the family from the start…The family is shaped by law in a yet deeper and more thoroughgoing way, in the sense that its very definition is legal and political; individuals may call themselves “a family” if they wish, but they only get to be one, in the sense that is socially significant, and that yields a wide range of social recognitions and benefits, if they satisfy legal tests.\textsuperscript{127}
\end{quote}

Thus, though the law constructs specific boundaries between the public and private realms, it often crosses the boundary and interferes with private matters. The right to privacy is incoherent.

\textsuperscript{124} ibid.
\textsuperscript{125} Allen, “Privacy in American Law,” 35.
\textsuperscript{127} Nussbaum, 117.
and inconsistent if it protects intimate interpersonal relationships, but yet decides which of those relationships will be state recognized and receive state benefits.

Using constitutional privacy as the vehicle for women’s advancement and equality is also problematic due to the masculine nature of the legal discourse itself. The law is not, in fact, neutral. Like all discourses, it presumes a fundamental subject from which to start. Law must start with a fundamental notion of what its subject is in order to function as a discourse for the subject. In American constitutional law, that fundamental subject is man.

Throughout the history of Anglo-American jurisprudence, the primary linguists of law have almost exclusively been men—white, educated, economically privileged men. Men have shaped it, they have defined it, they have interpreted it and given it meaning consistent with their understandings of the world and of people “other” than them. As the men of law have defined law in their own image, law has excluded or marginalized the voices and meanings of these “others”...Because the men of law have had the societal power not to have to worry too much about the competing terms and understandings of “others,” they have been insulated from challenges to their language and have thus come to see it as natural, inevitable, complete, objective and neutral.  

In a nutshell, this is how law became a male-centered discourse. Men had societal power. In authoring the rules for their societies, they made rules according to their needs and experiences since they were subject to the law. The male experience as formulated into law then went through the historical process of being interpreted by other men until eventually, the discourse could not be identified as a male-centered discourse, but was merely a natural reflection of society. Since excluded groups were not participants in society, the law did not need to address their concerns. In creating a law just for themselves, men created a system that reflected their characteristics as men. “Rationality, abstraction, a preference for statistical and empirical proofs over experiential or anecdotal evidence, and a conflict model of social life corresponds to how

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These men have been socialized and educated to think, live and work.”129 Because these were the life experiences of men, they were the characteristics around which they shaped their law. Thus American constitutional law favors rationality as the highest principle, works in abstract principles rather than in contextual experience, works in dichotomies where a person has a right or does not, and is very adversarial where there are clear-cut winners and losers.

Over time, the law had to make these characteristics appear natural and objective so that others would believe in the legitimacy of law. “To keep its operation fair in appearance, which it must if people are to trust resorting to the legal method for resolving competing claims, the law strives for rules that are universal, objective and neutral.”130 Universality and neutrality hid the male-centered foundations of law. With the appearance of objectivity, the law could be applied to groups not previously considered when law was being written. In this way, new groups could easily be brought under the patriarchal legal system without sacrificing the privileging of the male point of view. This means, however, that women seeking recourse to law are seeking recourse to a system that is hostile to their needs. The patriarchy underlying the American legal system means that

state power is not to be understood in its own terms, but as a part of a ubiquitous system of patriarchal power. This means that it is not a neutral tool equally available for women and men, and that it will not automatically respond to the dictates of reason or justice.131

The law, therefore, is not a neutral and objective tool for protecting rights and seeking equality. It will produce the results conducive to its survival.

In order to maintain coherence and its appearance of objectivity, the law tries to treat women as equal to men for the sake of formal equality. Yet women’s social situation and

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129 Finley, 572.
130 Finley, 574.
personal agency have been vastly different from that of men. Because the male-centered law
was simply applied to woman as if she were a man,

The state will appear most relentless in imposing the male point of view when it comes
closest to achieving its highest formal criterion of distanced aperspectivity. When it is
most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most
blind to the sex of the standard being applied. When it most closely conforms to
precedent, to “facts,” to legislative intent, it will most closely enforce socially male
norms and most thoroughly preclude questioning their content as having a point of view
at all.132

Because law has been functioning as a male discourse for so long, and because the legal system
is overwhelmingly male, it cannot recognize its own point of view. Thus, when the law neutrally
applies its male-centered standards on women, women become treated as if they were men and
the law completely neglects to consider women’s social situations and experiences.

Two cases in particular demonstrate how the Court has historically been ambivalent when
deciding whether to treat women as equal to or different from men. Both strategies, treating
women as different or as equal, prove problematic. In Muller v. Oregon,133 the Court upheld
legislation setting the maximum number of hours women could work in a factory or laundry
facility at ten hours a day. Justice Brewer noted that, despite women’s legal and civil equlity,
there was a “widespread belief that woman’s physical structure, and the functions she performs
in consequence thereof, justify special legislation restricting or qualifying the conditions under
which she should be permitted to toil.”134 Though women were considered formally equal to
men in their political and contractual rights, their different physical nature justified special
legislation, legislation that would be struck down had it been made to protect men as well as

132 MacKinnon, Catharine A. “Feminist, Marxism, Method, and the State: Toward a Feminist Jurisprudence” in
1993).
134 ibid.
women. The Court decided the law was necessary because women were not on equal footing with men in making contracts with employers.

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not…continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.135

Although this legislation and the Court’s decision are intended to help women, the reliance on stereotypes and perceived notions of a woman’s “natural” role make this case an example of a setback for women’s equality. Justice Brewer defends this legislation because he perceives that all women will become mothers. “Even when they are not” pregnant or “burdened” by motherhood, the state still has an interest in taking the lead for her physical protection because she one day will be a mother, like all good dutiful women. The Court here, justifies state-sponsored intrusion of a woman’s body in order to keep her healthy in order to use her as a vessel for producing healthy future citizens. Imagine what other kinds of legislation could potentially be justified by categorizing women’s “physical well-being” as a concern for the state. Could the state compel women to follow a nutrition and fitness regimen? Could the state determine what occupations women could pursue? The possibilities are frightening.

It is admirable, however, that the Court does try to support law that compensates for social inequality. Though formally equal to men, women, “even with…the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother.”136 The intentions of the Court and Oregon’s legislation are good, but for the wrong reasons. The Court does not say that women are socially unequal to men.

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135 ibid.
136 ibid.
because of a history of subjection and subordination, but she is unequal because of her physical differences and her role as a potential mother.

Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.\(^{137}\)

Thus, though women were gaining formal equality—equality under the law—they were still unequal in everyday society. The Court recognized this and attempted to compensate for it by upholding the legislation. Yet, the Court did not help women because they historically have been subjugated to men. Women will always be inferior, merely because it is their station in life, decreed by nature. She is to be a wife and mother; those are the duties for which she has been designed. Any other use of her physical body can be controlled by the state to protect her. The Court thus protects women, but by placing them in a position subordinate to men. With *Muller*, one can see the problems with treating women differently under the law. The Court recognized that formal equality under law did not equate to social equality and so brought the real conditions of women up by validating this legislation. Yet, in doing so, Justice Brewer employed the very stereotypes that contribute to and perpetuate the notion of women’s inferiority and inequality to men.

*Adkins v. Children’s Hospital*\(^{138}\) was very similar to *Muller* yet yielded a very different result. In *Adkins*, the Court rejected the notion of women requiring special treatment and invalidated legislation creating a minimum wage for women. In *Muller*, the end result was good, but the reasoning behind it very harmful for women. Here, the end result is bad for women, but

\(^{137}\) ibid.

the consideration of women is far superior. *Adkins* is an example of how the male-standard of law applied to women hurts women’s social situation. Justice Sutherland’s opinion for the Court stated that women were equal to men in their liberty to contract freely, and thus the special minimum wage legislation for women was unconstitutional. Justice Sutherland stated:

> It is not unreasonable to say that these [nonphysical] differences [between men and women] have now come almost, if not quite, to the vanishing point...We cannot accept the doctrine that women of mature age...require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.¹³⁹

Justice Sutherland rightfully acknowledged the formal equality between men and women. Men have a liberty to contract, and women, as their political and civil equals, must also have that liberty free from government interference. Justice Sutherland did women another favor when he claimed that the purpose of the law “to protect [women’s] morals” is not sufficient to warrant the legislation. “If women require a minimum wage to preserve their morals men require it to preserve their honesty.”¹⁴⁰ Here Justice Sutherland rejected the traditional notion that women are the keeper of society’s morals and that society must protect and defend them in order to preserve their delicate, virtuous natures.

This formal equality, however, comes at the expense of women’s social equality. Women were not in a state of equality when “contracting” with employers. They worked long hours for very little pay and had no recourse to unions or the law in order to change their conditions. Justice Sutherland completely neglected the practical realities of women’s situations when he stated,

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¹³⁹ ibid.
¹⁴⁰ ibid.
Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it.\footnote{ibid.}

Here the Court presumes that if a woman wants a job that pays better, she can simply leave her current position and find another that will pay more. Yet the reality for women was very different. Often the unskilled labor jobs that paid next to nothing were the only positions women could hold while supporting families. These very real and practical considerations are left out of the Court’s thought and thus demonstrates how legal neutrality can enforce the societal oppression of women.

The masculine base of law, present in many cases like these, have caused feminists to reject law as a vehicle for women’s rights and equality. For them, appealing to law for the advancement of disenfranchised and historically excluded groups only reinforces the hierarchical system.

The reliance on litigation reflects the belief in law as a source of social change, while ignoring the ideological power of law to mask social reality and block social change. Court battles about “women’s issues” are waged and sometimes won with the result that a new body of rights is created and deployed in battle, but the basic sexual hierarchy is not changed.\footnote{Rifkin, Janet. “Toward a Theory of Law and Patriarchy” in \textit{Feminist Legal Theory: Foundations}, edited by D. Kelly Weisberg, 413. (Philadelphia: Temple University Press, 1993).}

Though law has historically been viewed as good method for social change, it only serves to create formal equality while leaving the actual social situations of people unaffected. Groups that are satisfied with court victories forget that those victories are only formal and actually change nothing for many people’s daily lives. Using a system designed to subjugate women only reinforces that oppression and exclusion.

The power of law is that by framing the issues as questions of law, claims of right, precedents and problems of constitutional interpretation, the effect is to divert potential
public consciousness from an awareness of the deeper roots of the expressed dissatisfaction and anger. The ideology of law serves to mask the real social and political questions underlying these problems of law. At the same time, the paradigm of law which historically has been and continues to be the symbol of male authority is not only unchallenged but reinforced as a legitimate mechanism for resolving social conflict.\textsuperscript{143}

Thus, because cases must be heard and decided upon in a male-centered legal discourse, people focus on the cases and principles instead of the discourse itself. Law is very powerful in that people accept its discourse as authoritative and do not question its methods or kind of reasoning, only its results. People accept the categories created by the law and then try to fit new groups and new rights into those male-centered, already existing doctrines.

A subtle testimony to the law’s success in achieving legitimacy is that women…now largely accept the law’s categories and its modes of discourse. To the extent that those groups choose to articulate their social criticism and their grievances in the law’s limited categories…and confine their action to litigation and lawmaking rather than struggle in such alternative arenas as the workplace, the family, and in organized religion, they are giving up the battle, because in so doing, they are tacitly approving the underlying social order and thus undermining more radical challenges to the overarching male supremacist and white supremacist structure of society.\textsuperscript{144}

Appealing to law and using the legal discourse for the statement of women’s grievances means that women accept the mechanism and its patriarchal bent. To utilize law is to recognize its authority and worth as an institution. Small legal victories actually become defeat for women because in the process of litigating, the patriarchy is enforced and time and resources were diverted from more worthwhile and promising efforts like social reform. Finally, recourse to law reinforces the patriarchy because the legal discourse forces the petitioning group to put its grievances in the language of patriarchy. Thus, women are denied the very language needed to express their social stigma and oppression.

\textsuperscript{143} Rifkin, 414.
Other feminists disagree. They feel that in order to change law, women must gain access to law. The first step in this process was gaining the same political rights as men. Women are now considered the formal equals of men. They have the same political and civil rights as men. Though once a controversial notion, women’s equality is largely accepted due to the power of law. Women have been able to use the liberal discourse of rights to assert their own worth as people and as rightful citizens of the United States, deserving all of the privileges and immunities possessed by citizens. To assert one’s right has important implications in a rights-based society.

The statement that women have rights is an assertion about the kind of society we want to live in, the kind of relations among people we wish to foster, and the kind of behavior that is to be praised or blamed. The assertion that women have rights is a moral claim about how human beings should act toward one another. On a personal level, to claim a right is to assert one’s self-worth, to affirm one’s moral value and entitlement.\(^\text{145}\)

Not only have women made the claim for equal rights, but the patriarchal legal system acknowledged and validated that claim. Thus, law has the ability to make room for women. By seeking entrance into law, women tell the patriarchy that they want to be like men.

The claim to the citizenship value of participation is a claim to an opportunity for individualist achievement. That is a right that a male-dominated institution like the Supreme Court can appreciate.\(^\text{146}\)

When the patriarchy accepts the claim that women are equal to men and want to enter law as men, that becomes a very powerful message. Women are then welcome to join the discourse. Though at this point women enter the hierarchy of law as a man, they finally can be insiders and their claims will not escape notice.

authoritative language, one that insists that to be heard you try to speak its language, we cannot pursue the strategy…of devising a new woman’s language that rejects ‘phallologocentric’ discourse."\textsuperscript{147} Law, and the legal discourse, has history on its side. The language of law is very powerful and rarely questioned. American society views law as a source of legitimate change and stability. Women must utilize these positive attributes. If women try to speak in a new discourse, a woman-centered discourse, it would not make legal sense. They would in essence be speaking another language. “So long as the courts know only the language of [rights and hierarchies], it would be foolish not to use that language in framing constitutional claims.”\textsuperscript{148} The key is to slowly change the faults within the legal discourse by using the language already present and its established power.

Since law inevitably will be one of the important discourses affecting the status of women, we must engage it. We must pursue trying to bring more of women’s experiences, perspectives, and voices into law in order to empower women and help legitimate these experiences.\textsuperscript{149}

If women do not engage law, these feminists fear, laws subordinating women will continue to be made and women will remain subject to discriminatory laws made without their consent. The only possible way to change law into an inclusive discourse of equality is to make new voices and groups unavoidable. When women are outside the legal system, the law can simply ignore their social situation and their experiences. When women enter law, however, the law must confront their experiences as women and must reconcile those with existing notions. This kind of engagement allows the law to bring in new voices and views, while retaining the benefits of the male-centered system. Such fractions within women’s rights advocates regarding the use of

\textsuperscript{147} Finley, 578.
\textsuperscript{148} Karst.
\textsuperscript{149} Finley, 578.
law is actually indicative of a larger problem. These different views stem from a controversy surrounding the liberal itself.
Liberalism and the Problem of Women

The arguments regarding the advantages and disadvantages of law actually reflect a larger debate regarding whether liberalism itself is a discourse available for the advancement of women. The critiques of privacy law are often critiques of liberalism writ large, since liberalism undergirds American law. Many feminists see an inherent problem with the division between public and private spheres upon which liberalism depends. Two main feminist critiques of privacy are that the notion of liberty is too negative and that liberal principles of autonomy and rationality do not reflect women’s experience.

The first critique feminists have of the liberal division between public and private is that the notion of liberty involved is strictly negative liberty. As Locke and Mill both noted, liberty is primarily a restriction upon government and society. Noninterference is the defining characteristic of liberty. The state must defend one’s freedom, but has no obligation to proactively do anything to help a person perform his/her liberty. The liberal paradigm has no responsibility to provide for the worth of liberty. Personas should be restricted by prohibitions or commands as little as possible. Law must be formal, rule bound, general, and concise—limited to the function of defining the abstract spheres of action (liberties) for the autonomous pursuit of personal interests.150

Thus, a liberal government’s primary focus is to stay out of people’s personal and private lives. Liberal governments should be limited to only a few, enumerated activities to ensure their people’s liberty and prevent legislative abuse. Since the United States is a government formed in the mold of the liberal tradition, it perceives privacy like Locke and Mill, in a negative, hands-off manner. While noninterference sounds promising in theory, when applied to the position of women in the United States, it takes on a new dimension.

For men in the U.S., nonintervention and negative liberty are acceptable, even desirable because men have traditionally had the means and agency to perform their liberal freedom. Women, on the other hand, have not had the political and economic power to enact the liberal promise of freedom that accompanies noninterference. In American law, as with liberalism in general, the private realm is perceived to be the natural state of things, and therefore not a place of personal violation and discrimination. For liberalism and liberal law, “injuries arise in violating the private sphere, not within and by and because of it.”¹⁵¹ When liberalism only applied to men, noninterference was very desirable because a man could not possibly be in danger in his home. As such, American law left the realm largely untouched. “Feminists [however] have demonstrated that the private sphere of home and family is a site of peril and subordination. Feminists claim that privacy facilitates subordination and shields violence against spouses, children and the elderly.”¹⁵²

Liberal feminists saw that private noninterference was not a workable construction for women, who had traditionally been subject to the worst abuses in their private homes. When the law keeps women in the private and refuses to regulate it, it allows private patriarchy and oppression to continue, leaving women helpless. For many years, the state did not enforce domestic abuse legislation. For a long time, it was considered impossible for a man to rape his wife. She was assumed open to him at his discretion. Privacy in these cases can be deadly.

The right to privacy and the right to protection exist in fundamental conflict—a conflict that illustrates the contradiction between freedom of action and security that recurs throughout our legal system. Privacy assures the freedom to pursue one’s own interests; protection assures that others will not harm us. We want both security and freedom, but seem to have to choose between them.¹⁵³

¹⁵¹ MacKinnon, 434.
¹⁵³ Olsen, 485.
A woman wants privacy if that means she can choose to use contraception or get an abortion. But privacy is not so appealing when the law cannot protect her against an abusive husband. Relegating women to the private also keeps them from achieving liberal equality. Equality is a characteristic expressed and protected in the public realm, but there is no enforcer of equality in private.

Isolating women in a world where the law refuses to intrude further obscures the discrepancy between women’s actual situation and our nominal commitment to equality. Like other collective ideals, the equality norm is expressed predominantly in legal form. Because the law as a whole is removed from women’s world, the equality norm is perceived as having very limited application to women.\(^{154}\)

Thus, a liberal government can easily proclaim that women have formal equality in the public realm because women, and the life experiences connected with women, stay in the private realm. The law can therefore ignore her social inequality while still proclaiming that it protects her equal rights to man.

Many feminist thinkers also criticize liberalism for its focus on autonomy, which renders liberalism unable to account for and understand the experiences of women. Liberalism is premised on the value of individuals. Rights adhere to the individual. Yet this seemingly obsessive focus on the individual can seem separatist and atomistic. Some call it unrealistic since it assumes people determine their own identities separate from any societal or cultural influence.

They fault liberal individualism for neglecting the social structures within which persons develop and the relations between persons that are so much of what an actual person is. For instance, family ties, membership in groups, and social connections are part of what constitutes a person as who she is. To see only abstract liberal agents as the units of political thought is seen as deficient, a denial of the interdependence that characterizes human life and a denial of history.\(^{155}\)


A person does not develop in a vacuum. These feminists argue that liberalism neglects the kinds of social and interpersonal relationships that truly define human beings and which create a truly human and worthwhile life. It is ludicrous to think that family does not shape a person and that a person is a blank slate once he/she becomes an autonomous, free-thinking individual. Liberalism “suggests that dependencies do not exist, and that society need not deal with them because it is composed of independent, free and equal individuals who meet their own needs and come together voluntarily to form associations.”\(^{156}\) For many, liberalism can lead to extreme atomism, which many correctly claim is not an accurate picture of real life. Though liberalism is premised on the individual, it is extreme to say that liberalism precludes all social interaction. Liberalism acknowledges the importance of social interaction; that is why such relationships are in the private sphere, so that the state may not interfere with such crucial and meaningful relationships. Liberalism focuses on the individual as the proper object of government regulation because individuals have rights that cannot be violated, even by the most intimate and worthwhile groups and relationships.

Feminists also critique liberalism because they claim its focus on the individual, on abstraction, contracts and reason do not adequately address women’s experiences and lives. Some feminist thinkers criticize the liberal values of reason and autonomy as male-centered values that cannot reflect the actual lives of real women. These feminists believe women think about the world in a fundamentally different way than men.

It is women’s typical experiences, [that shape] the ways in which they think and moralize about the world. Here [C. Gilligan] claims that while male ethical systems are based on ideas of justice and right, female ones are based on caring and responsibility; she argues

\(^{156}\) Held, 162
that these are ‘two different modes of experience that are in the end connected’ and that a mature theory and ethical standpoint must incorporate both.  

The values of caring, interdependence, passion and emotion are part of the characteristics that define and shape women’s understandings about the world. Liberalism, with its focus on competition, abstraction and justice, ignore the concrete realities of women’s lives. Since it neglects to address or make room for the experiences of women, liberalism offers an incomplete picture of human life and human nature.

Liberalism is said to rest upon a partial understanding of human nature and motivation which involves a denial or devaluation of women’s experiences and of society’s reproductive needs. [Alison] Jaggar has described the liberal idea of human nature as ‘political solipsism’: this sees each individual as essentially rational, independent, competitive and autonomous, a view which she says ignores the nurturing, cooperation and mutual support that are an essential basis for human society, and that have historically been central to women’s lives. 

Women’s experiences as mothers and nurturers gives them a different moral view of life, a view that has been subordinated by liberalism’s obsession with objectivity, reason and autonomy.

Woman are not, and do not see themselves as, autonomous in the way that men are, or see themselves. Childbearing, breast feeding, and heterosexual sex connect women physically and psychologically to others. Ideals of ethical care, compassion, and community responsibility dominate women’s lives.

With these notions characterizing the lives of women, it is understandable that liberalism and a liberal society seem foreign and incomplete for women. Without recognition of the value of caring, nurturing and compassion, liberalism seems antithetical to the female experience. Feminists who ascribe to this school of thought believe the woman’s moral view is just as legitimate as the liberal view, and that the women’s view needs to be part of any theory that claims equality for women and men.

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157 Bryson, 171.
158 Bryson, 168-169.
159 Allen, “Privacy in American Law,” 35.
Although some feminists believe women have a fundamentally different understanding of the world and morality, other feminists find this dichotomy problematic because these theories can be used to further discriminate against women and seem to ignore the diversity of women. “Many feminists…reject the idea that ‘reason and logic are inherently alien to a feminist epistemology and should therefore be abandoned’ or that women have unique access to mysterious forms of understanding inaccessible to men.”\textsuperscript{160} And it should not be surprising that many feminists find the characterization of women incorrect and inaccurate. The essentialist claims that all women have nurturing and compassionate experiences ignores the numerous counterexamples. “Jean Grimshaw reminds those who wish to replace or supplement ‘male philosophy’ with one based on female experiences that there is no unity of experience shared by all men or by all women, so that the ‘divergences in the lives of women and in feminist thinking, mean that there is no non-contested or isolable paradigm of female virtues or priorities which can be seen as a source for feminist philosophical thinking.”\textsuperscript{161} Women’s experiences run the social gamut. A rich, married white woman with a college degree will not have the same life experiences as a Latina single mother in the ghetto. To assume that both women view life the same way and have the same moral concerns is rather narrow-minded for a movement seeking to establish women’s equality.

These essentialist claims also seem to perpetuate the very kind of stereotyping that feminists wish to halt. Why is reason alien to women? Clearly women are capable of reason, and can be more reasonable than men. Why is compassion inaccessible to men? These claims enable society to judge men and women based on generalizations rather than personal experience and qualifications. Think back to \textit{Muller v. Oregon} where women were given special treatment.

\textsuperscript{160} Bryson, 174.
\textsuperscript{161} Bryson, 172.
because of their naturally weak and fragile natures. For generations women were considered unfit for public life because of their role as nurturers and caretakers. How can an effective feminism fight discrimination when it believes in the same kind of essentialist claims that lead to discrimination? As Patricia Smith notes, many of these characteristics do not apply to a vast number of women: “Although these theories are always phrased as descriptions of the ordinary woman, they apparently have never actually applied to ordinary women.”

Beate Rossler helps to sort out why feminists have so many divergent views on the value of liberal privacy. She attributes much of the confusion to a multifaceted understanding of privacy. In American liberalism, privacy has two distinct meanings. Privacy is the realm of freedom, autonomy and self-development. Yet there is another dimension of privacy that liberalism inherited from ancient Greek philosophy.

If in Aristotle’s conception, and in modern conceptions indebted to him, the private realm is one of necessity, limitation, restriction, and subjection under the (unpleasant) laws of nature and reproduction, such a description and evaluation certainly is preserved in liberalism as well, but it is accompanied not only by the positive connotation of the private as a refuge but also by an entirely different description and evaluation, in diametric opposition to Aristotle, of privacy as constituting a dimension of the individual’s freedom.

The liberal notion of privacy is thus an amalgamation of ancient Greek notions that regarded the private as the realm of women, bodily restraint and necessity, and the novel liberal construction of privacy as a realm of freedom and self-expression. Because of liberalism’s role in American history, these two notions often become conflated and lead to the kinds of misconceptions about privacy discussed above. Thus, Americans inherited two contradictory notions that are collectively called “privacy.”

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The domestic, private domain acquires a twofold significance…: on the one hand, the private sphere, including the family, is esteemed and approved of as the realm that is shielded from the demands of the hostile world, where love and affection prevail instead of competition and the profit motive, and which offers a refuge from the harsh laws of the economy and the inexorable order of politics. Alongside this approval of the domestic realm, however, there is a second sort of evaluation, a negative one that unambiguously associates the private sphere with ‘women’ and the public sphere with ‘men,’ thereby subordinating the private to the public sphere in much the same way as nature is thought to have a lesser status than culture. This use of the concept helps to maintain the lesser value granted to the family and the domain of the private, as it is the public sphere in which the relevant decisions will be made and social and political responsibilities assumed, and where independence from the requirements of nature and reproduction is the rule.\textsuperscript{164}

Note here that the older, more traditional notion of privacy is a gendered form of privacy. This dual notion of privacy has problematic implications when applied to women.

Because these two notions became conflated in liberalism, they have become fused in American constitutional jurisprudence. As such, when laws or court decisions construct the categories of public and private in order to protect individual freedom, in reality those constructions actually reinforce gender hierarchy as understood in ancient philosophy. Thus the division between the public and private unintentionally creates a hierarchy that hinders the progress of women. Law intended for personal freedom can have the reverse effect and further enforce gender discrimination.

By placing the operation of the law squarely in the public realms and, at least rhetorically, removing itself from the “private realm” of personal life and the family, the legal system created a distinction between a public realm of life, which a proper arena for legal and social regulation, and another, fundamentally different, personal sphere, which is somehow outside the law’s or society’s authority to regulate.\textsuperscript{165}

In ancient philosophy, the public realm has historically been the realm of men. It is the realm of power, of reason and strength. Important matters of state are kept in the public realm. Law addresses important social issues that affect everyone. The private realm, however, has

\textsuperscript{164} Rossler, 53-54.
\textsuperscript{165} Polan, 422.
historically been the realm of women. It is the realm of the home, childbearing and emotion. “The very place (home, body), relations (sexual), activities (intercourse and reproduction), and feelings (intimacy, selfhood) that feminism finds central to women’s subjection form the core of privacy doctrine.”166 When the law states that something is within the private realm, it is automatically equating that action with femaleness and essentially asserting that the issue is not important enough to warrant public attention.

The insulation of women’s world from the legal order also conveys an important ideological message to the rest of society…[T]he law’s absence devalues women and their functions: women simply are not sufficiently important to merit legal regulation.167

When the law places activities traditionally associated with women in the private realm, it puts women in the private sphere and thus reinforces the gendered notion of privacy. Thus, though intended as a realm of freedom and self-expression, the doctrine of liberal privacy actually reinforces the traditional notions of women that have been used historically to subjugate and oppress them.

What can be done to stop the subjection of women in the name of equality? Does liberalism offer any hope, or should the notion of privacy be dismantled in favor of a new theory that will adequately address women? Liberal feminists agree that liberalism should be maintained, but often disagree as to the method of that preservation. Ultimately, I feel Martha Nussbaum has an interesting way to make liberalism work for women. She, among other liberal feminists, claim that liberal rights have never been properly applied to women and thus what is needed is a form of hyper-liberalism to end gender inequality in the private realm.

Liberal feminists all agree that there is a value to liberalism that women should be hesitant to abandon. They deny the radical feminist stance of rejecting liberalism and favoring a

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166 MacKinnon, 434.
167 Taub and Schneider, 13.
complete restructuring of society. These radical feminists neglect to notice the value and benefits of a liberal system, aside from the fact that liberalism is the discourse of American politics and law. Demanding equal rights and using a liberal discourse “has the advantage of speaking to liberals on their own ground, appealing to principles of justice, equality, and equal rights to which liberals are already committed, and with arguments with which many people initially inhospitable to feminism may find it hard to disagree.”\textsuperscript{168} Simply speaking, since liberalism is the American discourse, women’s claims of rights find legitimacy when using the discourse. It is pragmatic to use liberalism to gain rights because “liberalism is one of the dominant languages of our political tradition.”\textsuperscript{169} The way to use the liberal discourse is to make claims of right. “Rights are of central importance to liberalism. Rights are the concept the liberal uses to express the moral significance of the individual, her freedoms and her choices.”\textsuperscript{170} Thus, to claim liberal rights, women claim that they are the proper subjects of liberalism; they can reason, they are individuals, and thus are entitled to the same protection liberalism affords to men. The conferring of rights upon a subject is the recognition that the subject is a proper subject worthy of rights. Thus, giving the same rights to women as to men is an acknowledgment that women, like men, can function in a liberal society, can contribute to a liberal society, and deserve the same protections that a liberal society promises. Rights is a recognition of citizenship and legitimacy. Patricia Williams writes, “rights imply a respect that places one in the referential range of self and others, that elevated one’s status from a human body to a social being.”\textsuperscript{171} Due to American history and the fundamental place of liberalism and

\textsuperscript{168} Held, 155.
\textsuperscript{171} Williams as quoted in Brennan, 96.
rights rhetoric in the United States, using the liberal discourse is simply the most realistic and efficient way for women to make gains.

The recognition of the practicality of liberal discourse for the advancement of women still seems to indicate that feminists use liberalism because it works, not because it is a desirable discourse in itself. Yet, liberalism is a great discourse for discussing and protecting individual freedom and the privacy necessary to have a truly human existence. Feminists should not scorn privacy, but embrace it.

Privacy is a matter of escaping as well as embracing encumbrances of identity. Without adequate privacy, there can be no meaningful identities to embrace or escape, and no opportunities to engage in meaningful reflection, conversation, and debate about the grounds for embracing, escaping, and modifying particular identities.172

Privacy enables people the full range of personal choice and expression. It enables people to live on their own terms and to explore the kind of life most suitable to their personal preferences. Privacy, simply stated, enables people to be what they are: people with desires, preferences, passions, emotions, ambitions, without the state suppressing the various forms of individual expression. Feminists should “encourage the respect for solitude, independent reflection, true intimacy, and moral choice that healthy modern liberal democracies presuppose.”173 Yet, if liberalism is so invigorating and liberating, why hasn’t that been the women’s experience of liberalism? Why have women not had the access to liberalism that men have, even after the granting of rights, political and legal equality?

Martha Nussbaum offers an interesting perspective as to why the promises of liberalism have not reached women. It is not liberalism that contributes the oppression of women, but the

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The improper application of liberal principles. “The oppression of women…is to be attributed to a failure to apply the rules of justice to the case of women.”¹⁷⁴  

Nussbaum believes that American law and the American state have inconsistently applied liberal principles, especially the principle differentiating between the public and private, and that has caused the private to be a realm of oppression and not freedom and individuality. Nussbaum agrees with Catharine MacKinnon’s observation that “the public-private distinction has typically functioned to protect male privacy, and not female privacy, and thence the unlimited sway of men over women in a protected domain.”¹⁷⁵  

Nussbaum believes that because of the two distinct notions of privacy, the liberal notion of privacy has been supported and defended for men only, while the traditional notion of privacy was applied to women. Liberalism has not protected the liberal understanding of privacy for women because they were traditionally in the home, and the home was the realm of noninterference. Thus, domestic abuse and spousal rape could occur without legal notice. For theoretical liberalism, however, such abuse is a deprivation of liberty. Domestic abuse endangers the security and lives of women and children in families. Since women are citizens of the state, a perfect liberal state would have to intervene to protect them, regardless of social circumstances.

Nussbaum’s solution to this problem is the correct application of liberal principles.

What has gone wrong with the individual rights approach of traditional liberalism is that it has not been consistently applied. Thus, the family has been excluded from considerations of justice and many of the issues confronting women—such as woman abuse—occur within the domestic setting. “Where women and the family are concerned, liberal political thought has not been nearly individualist enough,” writes Nussbaum. So liberalism needs to extend the application of rights.¹⁷⁶

¹⁷⁴ Brennan, 88.
¹⁷⁵ Nussbaum, 115.
¹⁷⁶ Brennan, 89.
Thus, what is needed is a sort of hyper-individualism to correct the misapplication of liberal privacy. A liberal government must protect individual autonomy and the private realm of freedom. Yet a person is not free or autonomous if that person is subject to physical and mental abuse. That kind of privacy is not the free and uplifting form of privacy promised by liberalism. When a person is not free due to the physical restraints of another, it is the obligation of a liberal government to step in and interfere as the protector of individual liberty. It matters not whether a person is in his/her home with family or in a public market shopping for groceries; if a person’s liberty is diminished by the violent actions of another, the state must step in. Government must protect every person’s liberty equally, even if that means entering the home to stop domestic abuse. Liberty is a basic right of each person. Liberalism must recognize, as a theory premised on the value of the individual, that like the state, “the family cannot violate these rights.” As Beate Rossler states, “All individuals need to have their privacy protected in the same way, if they are to avail themselves of individual freedoms and to be able to maintain intimate relationships: the purpose of privacy is to protect freedom. A true liberal government should have as its primary function the physical security of the people since that security gives people freedom and liberty.

Privacy, on the one hand, and private choice, on the other, restrain and obligate government. Government must leave us alone as a matter of government restraint. Government must also protect us from interference and invasion as a matter of government obligation.

The state has an obligation to interfere when the freedom of any citizen is endanger, man or woman, because all citizens are equal in the eyes of the state.

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177 Nussbaum, 115.
178 Rossler, 65.
This hyper-liberalism serves two very important purposes. First, it enables women to keep the benefits of liberalism. This kind of change can be made without any radical restructuring of current society. The current liberal system would stay in tact, and women would get the advantage of having access to the promising aspects of liberal privacy traditionally enjoyed only by men. At the same time, this strategy, by focusing on the individual (as a liberal government should) would begin to break down the notion of privacy as a feminine space of reproduction, necessity and noninterference. “Discrimination in society can also be overcome by means of guaranteeing an equal right to privacy and that this course must be taken, especially as in this way the liberal kernel of privacy will be preserved while doing away with privacy’s gender specific connotations.”180 Focusing solely on the equal liberty and freedom of all individuals would cause the gender construction of privacy to break down, leaving only the positive notion of privacy which creates a space for self-fulfillment, expression and personal choice.

Yet, Nussbaum recognizes that this is a very difficult task, one that will take time and patience. But she urges other feminists not to give up so soon on liberalism:

> It is no accident that in a sphere that is the home both of intimate self-definition and also of egregious wrongdoing the search for liberal justice should encounter difficulties: for liberal justice is committed both to protecting spheres of self-definition and to ending the wrongful tyranny of some people over others. But the failure to have a fully satisfactory solution to these difficulties is not a failure of liberal justice, because the liberal is right. Self-definition is important, and it is also important to end wrongful tyranny. The tension that results from these twin principles is at the heart of liberalism, but it is a valuable and fruitful tension, not one that shows confusion or moral failure. In general, tension within a theory does not necessarily show that it is defective; it may simply show that it is in touch with the difficulty of life.181

Nussbaum understands, and encourages other feminists to consider, that liberalism’s lack of a clear and perfect solution to the issue of women is not a failing of liberalism. Liberalism

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180 Rossler, 61.
181 Nussbaum, 123.
champions two very ambitious but precious goals: the security of citizens and the uninhibited liberty of citizens. These goals clash occasionally and liberalism must balance the two goals; the solutions are never ideal for each citizen. But liberalism is a lofty philosophy and offers so much potential. Nussbaum and other liberal feminists correctly believe that the potential of women’s advancement promised by liberalism is too great to abandon.
Conclusion

There are so many directions this thesis could have gone, and all are worthy of attention. Unfortunately, there was not time enough to address such important issues as women in the public realm, how American law and politics deals with pregnant bodies, how class affects the privacy issues discussed in this thesis. Such issues further reinforce the important notion that no matter how much one talks about women’s rights and women’s advancement, “women” will never be a completely cohesive and homogenous group with all the same concerns and opportunities. I found it important here, however, to discuss the liberal notion of privacy since the constitutional construction of privacy has been both the biggest help, and yet one of the biggest hindrances to women’s advancement. We are stuck with a liberal nation, and with over 200 years of liberal history behind it, so what are the options for action?

This thesis is for women’s rights advocates that support the notions of women in the workplace, women in government, and the restructuring of the home. The views expressed in this thesis all work for the same goals—the social and political equality of women—but disagree regarding the proper means of achieving those goals. Pro-life advocates and other conservative women’s groups are not proponents of applying basic liberal principles to women. Concerned Women for America explicitly admit this point on their website, stating “at its root, each of these issues is a battle over worldviews.” 182 These conservative groups want to maintain the gendered notion of traditional privacy: “We honor the institution of marriage and the role of the full time homemaker.” 183 These advocates do not measure progress by the number of women in public office, or the wage gap between men and women. For them, happiness and self development are things women are unable to find outside the home and family. As mentioned, they believe in the

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182 Concerned Women for America.
183 Eagle Forum.
The traditional notion of privacy, whereby a woman remains in the home and finds her self-worth and fulfillment by taking care of her children and home. Thus, this thesis is not for them and they would probably attack much of this work as feminist ranting.

This thesis is for the feminist who believes in women’s rights and women’s advancement through the kind of political and social equality that would enable women to make the kinds of important life decisions that all autonomous individuals should have the freedom to make. This kind of advancement is best actualized in the real world through the use of liberalism. The mission statements of NARAL Pro-Choice America and NOW are worth note. Both are couched very deeply in liberal rhetoric. The words “freedom,” “fundamental right,” “equality,” and “justice” appear numerous times. Along with those words appear a deep commitment to “privacy,” the “right to choose,” and “freedom of choice.” These words ooze the liberal notion of the importance of the realm of privacy. These are two leading groups of the women’s movement and they choose to use the language of liberalism for women’s rights. These groups are fighting the everyday battles for real social change, rather than sitting in an office writing theory papers.

Though theory often seems impractical and too removed from the “real world,” one should not deny the importance of theory. Even radical theory is necessary and helpful to bring new views to light and force us to question our guiding assumptions. These theories, however, can only do so much. At some point, concrete action becomes necessary to effect change. Yet when acting, one should not cease to think critically about the deep, theoretical implications that follow actions. Using liberalism to pursue women’s rights is, to me, the correct action. But that should not preclude those acting from questioning liberalism, notions of right, notions of privacy and the very discourse used to effect change. No discourse or political theory is perfect in

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184 NARAL Pro-Choice America
incorporating all groups of people into a coherent whole; that is simply a result of the varied lives and experiences of diverse people. What matters is that the questions are raised and cause people to think critically about their actions. Even if the questions asked have no answers, asking is still a productive venture.

I believe one of the biggest challenges to women’s equality is simply recognizing the amount of time that will be necessary to reach “the goal,” if the ideal goal can ever be reached. Women are trying to combat a well established American history, and against a notion of privacy as old as the Ancient Greeks, both of which subordinated women. It will take time and patience to overcome that much tradition. Women’s advancement in the United States has been very quick, historically speaking. Women have not even had the vote for 100 years and already there is talk of the first serious female bid for the American presidency. Women must not get discouraged. Stable kinds of change are incremental and very slow, often taking generations. Women must continue the fight not only for themselves, but for the future of the United States, since the fate of the nation is tied up with the fate of women. Yet when progress happens, women must not become complacent. Therein lies the value of theory, even radical theory. It challenges women to see how far we have come, and yet how far we still have to go for the kind of equality and freedom we seek. Right now liberalism offers the most potential for the kind of change we wish to see. Not only is it a discourse familiar to Americans, it is a discourse holding the most promise for women.
Works Cited


*Allgeyer v. Louisiana*, 165 U.S. 578 (1897).


The Declaration of Independence.


The United States Constitution