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Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights

Barbara Stark
*Maurice A. Deane School of Law at Hofstra University, Barbara.J.Stark@hofstra.edu*

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DECONSTRUCTING THE FRAMERS’ RIGHT TO PROPERTY: LIBERTY’S DAUGHTERS AND ECONOMIC RIGHTS

Barbara Stark*

[E]verything I know of my family comes from that time when I steeped myself in land transfers, sea logs and records of hogsheads of molasses and rum.... [That] set in motion a hunger for connectedness, a belief that with sufficient passion and intelligence we can deconstruct the barriers of time and geography.

Bharati Mukherjee1

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* Professor of Law, University of Tennessee College of Law; B.A., Cornell; J.D., N.Y.U.; LL.M., Columbia. Early versions of this paper were presented at the Feminism and Legal Theory Conference at Columbia Law School, and to my International Human Rights students. I am grateful to all for their suggestions and to the College of Law for its generous support. Thanks to Fran Ansley, Judy Comett, Gabrielle Cowan, Deseriee Kennedy, Jerry Phillips, and Greg Stein for their thoughtful comments on earlier drafts, to Susan Geist for her diligent research assistance, and to Pat McNeil for her painstaking and skillfull preparation of the manuscript.

“Liberty’s Daughters” refers to the brilliant and groundbreaking work, MARY BETH NORTON, LIBERTY’S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN 1750-1800 (1980). Professor Norton’s books, along with those of other women’s historians, made this Article possible. See infra note 6.


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I. INTRODUCTION

Deconstruction is a method for exposing hidden assumptions, that which is taken for granted, unquestioned. This Article draws on this method first to explain how the right to property, as understood by the Framers, became the hidden, unquestioned assumption of the Bill of Rights. Second, this Article draws on deconstruction to “unpack” the right to property to reveal the lesser-subsumed economic rights it takes for granted. It argues that the right to property and economic rights are


3. “From the very beginning, the settlement of North America was closely linked with economic rights.” JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 10 (1992).

4. By “unpack,” I mean “deconstruct” not “in the technical sense used by critical legal scholars influenced by Jacques Derrida . . . but in the emerging popular sense of deconstructing a social phenomenon into its component parts.” Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 797 n.1 (1989).

iterations of the same rights, from the perspectives of the “haves” and the “have-nots,” respectively. Recent work by women’s historians makes it possible to use late eighteenth century women, one of the most conspicuously neglected groups of have-nots at the time, as a case study. This analysis shows how the denial of economic rights by culture and social custom, as well as by law, progressively distances civil and political rights. Ultimately, the denial of economic rights makes the legal proscription of civil and political rights unnecessary because, as a practical matter, these rights become unimaginable.

and cultural rights” that guarantee a minimum welfare system). These rights, including the rights to food, housing, health, and education, are set out and described in Part V, infra. See generally Introduction to Economic Rights (Ellen Frankel Paul et al., 1992) (containing a collection of essays exploring the “rights to use, possess, exchange, and otherwise dispose of property [which] are the core of some of the most important and fundamental disputes in Western moral and political theory”); cf. Adrienne D. Davis, The Private Law of Race and Sex: An Antebellum Perspective, 51 Stan. L. Rev. 221, 242 (1999) (using the term “economic rights” to refer to the capacity to participate in the market).


7. As Sylvia Law observes, “[s]ilence, absolute and deafening, is the central theme of the original founders’ discussions of women and families.” Sylvia A. Law, The Founders on Families, 39 U. Fla. L. Rev. 583, 586 (1987). African Americans, including women, were another major group of have-nots. Slaves comprised approximately 20% of the colonial population. See Howard Zinn, A People’s History of the United States 1492-Present, at 72 (rev. ed. 1995). See generally Linda K. Kerber et al., Introduction to U.S. History as Women’s History: New Feminist Essays I, 3 (Linda K. Kerber et al. eds., 1995) [hereinafter New Feminist Essays] (describing Gerda Lerner’s “stubborn insistence that sources could be found to study even the poorest and most subordinated of women”).
For the Framers, the enjoyment of the right to property, like the enjoyment of civil and political rights, was explicitly limited to white men. Although more than two hundred years of constitutional jurisprudence has extended most civil and political rights to blacks and white women, disproportionate numbers of these groups lack the economic rights necessary to fully enjoy them. Economic rights are important in themselves, however, not only because they facilitate the enjoyment of civil and political rights. Rather, the two kinds of rights are equally crucial to any meaningful conception of human dignity. The two kinds of rights are also interdependent; that is, each is necessary for the enjoyment of the other. As this Article demonstrates, this understanding is
neither new nor foreign, but buried in the very heart of American consti-
tutional jurisprudence. 13

Part II explains some basic terms in deconstruction as they are used in this Article. Part III draws on these terms to map the relationship between property rights and civil and political rights in the early state, and later federal, bills of rights. Part IV deconstructs the right to property itself, exposing its component parts. Part V is a historical case study, again drawing on deconstruction, which examines the component parts of the right to property in the lives of eighteenth century women.

II. DECONSTRUCTION

A. Hierarchical Oppositions

The process of deconstruction begins by identifying the opposition contained in a particular concept. 14 The concept of “day,” for example, actually contains the opposition “day/night.” That is, the concept of “day,” referring to a twenty-four hour period of time, such as Tuesday, actually contains the opposition “Tuesday day” and “Tuesday night.”

The next step is to invert the hierarchies contained in that opposition. 15 By doing so we expose what we have forgotten—the hidden, subordinated conception on which the privileged conception is always dependent. To invert the day/night hierarchy, we treat “night” as the privileged concept. Imagine, for example, going out at two o’clock in the morning, to pick up milk for coffee.

13. See John Leubsdorf, Deconstructing the Constitution, 40 Stan. L. Rev. 181, 184 (1987); cf. James A. McKenna, The Framers of the Constitution Were Our First Postmodernists (Or Why Justice Scalia Is Wrong), 23 LEGAL STUD. F. 71, 77 (1999) (“The radical postmodernists seek to ‘deconstruct’ our political and social hierarchies, to expose them as arrangements of the powerful, and to thereby transform society. The postmodernists of the 1770s were involved in a similar project.”).

14. See Balkin, supra note 2, at 746. This Part draws heavily on Professor Balkin’s article, Deconstructive Practice and Legal Theory. See id. Balkin is often clearer than those he interprets. As Jonathan Culler remarks, “[n]ot only does repetition produce what can then be regarded as a method, but critical writings that are said to imitate or deviate often provide clearer or fuller examples of a method than the supposed originals.” CULLER, supra note 2, at 229.

15. See Balkin, supra note 2, at 746. See also, e.g., THE OXFORD COMPANION TO WOMEN’S WRITING IN THE UNITED STATES 241 (Cathy N. Davidson et al. eds., 1995) [hereinafter WOMEN’S WRITING] (“The paradigm of binary oppositions is useful to feminism because it denaturalizes identity by exposing its structural aspects.”).
B. The Dangerous Supplement

Night, the subordinated conception here, is referred to in deconstruction as the “dangerous supplement.” The supplement is dangerous, first, simply because it adds to our understanding, thus exposing our original understanding as incomplete. Picking up milk at two o’clock in the morning, we are surprised to see other cars out. Gas stations and grocery stores are open. The stores are much less crowded and there are no lines. Thus, we understand that our original concept of “day” is incomplete—it takes for granted that “day” is the better time to shop even though there are apparently advantages to shopping at night (i.e., it is easier to park and there are shorter lines).

The supplement is also dangerous because it subverts our confidence in the privileged concept. Inverting the hierarchy invites us to consider that there may be other advantages to doing things at night. Perhaps we could get more work done at night, for example, when there are fewer distractions. In fact, there is a whole alternative economy that operates when most of us are asleep.

C. Trace and Iteration

The dangerous supplement, the subordinated opposition, can also be found in the dominant concept as “trace.” That is, each of the terms retains a bit of the other, a reminder of its origins:

The word “trace” is a metaphor for the effect of the opposite concept, which is no longer present but has left its mark on the concept we are now considering. The trace is what makes deconstruction possible; by identifying the traces of the concepts in each other, we identify their mutual conceptual dependence.

This “mutual conceptual dependence” becomes clearer when the same opposition appears in another context. The repetition of the same in different contexts is referred to in deconstruction as “iterability.” “Morning,” for example, may bring to mind thoughts of welcome sunlight, wakefulness, energy, coffee, orange juice, or eagerness to face the day. “Morning,” when it is announced on a trans-Atlantic jet, however,

16. See Culler, supra note 2, at 104-05 (discussing Rousseau’s concept of the “dangerous supplement”).
17. See Balkin, supra note 2, at 751.
18. See id. at 763.
19. Id. at 752.
20. See id. at 749.
means something quite different. This iteration of morning may be bright, there may be orange juice and coffee, yet we feel exhausted and confused. It is the absence of night—the lack of sleep, darkness, and dreams—that robs morning of its pleasant associations on such flights.

Indeed, as sleep researchers have demonstrated, waking life literally depends on sleep. Without it, functioning is soon impaired; we become irritable and distracted. If the deprivation continues, there are likely to be significant health costs.

Conversely, it is the "trace" of day—the brightly-lit parking lot, the wide-awake workers and shoppers, and the cars on the road—that gives nighttime shopping its charm. Deconstruction exposes our unspoken assumptions, what we take for granted when we speak of "day." It also reveals its dangerous supplement, of which we are only peripherally aware, and its critical role in our lives.

D. Liberating the Text

As Jacques Derrida explains, texts are necessarily free of their authors because texts are public and initiate a series of interpretations which cannot be predicted. As Professor J.M. Balkin puts it:

Our words seem to perform tricks that we had not intended, establish connections that we had not considered, lead to conclusions that were not present to our minds when we spoke or wrote.... This curious habit of our words to burst the seams of our intentions and to produce their own kind of logic is what Derrida labels the free "play" of text.

Because there are an indefinite number of interpretations that can be applied to any given text, each is necessarily partial. The integrity of any interpretive process, therefore, depends on distinguishing misreadings from readings. As Jonathan Culler points out, however:

Every reading can be shown to be partial. Interpreters are able to discover features and implications of a text that previous interpreters neglected or distorted. They can use the text to show that previous read-

21. See William C. Dement & Christopher Vaughan, The Promise of Sleep 262-71 (1999). The founder and director of the Stanford University Sleep Research Center describes the importance of sleep to physical and psychological well-being, including immune system functioning. See id. at 5, 262-75; see also, e.g., Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 41, 94 (1978) (holding that depriving detainees of sleep amounted to inhumane and degrading treatment).

22. See Dement & Vaughan, supra note 21, at 263, 274-75.

23. See Culler, supra note 2, at 131.

24. Balkin, supra note 2, at 777.

25. See id. at 781.
ings are in fact misreadings, but their own readings will be found wanting by later interpreters.\textsuperscript{26}

The point is not to arrive at some "correct," indisputable interpretation.\textsuperscript{27} Rather, the point is to "displace the question, leading one to consider what are the processes of legitimation, validation, or authorization that produce differences among readings and enable one reading to expose another as a misreading."\textsuperscript{28}

Maurice Sendak's \textit{In the Night Kitchen},\textsuperscript{29} for example, may be read as a deconstruction of "day." Sendak transforms an ordinary kitchen into a fantastic metropolis, in which industrious bakers work all night under the stars so that their cake-loving protagonist (along with the rest of us) can have cake to eat in the morning.\textsuperscript{30} \textit{In the Night Kitchen} exposes our original concept of day as incomplete,\textsuperscript{31} and it subverts our confidence in that concept. "Day" is not the only time for productive work, and it may not be the best.\textsuperscript{32} Indeed, our most valued daytime activities (such as eating cake) may in fact depend on the unseen nighttime work of others, of whom we may be oblivious.\textsuperscript{33} This Article simi-

\textsuperscript{26} Culler, supra note 2, at 176.

\textsuperscript{27} To the contrary, deconstruction is necessarily ongoing. "Any text, even a postmodern deconstructive text, can be deconstructed." Stephen M. Feldman, \textit{Playing with the Pieces: Postmodernism in the Lawyer's Toolbox}, 85 Va. L. Rev. 151, 178 (1999). "Rather than conceiving of patriarchy as a monolithic entity (a tactic that only offers a partial analysis of oppression and so only suggests partial points of resistance), a feminism based on Foucauldian deconstruction looks at the multiplicity of power relations in which women are oppressed." Walker, \textit{Deconstruction and Feminism}, supra note 15, at 242.

\textsuperscript{28} Culler, supra note 2, at 179.

\textsuperscript{29} Maurice Sendak, \textit{In the Night Kitchen} (1970).

\textsuperscript{30} See id. at 7.


\textsuperscript{32} Indeed, the night may be more conducive to creative work, an auspicious time for those poets and artists whose work may be closer to dreaming. Sleep, however, remains crucial. See Dement & Vaughan, supra note 21, at 312-31 (explaining the importance of sleep with respect to the creative process).

\textsuperscript{33} Thus, Sendak shows how "night" is the dangerous supplement of "day." This was not his intention, but that would only matter if the author's intent were necessary to "legitimate, validate, or authorize" that interpretation. Culler, supra note 2, at 179. Here, instead, the interpretation is validated by the effectiveness of Sendak's playful and radical inversion; he achieves precisely that transformation of sensibility to which deconstruction aspires, whether it is his intention or not. The example is particularly apt in this context, moreover, because of the importance
larly uses deconstruction to show how the Framers’ most valued civil and political rights in fact depended on economic rights, and how those rights, in turn, depended on the unseen work of the women who were their contemporaries.

III. THE BILLS OF RIGHTS

This Part explains how the right to property became the “dangerous supplement” of our familiar civil and political rights, and describes the critical importance of this right for the Framers. First, it explains the Framers’ familiarity with the notion of rights as interdependent and implicit. Second, it shows that, consistent with this notion of rights, “property” had a more expansive meaning than it does today. Finally, it explains how the politics of ratification put other issues in the foreground, leaving the right to property “buried” in the Bill of Rights. Yet the right to property remained—along with the lesser economic rights subsumed in that right—in the states’ bills of rights, in “natural law,” in custom, culture, and private law—at least for some.

that Lochner v. New York, 198 U.S. 45 (1905), played in shaping American notions of economic rights. See, e.g., Richard E. Levy, Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. Rev. 329, 438 (1995) (using economic rights to refer to freedom of capital). In Lochner, the Supreme Court struck down a New York law limiting bakers to a 60 hour work week on the ground that it violated constitutionally protected “freedom of master and employ6 to contract with each other in relation to their employment . . . .” 198 U.S. at 64; see also infra text accompanying note 303 (explaining that the “right to work” includes a “reasonable limitation of working hours”).


35. As I have just shown, “intent” is not important in deconstruction. See supra notes 33-34 and accompanying text. Rather, the purpose of demonstrating this familiarity here is to show, as John Leubsdorf has observed, that “[t]he framing of the Constitution took place at what amounted to several levels of consciousness, so we should not be surprised to find in it concealed conflicts and accommodations.” Leubsdorf, supra note 13, at 183-84. In addition, this example should de-mystify deconstruction in this context. Cf. Dennis W. Arrow, Pomobabble: Postmodern Newspeak and Constitutional ‘Meaning’ for the Uninitiated, 96 Mich. L. Rev. 461 passim (1997) (explaining the theory of deconstruction by using a language other than English but which nevertheless resembles it).

36. Ironically, the right to property is not set out in the International Covenant on Economic and Cultural Rights (the “Economic Covenant,” the “Covenant”). See International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. (entered into force Jan. 3, 1976); see also infra notes 110-74 (discussing the lesser economic rights subsumed by the right to property). Rather, the Covenant articulated the lesser subsumed economic rights which are included in the right to property. See discussion infra Part IV.A.
The goal of deconstruction, like that of other critical theories, is not to uncover some empirical "truth," but to enlighten and to increase our understanding of that which is being deconstructed. Accordingly, it is an ongoing process, the result of which can always itself be deconstructed. Depending on the context, one concept may be more illuminating than another may. In discussing the historical origins of the bills of rights, for example, the concept of "mutually dependent oppositions" eerily tracks the Framers' arguments. The concept of iteration, the repetition of the same in a different context, clarifies the Framers' understanding of the right to property and its place in the Federal Bill of Rights. Finally, the relationship of the dangerous supplement to the privileged conception enables us to crystallize the relationship between the right to property and civil and political rights. By tracking the right to property from its privileged position in colonial jurisprudence to its subordination in the Bill of Rights, we can understand how it became—and how it remains—a dangerous supplement to civil and political rights.

A. Historical Origins—The Right to Property

The colonists brought with them a rich tradition of rights. As Pulitzer Prize-winning historian Jack N. Rakove points out, there was "no shortage of rights consciousness among colonists whose dual motives for emigration included both tender matters of religious conscience and the pursuit of property." This "rights consciousness" was grounded in the notion of natural, inalienable rights, which belonged to man in the state of nature described by John Locke.

37. See Balkin, supra note 2, at 764-67 (comparing deconstruction to other critical theories, such as psychoanalysis, in which the goal is to increase understanding).

38. See supra note 27 and accompanying text.

39. As Professor Leubsdorf points out in a related context, this reflects the ways in which opposing positions became embedded in the Constitution. See Leubsdorf, supra note 13, at 201; see also McKenna, supra note 13, at 87-89 (explaining how, like the conflicting moralities and views of one person, the Framers used their conflicting views to create the Constitution).


41. "Man," of course, was Locke's term, as "homme" was Rousseau's. This was deliberately and profoundly gendered. See Kerber, supra note 6, at 15; Jean-Jacques Rousseau, Emile or On Education 357-59 (Allan Bloom trans., 1978) (explaining what Rousseau viewed as fundamental and innate differences between men and women); infra text accompanying notes 268-79 (describing Locke's view on women); see also Alice Browne, The Eighteenth Century Feminist Mind 21 (1987) ("Rousseau's work encouraged women's sense of themselves as a group.

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These rights, to which Englishmen were entitled as a birthright, were well understood: "Life, liberty, and property comprised the fundamental trinity of inalienable rights." As explicitly set out in the Virginia Declaration of Rights:

[ALL men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.]

Men left the state of nature only to better assure these inalienable rights. That is, they entered into Locke's social contract, through which they constructed legal rights, to protect and promote their pre-existing natural rights. As Rakove stresses, these legal rights, also referred to as "positivist" or "English" rights, were seen as part of a continuum on which natural rights could also be found: "English rights were the legal application of natural rights."

The right to property held a privileged place in colonial jurisprudence. William Penn began his short list of English rights with the right to property: "[T]he rights and privileges which I call English ... may be reduced to these three ... I. An ownership, and undisturbed possession: that which they have is rightly theirs, and nobody's else."

What exactly was meant by a right to property? As legal historian John Phillip Reid has explained, the eighteenth century understanding of the right to property was much broader than ours:

\[\text{in society with rights and duties defined by their gender, even though it undermined faith in women's autonomy and rationality.; but see Louis Henkin, The Rights of Man Today 3 (1978) (opining "[t]hat the rights ... described as human ... are the rights of men and women").}\]

42. Rakove, supra note 40, at 290.

43. Henkin, supra note 41, at 6 (quoting the Virginia Declaration of Rights).

44. Rakove, supra note 40, at 293. Positivist rights, however, were alienable. They were created and bestowed by States and could be withdrawn by States. Thus, inalienable and alienable rights are related to each other in Professor Balkin's system of "mutual conceptual dependence." Derrida calls this concept difference. See Balkin, supra note 2, at 761. Inalienable rights depend on positivist, alienable rights for their realization. At the same time, positivist, alienable rights are justified by the natural, inalienable rights they presumably protect. Alienable rights are the dangerous supplement of inalienable rights precisely because they can be alienated, leaving the inalienable right unprotected. But if alienable rights are forgotten, the justification for alienable rights is lost. For the Framers, the notion of rights as interdependent was a familiar one. They were comfortable with the notion of supplementary rights, some "present," an unquestioned part of daily life, others submerged, although "deconstruction" was not to emerge for almost 200 years. See Balkin, supra note 2, at 743 n.1.

45. Rakove, supra note 40, at 294 (citation omitted).
The thought has been that when seventeenth-century English and eighteenth-century Americans defended their right to property, they were speaking as a governing class seeking to protect their private holdings, both personal and real. Sometimes they were, and it is important not to ignore that fact. But in legal terminology, "property" was not necessarily the object itself, but the right and interest or domination lawfully held over the object; it was a species of title, inchoate or complete, legal or equitable, corporeal or incorporeal, tangible or intangible, visible or invisible, real, personal, or contractual. Most commonly, when used in revolutionary constitutional debates... "property" referred to rights of all kinds.

The "right to property," in short, was used to refer to both property rights and to civil and political rights, just as "day" refers to the twenty-four hour period including both daylight hours and nighttime hours. Accordingly, for the colonists, the right to property was the dominant conception and civil and political rights were the subordinated opposition.

At the same time, just as "day" is also used to refer specifically to the hours of daylight, the right to property was also used to refer specifically to rights in particular property. One had to have "property" in order to vote, for example, and for that purpose property generally meant land. As James W. Ely, Jr., notes, "[w]hen the Constitution was written, virtually every state imposed a property or taxpaying qualification on suffrage and set higher property qualifications to hold public office." This requirement was met by an amount of property within the

46. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 97 (1986) (emphasis added); see Renée Hirschon, Introduction: Property, Power and Gender Relations, in WOMEN AND PROPERTY—WOMEN AS PROPERTY 1, 6 (Renée Hirschon ed., 1984) ("[T]he nature of 'property' as a category is essentially dynamic. Its form depends on a combination of interacting forces, political, legal as well as economic and cultural and these change through time. . . . It is essential, therefore, to take an historical perspective.").

47. See supra Part II.A and accompanying text.

48. James Wilson was the only one of the Framers to "declare[] that property was not the main object of government." JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 96 (1990). See generally 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911-37).

49. See CHARLES WARREN, THE MAKING OF THE CONSTITUTION 71 (1937) ("[P]ossession of freehold in land was then a property qualification for voting for members of the [state] Legislature, it was peculiarly the small farmers who, in most states, were possessed of the requisite qualification to vote.").

50. ELY, supra note 3, at 47; Jacob Katz Cogan, Note, The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America, 107 YALE L.J. 473, 473 (1997) (observing that "the eighteenth century had located a person's capacity for political participation . . . (in material things, such as property)").
reach of many, if not most, white men. Even those white men without money could participate in the many claims programs through which land was distributed to those willing to farm it, which had drawn many of them to the colonies. Property requirements, of course, effectively excluded black men and all women, whose capacity to own property was strictly limited by law and custom.

51. "Scholars agree that from 50 to 80 percent of the adult white males were eligible to vote in the colonial period." Christopher Collier, The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 19, 20 (Donald W. Rogers ed., 1990). "In all colonies, men had to own property in order to qualify for the suffrage. . . . [Specific property requirements differed] but [the] most widely used was the forty pound freehold. . . . [P]otential voters had to own property—usually real estate—that was worth forty pounds, or that returned forty shillings a year . . . in rent or interest." Id. at 22-23. See generally JACQUELINE JONES, AMERICAN WORK: FOUR CENTURIES OF BLACK AND WHITE LABOR 143 (1998) (noting that an "estimated 80 percent of all Americans . . . remained legal dependents at the end of the Colonial period . . . includ[ing] all women, children, servants, and slaves, as well as landless white men").

52. "Most colonies outside New England adopted the 'headright' system as a means of distributing land. By this device an amount of land was awarded to each person emigrating to the colony. . . . Although headrighting was gradually eliminated, individuals could still purchase land for a modest payment." ELY, supra note 3, at 11. For a compelling account of "the homesteading system and the spatial grid for land settlement in the United States (a product of Jeffersonian democratic and Enlightenment thinking)," see DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE 255 (1990). As Harvey observes, this "change in space relations . . . led to a redistribution of wealth and power." Id. Women, however, were explicitly excluded from this redistribution.

53. Most black men were slaves and were rarely able to satisfy the property requirements necessary for suffrage. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 170 (1978) (noting that slaves were prohibited from owning or acquiring property). Those free black men who were able to meet the requisite property threshold necessary for voting, often faced legal impediments in the North as well as in the South. See id. at 150, 203. In New York, for example, because the state constitution "gave the franchise to all free propertied men, without reference to color . . . in 1785 . . . emancipation would have given all blacks the same civil rights enjoyed by whites." Id. at 139. This was rejected by the state legislature, which approved a plan for gradual emancipation instead. See id. Similarly, in South Carolina, "[o]ne of the most significant legal incapacities placed upon the free black was the legislative declaration that he could not vote." Id. at 203.

54. Slave women were subject to the same restrictions as slave men, and free black married women were subject to the same restrictions as white married women. See Cheryl I. Harris, Finding Sojourner's Truth: Race, Gender, and the Institution of Property, 18 CARDOZO L. REV. 309, 321 (1996). According to Blackstone, "[b]y marriage, the husband and wife are one pers[on] in law: that is, the very being or legal exis[ten]ce of the woman is [s]uspended during the marriage. . . . and her condition during her marriage is called her coverture." 1 WILLIAM BLACKSTONE, COMMENTSARIES ON THE LAWS OF ENGLAND 430 (Dawsons of Pall Mall 1966) (1765); see also infra text accompanying note 245. "[S]ome colonies. . . . excluded persons [from voting] on the basis of sex and race. But these . . . were articulated less frequently, if only because (as a consequence of coverture or slavery) they were so often subsumed within the freehold qualification itself." Cogan, supra note 50, at 477; accord Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1285 (1991).
From the Framers’ perspective, however, propertied white men were the threatened minority in need of protection. As James Madison, principal drafter of the Bill of Rights, explained, “in all populous countries the smaller part only can be interested in preserving the rights of property.”

These property owners were crucial to the survival of the new Republic because they alone had a real stake in it. Thus, for Madison, as Jennifer Nedelsky explains:

Good government must be able to protect both the “rights of persons” and the “rights of property” . . . The problem was that if political rights were granted equally to all, the rights of persons and the rights of property would not be equally protected. The propertied could be relied upon to respect the rights of persons, in which they also had an interest. But the propertyless had no corresponding interest in property . . . . The problem of providing equal protection for the rights of persons and the rights of property in a manner consistent with republican principles was, Madison said, the most difficult of all political problems.

Rakove, similarly, describes Madison’s:

palpable fear that economic legislation was jeopardizing fundamental rights of property. Paper-money laws, debtor-stay laws, and the specter

While single women usually had more legal rights to own and transfer property, they were rarely able to acquire property because of their limited access to work and education. See discussion infra Parts V.B.4, V.B.9. In addition, there was a significant social stigma associated with “spinsterhood.” See discussion infra Part V.B.6.b. See generally Lee Virginia Chambers-Schiller, Liberty, A Better Husband (1984) (discussing the social history of single women in America between 1780-1840). Nevertheless, free black women often chose to remain unmarried, as did white widows of independent means. See Suzanne Lebsock, The Free Women of Petersburg: Status and Culture in a Southern Town 1784-1860, at xviii (1984).

55. Rakove, supra note 40, at 314 (citation omitted).


The evolution of the colonial franchise was based upon a growing awareness that only those with some kind of stake in society could be counted upon to act as responsible electors . . . . Not until 1736 was the amount of property necessary for voting specified as either 100 acres of unimproved land or 25 acres improved with a house or a lot and house in town.

Id.

57. It was the view of the Framers that property owners would play a central role in the new government. Hamilton, like the other Framers, believed that “the representative body . . . [would] be composed of landholders, merchants, and men of the learned professions” and that, as such, those individuals were best suited to respect property rights. The Federalist No. 35, at 168 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

58. Nedelsky, supra note 48, at 5; see also The Federalist No. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961) (“Government is instituted no less for protection of the property than of the persons of individuals.”).
of Shays's Rebellion in Massachusetts all alarmed him terribly. So did the grim prospect [that] . . . a factious majority might eventually form from "those who will labour [sic] under all the hardships of life, & secretly sigh a for more equal distribution of its blessings." 59

Madison became the champion of that propertied minority, which had the most to lose from a "more equal distribution." 60

B. The States and the Union

After the American Revolution, Congress drafted the Articles of Confederation. Ratified by the states in 1781, these empowered Congress to declare war and to settle boundary disputes. 61 Crucially, however, the Articles of Confederation did not give Congress the power to enforce its decisions, to collect taxes, or to enter into foreign trade agreements. 62 It became increasingly clear that the states would have to unite if they were to thrive in the larger world of nation States. 63 But their recent experience with the King's strong, centralized government had left the newly independent states wary of a federal union. 64

59. Rakove, supra note 40, at 314 (quoting Madison); accord Nedelsky, supra note 48, at 4 ("Almost all the new state governments had issued paper money and passed debtor relief laws which were widely perceived as [taxes] on property rights.").

60. Madison understood, and occasionally sought to preempt, the concerns of this potential "factious majority." In a debate regarding the jurisdictional amount, for example, Madison argued that, "in the minds of many citizens [there is] the greatest apprehension that persons of opulence would carry a cause from the extremities of the union to the supreme court, and therefore prevent the due administration of justice...."


62. See Smith, supra note 61, at 73-81.

63. See The Federalist No. 7, at 62 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Without unification, for example, the states risked ruining each other through vigorous competition. See id. (stating that "[c]ompetitions of commerce would be another fruitful source of contention"); Nedelsky, supra note 48, at 4 (explaining that the Federalists wanted "a central government strong enough to take a respected place among the nations of the world and capable of avoiding and controlling the unjust propensities of the state governments"). For an extended discussion of the "fascinating set of exchanges with established institutions" that ultimately resulted in the Constitutional Convention, see Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 U. Chi. L. Rev. 475, 489 passim (1995).

Well aware of the states’ concerns, the Framers carefully restricted the powers of the new federal government when they drafted the Constitution.\(^{65}\) James Wilson, described by one scholar as “with Madison, perhaps [the Constitution’s] principal architect,”\(^{66}\) explained that in the states the people had “‘invested their representatives with every right and authority which they did not in explicit terms reserve,’”\(^{67}\) but in the Federal Constitution “‘everything which is not given is reserved.’”\(^{68}\) Thus, a federal bill of rights would actually be redundant—it would prevent the federal government from infringing on rights which it had no authority to restrict in the first place.\(^{69}\)

Although the Bill of Rights was to become necessary—politically,\(^{70}\) if not legally\(^{71}\)—this background suggests plausible explanations for the otherwise mysterious omission of the right to property.\(^{72}\) First, the real
safeguards for individual rights from overreaching government were in the states' bills of rights.\textsuperscript{73} Second, it was unnecessary for the Federal Bill of Rights to assure the right of property because it existed independently of the federal government as a prior, inalienable right.\textsuperscript{74} This was not merely theoretical; rather, the right to property was a given, an unquestioned, permanent part of the normative landscape. Thus, as Ely observes, "[f]or all their devotion to property rights, the framers were content to rely primarily on institutional and political arrangements to safeguard property owners."\textsuperscript{75}

In fact, Madison's proposed amendments included an addition to the Preamble, which stated in pertinent part, "[t]hat government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property..."\textsuperscript{76} But Madison's colleagues rejected his proposal to modify the preamble because they preferred to leave the text of the Constitution intact.\textsuperscript{77} They doubted that they had the authority to alter the Constitution,\textsuperscript{78} or that it needed altering.\textsuperscript{79} They were content and

\textit{pra} note 60, at 22 ("[N]o Person ought to be taken imprisoned, or disseised of his freehold... or deprived of his... Property, but by due process of Law.").

\textsuperscript{73} See \textit{Creating the Bill of Rights}, \textit{supra} note 60, at 189. A number of state constitutions explicitly protected the right to property in 1789. See \textit{Sources and Documents of United States Constitutions} (William F. Swindler ed., 1978). They include: Connecticut (1662 Charter) see 2 id. 131-32; Delaware (1776 Declaration of Rights and Fundamental Rules) see id. at 198; Massachusetts (1780 Constitution) see 5 id. at 93; New Hampshire (1784 Bill of Rights) see 6 id. at 344; Pennsylvania (1776 Constitution) see 8 id. at 278; Vermont (1786 Constitution) see 9 id. at 497; and Virginia (1776 Bill of Rights) see 10 id. at 49; see generally \textit{The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States: Part I} (Government Printing Office 2d ed. 1878). The Vermont Constitution, incidentally, was the first to provide for just compensation in cases of eminent domain. See Levy, \textit{supra} note 69, at 299; see also Barbara Stark, \textit{Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"} 44 HASTINGS L.J. 79, 92-94 (1992) (discussing the significant role that states played with respect to public welfare and entitlements).

\textsuperscript{74} As Levy notes, the Framers protected natural rights inconsistently. See Levy, \textit{supra} note 69, at 272. "Liberty," for example, was zealously protected. See, e.g., \textit{Creating the Bill of Rights}, \textit{supra} note 60, at 3-4 (setting forth the first twelve proposed amendments to the Constitution).

\textsuperscript{75} \textit{Ely}, \textit{supra} note 3, at 47.

\textsuperscript{76} \textit{Creating the Bill of Rights}, \textit{supra} note 60, at 11 (emphasis added). As Rakove points out, Madison could not "imagine how rights of property could ever be codified with the same ease and precision with which procedural rights could be guaranteed." \textit{Rakove}, \textit{supra} note 40, at 334.

\textsuperscript{77} See \textit{Creating the Bill of Rights}, \textit{supra} note 60, at xiv-xv.

\textsuperscript{78} See, e.g., \textit{id.} at 137 (reporting the statements of Mr. Tucker).

\textsuperscript{79} See \textit{id.} at 138. As John Page remarked, "[w]e the people' had a neatness and simplicity, while its expression was the most forcible of any he had ever seen prefixed to any constitution. He did not doubt the truth of the proposition brought forward by the committee, but he doubted its necessity in this place." \textit{Id.}
Madison had no choice but to accede to the will of the majority. His precious right to property remained buried in the "institutional and political arrangements" of the new Constitution.

C. Deconstructing the Bill of Rights

The process of deconstructing the Bill of Rights begins by identifying the opposition it contains. The Bill of Rights inverted the traditional hierarchy of rights in colonial jurisprudence, privileging civil and political rights over the right to property. Thus, the right to property became the subordinated concept, the "dangerous supplement" to the civil and political rights set out in the Bill of Rights. First, it adds to our understanding, exposing our original understanding of civil and political rights as incomplete. It is obvious now, as it was obvious then, that civil and political rights cannot be enjoyed without "the means of acquiring and possessing property." "Life, liberty, and property" are the "trinity of inalienable rights"; they are interdependent, and none is worth much without the others. Civil and political rights mean little without property, especially without the satisfaction of basic human needs that property implies.

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80. See Ely, supra note 3, at 47.
81. Id.
82. See id. "The primacy of the Federalist concern with protecting property so shaped the structure of the Constitution that it was characterized as much by this implicit priority as by the absence of its formal institutionalization." Nedelsky, supra note 48, at 7.
83. See Nedelsky, supra note 48, at 5. For an account of the meetings in which Madison's proposal to revise the Constitution was rejected in favor of Sherman's proposal to annex a separate Bill of Rights, see Creating the Bill of Rights, supra note 60, at 104-07.
84. See Williams, New Developments, supra note 34, at 605; cf. Nedelsky, supra note 48, at 5 ("Civil rights, which included both the rights of persons and of property, were to be distinguished from political rights."). Nedelsky concedes that "in 1787, however, the choice implicit in these categories was still preliminary." Id.
85. Levy, supra note 69, at 262 (quoting the Virginia Declaration of Rights).
86. Rakove, supra note 40, at 290.
87. See G.A. Res. 44/130, supra note 12, at 2. See also Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.").
88. See, e.g., Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 24 (1980) ("No one can fully ... enjoy any right ... if he or she lacks the essentials for a reasonably healthy and active life ...."); Isaiah Berlin, Two Concepts of Liberty, in Four Essays on Liberty 118, 122-24 (1969) (describing the notion of "negative" freedom); see also Burns H. Weston, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, in International Law: Classic and Contemporary Readings 519, 546 (Charlotte Ku & Paul F. Diehl eds., 1998) (concluding that "[t]he great challenge lies less in 'proving' the rightness or wrongness of the competing special claims (and values) involved, but in..."
The right to property is also dangerous because it subverts our confidence in civil and political rights. What is the "civil right" to sit at a lunch counter worth, for example, if you cannot afford lunch? Madison avoided any concrete, contextualized consideration of this question, noting merely that those with property, as well as those without it, had an interest in civil and political rights. He did not consider how that interest might differ for the two groups, perhaps because he had property. While the Framers were certainly not all rich, they were for the most part comfortably middle-class. The Framers understood the right to property from their own perspective, that is, from the perspective of those who had it.

The text of the Constitution, for example, is replete with traces of the right to property, taking it for granted that there are "Post Offices

formulating, clarifying, and applying policies that will simultaneously satisfy developmental goals and attract beneficial private capital and technology").

89. For a compelling account of the lunch counter sit-ins and their importance in the Civil Rights Movement, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 391 (1988); see also DAVID HALBERSTAM, THE CHILDREN 238 (1998) (discussing the struggle for lunch counter rights). The slogan for the Legal Aid Society in the 1970s, "You can’t call a lawyer if you haven’t got a dime," may be understood as an iteration of this idea. 90. See NEDELSKY, supra note 48, at 5.


92. As Mark Tushnet concludes:

Basically, of course, Charles Beard had it right. Not that the members of the Constitutional Convention were financially interested in any direct sense in creating a strong national government. But that we cannot fully understand the Constitution unless we see how its underpinnings in political theory were connected to the Framers' vision of social order and disorder, and he was right to emphasize that to the Framers, the economy was the pivot of the social order.


"Are you not concerned with the basic contradiction in your position: that you . . . in fact represent and constitute major property holders? Do you not mind that your slogans of liberty and individual rights are basically guarantees that neither a strong government nor the masses will be able to interfere with your property rights and those of your class?"

DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 31 (1987) (quoting CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 64-151 (1913)).

93. This is a postmodern cliché. As Steven Feldman notes, all textual understanding arises from "one’s current horizon of sociocultural prejudices and interests." Feldman, supra note 27, at 155.
and post Roads" as well as "Courts" and courthouses. The Second Amendment, similarly, assumes that citizens have "Arms." The Third Amendment assumes that citizens have "house[s]" in which soldiers may not be quartered in times of peace. The Eighth Amendment assumes that citizens can afford to pay bail or fines as long as they are not "excessive." While not yet a rich nation, even in the beginning the United States was far from a poor one. This is not to suggest, of course, that there was no poverty in the colonies. But poverty was not considered as permanent as it had been in Europe; poor whites were not so rigidly confined to their class. Poverty was considered more of a choice than a fate, at least for white men. Most white men could acquire property, and once acquired, the law would assure their "ownership, and undisturbed possession."

94. See U.S. CONST. art. I, § 8. By letter of March 6, 1796 to Madison, Jefferson noted that the power to "establish" post roads could mean either "make the roads" or designate which existing roads would serve as post roads. See WARREN, supra note 49, at 479 n.1.

95. See U.S. CONST. amend. III, § 1.

96. See U.S. CONST. amend. II; see also EDMUND S. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 379 (1975) (explaining that "[f]irearms were great levelers, and the use of them by ordinary men against established authority was in itself enough to generate leveling thoughts"); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 TENN. L. REV. 461, 467-69 (1995) (citing Madison and Jefferson, both of whom noted with approval the widespread ownership of guns by Americans).

97. See U.S. CONST. amend. III.

98. U.S. CONST. amend. VIII; see also CREATING THE BILL OF RIGHTS, supra note 60, at 30-31.

The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines?

Id. at 187 (quoting Mr. Livermore).

99. "The bulk of Americans, in 1787, were actually neither rich nor poor, but ... possessing sufficient means to raise a family in reasonable comfort." WARREN, supra note 49, at 72.

100. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 24 (1941) (describing "four groups whose economic status had a definite legal expression: the slaves, the indentured servants, the mass of men who could not qualify for voting under the property tests imposed . . . and women").

101. But see MORGAN, supra note 96, at 384 (quoting James Madison's reply to Thomas Jefferson's suggestion that the poor in France appropriate the surplus lands held by the French nobility in which he stated that "[a] certain degree of misery . . . seems inseparable from a high degree of population").

102. As McDonald put it, at the time of the formation of the union: "[M]ost New Hampshireites had already achieved the taxless, shiftless utopia which most Americans cherished as a secret dream, and for which 'republicanism' and 'unalienable rights' were merely euphemisms." MCDONALD, supra note 91, at 199.

103. See WARREN, supra note 49, at 72-73.

104. RAKOVE, supra note 40, at 294 (quoting William Penn).
IV. DECONSTRUCTING THE RIGHT TO PROPERTY

Libraries have been filled with volumes describing and analyzing civil and political rights and the white men who defined and exercised them. A recent article in the *Harvard Law Review*, for example, rigorously examines the impact of Madison’s arguments in *The Federalist No. 10* on his audience; that is, the other participants in the Constitutional Convention. While this attempt to examine Madison’s theory in context is a welcome and important addition to the canon, “context” is once again limited to the men who attended the Convention and the texts they promulgated.

This Article, in contrast, attempts to situate the Framers in a broader, more concrete, social context. Who prepared their meals? Who made and mended their clothes? Who bore their children? Who nursed them when they were ill and took care of a thousand other details of daily life so that the Framers could focus on the larger intellectual questions that so engaged them and their chroniclers?

By deconstructing the right to property, we see what propertied white men never had to see, what they took for granted, and what the “rights culture” they bequeathed us has blinded us to. Deconstruction reveals first, the lesser economic rights subsumed in the right to property; and second, the complex and dynamic relationship between these subsumed economic rights and civil and political rights. Examining the relationship between the two kinds of rights in the context of concrete social history shows first, and most obviously, that the Framers’ enjoyment of civil and political rights depended on their own enjoyment of economic rights. Second, and much less obvious, their enjoyment of these subsumed economic rights was in part assured by women’s unseen work. Finally, least obvious and most disturbing, the Framers’ enjoy-

105. Frequently cited examples include BEARD, supra note 100; ELY, supra note 3; McDONALD, supra note 91; NEDELSKY, supra note 48; RAKOVE, supra note 40; REID, supra note 46; WARREN, supra note 49.
107. See id. at 616.
109. For a brilliant deconstruction of “the connection between patriarchy and the privileging of the rational, the abstract, or the intellectual,” see CULLER, supra note 2, at 38.
ment of some of these rights was actually predicated on women’s denial of them; they enjoyed these rights more because women enjoyed them less.

A. Economic Rights as an Iteration of the Right to Property

For the Framers, the right to property included lesser economic rights; that is, those rights which property implies, those rights which one possessing property has no more need to articulate than one possessing liberty need articulate a right “not to be bound.” These subsumed rights include the right to an adequate standard of living, including food and shelter, and the right to work. The Framers took these rights for granted and fiercely resisted any threat to take from them “that which . . . [was] rightly theirs, and nobody’s else.” Because white women and slaves were for the most part incapable of owning property, they could not take these lesser included economic rights for granted. Being permitted to hire her time, for example, was a precious privilege for a slave woman.

Two hundred years later, in the 1960s, these lesser economic rights were similarly important to those emerging from colonialism in the Third World. States which had recently been property themselves

111. See discussion infra Parts V.B.4, V.B.9 (describing how men’s property was increased by the denial of women’s right to work and how the purpose of women’s education was to enable mothers to educate their sons).

112. The right to work is one of “the means of acquiring property.” Levy, supra note 69, at 262.

113. RAKOVE, supra note 40, at 294 (citation omitted).

114. Indeed, except for a small number of free black women, black women were property. See PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 162 (1991). Married white women were like property. See id. For a brilliant and moving effort to come to terms with the dual legacies of her great-great-grandparents, an eleven-year-old slave and the white lawyer who impregnated her, see id. at 216-17.

115. See Davis, supra note 5, at 243 (“While many masters permitted persons they enslaved to trade, hire their time, and amass small savings, these were all customary practices, without legal force.”).

joined in the arduous process of defining "economic rights," articulating the substance and content of those lesser subsumed rights which the Framers had taken for granted. A United Nations Committee was formed to draft a legal instrument assuring these rights, and the former colonized States—the global have-nots, those who did not already possess property—were full participants in the process. This culminated in the International Covenant on Economic, Social and Cultural Rights (the "Economic Covenant"). The Economic Covenant has been ratified by 141 other nations, including every other Western industrialized democracy and Japan.

By drawing on the Economic Covenant, we can invert the hierarchical opposition that underlies our own Bill of Rights and unpack the right to property. What lesser economic rights are subsumed in that right? What does the right to property mean from the perspectives of the
have-nots?' By examining the rights set out in the Economic Covenant, we expose what the Bill of Rights takes for granted and we discover that economic rights are iterations of the Framers’ right to property from the perspectives of those who had no property, including those who were property themselves.123

B. A Dangerous Supplement

Even as the Framers sought to protect the propertied minority, nothing—not even subsistence—could be taken for granted by white women and black slaves.124 While some of them lived quite well, and a few even enjoyed the accoutrements of wealth and privilege, in general they had no right to property. From the Framers’ perspectives, white women and black slaves were so obviously inferior that rights discourse simply did not apply to them.125

122. The have-nots, of course, include a wide range of often-divergent interests. In ARUNDHATI ROY, THE GOD OF SMALL THINGS (1997), for example, the author describes a dam project which enables rice farmers in India to harvest two crops a year, but costs the surrounding community a river. See id. at 118-19.

123. At the same time, economic rights may be in tension with the right to property. See, e.g., HUNT, supra note 40, at 45 (“The protection of property rights may, in fact, conflict with an obligation to provide housing, employment or food for all.”) (quoting J.B. ELKIND & A. SHAW, A STANDARD OF JUSTICE 7-8 (1986)).

124. See supra text accompanying notes 53-54.

125. For example, Madison referred to slaves as “an unhappy species of population ... sunk below the level of men.” THE FEDERALIST No. 43, at 277 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST No. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961) (indicating Madison’s views on slaves as “debased by servitude below the equal level of free inhabitants”). As social historian Stephanie Wolf explains:

A free, married man was the “head of the family” and master of all its members, no matter how marginal his own position in society. Black slaves were thoroughly dehumanized, appearing in inventories of property along with the cattle, horses, and other livestock if they were field hands, and among the pots, pans, and “dough troughs” if they were house servants. Servants, apprentices, wives, and children were not “chattels” in the same literal sense, but they were generally not regarded as being “people” ... Only the [white man] was recognized as a fully empowered responsible member of society ... only he was, in fact, truly a human being. This legal fact of life impinged far more on eighteenth-century Americans than any lack of political rights like speaking in public, voting, or election to office.

WOLF, supra note 6, at 246-47. Many legal commentators have noted the consequences for women of the Framers’ misogyny and racism. See, e.g., BELL, supra note 92, at 9 (noting the ramifications for black women emanating from “the psychologically disabling condition that contemporary black men, ... like their slave forbears” suffer from); Mary E. Becker, The Politics of Women’s Wrongs and the Bill of “Rights” - A Bicentennial Perspective, 59 U. CHI. L. REV. 453, 454-56 (1992) (discussing the shortcoming in the Bill of Rights with respect to “guaranteeing women the exercise of governmental power”); Kenneth L. Karst, Woman’s Constitution, 1984 DUKE L.J. 447, 486 (1984) (stating that “[t]he men who wrote the Constitution in 1787 designed a framework for governing society as it was perceived by men and run by men”); Sylvia A. Law, Rethinking Sex
From a human rights’ perspective, the “inferiority” of white women and black slaves was socially and politically constructed by the denial of basic human rights, including economic rights. The Economic Covenant is a “dangerous supplement” because it adds to our understanding, exposing the Framers’ perspective as incomplete. It subverts our confidence in that perspective. The fact that our confidence has long been subverted, that the terrible flaws in the Framers’ perspective are now widely recognized, simply shows the extent to which some of the basic precepts of the Economic Covenant have already seeped into our consciousness and our law. It also suggests the ongoing costs of ignoring those precepts that have not.

126. See infra Parts V.B.7, V.B.9 (discussing the denial of the rights to an adequate standard of living and to an education).

127. See infra Part V.B.1.a (discussing the denial of the right to self-determination).

128. There are some surprising similarities between subsistence agrarian societies two hundred years apart. See generally Penelope Andrews, Spectators at the Revolution? Gender Equality and Customary Law in a Post-Apartheid South Africa, in LAW & ANTHROPOLOGY: INTERNATIONAL YEARBOOK FOR LEGAL ANTHROPOLOGY 261, 261 (René Kuppe & Richard Potz eds., 1994) (describing the social and political construction of women’s inferiority with respect to the promise of equality for South African women of color).

129. Cf. Mark D. Greenberg & Harry Litman, The Meaning of Original Meaning, 86 GEO. L.J. 569, 570-71 (1998) (arguing that “original meaning, properly understood, must contemplate the possibility that a traditional practice is unconstitutional, and more broadly that requiring fidelity to original practices is inconsistent with interpreting constitutional provisions to stand for principles”).

130. Many constitutional scholars, analogously, have rejected originalism because of a similar subversion of confidence. See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 205 (1980) (opining that “[s]ome central doctrines of American constitutional law cannot be derived even by moderate originalist interpretation, but depend, instead, on . . . ’nonoriginalism’”); James E. Fleming, Original Meaning Without Originalism, 85 GEO. L.J. 1849, 1849 (1997) (noting that several prominent originalists have asserted the notion that it is not “possible for a constitutional theorist to give due regard to original meaning in constitutional interpretation without being an originalist”); Michael J. Klarman, Antifidelity, 70 S. CAL. L. REV. 381, 382 (1997) (discussing whether the Constitution warrants a showing of fidelity).

131. A popular children’s history text, the title of which is taken from a poem written by Langston Hugues, for example, matter-of-factly refers to the Framers’ failure to take blacks and white women into account. See BEVERLY J. ARMENDO ET AL., AMERICA WILL BE 264 (1997).

132. The Economic Covenant’s norms against race and sex discrimination, set out in Articles 2 and 3, for example, are glaringly absent from the Bill of Rights. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 5. As Stephen Marks has
DECONSTRUCTING THE FRAMERS' RIGHT TO PROPERTY

C. Liberating the Text of the Economic Covenant

The conventional story is that Americans do not need economic rights; they are irrelevant to our experience. Most of the accounts of the founding of the United States confirm this view. Economic rights only emerge in these accounts as "trace." By shifting our attention from the historical experience of the Framers to the experience of a group which did not enjoy economic rights, however, we "displace the question, leading one to consider what are the processes of legitimation, validation, or authorization that produce differences among readings and enable one reading to expose another as a misreading." By liberating the text of the Economic Covenant, we discover that economic rights were extremely relevant to the historical experience of eighteenth century women. For those who did not enjoy economic rights, who could not take them for granted, they may well have been even more crucial, even more vivid, than the civil and political rights to which we unthinkingly subordinate them.


133. See, e.g., Barbara Stark, Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast," 33 Va. J. Int'l L. 433, 439 (1993) (positing that the dream of opportunity "made economic rights superfluous"). See also discussion infra Part V.A (discussing how economic rights were not valued as much as civil and political rights on the United States).

134. See, e.g., Bernard Bailyn, The Origins of American Politics 100 (1968) ("[T]here was not sufficient stability in the economic groupings more loosely defined to re-create in America the kind of stable interest politics that found in England so effective an expression in 'virtual' representation."); Reid, supra note 46, at 96-97 (examining different theories of property and stating that "during...seventeenth century, 'property' referred to rights of all kinds"); Warren, supra note 49, at 73-74 ("[A]n alignment of men as for or against a new Constitution, on the basis of property or non-property...is an attempted simplification of the political situation in 1787, which facts and human nature do not support."); Gordon S. Wood, Creation of the American Republic 1776-1787, at 404-05 (1969); Levy, supra note 69, at 260-62 (stating that while no one opposed the principle of a bill of rights, the framers "had...confidence in their constituents and the state legislatures that elected them" to uphold the principles contained therein); But see Neddelsky, supra note 48, at 96-97 (discussing James Wilson's alternative perspective that "property was not the main object of government."); Zinn, supra note 7, at 56-75.

135. See supra Part ILC (explaining the dominant concept of "trace"); supra text accompanying notes 89-95 (describing that which is taken for granted in the text and Amendments of the Constitution).

136. Culler, supra note 2, at 179.
By liberating the text of the Economic Covenant, in short, we may achieve a transformation of sensibility. We may come to see that our original conception of civil and political rights is incomplete, and come to lose confidence in that reading. We may come to see, like the cake-loving protagonist of In The Night Kitchen, that what we value most is dependent on the work of those who have hitherto been missing from the story.

1. Economic Rights in Context

Economic rights must be understood in context, concretely, from the bottom up. Like civil and political rights, economic rights are not abstractions, but acquire meaning and substance from the real physical contexts in which they are enjoyed, or from which they are absent. But how can we grasp the physical contexts of another time? In The Holder of the World, Bharati Mukherjee’s novel about two twentieth century Americans trying to grasp the physical contexts of seventeenth century colonial experience, she undertakes this task through two very different, but complementary, approaches. Venn is a virtual reality specialist, meticulously collecting minute pieces of hard data, organizing them and putting them in digital form. The first-person narrator, in sharp contrast, follows clues serendipitously happened upon in museums and antique stores, linked together by some unspecified connection to a distant ancestor. Mukherjee suggests that the historian’s project requires both the painstaking accretion of detail and a discriminating surrender to visceral impressions. Thus, while Venn methodically enters data on weather conditions, economics, exchange rates, imports, and exports, the narrator loses herself in a small painting, seeking understanding through a subjective response to art.

Here, similarly, this dialogue with the past requires both meticulous research and a discriminating surrender to the stories that bring re-

137. See generally SENDAK, supra note 29.
139. See id. at 5-21.
140. See id. at 5-6.
141. See id. at 7-20. A.S. Byatt tackles a very similar theme, more effectively but less pertinently. See generally A.S. BYATT, POSSESSION: A ROMANCE (1990) (illustrating that by doggedly tracking a text, a scholar discovers her great-grandmother and her great love, who finds his vocation).
142. See MUKHERJEE, supra note 138, at 17-19 (describing what the narrator does and feels when looking at a small painting).
143. See id. at 5-6, 17-18.
search to life." Deconstruction can be used to give voice to both, making their respective claims and challenges explicit, allowing neither to become the privileged, unquestioned perspective. Deconstruction has been used, for example, to question the authority of human rights law to impose purportedly "universal" standards on people living in very different cultures. Several commentators have argued that such standards incorporate Western values and they have urged those espousing them to seek more constructive alternatives. Tracy Higgins, for example, has proposed that human rights advocates engage in a "consciousness-raising" dialogue with those in other cultures, through which both groups may be changed. What is proposed here, however, is not a consciousness-raising dialogue with women from another place, but a dialogue with women from another time. The risks are different, but the objective—to displace our cultural solipsism—is the same.

144. See infra notes 191-98 and accompanying text (describing the assumptions underlying this "discriminating surrender" and the criteria used).
145. As Culler puts it, "[e]ach perspective shows the error of the other in an irresolvable alternation or aporia." CULLER, supra note 2, at 96.
146. See, e.g., Isabelle R. Gunning, Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 COLUM. HUM. RTS. L. REV. 189, 189 (1992) (positioning the author's right "as a Western feminist . . . to criticize as right or wrong the practices of an entirely different culture . . . and . . . [whether] law, with its attribution of right and wrong, exonerates and punishes, [should and can] be used to eradicate a cultural practice"); Hope Lewis, Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide, 8 HARV. HUM. RTS. J. 1, 3 (1995) (exploring "the ambivalence and tension in feminist discourse about the involvement of Western feminists in a human rights-based, cross-cultural effort to eradicate" female genital surgery).
149. But see Feldman, supra note 27, at 28 (criticizing the use of deconstruction by modernists who use it "to criticize the normative positions of other modernists. But then, once the values and goals of others have been neatly deconstructed and swept away, the modernist writer typically begins to articulate his or her own normative position").
As explored more fully below, this is a complex and often ambiguous project. The impact on eighteenth century women of the lack of some economic rights, such as the capacity to own property, seems relatively straightforward. The impact of the lack of other economic rights, however, such as "the right to health," at a time when medical attention was often fatal, is considerably more problematic. At the very least, however, this dialogue with the past illustrates the void in our jurisprudence, the absence of economic rights from the very beginning, and the overwhelmingly negative impact of that absence on women even then.

2. Reclaiming the Past

American women are all "Liberty's Daughters" in that they all live with the legacy of the women of the Republic, whether consciously or unconsciously, whether their ancestors were kidnapped and brought here centuries ago, whether they arrived twenty-five years ago from Puerto Rico, or whether they arrived yesterday from Southeast Asia. That legacy permeates our laws, especially the laws that continue to marginalize economic rights, from the patched-over lacunae in the Constitution to the family laws that still insulate the private sphere from the

151. See infra Part V (describing a thought experiment in which the Economic Covenant is transported to the eighteenth century).

152. This includes all women subject to American law, aliens as well as citizens. As Deserée Kennedy points out, many women throughout the world are "subject" to American law, whether American nationals or non-nationals. The focus here is on women living within United States territory, but the point is well-taken and one I address at length in Barbara Stark, Women and Globalization: The Failure and Postmodern Possibilities of International Law, 33 VAND. J. TRANSNAT'L. L. 503 (2000).


155. Many young women from Southeast Asia are lured here by international "mail-order bride" businesses. See, e.g., Christine S.Y. Chun, Comment, The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes, 17 U. PA. J. INT'L ECON. L. 1155, 1157 (1996) (examining the mail-order bride industry by focusing on transactions between the United States and the two major suppliers of mail-order brides, the Philippines and Russia); Eddy Meng, Note, Mail-Order Brides: Gilded Prostitution and the Legal Response, 28 U. MICH. J.L. REFORM 197, 197 (1994) ("explo[ring] the international mail-order bride industry where women from Asia and other developing countries are trafficking to men in Western industrialized countries").
public sphere.156 We cannot understand the erasure of economic rights in this country without understanding their legacy, and we cannot understand that legacy without understanding their experience.157 If we are to reclaim economic rights, accordingly, we must reclaim our past.158

This has psychological, as well as, legal implications.159 That is, the historical erasure of economic rights has shaped the way our culture thinks and feels about the distribution of wealth and property,160 from our notions of what kind of work, done by whom, deserves what kind of compensation, to our notions of what kind of work should be done for "love," and not for money at all.161 Thus, the dialogue attempted here is analogous to the psychoanalytic process. As Peter Brooks explains it, through the "talking cure," the patient eventually imposes order and meaning on the events of her life.162 By shaping the past into a coherent story, the patient in analysis creates a coherent self and thus frees her-

156. See, e.g., Davis, Antebellum Perspective, supra note 5, at 288 ("[T]he ideological messages and distributional consequences of private law are at least as important—if not more important—than the public law criminalization of a particular kind of relationship.").

157. Native American women are not included in this study because they were subject to the laws of another sovereign, and another culture. Useful introductions to eighteenth century social histories of Native American women may be found in MARION E. GRIDLEY, AMERICAN INDIAN WOMAN (1974); FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST (1975); HENRY THOMPSON MALONE, CHEROKEES OF THE OLD SOUTH (1956).

158. This Author has discussed the need for such reclamion elsewhere. See, e.g., Stark, Turning the Wheel, supra note 108, at 181-86 (discussing "Nietzsche's 'Eternal Return'" and the struggle that women face in attempting to overcome their history); Barbara Stark, Urban Despair and Nietzsche's "Eternal Return: From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights, 28 VAND. J. TRANSNAT'L L. 185, 194-95 (1995) (showing that irrespective of the perception that economic rights in United States culture are too marginal, in fact, the United States has already adopted economic rights law and the urban poor can claim this law as their own).

159. Gerda Lerner "persuasively argued that women's struggle to comprehend their own history lies at the heart of their ability to envision a world in which they are full participants." Kerber et al., supra note 7, at 4. This has become a major feminist project. See generally SCOTT, supra note 6, at 15-27 (describing the recent work of historians who are explicitly taking women's experiences into account).

160. The American Civil Liberties Union ("ACLU"), for example, has taken the position that while the government has no affirmative obligation to assure the rights set out in the Economic Covenant, it cannot "cause or perpetuate poverty." Nadine Strossen, What Constitutes Full Protection of Fundamental Freedoms?, 15 HARY. J.L. & PUB. POL'y 43, 48-49 (1992).


162. See PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE 90-112 (1984) (comparing the process of structuring experience into a coherent narrative, or story, with the psychoanalytic process).
self from the internalized constraints of the past. This is experienced as both liberating and empowering. As Richard Rorty explains, by finding "a way to describe [the] past which the past never knew...[we find selves] to be which [our] precursors never knew [were] possible." Because of our reverence for the Framers, we remain ambivalent, even now, about recognizing their wrongs. Their ideas about rights were inspired by, we say, the bedrock upon which to build a great country. The Framers simply did not extend those ideas far enough.

But this ignores the economic, social, and cultural assumptions built into those rights and thus, ironically, reinforces and perpetuates those wrongs. By imagining how the Economic Covenant might have

163. "The first act of a feminist critic is "to become a resisting rather than an assenting reader and, by this refusal to assent, to begin the process of exorcizing the male mind that has been implanted in us." CULLER, supra note 2, at 53 (quoting Judith Fetterly).

164. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 29 (1989); cf. Tracy E. Higgins, Democracy and Feminism, 110 HARV. L. REV. 1657, 1690 (1997) ("For many feminists, the self that lies at the heart of liberal constitutional theory...does not comport with women's selves under patriarchy.").

165. As Jennifer Nedelsky explains:
Their sense of the vulnerability of property in a republic became the focus for the broader task of securing individual rights against the tyranny of the majority. This focus, in turn, led to the greatest weakness of our system: its failure to realize its democratic potential. The Framers' preoccupation with property generated a shallow conception of democracy and a system of institutions that allocates political power unequally and fails to foster political participation.


166. See, e.g., Ackerman & Katyal, supra note 63, at 573 (explaining that the founding of the United States stands for the promise of the future).

So long as the Republic lives, the Founding will serve as a caution for the future: The Glorious Revolution has no end, but only new beginnings; we cannot sustain our constitutional tradition without unconventional innovation and democratic renewal; we cannot sustain our tradition without leaving a large space for the People, and their ongoing effort to take control of their government.

Id. See generally MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE xi (1986) ("attempt[ing] to describe the place of the Constitution in the public consciousness and symbolic life of the American people").

167. See, e.g., MacKinnon, supra note 54, at 1285 (describing that "laws developed when women were not allowed to learn to read and write, far less vote, enunciated by a state built on the silence of women, predicated on a society in which women were chattel, literally or virtually"). See generally Richard A. Posner, The Constitution as an Economic Document, 56 GEO. WASH. L. REV. 4 (1987) (analyzing the eight "topics" he deems necessary for studying the Constitution through economics). But see McKenna, supra note 13, at 79-80 ("The Framers knew that both laws and men were indeterminate and evolving...They designed a form of government that forced debate on every major decision and new law.").
transformed the lives of those for whom civil and political rights—without more—would have made little difference, we can begin to appreciate the extent of those wrongs, and what might be required to remedy them.168

"Economic rights" are an anachronism, inconceivable at the time. This is precisely the point, however. Because economic rights were inconceivable to the Framers, except as enjoyed by the already-propertied, the universalizing trends that eventually extended civil and political rights to those originally denied them, never applied to economic rights.169 Nor can economic rights ever be "found" in the Constitution, as the Supreme Court has consistently held.170 While the interdependence of economic rights and civil and political rights is globally recognized,171 accordingly, economic rights still play a very minor role in our national jurisprudence.172 Their marginalization reflects and reinforces the marginalization of those who still have the least property—a group, not coincidentally, disproportionately comprised of women173 and black men.174

168. "When we understand the distortions rooted in the original focus on property, we can more clearly see the real problems Madison so brilliantly and imperfectly grappled with, and we can begin to envision alternatives to the concepts and institutions he bequeathed us." Nedelsky, supra note 48, at 15. As Professor Kramer concludes:

[W]hile investigating the reception of Madison's theory is only a start, it suggests a possible need to reexamine the Founding more broadly and to consider whether—in our understandable desire to make the creation of the Constitution seem as important, familiar, or just plain interesting as possible—we have mischaracterized what it actually meant in context. Kramer, supra note 106, at 673.

169. But see, e.g., Cogan, supra note 50, at 478 (describing the demise of property requirements for voting that occurred in the 1800s).

170. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 288 (1984) (holding that demonstrators and protesters had no right to sleep in public places); Harris v. McRae, 448 U.S. 297, 297 (1980) (holding that there was no right to Medicaid funding for abortion); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (holding that there was no right to housing). See also Lynn A. Baker, The Myth of the American Welfare State, 9 YALE L. & POL'Y REV. 110 (1991) (reviewing Theodore R. Marmor et al., America's Misunderstood Welfare State: Persistent Myths, Enduring Realities (1990)). Many scholars have argued that economic rights should be "found" in the Constitution. See, e.g., Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 17 (1996) (finding "the defining aim of democracy to be . . . collective decisions [that] treat all members of the community as individuals with equal concern and respect"). For a number of sources supporting this premise as well, see supra note 10.

171. See supra note 12 and accompanying text.

172. "US jurisprudence reveals an approach to rights which is less amenable to second generation rights than any other Western jurisdiction." Hunt, supra note 40, at 52.

173. In 1995, 13.3% of women between the ages of 18 and 64 were at or below the "poverty threshold" as computed by the Bureau of the Census, compared to 9.5% of men. See Hacker, supra note 9, at 62-63. Among older people, poor women outnumber poor men three to one. See id.
V. A CASE STUDY: *LIBERTY’S DAUGHTERS* AND ECONOMIC RIGHTS

This Part is a thought experiment in which the text of the Economic Covenant is “liberated” from its twentieth century moorings and transposed intact to the eighteenth century. Imagine that “Madison’s nightmare” became reality, that Shays’s Rebellion and similar rebellions were not squelched, but succeeded and sparked still more rebellions, and that the Constitutional Convention was forced to take another faction into account. Imagine that this faction, drawing perhaps on at 64. The link between women’s subordination and private property was first theorized in FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 43 (1884) For a critique of Engels’s “thesis that women’s subordination developed through the private ownership of property together with monogamous marriage,” see WOMEN AND PROPERTY, supra note 46, at 1. For an analysis of “how women might do systematically worse than men with respect to property, if one [assumes] either . . . that women have a greater ‘taste for cooperation’ than men . . . . [or] that women are merely perceived to have a greater taste for cooperation than men, even though that perception may be erroneous,” see CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 234 (1994).

174. In 1995, 29.3% of blacks were poor. See HACKER, supra note 9, at 63. Although official statistics fail to capture the poverty rate for single men, Hacker notes the pertinence of the United State’s incarceration rate. See id. at 65. The total number of inmates, it is predicted, will well surpass two million by the end of year 2000. See Gaylord Shaw, *Tougher Laws Result in Increased Number of Prisoners*, LAS VEGAS REVIEW-JOURNAL, Jan. 1, 2000, at 11B. For a black American born in 1999, the chances of incarceration are 1 in 4. See Timothy Egan, *Hard Time: Less Crime, More Criminals*, N.Y. TIMES, Mar. 7, 1999, (Week in Review), at 1.

175. See supra Part II.D (discussing “liberating the text”).

176. See generally Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 342 passim (1990) (discussing events subsequent to Madison’s vision (i.e. “the new bureaucratic system . . . [that] constitute Madison’s Nightmare”)).

177. Ackerman and Katyal point out: Shays’s Rebellion was only the most dramatic example of agrarian uprisings that swept through Connecticut, New Hampshire, Rhode Island, as well as Massachusetts, in the mid-1780s. Throughout western New England, farmers were not only closing down courts and refusing to pay debts. They were engaging in more constructive forms of politics, meeting in illegal county conventions, and making extraordinary demands for fundamental change.

Ackerman & Katyal, supra note 63, at 498. See also DAVID P. SZATMARY, *SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* 120 (1980) (“[I]t is clear that Shays’ Rebellion played an integral part in the genesis and formation of the United States Constitution . . . .”); ZINN, supra note 7, at 93-94.

178. The extent to which Shays’ Rebellion affected the Constitutional Convention is a matter of considerable debate. See Ackerman & Katyal, supra note 63, at 498 n.66. Compare WARREN, supra note 49, at 79 (stating that historians have overemphasized the role of Shays’ Rebellion in bringing about the call for the Constitutional Convention) with ZINN, supra note 7, at 94 (positing that such rebellions played a critical role in motivating the effectuation of the Convention). In fact, after the Massachusetts General Court declared a state of rebellion, the Governor raised 2600 new troops and the legislature “passed an act disqualifying Shaysites from voting, serving as jurors, or holding public office.” Ackerman & Katyal, supra note 63, at 504 n.81.
Thomas Paine’s plan for economic, social, and cultural rights, though unable to persuade the Convention to incorporate these rights into the Constitution, produced a separate legal instrument, the Economic Covenant, which was duly ratified by the Congress. What difference would it have made? To whom?

A. An Overview of Economic Rights

The Preamble to the Covenant explicitly “[r]ecogniz[es] that . . . the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. . . .” Economic rights refer to a State’s obligation, inter alia, to assure its people’s basic needs, including an “adequate standard of living”; i.e., food, housing, healthcare, and shelter. In addition, the Covenant requires States to assure education, employment, support for the family, and similar rights conducive to the “inherent dignity of the human person.”

As a practical matter, the drafters of the Economic Covenant understood that these rights could not be implemented in precisely the same way as civil and political rights. Rather, economic rights are to be “progressively . . . realiz[ed].” This does not mean that economic rights are merely “aspirational.” Rather, the State is expected to make


The crucial social chapter of Part Two envisages a graduated income tax to finance a benefit for newly-wedded couples; a maternity allowance; a benefit for poor families enabling them to raise and educate their children; public employment for those in need of work; a system of social security permitting workers to retire on a pension at age sixty; and a benefit for the decent burial for those who die in poverty.


180. See supra text accompanying note 132.

181. Economic rights refer to a State’s obligation, inter alia, to assure its people’s basic needs, including an “adequate standard of living”; i.e., food, housing, healthcare, and shelter. In addition, the Covenant requires States to assure education, employment, support for the family, and similar rights conducive to the “inherent dignity of the human person.”

182. See supra text accompanying note 132.

183. See supra note 117, at 106 passim.

184. Of those rights that might be clearly defined as “economic”, “social”, or “cultural” rights, the only obvious absence from the Covenant is the right to property. A draft article based upon article 17 of the Universal Declaration of Human Rights had been put forward for inclusion in the Covenant [by the United States] but disagreement over the issues of expropriation and compensation meant that agreement upon a text was never possible.
steady progress towards its realization. According to the Committee charged with implementing the Economic Covenant, at the very least "progressive realization" means that a State cannot fall below previously assured levels of rights. In addition, some progress, some discernable improvement in the enjoyment of rights, must be shown over time.

Scholars have argued that civil and political rights are "negative" rights, which basically require that the State refrain from certain acts. Economic rights, in contrast, have been characterized as "positive" rights, imposing affirmative obligations on the State, which are necessarily more difficult to implement. This dichotomy, however, has been criticized for overstating the distinction between the two types of rights.

Rather, both kinds of rights require extensive and often complex interactions between State and private actors, and public and private law. Civil and political rights, for example, require courthouses, lawyers, and an independent judiciary (beyond the reach of bribes or corruption), if they are to function effectively. The United States has be-

186. See id.
187. See id.
189. The relationship between negative and positive rights involves what deconstructionists call:
[A] notion of presence . . . the superior term belongs to the logos and is a higher presence; the inferior term marks a fall. Logocentrism thus assumes the priority of the first term and conceives the second in relation to it, as a complication, a negation, a manifestation, or a disruption of the first.
Culler, supra note 2, at 93.
190. See Hunt, supra note 40, at 55-56 ("It is misleading to suggest that civil and political rights require only non-interference by the state. The prohibition against torture, inhuman and degrading treatment, for example, obliges the state to provide places of detention which conform to international standards and to establish training programmes for prison and police officers."); see also Craven, supra note 117, at 111 n.22 ("The obligation to protect in the field of civil and political rights would seem to require as a minimum the provision of an effective police force and justice system.").
191. For a brilliant account of the role of private laws in preserving property rights and sustaining racism, see Davis, supra note 5, at 221-88.
192. See, e.g., Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) ("Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accor-
come oblivious to some of these costs because we take them for granted; we have always invested in them. From the earliest public buildings in Philadelphia and Washington to the student loans which weigh down recent graduates, we have invested, publicly and privately, in the civil and political rights which are so valued as a part of American law.

We have treated economic rights very differently. In the case of property-owning men, the complex interrelationship between legal supports on the part of the state and responsible stewardship on the part of the rightsholder was well understood in the eighteenth century. Eighteenth century women, like contemporary women, were primarily responsible for assuring "lesser" included economic rights, such as adequate food, clothing, and shelter. The male head of the household was expected to provide them with the means with which to do so, and he, in turn, could rely on certain supports from the government. But it was the women's responsibility to make sure that each member of the household was fed, clothed, and sheltered. If her husband, father, or owner failed to provide her with a household allowance sufficient for doing so, a woman generally had no recourse. She was nevertheless...
expected to “make do.” Women were blamed, then as now, for their inability to care for their families, even under circumstances making it impossible for them to do so.\textsuperscript{198}

This is consistent with John Locke’s blueprint, which separated the public sphere of politics and civil society from the domestic sphere of the family.\textsuperscript{199} The laws and customs which encouraged women’s subordination to their husbands, unlike the laws and customs which encouraged their husbands’ subordination to the King, were maintained under Locke’s liberal theory.\textsuperscript{200} As Carole Pateman trenchantly notes, “[t]he dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.”\textsuperscript{201}

Greater power attaches to the public, male world. Assigned to the domestic sphere, women are regarded as dependent on men for subsistence. Further, the law more closely regulates the public sphere. Shielded by the privacy of domestic life, the private world is less visible and less regulated, tending to preserve the status quo. In short, the dichotomy is gendered: it “operates both to obscure and legitimate men’s domination of women.

\textbf{HUNT, supra note 40, at 86 (citation omitted).}

\textsuperscript{198.} See Catherine McBride-Chang et al., \textit{Mother-Blaming: Psychology and the Law}, 1 S. CAL. REV. L. & WOMEN’S STUD. 69, 69 (1992) (discussing the historical scape-goating of mothers); cf. Dorothy E. Roberts, \textit{The Value of Black Mothers’ Work}, 26 CONN. L. REV. 871, 873-75 (1994) (arguing that the work of black mothers is devalued and unappreciated). The extent to which this norm was internalized varied, of course, among cultural groups as well as among individuals. \textit{See id.} at 873.

\textsuperscript{199.} This public/private dichotomy can be traced to Aristotle. \textit{See GERDA LERNER, THE CREATION OF PATRIARCHY} 208-11 (1986) (citing ARISTOTLE, \textit{POLITICA} (Benjamin Jowett trans., in, \textit{THE WORKS OF ARISTOTLE} (W.D. Ross ed., 1921)); \textit{see also infra} text accompanying notes 278-79 (discussing how Locke separated the public sphere of politics and civil society from the domestic sphere of the family).

\[\text{[Locke], in company with other Enlightenment thinkers, severed the connection between family and state; he in particular contended forcefully that the state originated not in the family but in a contractual agreement among men, and that the aims and functions of the resulting polity were very different from those of the family.}\]

\textbf{NORTON, supra note 6, at 5. See also infra Part V.B.2 (noting that Locke stated that authority was grounded in the social context).}

\textsuperscript{200.} \textit{See infra} notes 276-79 (explaining this assertion in greater detail).

\textsuperscript{201.} Carole Pateman, \textit{Feminist Critiques of the Public/Private Dichotomy, in PUBLIC AND PRIVATE IN SOCIAL LIFE} 281, 281 (S.I. Benn & G.F. Gaus eds., 1983); \textit{see also} Hilary Charlesworth et al., \textit{Feminist Approaches to International Law}, 85 Am. J. Int’l L. 613, 635 (1991) (“The major forms of oppression of women operate within the economic, social and cultural realms.”).
B. Economic Rights on the Ground

This Part focuses on the decades between 1750 and 1800. The experience of women during this period varies tremendously, of course, as a function of class, geography, race, and the specific circumstances of their lives. It is not the purpose of this Part to provide a comprehensive overview, but rather to provide some concrete examples...
of the lack of economic rights in women's lives.\textsuperscript{207} It then draws on de-
construction to explore and illuminate the consequences.

This Part focuses, to the extent possible with respect to a particular
right, on the perceptions of eighteenth century women themselves. The
absence of economic rights, as such, was rarely an issue for most of
them. This is not to say, of course, that they were unaware of their own
hunger, poverty, or dependence; rather, they did not view their various
deprivations as the absence of an entitlement. But the eighteenth century
was neither homogenous nor hermetic.\textsuperscript{208} In different contexts, different
women noted and protested the absence of particular economic rights in
their lives. Two very different groups of eighteenth century women
were perhaps especially likely to question the cultural "givens": African
American women, particularly those who had been kidnapped from Af-
rica; and those white female heads of households whose privileges were
a constant reminder that limitations were not inherent in gender.\textsuperscript{209}

1. Article 1—The Right to Self-Determination

Article 1 of the Economic Covenant provides that: "All peoples
have the right of self-determination. By virtue of that right they freely
determine their political status and freely pursue their economic, social
and cultural development."\textsuperscript{210} The Guidelines explain that, "[t]he right of
self-determination is of particular importance because its realization is
an essential condition for the effective guarantee and observance of in-
dividual human rights and for the promotion and strengthening of these
rights."\textsuperscript{211} That is, while the right to "freely determine their political
status and freely pursue their economic, social and cultural develop-

\textsuperscript{207} For a very different, but not inconsistent, approach, see ROSE, supra note 173, at 233.

\textsuperscript{208} See, e.g., MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION
MAKING IN REVOLUTIONARY AMERICA 103-06 (1997) (noting that a few even asked why widows
and unmarried women with property could not vote); WOLF, supra note 6, at 249 (concluding that
"[t]he revolutionary century did . . . little to change the status of women and, like that of blacks, it
got better in some places, worse in others").

\textsuperscript{209} As Norton explains, there were "three problematic elements" in the late seventeenth
century and early eighteenth century social hierarchy. See NORTON, supra note 6, at 10. First,
women, as mothers, had some authority within the family. See id. Second, widows were no longer
subordinate to their husbands. See id. "[T]hird, high-status women took precedence over low-
status men . . . . When the three elements were united—that is, in the persons of high-status wid-
owed mothers—the combination posed particularly knotty problems for state and society." Id.

\textsuperscript{210} International Covenant on Economic, Social and Cultural Rights, supra note 36, 993
U.N.T.S. at 5.

\textsuperscript{211} Alston, supra note 185, at 82. In the Guidelines to the Covenant, Philip Alston, Chair of
the Committee, notes that the Civil Covenant uses the same language. See id.
ment” belonged to groups like the American colonists, a major purpose is to assure the rights of individuals within the larger group.212 The drafters of the Economic Covenant, like the American Framers, recognized the primary importance of self-determination; that is, the right of individuals to participate politically in their government.213 Indeed, the Revolution was fought so that Americans could “freely determine their political status and[,]” implicitly, “freely pursue their economic, social and cultural development.”214 But women were universally denied this right. Thus, the concept of self-determination contained an oppositional hierarchy: “self-determination” was the privileged conception, and determination by others was the subordinated opposition, which was, in fact, the experience of eighteenth century women.215 No women could vote.216 Almost all black women were slaves and property themselves, protected only by


213. The idea of self-determination is often considered the first principle of the American Revolution. See BAILYN, supra note 134, at 19-20. The idea took root and became pervasive: “Authority had been challenged in 1776 by appeals to the people that now seemed limitless. The right to rule, the Whigs had said, existed only so long as the people’s good was promoted. But who could judge the people’s good better than the people themselves?” WOOD, supra note 134, at 398.


215. See generally BRANDON, supra note 179, at 28 (discussing the contradictions between the Constitution’s simultaneous protection of freedom and slavery).

216. See KERBER, supra note 6, at 120. A married pair might express only one will to the outside world—the husband’s; therefore a married woman had no independent control of her property. Since republican theory emphasized that the right to participate in the management of a political unit stemmed from ownership of property, the denial of political rights to women seemed quite natural.

Id. “Women who were not slaves were counted as persons, without being mentioned, for purposes of apportionment; slaves of both sexes were explicitly counted as three-fifths of a person. The only purpose of counting either of them was to divide power among white men . . . .” MacKinnon, supra note 54, at 1282. New Jersey was a brief exception to this rule, allowing property-owning women to vote until 1807. See EDWARD R. TURNER, WOMEN’S SUFFRAGE IN NEW JERSEY: 1790-1807 SMITH COLLEGE STUDIES IN HISTORY 1 (1916); accord Ann D. Gordon & Mari Jo Buhle, Sex and Class in Colonial and Nineteenth-Century America, in LIBERATING WOMEN’S HISTORY: THEORETICAL AND CRITICAL ESSAYS 278, 296 n.24 (Berenice A. Carroll ed., 1976).
the economic self-interest of their masters, which conspicuously failed to assure any minimal level of rights. White women were subject to their fathers' governance as daughters and to their husbands' governance as wives.

a. Political Status

Unlike the Framers, the drafters of the Covenant explicitly made the right to self-determination applicable to women as well as to men. While most eighteenth century women may well have been baffled by the "right to self-determination," the contemporaneous acts and statements of two specific groups—African slaves from the Igbo tribe in

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217. See, e.g., Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values 175-76 (1997) (describing "slaveholder's unnatural powers ... over the sexual functions of slaves," including "breeding").

218. "Slaves had little protection ... from a master's excessive cruelty." Norton, supra note 6, at 103. Indeed, killing a slave was not a felony because "it cannot be presumed that preposited malice (which alone makes [murder a felony]) should induce any man to destroy his own[] estate." Id. (quoting the reasoning of the legislators). By definition slavery precludes enjoyment of the threshold right of self-determination:

The essence of slavery was that the slave was legally a chattel, a piece of property to be bought and sold and disposed of at the master's will. He had no legal rights, could not testify in his own behalf nor bear witness against a white person. As a result of this feature of the slave system, which was peculiar to North American slavery, the slave was subject to the arbitrary will of his master in all matters.


"The care of negroes is the first thing to be recommended, that you give me timely notice of their wants that they may be provided with all necessarys [sic]. The breeding wenches more particularly you must instruct the overseers to be kind and indulgent to ... and the children to be well looked after, ... and that none of them suffer in time of sickness for want of proper care."

Id. (quoting Richard Corbin, writing for the guidance of his steward in 1759) (second alteration in original).

219. After the Revolution, daughters were allowed to inherit as well as sons in most states.

See Salmon, supra note 6, at 142.

220. See Blackstone, supra note 54, at 430; see also Salmon, supra note 6, at 188 (describing reforms to simplify the law, which further disadvantaged women by strengthening the concept of "[u]nity of person"); infra Part V.B.2 (discussing nondiscrimination); cf. Kerber, supra note 6, at 140 (describing St. George Tucker, who published Blackstone's commentaries in the United States and was dismayed by the treatment of women under American law).

West Africa and a small group of well-to-do educated white women—showed that they would have put it to good use.\textsuperscript{222}

These two groups were probably closer to the right of self-determination than any other women in the colonies. For affluent, educated white women, the right was expounded upon and enjoyed by the men in their own homes. For the Igbo women, the right was a recent memory.\textsuperscript{222} Despite spatial and temporal proximity, however, the right to self-determination remained out of reach for both groups.

In Africa, the Igbo were highly democratic.\textsuperscript{224} Although “women did not participate in government to the same degree as men,”\textsuperscript{225} they were accustomed to political autonomy. Before their enslavement, Igbo women “distinguished themselves in multiple arenas.... [by] control[ling] local exchange. ... [and] regularly defend[ing] the village.”\textsuperscript{226} The Igbo women in America soon realized they had no hopes for a decent life among those who had kidnapped and enslaved them. While some sought to regain their right of self-determination by running away,\textsuperscript{227} others, along with Igbo men, took more drastic measures.

There are innumerable stories and songs in African American folklore about slaves who “[rose] up in [to the] sky an[d] ... [flew]

\begin{enumerate}
\item \textsuperscript{222} See Davis, supra note 217, at 109 (“As early as 1774, enslaved people petitioning the government of Massachusetts grounded their claim to freedom in an argument of a natural right to family integrity and autonomy.”).
\item \textsuperscript{223} See, e.g., L. Amede Obiora, Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision, 47 CASE W. RES. L. REV. 275, 305 (1997) (“The epoch-making political demonstrations of Igbo women at the turn of the century offer a clear example of how the ‘public sphere’ is not conceptualized as masculine.”).
\item \textsuperscript{224} See, e.g., John W. Blasingame, The Slave Community: Plantation Life in the Antebellum South 15 (1972) (describing Ibo culture by drawing on the account of Olaudah Equiano, the son of an Ibo tribal leader).
\item \textsuperscript{225} Michael A. Gomez, Exchanging Our Country Marks: The Transformation of African Identities in the Colonial and Antebellum South 128 (1998).
\item \textsuperscript{226} Id. at 126-27.
\item \textsuperscript{227} See id. at 121; see also id. at 126-27 (describing the disproportionate number of Igbo female runaways in America); Gerald W. Mullin, Flight and Rebellion: Slave Resistance in Eighteenth-Century Virginia 36 (1972) (noting that “rebelliousness ... focuses on the psychological implications of a pattern of resistance for the slave as an individual”); Peter H. Wood, Black Majority: Negroes in Colonial South Carolina from 1670 through the Stono Rebellion 239 (1974) (capturing this resistance in the chapter “Runaways: Slaves Who Stole Themselves”).
\end{enumerate}
back to Africa." Michael A. Gomez traces these stories to an actual event at Ebo Landing on St. Simon's Island, where a group of Igbo slaves marched into the river and committed collective suicide. As Gomez explains, the Igbos believed that at death their spirits would fly back to their native land. Thus, "the slaves in the account, presumably Igbo, were experiencing suffering unusual even for a slave... such that they were unproductive, and rather than accept punishment, they chose to fly back to Africa." The Igbo women would have known exactly what to do with the right to self-determination—they would have returned home.

The second group of eighteenth century women who would have known what to do with the right to self-determination were those educated American women who saw an obvious parallel between the colonists' situation with respect to the British and their situation with respect to the new American government. In 1781, for example, Mary Byrd "claimed the right to redress of grievances 'as a female, as the parent of eight children, as a virtuous citizen, as a friend to [her] Coun-

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228. The Flying Africans, in 2 THE HEATH ANTHOLOGY OF AMERICAN LITERATURE 204, 205 (1990); see also HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925, at 332 (1976) (describing prevalence of the belief held by Africans that they would return to their own country after death); Wishbone (PBS children's television show) (devoting an episode to this theme in which Anansi, a "trickster" spider, showed the slaves how to make magical golden dust which caused them to rise up in the air and fly toward Africa when tossed at each other while working in the fields).

229. See Gomez, supra note 225, at 119; see also Davis, supra note 217, at 63 ("By its radical deprivations of civil rights, slavery imposed a civil death, such that the enslaved person was unable to go about the characteristically human projects of applying energy to chosen ends, establishing and honoring affiliations, and making moral choices.").


231. Id. at 119.

Some of these stories are probably references to absconding, but the fact that the American-born never similarly vanish suggests that many of these flights were suicides, and that the Igbo were disproportionately represented in these tragedies. In any event, a close link between the Igbo and suicide was clearly established in the minds of many planters, and a self-terminating labor force was clearly out of the question.

Id. at 120.

232. See, e.g., id. at 71-72 (noting that in 1733, a Royal African company Officer had Ayuba b. Sulaiman freed and returned to West Africa after the officer was "moved by his plea ( penned in Arabic) for liberty"). The right to return now is well established in international human rights law. See, e.g., UNIVEnal Declaration of Human Rights, G.A. Res. 217A, art. 13, ¶ 2, at 71, U.N. Doc. A/810 (1948) ("Everyone has the right to leave any country, including his own, and to return to his country."); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 176 ("No one shall be arbitrarily deprived of the right to enter his own country.").
try, and as a person, who never violated the laws of her Country. As Norton observes:

Byrd’s recital of her qualifications was peculiarly feminine in its attention to her sex and her role as a parent (no man would have included such items on a list describing himself), but it was also sexless in its references to her patriotism and her character as a “virtuous citizen.” In developing the implications of the latter term, Byrd arrived at her most important point. “I have paid my taxes and have not been Personally, or Virtually represented,” she observed. “My property is taken from me and I have no redress.”

As Abigail Adams more famously warned her husband John, “‘[i]f particular care and attention is not paid to the Laidies,’ [sic] . . . ‘we are determined to foment a Rebel[j]ion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.”

But, the liberal principle of “consent of the governed” only applied to men. In the “Ladies” context, it could only be a joke. Thus, Abigail Adams used iterability, the repetition of the same in a different context, to expose the dangerous supplement, the hidden subordinated conception on which the privileged conception depended. Here, the privileged conception, the “consent of the governed,” in fact depended on the continuing governance of women without their consent. The subordinated conception, the refusal to extend the principle of consent to women, was its dangerous supplement, exposing the original conception

233. MARY BETH NORTON, LIBERTY’S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800, at 226 (quoting Mary Byrd); see also Kerber, supra note 6, at 140 (citing St. George Tucker, who complained that women were subject to taxation without representation, since they were taxed but could not vote).

234. NORTON, supra note 233, at 226.

235. Id.; see also THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762-1784 (L. H. Butterfield et al. eds., 1975) (restoring the spelling mistakes and the sections of Adams’ letters deleted in an earlier edition by her grandson, Charles Frances Adams, regarding matters he considered “unseemly,” such as her pregnancies and child rearing); see generally EDITH B. GELLES, PORTIA: THE WORLD OF ABIGAIL ADAMS (1992) (discussing the life and times of Abigail Adams through her letters).

236. See Linda K. Kerber, A Constitutional Right to be Treated Like American Ladies: Women and the Obligations of Citizenship, in NEW FEMINIST ESSAYS, supra note 7, at 17, 21 (“Even though coverture, which transferred a woman’s civic identity to her husband at marriage, giving him the use and direction of her property throughout the marriage, was theoretically incompatible with revolutionary ideology . . . patriot men carefully sustained it.”).

237. See Balkin, supra note 2, at 749-50.

238. See CULLER, supra note 2, at 104-05; Balkin, supra note 2, at 751.
as incomplete. What did it mean for a woman to be a “citizen,” as Adams and Byrd argued, if in fact women did not have access to the law?240

b. Economic, Social, and Cultural Development

Their inability to freely determine their political status kept eighteenth-century women from changing the law, and the law kept them from enjoying the second element of the right to self-determination: i.e., the right to “freely pursue their [economic,] social and cultural development.”241 Female slaves could not own or transfer property; they did not even “own” themselves.242 Rather, they were property and could be sold and transferred. Their sexuality and reproductive capacity, similarly, were subject to their owners’ control.243

Even wealthy white women were generally denied the right to economic self-determination.244 First, “[u]nder the common law the colonists inherited from England, married women legally became one with their husbands, and so they could not sue or be sued, draft wills, make contracts, or buy and sell property.”245 Even if women earned money, it belonged to their husbands.246 Laws under which slave owners owned slaves’ wages and property and husbands owned their wives’ wages and

239. See supra text accompanying notes 6-17.
240. See Norton, supra note 233, at 227 (noting that Byrd and Adams “thus demonstrated an unusual sensitivity to the possible egalitarian resonances of revolutionary ideology and showed an awareness of implications that seemed to have escaped the notice of American men”).
241. Craven, supra note 117, at 120; see also id. at 120-21 (“Not only is the individual posited as the primary subject of development, but . . . emphasis is placed upon ‘empowerment’ or ‘self-reliance’ as an objective.”).
243. See discussion infra Part V.B.6.a.
244. See, e.g., Twila L. Perry, Alimony: Race, Privilege, and Dependency in the Search for Theory, 82 Geo. L.J. 2481, 2484 (1994) (noting that there is a hierarchy among white women, in which their value is determined by their ties to affluence).
245. Norton, supra note 233, at 45-46; see also Renée Hirschon, Introduction: Property, Power and Gender Relations, in Women and Property—Women as Property, supra note 46, at 1, 20 n.2 (“J.S. Mill, an early feminist, . . . assert[ed] ‘the wife’s position under the common law of England is worse than that of slaves in the laws of many countries.’”) (quoting J.S. Mill).
246. See Norton, supra note 233, at 45-46. “[I]f they owned property prior to marriage, any personal estate went fully into their husbands’ hands and any real estate came under their spouses’ sole supervision.” Id. at 46. Prenuptial agreements were available in the United States, although they were generally construed quite narrowly. See Kerber, supra note 6, at 141 (citing Wilson v. Wilson, 1 S.C. Eq. 219 (1 Des. 219) (1791)); cf. Browne, supra note 41, at 15 (noting that in England, “a wife’s property, including her earnings, became her husband’s, although there were restrictions on his right to dispose of land belonging to her[] . . . rich families normally settled their daughters’ money [under the management of a trustee] . . . rather than allowing it to pass into their husbands’ control”).
property would have directly contravened Article 1(2), which provides, "[i]n no case may a people be deprived of its own means of subsistence."\textsuperscript{47} In many cases, the "self-determination" enjoyed by propertied white men was thus predicated on the denial of women's self-determination.

The slave codes, and the customs they supported,\textsuperscript{248} imposed brutal constraints on black women's social and cultural development. From the earliest practices of the slave traders, who made every effort to separate slaves who spoke the same language,\textsuperscript{249} to laws prohibiting slaves from congregating for worship,\textsuperscript{250} social life was rigidly restricted.\textsuperscript{251} Notwithstanding these restrictions—and to some extent, paradoxically, because of these restrictions—over time and incrementally, slaves developed a rich and diverse African American culture.\textsuperscript{252}

\textsuperscript{47} International Covenant on Civil and Political Rights, supra note 232, 999 U.N.T.S. at 173. "[E]very man has a property in his own person. This nobody has any right to but himself. The labour of his body and the works of his hands . . . are properly his." Reva B. Siegel, \textit{Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor}, 1850-1880, 103 YALE L.J. 1073, 1103 n.104 (1994) (quoting John Locke, \textit{An Essay Concerning the True Original, Extent and End of Civil Government}, in \textit{SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND Rousseau} 17 (1947). Professor Siegel has described how nineteenth century feminists cited John Locke and Adam Smith when they "invoked the discourse of self-ownership to protest the expropriation of wives' labor. . . ." Id. As Fran Ansley points out, whether a gender constitutes a "people" within the meaning of Article 1.2 is problematic. This interpretation is supported, however, by the redundant assurances of nondiscrimination on the grounds of sex in the Covenant. See, e.g., discussion infra Part V.B.2 (describing the nondiscrimination norms of Articles 2 and 3).

\textsuperscript{248} See Hirshborth, supra note 53, at 252 (discussing the Georgian slave codes which "created numerous new crimes for which slaves could be executed and placed strict limitations on slaves' everyday activities and movements").

\textsuperscript{249} This practice developed after several shipboard uprisings. See Wolf, supra note 6, at 24-25; see generally Richard Newman & Marcia Sawyer, \textit{Everybody Say Freedom: EVERYTHING You NEED TO KNOW ABOUT AFRICAN-AMERICAN HISTORY} 31 (1996) (noting how African slaves "welded themselves . . . into a single people" despite their different languages and cultures).

\textsuperscript{250} See Newman & Sawyer, supra note 249, at 32. By law, for example, slaves could not gather for worship in several southern states unless a white person was present. See id. See generally Albert J. Raboteau, \textit{Slave Religion: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH} 214-15 (1978) (discussing, among other things, religion in the slave communities and noting that despite the fact that "[s]laves faced severe punishment if caught attending secret prayer meetings[,]" slaves nevertheless "devised several techniques to avoid detection of [those] meetings").

\textsuperscript{251} Prohibitions against the most intimate relationships between husbands and wives, and parents and their children are discussed in connection with Article 10. See infra Part V.B.6. The ways in which African culture was suppressed, similarly, are discussed in connection with Article 15. See infra Part V.B.10.

\textsuperscript{252} See, e.g., Eugene D. Genovese, Roll, Jordan, Roll: THE WORLD THE SLAVES MADE xvi (1976) (concluding that "slaves made an indispensable contribution to the development of black culture and black national consciousness as well as to American nationality as a whole"); Morgan, supra note 96, at 379 (noting that the use of firearms by ordinary men against the estab-
Although white women, even those who were indentured, had considerably more scope for social development in that they were not legally prohibited from meeting with friends, or traveling to do so, as a practical matter white women were also subject to restrictions. First, few had the means to travel independently. Second, even fewer had the time. As described elsewhere, their families depended on them on a daily basis. Thus, women’s social activity had to be justified by providing some greater benefit to the family or, less commonly, to the community. In the early part of the century, for example, women were expected to call on a large number of acquaintances in order to barter. Women also participated in quilting and sewing “bee[s].” For the most part, however, white women’s social lives revolved around the church, which reinforced norms of female subordination. Unlike black women, whose social lives were rooted in a counterculture in which the norms of white society were often irrelevant, white women were a
part of the dominant white culture and for the most part, they accepted and internalized its norms.

2. Articles 2 and 3—Nondiscrimination

The universality of economic, social, and cultural rights is confirmed by the explicit provisions of Article 2: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, ... or other status." Equality under the law is essential to the Covenant scheme. Equality, similarly, comprised the "life and soul" of eighteenth century republican thinking, according to historian Carl Wood. But equality was still a relatively new idea, and its parameters were uncertain. While it was clear that there would be no nobility, some still dreamed of a New World meritocracy: "[N]one would be too rich or too poor, and yet at the same time ... men would readily accede to such distinctions as emerged as long as they were fairly earned."
Equality was grounded in the social contract theory of John Locke.268 According to Locke, authority was grounded not in some natural, divinely ordained hierarchy, but in the social contract, i.e., the agreement between the governed and the governing.269 Locke's theory challenged a profoundly hierarchical society, in which the notion of female subordination was firmly embedded. This was encapsulated in the philosophy of Sir Robert Filmer.270 Each household was a little monarchy, with each male head of household serving as a benevolent despot.271 Hierarchies of subordination and responsibility were replicated within the family structure; that is, just as the wife was subordinate to the husband, the children and servants were subordinate to the wife.272 Among servants, as among children, gendered hierarchies were replicated. This was redundantly reinforced—and internalized—through culture (including religion),273 social relations (formalized in family law), and economic institutions.274

Norms most deeply embedded, such as those regarding race and gender, were considered natural and not subject to analysis.275 Although
many opposed slavery, especially in the North, their objections were not
grounded in any presumed equality between the races, but rather in the
notion of liberty. Rather, distinctions grounded in gender were ac-
cepted as necessary and inevitable. Thus, even as Locke challenged
the political order (the public sphere), he left the private domestic
sphere to the laws and customs of the old regime. While Locke’s the-
ory was the basis for the political challenges asserted by the white men
at the top of the domestic hierarchy against a foreign authority, the
implications of that theory did not immediately reverberate in the domestic
sphere.

While most eighteenth century women might have considered the
Covenant’s prohibitions against discrimination unintelligible, they

e.g., New York State Club Ass’n v. City of New York, 487 U.S. 1, 5-6 (1988) (rejecting a chal-
lenge to a New York City law prohibiting discrimination in private clubs deemed to be sufficiently
“public” in nature). The Supreme Court has repeatedly rejected such arguments. See id. at 18
(O’Connor, J., concurring); Board of Directors of Rotary Int’l v. Rotary Club of Duarte, 481 U.S.

276. See generally MORGAN, supra note 96, at 379-82 (noting that many Northerners opposed
slavery not for equality of the races but because slavery was not consistent with a Republican ide-
ology).

277. See NORTON, supra note 233, at xiv. Norton notes:

Eighteenth-century Americans proved to have very clear ideas ... of what behavior
was appropriate for females, especially white females; and of what functions “the sex”
was expected to perform. Moreover, both men and women continually indicated in
subtle ways that they believed women to be inferior to men ... [M]ost of the white
women who lived in pre-revolutionary America turned out to display low self-esteem,
to have very limited conceptions of themselves and their roles, and to habitually deni-
grate their sex in general.

Id.

278. See NEW FEMINIST ESSAYS, supra note 7, at 21. “If ever there were a site to examine the
simultaneity of the personal as the political, it is here. The legal treatises of the early republic
decribe households as hierarchical as if Locke had never written.” Id. As Professor Cornett points
out in her analysis of eighteenth century English law, “women’s legal subordination and their con-
comitant exclusion from the public sphere were not theorized.” Judy M. Cornett, Hoodwink’d by
Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature,
4 WM. & MARY J. WOMEN & L. 1, 14 (1997); cf. Mark E. Brandon, Family at the Birth of Ameri-
can Constitutional Order, 77 TEX. L. REV. 1195, 1199 (1999) (arguing that “conceptions of the
family played an important role in imagining and establishing political authority in England and in
her colonies in North America”).

279. See SALMON, supra note 6, at xvii. “Most important, although the ideal of equality es-
poused in the Declaration of Independence did not work immediately to allow women greater
autonomy, it represented a powerful weapon for future use ... . In this sense, the influence of the
American Revolution is still being felt today.” Id.; cf. BROWNE, supra note 41, at 20 (noting that
Locke “argues that women and men should receive similar educations, and that the extent of a
wife’s subordination to her husband is a matter of contract; [and] can be varied, or even abolished
altogether ... . He does not deny women’s natural inferiority, but consistently plays it down”).

280. See DE PAUW & HUNT, supra note 6, at 153 (explaining that no “woman of her time per-
ceived these [lofty] principles [of the Revolution] as promising full equality to the female sex”).
would have resonated profoundly for some. Numerous examples have survived of women who questioned the constraints of the time. Elizabeth Freeman and Jenny Slew, for example, sued for their freedom in Massachusetts, asserting that slavery could not be reconciled with the principles of the Revolution.281 Mercy Otis Warren claimed a place for herself in the world of work, becoming a prolific political writer and historian.282 Others, like Mary Byrd, sought to challenge property regimes.283 Eighteenth century laws and customs limiting ownership, management, and transfer of property to men plainly would have violated the Covenant. In such cases, moreover, the norms of the Covenant would have been justiciable.284

More generally, over time, the Covenant probably would have supported the progressive realization285 of nondiscrimination. As a dangerous supplement, it may well have exposed the original understanding as incomplete.286 It would have subverted confidence in the privileged concept and undermined the myriad economic and social arrangements that reinforced and perpetuated the eighteenth century social structure.287 Successful reliance on the Covenant in some areas would have encour-

281. See id.; GIDDINGS, supra note 6, at 40; see also HAROLD W. FELTON, MUMBET: THE STORY OF ELIZABETH FREEMAN 7 (1970) (discussing the action brought by Elizabeth Freeman, "Mumbet," in 1781 to obtain freedom under the constitution of Massachusetts). Equality as a social norm, as opposed to a legal right, was more often found between partners in a slave family than in a white one. See GENOVESE, supra note 252, at 501 ("The slave family ... rested on a much greater equality between men and women than ... the white family.").

282. See Marianne B. Geiger, Mercy Otis Warren, in PORTRAITS OF AMERICAN WOMEN: FROM SETTLEMENT TO THE PRESENT 121, 121 (G. J. Barker-Benfield & Catherine Clinton eds., 1998); see also KERBER, supra note 6, at 227 ("Warren was virtually the only prominent American example who could be trotted out against the complaint that intellect necessarily meant rejection of domesticity and domestic work.").

283. See supra text accompanying notes 233-40.

284. See CRAVEN, supra note 117, at 181 ("It would seem quite apparent that States are capable of eliminating most de jure discrimination immediately.").

285. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 5-6; see also Alston, supra note 185, at 39 (noting that the progressive realization obligation of Article 2.1 of the Covenant is made subject to the availability of resources). "The provisions of this Article are probably the most complex in the entire Covenant. They are of major importance since they spell out the nature of the general obligation incumbent upon all States parties with respect to each and every one of the substantive obligations recognized in the Covenant." Id. at 46.

286. See discussion supra Part II.B.

287. See SALMON, supra note 6, at 191 (noting that this would have accelerated a process already underway because “[b]y 1800 ... families were becoming increasingly egalitarian. Male dominance in the family circle was yielding to an emphasis on spouses' equality, albeit an equality based on the idea of separate spheres").
aged women to rely on it in others. Norton points out, for example, that women voluntarily remained ignorant of family finances:

Married women rarely appear to have sought economic information from their husbands, whether in anticipation of eventual widowhood or simply out of a desire to understand the family’s financial circumstances. On the contrary, women’s statements reveal a complete acceptance of the division of their world into two separate, sexually defined spheres.

This “complete acceptance” reflected a very real recognition of their lack of options. Once married women had a right to manage their own property, surely some, at least, would “have sought economic information” from their husbands, and would have begun—however tentatively—to question the “division of their world into two separate, sexually defined spheres.”

3. Articles 4 and 5—Non-Derogation

Articles 4 and 5 address the non-derogation of economic, social, and cultural rights. Article 4 provides in pertinent part that “the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” As Professor Alston notes, this imposes a rigorous standard: “[L]imitations must, in the first place, be ‘determined by law’ in accordance with the appropriate national procedures and must

288. The Covenant scheme also supports women’s economic independence by recognizing the need for affirmative action. See CRAVEN, supra note 117, at 184-86 (noting an insightful analysis of affirmative action in the Covenant, which concludes that while the travaux confirm the legitimacy of affirmative action, there is little indication beyond Article 3 that it is required, although the focus throughout on vulnerable and disadvantaged groups is certainly consistent with an endorsement of affirmative action); cf. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Human Rights Comm., 37th Sess., General Comment 18, Non-discrimination, at 26, U.N. Doc. HRI/GEN/1/Rev.1 (1989) (“[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”); HUNT, supra note 40, at 64 (noting the General Comment on non-discrimination and equality).

289. NORTON, supra note 233, at 7 (footnote omitted).

290. As Reva Siegel notes, Antoinette “Blackwell may have been one of the first feminists to note that the law reduces women to ‘pecuniary dependence’ on men.” Siegel, supra note 247, at 1075 n.3.

not be arbitrary or unreasonable or retroactive. The limitations must also 'be compatible with the nature' of these rights.'

Article 5 extends the prohibition against derogation in three important ways. First, it extends this prohibition to non-State third parties. Second, it extends the prohibition to activities indirectly aimed at derogation, such as indenture. Third, it prohibits derogation from any other rights on the "pretext" that the Covenant requires such derogation.

Articles 4 and 5 require the State to address the inevitable tensions between and among civil/political and economic, and social and cultural rights. Thus, the supplement becomes dangerous here in a political sense because it exposes competing interests. The practice of allocating one-seventh of the food allowance for slaves as for white indentured servants, for example, could have been challenged under Article 11. Those private individuals responsible for setting this allowance might have argued that the food allowance was their own property, to do with as they liked. Articles 4 and 5, however, would have provided an important counter-argument. For the State to have supported those private individuals would have been to support non-State third parties in the effective derogation of Article 11 rights. This is precisely the example used by Alston to illustrate a violation of these provisions: "[A] limitation which purported to prevent access to food by a part of the population would be unlikely to be considered ... to be compatible with the basic concept of human dignity on which the Covenant is grounded." Similarly, arguments that it would be impractical or unnatural to educate girls would have generally been rejected under the Covenant, even if supported by evidence that girls themselves were uninterested in education. Rather, the State would have been expected to address the

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292. Alston, supra note 185, at 48.
293. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 6 (extending protection to a "group or person"). As Craven notes, "[I]t must be assumed that where the State is not in a position to ensure the rights itself, it must regulate private interaction to ensure that individuals are not arbitrarily deprived of the enjoyment of their rights by other individuals." CRAVEN, supra note 117, at 112.
295. See id.
296. See id. at 5-6.
297. See WOLF, supra note 6, at 166.
298. Alston, supra note 185, at 48. Nor could such a limitation be justified by appeal to "the general welfare in a democratic society," he continues, since it "simply discriminated against one segment of society in favour of another." Id.
299. See discussion infra Part V.B.9 (discussing the right to education).
social and cultural factors underlying girls’ lack of interest and to affirmatively educate the public about the importance of educating girls. Tensions between competing rights would have been subject to the same kind of rigorous, contextual inquiry.

4. Articles 6, 7, and 8—The Right to Work

The right to work is broken down in the Covenant into three major guarantees. First, under Article 6, the State “recognize[s] . . . the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.” Article 7 goes on to assure “just and favourable conditions of work,” explicitly including:

[F]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; a decent living for themselves and their families . . .; rest, leisure and reasonable limitation of working hours . . .

Article 8 focuses on the right to form and join trade unions. As the commentary to the Guidelines notes, “[t]he right to work is of fun-
damental importance, not only for its own sake but because it can be the key to the enjoyment of many other rights."\(^{305}\)

Eighteenth century women were systematically denied the rights set out in Articles 6 through 8, and this denial was key to the perpetuation of their subordination and dependence.\(^{306}\) The meaning of work was radically transformed during the eighteenth century, however, and the ways in which these rights were denied changed as well.\(^{307}\) At the beginning of the century, the colonies were basically a subsistence agrarian economy.\(^{308}\) When production was centered in the home, women could meet its demands while also meeting the demands of home and family.\(^{309}\) By the end of the eighteenth century, the North was becoming industrialized\(^{310}\) and the plantation system had been institutionalized in the South.\(^{311}\) In the North, production shifted from the home to the factory and a preference emerged for manufactured, rather than home-produced, family loyalties, see Mary H. Blewett, the Sexual Division of Labor and the Artisan Tradition in Early Industrial Capitalism: The Case of New England Shoemaking 1780-1860, in AMERICAN WOMEN AT WORK, supra note 257.

305. Alston, supra note 185, at 117. The comments “provide authoritative ‘jurisprudential insights’ into the Covenant’s provisions.” HUNT, supra note 40, at 61.

306. See, e.g., Alice Kessler-Harris, Women, Work, and the Social Order, in LIBERATING WOMEN’S HISTORY, supra note 216, at 330-43 (providing a provocative exploration of the interaction between ideas about women and their labor force participation).


308. See KERBER, supra note 6, at 7.

309. See DE PAUW & HUNT, supra note 6, at 61.

310. See CLINTON, supra note 274, at 5.

While the political center in New England remained the town, plantation society revolved around the county unit. Urbanization and industrialization, which made such inroads into northern society, had little impact upon the plantation South. European immigrants avoided the region; the planters discouraged any influx of foreigners, from a xenophobic impulse to preserve their own homogeneity; and the recent arrivals shunned competition with slave labor.

Id. See, e.g., BILLY G. SMITH, THE “LOWER SORT”: PHILADELPHIA’S LABORING PEOPLE, 1750-1800, at 63-91 (describing the effect of industrialization on the working class of eighteenth century Philadelphia).

311. See CLINTON, supra note 274, at 5. This is obviously a simplified schema. See Nell Irvin Painter, Soul Murder and Slavery: Toward a Fully Loaded Cost Accounting, in NEW FEMINIST ESSAYS, supra note 7, at 126 (“In the seventeenth and eighteenth centuries, slavery was a national phenomenon, and its effects were by no means limited to the South.”). By 1710 the plantation had emerged “as the basic unit of capitalist agriculture” in the South. STANLEY M. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 47 (3d ed. 1976); see generally Davis, supra note 5, at 224 n.6 (explaining that “many historians of the South . . . use the term plantocracy to describe the southern political economy in which the mode of production, slavery, structured social and economic relationships”).
In the South, the large plantations that sustained the economy depended on a large number of slaves. In the South, the large plantations that sustained the economy depended on a large number of slaves.

Thus, at the beginning of the century, white women participated in all of the occupations:

[S]ince all occupations centered in the home or a nearby office or workshop . . . women and children as well as men worked to make a success of the family enterprise. There was no formal licensing required for the practice of law and medicine until the end of the eighteenth century, so that women might draft wills and other legal documents. Some appeared in court arguing on their own behalf or as attorney for an absent husband. As we have seen, women monopolized obstetrical practice until the last part of the century, and they were preferred as medical practitioners by most of the population.

By the end of the century, however, white women were limited to a few marginalized professions, such as midwifery. At the beginning of the century, black women’s work was similarly diverse. By its end, black women, for the most part, were consigned to fieldwork. The question here is whether the Economic Covenant would have made any difference. If so, to whom? How would it have come into play?

Four major factors combined to deny women the right to work by the end of the eighteenth century. First, and most obviously, slavery precluded enjoyment of this right. Second, women were for the most part incapable of owning property, which meant that most women could

312. See DePauw & Hunt, supra note 6, at 65.
313. See generally Julia C. Spruill, Women’s Life and Work in the Southern Colonies (1972).
314. DePauw & Hunt, supra note 6, at 61. “The years between 1750 and 1815 witnessed the passing of a remarkable generation of women who were strong, self-reliant, employed in all occupations entered by men, although not in equal numbers, and active in political and military affairs.” Id. at 9; see also Women and Property, supra note 46, at 8 (“Everywhere wage labour is generally more accessible for men.”); Zinn, supra note 7, at 109 (“Women also were shopkeepers and innkeepers . . . bakers, tinworkers, brewers, tanners, ropemakers, lumberjacks, printers, morticians, woodworkers, staymakers, and more.”); cf. Marsha Freeman & Arvonne S. Fraser, Women’s Human Rights, in Human Rights: An Agenda for the Next Century 108 (Louis Henkin & John Lawrence Hargrove eds., 1994) (“Even men who belong to traditionally oppressed groups . . . have more choices in their lives than their female counterparts and companions.”).
315. See DePauw & Hunt, supra note 6, at 61.
316. See id. at 68.
317. See id. But see Genovese, supra note 252, at 328 (noting that approximately a quarter of the southern slaves, including slaves owned by small farmers and townspeople, worked in or around the house rather than in the fields).
318. See Davis, supra note 217, at 13 (“[T]he most basic and obvious of slavery’s deprivations [was] the right to choose one’s work and to pursue it in the marketplace.”).
not own their own labor. Third, most occupations and professions were closed to them. Fourth, women were responsible for women's work; that is, the childcare, food preparation, cleaning, laundry, sewing, weaving, and other work that women did for their families. This was not considered part of the market economy.

Each of these factors had an impact on each right as shown in the following chart:

<table>
<thead>
<tr>
<th>Art. 6: “to gain his living by work that he freely chooses or accepts”</th>
<th>Art. 7: “fair wages and equal remuneration for work of equal value”</th>
<th>Art. 8: “right of everyone to form trade unions and join the trade union of his choice”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under slavery</td>
<td>“Subsistence” more common than “living”; no choice about work</td>
<td>No wages</td>
</tr>
<tr>
<td>Legal incapacity to own property</td>
<td>“Living” goes to husband</td>
<td>Earnings to man of the house</td>
</tr>
<tr>
<td>Exclusion from most occupations</td>
<td>Limited work open from which to “freely choose”</td>
<td>Work of “equal value” foreclosed for most women</td>
</tr>
<tr>
<td>“Women’s work”</td>
<td>Unpaid women’s work first priority for white women, black women often denied opportunity to care for their own families</td>
<td>“Men’s work” was work minus the work done for them by women; “women’s work” was work plus the work they did for their families</td>
</tr>
</tbody>
</table>

While all of these factors affected all women, they obviously did not affect all women in the same way or with the same impact. Women’s work and slavery, for example, had dramatically different im-

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319. See Kerber, supra note 6, at 120. See generally Christine Stansell, City of Women: Sex and Class in New York, 1789-1860, at 106-19 (1986) (describing a practice known as “outwork,” in which factory owners paid women for piece work; for example, weaving and sewing done in their homes).
320. See De Pauw & Hunt, supra note 6, at 65.
321. See id. at 45.
plications for black and white women, as discussed below. Two groups of women are missing from the following chart: free black women and unmarried (or widowed) white women. Although both groups were for the most part free to own property, married free black women were subject to coverture and unmarried white women usually found themselves doing women’s work in someone else’s home. Both groups, moreover, remained excluded from most professions.

a. Black Women Under Slavery

Slavery barred most black women from any enjoyment of the Article 6 right “to gain ... [their] living by work which ... [they] freely cho[se] or accept[ed].” First, they were rarely able to gain a “living.” While the living conditions for a single slave might be very different from those of a slave on a large plantation, both were likely to be supported at subsistence levels, or below. Although the following account refers to male slaves, women rarely received preferential treatment.

In Georgia, for example, during the 1740s, it was reckoned that it cost £9 per year to keep a male white servant, compared to only £3.46.

322. This is not to suggest, of course, that black women were unaffected by women’s work, or that white women were unaffected by slavery. Rather, slavery and women’s work were linked in a complex and problematic system of “mutual conceptual dependence.” See text accompanying supra note 54; see also infra text accompanying notes 358-66 (describing the inability of slave women to perform the women’s work of taking care of their children due to their other duties on the plantation). See generally CLINTON, supra note 274, at 3-16 (discussing the lives of women on cotton plantations in the South from 1780-1835).

323. But see infra note 339 and accompanying text (describing Maryland law, which required property-owning women to marry). In fact, “[f]ew antebellum single women ever acquired financial security, a place of their own, or higher education. ... [F]or the spinsters of this study, liberty remained largely the subject of fantasy.” CHAMBERS-SCHILLER, supra note 54, at 82.

324. See CHAMBERS-SCHILLER, supra note 54, at 107 (noting that even if a woman had no husband or children, “the single woman’s parents expected that she could be recalled at need”); infra note 350 and accompanying text (describing the need for a “hired girl” in New England households).

325. International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S at 6. The specific measures necessary for implementation of Article 6 had been set out in ILO instruments by the mid 1950s. See CRAVEN, supra 117, at 200.

326. See discussion infra Part V.B.7 (discussing the right to an adequate standard of living).

327. See discussion infra Part V.B.8. Indeed, even nursing mothers were often denied an adequate allotment. See discussion infra Part V.B.8 (discussing the right to health). But see BLACK WOMEN IN WHITE AMERICA, supra note 202, at 47-48 (“[S]he was er breeder woman en’ brought in chillum ev’y twelve mont’s jes lak a cow bringin’ in a calf ... He orders she can’t be put to no strain ‘casen uv dat.”) (quoting Martha Jackson, b. 1850, ALABAMA NARRATIVES, Federal Works Project, WPA for the State of Alabama, 1939) (alteration in original); JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW 17 (1985) (“Pregnant and nursing women usually ranked as half hands and were required to pick an amount less than the average 150 or so pounds [of cotton] per day.”).
for a black slave. The difference was accounted for in both clothes and food. Servants were clothed after the style of their masters in character of garments, if not in quality, while slaves, at least in warm weather, merely wore loose, untailored garments of linsey-woolsey and wore no shoes. The real difference came in food allowances: Servants received seven times as much food as slaves, on average, and their alcohol ration, in the form of beer, was valued in cash at almost as much as the entire food and clothing ration of their black coworkers.\footnote{328} Nor did slaves have any choice about their work. The plantation system was well entrenched in the southern economy, and although black women engaged in a wide range of tasks, including highly skilled work such as smithing, they “were usually put to [the] hard labor in the fields[.]”\footnote{329} Furthermore:

[By the end of the eighteenth century black women were almost never trained in a craft by which they might hope to support themselves if they ran away. Spinning was virtually the only alternative to labor in the fields except for a few privileged house servants, and generally only the old and sick were allowed to spin.\footnote{330}]}

Slavery similarly precluded enjoyment of the Article 7 right to “just and favourable conditions of work.”\footnote{331} In an account published in 1839, Angela Grimké Weld shows how even relatively privileged house slaves suffered.\footnote{332} In the winter, for example:

[S]eamstresses were kept in cold entries to work by the staircase lamps for one or two hours, every evening in winter—they could not see without standing up all the time, though the work was often too large and heavy for them to sew upon it in that position without great inconvenience, and yet they were expected to do their work as well with their cold fingers, and standing up, as if they had been sitting by a comfortable fire and provided with the necessary light.\footnote{333}

Conditions were generally worse for women who worked in the fields. Even after Chesapeake farmers began to use plows and carts, for example: “[B]lack women continued their old familiar routines of hand hoe-
ing and weeding, as well as grubbing stumps from the swamps in the wintertime, breaking new ground which could not be handled with the plow, cleaning stables, and spreading manure.\textsuperscript{334}

Article 8 rights, assuring workers the right to organize,\textsuperscript{335} were ruthlessly and violently suppressed. As Lerner notes, "[t]he terror system against open rebellion was too cruel and overwhelming, the slave's isolation from supporting allies too complete to make rebellions anything but rare, sporadic outbursts, doomed to certain defeat."\textsuperscript{336} The persistent resistance of women under slavery, however, shows that many would have known what to do with the right to organize, had it been recognized at the time. "The real story of slave resistance must be sought in the buried record of daily sabotage, passive resistance and deliberate deceit. In a system such as slavery, survival for the oppressed group was the greatest form of resistance."\textsuperscript{337} In short, slavery effectively denied rights provided under Articles 6, 7, and 8; that is, every aspect of the right to work. Thus, by the end of the eighteenth century, the southern economy was predicated on the denial of the most basic human rights.\textsuperscript{338}

b. Women's Legal Incapacity to Own Property

Laws prohibiting married women from owning property\textsuperscript{339} meant that women were precluded from gaining their living, or assuring a "decent living for themselves and their families."\textsuperscript{340} Despite the visibility of
“wives’ economic contribution to the household . . . in the more subsistence-oriented agrarian economies of the colonial and Revolutionary eras[,]”\textsuperscript{341} they had no legal right to that contribution. While “[w]idows and spinsters could hold property of their own . . . it was difficult to make a living outside of a family business in the eighteenth century, and unmarried women were often impoverished.”\textsuperscript{342} As Wolf remarks, “[w]omen who were heads of their households and supported themselves and their families by sewing, washing, cooking, or spinning faced still worse hardships. Many relied solely on prostitution and others augmented insufficient incomes in this way as well.”\textsuperscript{343} Unmarried women, who were not virgins, whether voluntarily or because of rape, “would feel obliged to leave home to save their parents from disgrace. And as job opportunities for women narrowed, prostitution was viewed as an alternative to starvation.”\textsuperscript{344}

c. Exclusion from Most Occupations

Before the Revolution, white women joined their husbands and fathers in household businesses and farms.\textsuperscript{345} They also practiced law and medicine.\textsuperscript{346} During the Revolution, many women managed these businesses and farms while the men were away.\textsuperscript{347} When the men re-

\textsuperscript{341} Siegel, supra note 247, at 1092.
\textsuperscript{342} De Pauw & Hunt, supra note 6, at 66. Even when women had a right to specific property, many eighteenth century women “enjoyed a right to property only when their communities believed that supporting it would help keep the women off relief roles.” Salmon, supra note 6, at xiv.
\textsuperscript{343} Wolf, supra note 6, at 185-86.
\textsuperscript{344} De Pauw & Hunt, supra note 6, at 14. But see id. at 89 (noting that enlisted men could not afford the “camp wives” abjured by the American officers during the Revolution).
\textsuperscript{345} See Gordon & Buhle, supra note 216, at 281 (explaining how this practice was not unique to America).
\textsuperscript{347} See Clinton, supra note 274, at 29; De Pauw & Hunt, supra note 6, at 90. The poorest women went to war with their husbands, “cooking, mending uniforms and stockings, foraging,
turned from the war, however, the women returned to their accustomed duties.\textsuperscript{348} By the end of the century, women were systematically excluded from most occupations.\textsuperscript{349} Rather, they were relegated to poorly paid women’s work,\textsuperscript{350} which was increasingly circumscribed. Midwifery, for example, had traditionally been women’s work.\textsuperscript{351} But after 1780, “schools of law and medicine were established [and] women [were] driven from the practice of these professions.”\textsuperscript{352}

d. Women’s Work

Women’s work, such as unpaid work done for their families, was literally “never done.”\textsuperscript{353} Professor Norton’s summaries of the work records of white farm wives in the eighteenth century are records of endless, hard, unpaid labor:

[Sarah Snell] Bryant devoted one day to washing, another to ironing, and a third at least partly to baking. On the other days she sewed, spun, nursing and doing laundry.” \textit{Id.} at 90. For accounts of 84 women’s lives during the Revolution, see REVOLUTIONARY WOMEN IN THE WAR FOR AMERICAN INDEPENDENCE: A ONE-VOLUME REVISED EDITION OF ELIZABETH ELLET’S 1848 LANDMARK SERIES (Lincoln Diamant ed., 1998). See generally \textit{WOMEN IN THE AGE OF THE AMERICAN REVOLUTION}, supra note 6 (discussing the changing role of women over time).

\textsuperscript{348} See De Pauw & Hunt, \textit{supra} note 6, at 95 (noting that “women’s participation was far more restricted than it had been during the Revolution”).

\textsuperscript{349} See Cott, \textit{supra} note 6, at 6. By the early nineteenth century, “[t]here was only a limited number of paid occupations generally open to women, in housework, handicrafts and industry, and school teaching. Their wages were one-fourth to one-half what men earned in comparable work.” \textit{Id.}

\textsuperscript{350} See Wolf, \textit{supra} note 6, at 36.

The unmarried female “retainer” was an ... ubiquitous and integral part of the New England family circle, since every farm household needed at least one woman to do jobs outside the male domain such as laundry, cleaning, and needlework. In general, the women received less than half the wages of the men.

\textit{Id.} Hannah Hickok Smith, for example, “commented anxiously on the presence or absence of a ‘hired girl’ in her family in every letter she wrote to her mother.” Cott, \textit{supra} note 6, at 29.

\textsuperscript{351} See Wolf, \textit{supra} note 6, at 201. Wolf notes that:

The position of the midwife was secure and respected: she was regarded as a professional to be paid for her ministrations, consulted during pregnancy, totally in charge in the delivery room and usually able to overrule husbands who tried to interfere. Moreover, she was a credible witness in court when some dispute arose over the nature of the birth or the death of a fetus or an infant.

\textit{Id.} at 200-01. For an illuminating account of the role and status of midwives in eighteenth century England, see Cornett, \textit{supra} note 278, at 18-24.

\textsuperscript{352} De Pauw & Hunt, \textit{supra} note 6, at 61; see generally JEAN DONNISON, MIDWIVES AND MEDICAL MEN: A HISTORY OF INTER-PROFESSIONAL RIVALRIES AND WOMEN’S RIGHTS (1977) (discussing the tradition of requiring midwives to have borne children themselves).

\textsuperscript{353} See AMERICA’S WOMEN AT WORK, \textit{supra} note 6, at 9; De Pauw & Hunt, \textit{supra} note 6, at 45.
and wove. In the spring she planted her garden; in the early summer she hived her bees; in the fall she made cider and dried apples; and in mid-December came hog-killing time. Mary Cooper recorded the same seasonal round of work, adding to it spring housecleaning, a midsummer cherry harvest, and a long stretch of soap-making, boiling “souse,” rendering fat, and making candles that followed the hog butchering in December.354

Women’s work was more repetitive than men’s work, involving more tasks, such as laundry, that had to be done over and over.355 As Norton explains: “[W]omen’s expressed dissatisfaction with their household role derived from its basic nature, and from the way it contrasted with their husbands’ work.... Against the backdrop of their husbands’ diverse experiences, the invariable daily and weekly routines of housewifery seemed dull and uninteresting to eighteenth century [white] women[].”356 Against the backdrop of slavery, in contrast, women’s work was a source of satisfaction and strength for black women, affirming their most intimate ties.357 Under slavery, black women were often prevented from taking care of their children and husbands. Even if they were not sold to different owners,358 the demands of field work combined with work for the slaveowner’s family often made


355. See Cott, supra note 6, at 26 (“During the late eighteenth century both unmarried and married women did their primary work in households, in families.”). But see De Pauw & Hunt, supra note 6, at 61 (“White women did not usually labor in the fields, but those desperate to survive could not be fussy about the work they did, and when necessary poor farm women would plow and harvest.”).


357. See Genovese, supra note 252, at 495 (noting that although some slave owners arranged for communal breakfasts, some slave women “had to cook for their families, put the children to bed, and often spin, weave, and sew well into the night”). I am not suggesting, of course, that this additional work was not often onerous.

358. See Davis, supra note 217, at 99 (describing “[t]he oft-told story of parent-child separation resulting from sale or other reallocations of slave resources [as] a subtext of panic in every parental script”). For example, when slave traders moved slaves, often ... young children [in the slave coffle] grew very noisy, being too young or unsophisticated to understand the gravity of the situation. The driver would complain of a child’s crying and warn the mother to stop the noise. If the crying persisted, the driver would take the child away from its mother and give it away to the first home the gang came across.

Id. at 99 (alterations in original) (quoting Stanley Feldstein, Once a Slave: The Slaves’ View of Slavery 92 (1971)).
it impossible for slave women to take care of their own families. A former slave described her dilemma:

Did you have any more children? Yes; but they all died. Why could you not rear any of them? La, me, child! they died for want of attention. I used to leave them alone half of the time. Sometimes old mistress would have some one to mind them till they got so they could walk, but after that they would have to paddle for themselves. I was glad the Lord took them, for I knewed they were better off with my blessed Jesus than with me. 359

Another former slave “thought the number of slave children raised on [his] plantation low because ‘[t]he mothers had no time to take care of them—and they . . . [were] often found dead in the field and in the quarter for want of care of their mothers.” 360

Similarly, slave women were rarely able to provide their families with even a modicum of amenities. “Chambermaids and seamstresses often slept in their mistresses’ apartments, but with no bedding at all.” 361 Even when they were allowed to live with their families, housing was usually inadequate. As Stephanie Grauman Wolf describes it:

Even on the wealthiest showplace plantations in the South, slave housing (at least that of field hands far from the main house, where it did not show) continued to be built in impermanent ways: wooden houses directly laid on the ground, with dirt floors and mud-covered wooden chimneys connected to the house only by supports that could be knocked away in the event of fire. 362

Thus, for eighteenth century slave women, the women’s work they were able to do for their families, as opposed to the women’s work they were forced to do for their owners, was a source of pride and satisfaction. 363

While the social meaning of women’s work may have varied, 364 its economic consequences were the same. 365 Women’s work freed white

359. Id. at 93 (quoting OCTAVIO ALBERT, THE HOUSE OF BONDAGE OR CHARLOTTE BROOKS AND OTHER STORIES 14-15 (1890)).
360. Id. (second alteration in original) (quoting STANLEY FELDSTEIN, ONCE A SLAVE: THE SLAVES’ VIEW OF SLAVERY 49 (1971)). But cf. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 97-98 (1978) (providing a separate opinion by Judge Zekia explaining that the separation of a mother from her suckling baby for hours, during which the baby cries from hunger, would be an example of “inhuman treatment” violative of the human rights of mother and child).
361. BLACK WOMEN IN WHITE AMERICA, supra note 202, at 21 (providing the testimony of Angela Grimké Weld).
362. WOLF, supra note 6, at 54.
364. See generally BLACK WOMEN IN WHITE AMERICA, supra note 202, at xxiv-xxv.
men, whether husbands, fathers, or owners, to tend to their businesses or professions. They were not expected to prepare meals, mend clothes, clean houses, take care of children, or do laundry. This was all women’s work.

e. Consequences of the Denial of the Right to Work

The right to work is linked to other economic rights. Most obviously, it is often requisite to the right to an adequate standard of living. Because they were denied this right white women’s standard of living usually depended on their relationships with men. While a few black women were able to improve their standard of living through relationships with white men, most endured abysmal conditions, even on the wealthiest plantations. The right to work is also related to the right to education, since many jobs require some kind of preparation or training. Thus, limitations on women’s right to work were used to justify limitations on girls’ right to education.

In addition, as described above, the right to work, and thus to acquire property, was related to certain civil and political rights, such as the right to vote. White women were of course denied the right to vote even after the demise of property requirements. However, as Gerda Lerner has explained, the feminist consciousness, which ultimately enabled women to mobilize for suffrage, required a critical mass of eco-

Id.  

365. See Jones, supra note 363, at 14 (“Tasks performed within the family context—child care, cooking, and washing clothes, for example—were distinct from labor carried out under the lash in the field . . . . Still, these forms of nurture contributed to the health and welfare of the slave population . . . .”).  

366. See Wolf, supra note 6, at 140-41.  

367. See Black Women in White America, supra note 202, at 46. Relationships with white male owners “were for slave women the one and only avenue toward some precarious improvement in their lot and that of their offspring. Promises of future emancipation for themselves and their children convinced some women when punishment did not.” Id.  

368. See discussion infra Part V.B.7 (discussing the right to an adequate standard of living).  

369. See discussion infra Part V.B.9 (discussing the right to education).  

370. See supra text accompanying notes 52-55.  

371. See supra text accompanying notes 49-51.
nomically independent women.\textsuperscript{372} The requisite mass did not materialize in the United States until women had more, rather than less, of the right to work and to keep and manage their own earnings.

5. Article 9—Social Security

Article 9 of the Covenant provides that: “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”\textsuperscript{373} This is not work-linked, but a fundamental entitlement to be afforded each member of society. It includes, but is not limited to, medical care, maternity, and old-age benefits.\textsuperscript{374} As the Guidelines note, “[p]articularly in the case of developing countries, many of these categories might be of very limited relevance. But in such cases, reports should provide information as to informal arrangements which might provide de facto coverage.”\textsuperscript{375}

In eighteenth century America,\textsuperscript{376} such de facto coverage was provided first and most importantly by families.\textsuperscript{377} Under the family dynasty model, it was the duty of the male head of household to support its infirm or aged members. As the family dynasty model eroded throughout the eighteenth century, however, this duty became increasingly attenuated and finally forgotten.\textsuperscript{378} Local governments were ambivalent about their scope of responsibility and uncertain how to cope with even the responsibility they conceded:

\textsuperscript{372} See Gerda Lerner, The Creation of Feminist Consciousness: From the Middle Ages to Eighteen-Seventy 276 passim (1993).
\textsuperscript{373} International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 7.
\textsuperscript{374} See Alston, supra note 185, at 55.
\textsuperscript{375} Id. at 56.
\textsuperscript{376} However, at least in the North, there is ample anecdotal evidence of an elderly population. See, e.g., Jones, supra note 51, at 149 (“The relatively healthy population of the northern colonies created a whole group of elderly men and women at risk of poverty, a demographic category that did not exist in the disease-ridden South.”).
\textsuperscript{377} See Wolf, supra note 6, at 18. “In return for their labor and submission, all the members of the family... in theory at least, were protected at the most basic level by an economic and social safety net of the master’s devising.” Id.; cf. Colonial Chesapeake Society, supra note 204, at 173 (noting that in seventeenth century Maryland, poor relief and the care of orphans were matters dealt with at the county level).
\textsuperscript{378} See, e.g., Wolf, supra note 6, at 46.

During the 1790s, several women who had worked for the [Drinker] family... applied to Mrs. Drinker for help when they or their husbands became disabled, or fell on hard times and were unable to support their families. It is clear that these former servants evidently felt something of the old entitlement to membership in the Drinkers’ family, but it is equally clear that the Drinkers felt no such reciprocal responsibility.
They fell back on the old British model of the almshouse... in addition to the custom of outdoor relief whereby a cash-short family might be tided over with a judicious handout of flour or firewood. In the Old World, these institutions had been intended only for the benefit of local, worthy indigents, but in the larger, more anonymous world of the young Republic, it was necessary to provide social services, in the name of humanity, even to those who seem clearly unworthy.379

Some local and state governments operated almshouses350 and orphanages. Churches and charities also provided some relief.381 The Guardians of the Poor, an eighteenth century version of a public welfare agency, arranged for the children of the working poor to be indentured.382

At the very least, the Covenant would have encouraged local governments to recognize their obligations and address them more systematically. Under the Guidelines, States are required to describe the forms of social security available in their country383 and, more specifically, “whether in your country there are any groups which... enjoy the right to social security... to a significantly lesser degree than the majority of the population. In particular, what is the situation of women in that respect?”384 Such data was obviously not collected in eighteenth century America.385 It is likely that women were disproportionately represented among the neediest, however, because of their legal incapacity to own property,386 their lack of access to remunerative employment,387 and their childbearing and child-rearing responsibilities.388 As Wolf explains, elderly widows or spinsters were more likely to require aid than men were.

379. WOLF, supra note 6, at 47-48.
380. See, e.g., THE DAILY OCCURRENCE DOCKET OF THE PHILADELPHIA ALMSHOUSE: SELECTED ENTRIES, 1800-1804 (Billy G. Smith & Cynthia Shelton eds., 1985); WOLF, supra note 6, at 48 (describing indigents seeking aid at the Philadelphia Almshouse in 1789: “Ruth and Henry Kendall... came here... in such wretched plight & swarming with Vermin so as immediately to extort clothing”).
381. Cf. BLACK WOMEN IN WHITE AMERICA, supra note 202, at 42-43 (providing a May 2, 1838 letter from Elizabeth Grimké, which explained that in South Carolina there is “no hospital, no lunatic asylum where [blacks]... are received and owners are made to take care of them”).
382. See WOLF, supra note 6, at 46. In early eighteenth century, colonial Chesapeake, the county court performed a similar service. See COLONIAL CHESAPEAKE SOCIETY, supra note 204, at 415 (“Orphans, bastards, children abandoned by runaway parents, and those whose parents were too poor to support them all came before the county court to be placed in households where they could be both nurtured and trained to support themselves as adults.”).
383. See Alston, supra note 185, at 55, 56. These may include medical care, cash sickness benefits, maternity benefits, old age benefits, unemployment benefits, or family benefits. See id.
384. Id. at 56.
385. But see supra note 378 (discussing anecdotal evidence of the “Drinker” family).
386. See discussion supra Part V.B.4.b.
387. See discussion supra Part V.B.4.c.
388. See discussion supra Part V.B.4.d.
because "the facts of the ownership of property in colonial America made [men who were ill and old] . . . far less vulnerable." 389

6. Article 10—Recognition of the Assistance Due the Family 390

Article 10 requires the State to recognize that the "widest possible protection and assistance should be accorded to the family . . . particularly for its establishment and while it is responsible for the care and education of dependent children." 391 "Family" is not defined under the Covenant. Instead, the Guidelines require the State to "indicate what meaning is given in your society to the term 'family.'" 392 Feminists have criticized such open-endedness for condoning, and thereby legitimizing and perpetuating, local patriarchal norms. 393 This criticism surely would have been justified as applied to eighteenth century norms. 394

389. Wolf, supra note 6, at 244.
390. See Craven, supra note 117, at 135 (noting that there is no reference to "rights" in Article 10).
392. Alston, supra note 185, at 57. In fact, social organization in the eighteenth century is better understood in terms of "households" than "families," since unrelated individuals, including indentured servants and slaves, were often included in a single social/economic unit. See Wolf, supra note 6, at 17-20. But see Norton, supra note 6, at 17 ("In seventeenth-century English America . . . [t]wo major connections linked members of a family to one another: co-residence and subjection to the same person.") (emphasis added). This is precisely the kind of arrangement, leaving children who were not family members particularly vulnerable, that Article 10 seeks to discourage. See id. (noting that families may be found within a household consisting of a male head of household, a wife, children, and sometimes other children); see also Craven, supra note 117, at 135 (noting that Article 10 refers to rights that "should" be in place for the family, mothers, and children).
393. See Economic, Social, and Cultural Rights, supra note 5, at 279 (noting that in many countries, "a married woman has to prove that she is a breadwinner before she can claim entitlements," while it is assumed that married men are breadwinners); see also Helen Bequaert Holmes, A Feminist Analysis of the Universal Declaration of Human Rights, in Beyond Domination: New Perspectives on Women and Philosophy 250, 251-55 (Carol C. Gould ed., 1984) (criticizing Article 16(3) of the Universal Declaration as repressive to women); Marilyn Waring, Gender and International Law: Women and the Right to Development, 12 Austl. Y.B. Int'l L. 177, 187 (1992) (arguing that "non-definition in international law is clarified by the use of the 'norm' that is, the insertion of the word 'patriarchal' before the word 'family'").
394. See, e.g., Gerda Lerner, The Creation of Patriarchy 239 (1986) (explaining that patriarchy is "the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general"). Lerner's definition of patriarchy is very close to Sir Robert Filmer's model for family relations. See supra notes 270-71 and accompanying text. But see Gordon & Buhle, supra note 216, at 280.

Throughout most of the seventeenth century, colonial society was relatively unfragmented, either by sex or age. . . . Cultural expressions of the time indicate lack of consciousness about the possible differences which later characterized all discussion of all women and children. Such silence about sex- and age-roles is a feature of pre-industrial societies.
During that time period, a white woman’s marriage determined her life. Upon marriage, she became a *feme covert* with no legal rights of her own. Since divorce was generally unavailable, the wife was basically at the mercy of her husband. Moreover, if she left him, she knew she would lose her children.

This predicament was sanctioned both by the early eighteenth century Filmerian system and by the liberal theory which was to supplant it. Both assumed a hierarchical family structure, with a white male acting as the head of the household, who controlled the family finances and represented the family insofar as the family had any dealings with the State. The hierarchical opposition was well-established and

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395. *See, e.g.,* CLINTON, *supra* note 274, at 59-86 (describing how marriage determined white women’s lives in the South). This often applied to black slave families on ante-bellum plantations as well as to whites, although the “sexual division of labor [in black slave families] . . . had no explicit economic base.” AMERICA’S WOMEN AT WORK, *supra* note 6, at 7.

396. *See supra* notes 245-46 and accompanying text. For contemporary explications of women’s rights in this context, see BARON AND FEME, A TREATISE OF THE COMMON LAW CONCERNING HUSBANDS AND WIVES 3-4 (Garland Publishing, Inc. 1978) (1700) (discussing “[t]he Nature of a Feme Covert”); A TREATISE OF FEME COVERTS: OR THE LADY’S LAW 78 (Garland Publishing, Inc. 1978) (1732) (“Of the Privileges of Feme Coverts, and their Power, in Respect of their Husbands, and all others: Of Husband and Wife, in what Actions they are to join, and how far they are chargeable.”). There was a scarcity of women throughout the colonies, however, allowing a woman some choice of a husband. See Gordon & Buhle, *supra* note 216, at 279.

397. *See CHUSED, supra* note 6, at 1; DE PAUW & HUNT, *supra* note 6, at 16; see also KERBER, *supra* note 6, at 183 (describing Nancy Shippen’s discovery in 1789 “that Revolutionary freedom did not clearly extend to the right to be free of an unhappy marriage”).

398. *See NEW FEMINIST ESSAYS, supra* note 7, at 22 (“Under coverture, a woman’s only freely chosen obligation was to her husband. Once she made that choice, he controlled her body and her property; there were relatively few constraints on what he could do with either . . .”).

399. *See SALMON, supra* note 6, at xv (describing the “enforced dependence” of American women).

400. *See supra* text accompanying notes 268-74.

401. *Locke . . . described a state of nature predating the creation of what he termed “Political Society,” even in that natural state women were not (indeed, could not be) free of men’s control. . . . Locke thereby refused to admit . . . that a woman could be a mother (that is, a powerful figure) without first being a wife (that is, under the control of the man). For Locke, only wives could be mothers, even in a state of nature, in the absence of all civil law, the relationship of husband wife necessarily preceded and gave rise to that of mother and child.* NORFORD, *supra* note 6, at 142.

402. *See supra* notes 213-16 and accompanying text; see also KERBER, *supra* note 6, at 119 (“‘Baron and Feme’ was the law of domestic relations. The very wording implies a political relationship: lord and woman, not husband and wife. One party had status as well as gender; the other had only gender. As ‘Baron,’ husband stood to wife as king did to baron.”).
generally unquestioned. The male head of household was legally, socially, and economically privileged, while the women and children within the household were legally, socially, and economically subordinated.

In view of its textual ambiguity, Article 10 would probably not have had a radical impact on hierarchical relationships in the eighteenth century family. However, it might have had some impact, particularly in conjunction with certain other articles, such as those assuring nondiscrimination, the right to work, an adequate standard of living, and education. For example, Article 10 would have provided a legal ba-

402. But see NORTON, supra note 233, at 10 (discussing the high status widowed mothers as the exception, who commanded respect equal to that of low ranking men, without being subject to the control of a man by virtue of their widowed status).

403. See NEW FEMINIST ESSAYS, supra note 7, at 23.

American revolutionaries did not change the law of domestic relations at the same time that they radically changed other civic relations; they did not even debate the possibility that all free married men—whatever their class position, whether they were white or black—benefited from a system of law in which husbands controlled the bodies and property of their wives. They felt no need to renegotiate it.

Id.

404. See supra notes 392-93 and accompanying text. The Article's alleged ambiguity is evidenced by its limited impact in those States which have in fact ratified the Covenant. See Barbara Stark, The International Covenant on Economic, Social and Cultural Rights as a Resource for Women, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 223 (Kelly D. Askin & Dorean Koenig eds., 2000).

405. Slavery, of course, often rendered such relationships incoherent:

"By our deplorable situation we are rendered incapable of shewing our obedience to Almighty God how can a slave perform the duties of a husband to a wife or parent to his child How can a husband leave master to work and cleave to his wife How can the wife submit themselves to there husbands in all things . . . ."

DAVIS, supra note 217, at 136 (quoting Petition to the Governor and Legislature of Massachusetts, dated May 25, 1774).

406. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 5; see also discussion supra Part V.B.2 (noting that the covenant may have encouraged a closer examination of the role of women in the family and in society and may have encouraged more people to question the social structure of the day).

407. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 6-7; see also discussion infra Part V.B.4 (noting that the absence of any meaningful opportunity to work deprived women of an opportunity to reduce their subordination and dependence).

408. See International Covenant on Economic, Social and Cultural Rightsh, supra note 36, 993 U.N.T.S. at 7; see also discussion infra Part V.B.7 (noting that the lack of a right to an adequate standard of living resulted in women spending much of their time and energy trying to secure one for themselves and their families).

409. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 8; see also discussion infra Part V.B.9 (noting that the absence of education is perhaps the most profound, as participation in all aspects of democratic society are impaired by the absence of an education).
sis for contesting at least two broad forms of women's subordination. First, the violence to which black women were subject under slavery would be barred by Article 10. Second, the social approbrium suffered by unwed white mothers and their children would be inconsistent with Article 10, which provides for "[s]pecial protection" for children, regardless of the circumstance of their birth. While contemporaneous accounts suggest that many black women would have availed themselves of the protections of Article 10, white women probably would have been more ambivalent.

a. Violence Toward Black Women

The importance of Article 10 protections are perhaps best revealed in the lives of black women denied them under slavery. Article 10.1, for example, provides that: "Marriage must be entered into with the free consent of the intending spouses." Article 10.1, provides that: "Marriage must be entered into with the free consent of the intending spouses." While some historians claim that

410. Although, as Craven notes, Article 10 does not refer to any "rights" but only requires States to recognize the protection due the family, the United Nations Human Rights Committee has consistently treated this obligation on a par with the rights of other articles. See CRAVEN, supra note 117, at 135.

411. See generally NORTON, supra note 6, at 119 (describing "two spouse-abuse incidents [that] began when mothers attempted to protect children from beatings by their fathers[, where] the courts in Salem and New Haven assessed penalties for striking the spouses but not for beating the children"). A discussion of domestic violence is beyond the scope of this Article.

412. See, e.g., Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601, 1601 (1986) (noting that when "[l]egal interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence"). Cover's well-known observations on the law's violence are brutally apt in this context. Indeed, this is precisely the kind of violence that precipitated human rights law, which invalidates those laws that seek to legitimize violence, such as the slave codes.

413. See generally THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH xlii-xiv (Catherine Clinton & Michele Gillespie eds., 1997) (discussing essays on slavery and gender in the colonial South).


415. See, e.g., DAVIS, supra note 217, at 4 (noting that "the stories of enslaved families" are "Motivating Stories" since "they inspired th[e] constitutional commitment" to make "family freedom a constitutional right").

416. International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 7. While white women were legally free to choose their husbands, as a matter of social custom it was often more of a collective family decision. See NORTON, supra note 233, at 43, 58. (However,) [a]s Eliza Southgate noted in 1800, "The inequality of privilege between the sexes is very sensibly felt by us females, and in no instance is it greater than in the liberty of choosing a partner in marriage; true we have the liberty of refusing those we don't like, but not of selecting those we do."

CHAMBERS-SCHILLER, supra note 54, at 36 (quoting ELIZA BOWNE, A GIRL'S LIFE EIGHTY YEARS AGO: SELECTIONS FROM THE LETTERS OF ELIZA SOUTHGATE BOWNE 38 (1887)). At the same time, the stigma borne by unmarried women, as well as the lack of employment opportunities, made
"black girls were almost always allowed to marry for love[,]" 417 slave marriages were not recognized by the state and offered none of the protections of legal marriage. 418 Black women’s marriages could be arranged at the whim of a slave owner. They could be dissolved by the sale of one of the partners. 419 Married or not, moreover, black women were routinely exploited sexually by white men. 420

In addition, black women had virtually no control over their own reproduction. 421 Black unwed mothers did not suffer the same stigma as white unwed mothers, in part because slave owners viewed black chil-

417. De PAUW & HUNT, supra note 6, at 16. "Slave parents did not have the authority to forbid a child’s marriage, and the master was usually content to have his slaves choose their own partners." Id. See generally HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925, at xvii (1976) (discussing the Afro-American family between 1750 and 1925 as well as the origins and early development of Afro-American culture).


419. See ELKINS, supra note 418, at 53-54 ("Any restrictions on the separate sale of slaves would have been reflected immediately in the market; their price would have dropped considerably."). See generally DAVIS, supra note 217, at 32-33 (providing a first person account of a family that was torn apart).

420. But see infra text accompanying note 504 (noting that black women knew how to avoid pregnancy). In order that the resultant offspring would be the white owner’s property rather than his legal obligations, the “universal understanding of Southern jurists” was that “‘the father of a slave is unknown to our law.’” ELKINS, supra note 418, at 55 (quoting Frazier v. Spear, 1 Ky. (2 Bibb) 385). As Professor Davis notes: “The private law doctrine of intestate succession . . . contributed to the cultural ideology regarding enslaved women’s sexual availability. In refusing to grant standard economic rights that inure to sexual families, civil law, like criminal law, denied legal recognition of enslaved women’s sexual relationships.” Davis, supra note 5, at 247; see also HARRIET JACOBS AND INCIDENTS IN THE LIFE OF A SLAVE GIRL 3, 21-22 (Deborah M. Garfield & Rafia Zafar eds., 1996) (describing sexual exploitation of Harriet Jacobs by her master); cf. BLACK WOMEN IN WHITE AMERICA, supra note 202, at 149-50 (describing the sometimes complex relationships between black women and white men); Davis, supra note 5, at 227 (explaining how the courts had to consider “the possibility of affection between the races” in probate cases involving interracial relationships). See generally CLINTON, supra note 274, at 199-222 (discussing oppression based upon and perpetuated by white sexual control); Karen A. Getman, Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System, 7 HARV. WOMEN’S L.J. 115, 115 (1984) (discussing sexual characterizations of black female slaves in the South).

dren as additional property.422 Even so, pregnant women, as well as those who had recently given birth, were frequently forced to work notwithstanding the threat to their health and their fetuses.423 As Francis Kemble, a British woman married to an American slaveholder, noted in her journal in 1838:

Fanny has had six children; all dead but one. She came to beg to have her work in the field lightened. Nanny has had three children. Two of them are dead..... Leah has had six children; three are dead. Sophy... came to beg for some old linen. She is suffering fearfully; she had had ten children; five of them are dead. Sally... has had two miscarriages and three children born, one of whom is dead. She came complaining of incessant pain and weakness in her back... There was hardly one of these women... who might not have been a candidate for a bed in a hospital, and they had come to me after working all day in the fields.424

Rather than petitioning a woman who had no ability to help them,425 these women could have demanded that the State assure the "[s]pecial protection" to which they were entitled under Article 10.2.426 Whatever the circumstance of their birth, black infants could be sold or "given away 'like puppies"427 and their mothers were powerless

422. See De Pauw & Hunt, supra note 6, at 24; Davis, supra note 5, at 285. In 1662 Virginia passed the following law: "'Children got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother, and if any Christian shall commit fornication with a Negro man or woman, he shall pay double the fines of the former act.'" Giddings, supra note 6, at 37 (quoting Dorothy Sterling, Black Foremothers: Three Lives 79 (1979)). As Higginbotham noted, this overturned the normal doctrine of English law, "that the status of a child would be dependent upon the status of the child's father." Higginbotham, supra note 53, at 44. For an insightful analysis of some of the consequences of this legacy, see Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 211-12 (1995) (analyzing the consequences of the genetic tie of racial identity).

423. See, e.g., Black Women in White America, supra note 202, at 49.

424. Id. (alterations in original).

425. Frances Kemble's journal entry concludes: "And to all this I listen—I an Englishwoman, the wife of the man who owns these wretches, and I cannot say: 'That thing shall not be done again... .' I remained choking with indignation and grief long after they had all left me to my most bitter thoughts." Id. at 50 (alteration in original).

426. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 7; supra text accompanying notes 410-14; see also supra text accompanying notes 358-60 (describing how slave women were often forced to neglect their children). As Genovese notes, slave women "complained especially about the inadequate conditions for nursing." Genovese, supra note 252, at 498. But see Jones, supra note 327, at 17 (describing some accommodations made for pregnant or nursing women).

427. Wolfe, supra note 6, at 38; see also Davis, supra note 217, at 91 (noting that black infants were often "sold along the roadside").
to protect them. 428 In addition to violating the self-determination rights of parents and their children, this obviously contravenes Article 10.1 429 and Article 10.3, which requires the State to assure “[s]pecial measures of protection and assistance . . . on behalf of all children.” 430

b. Separation from Their Children and Other Consequences of Unwed Motherhood for White Women

Adultery was understood as a crime against the husband of a married white woman. 431 Eve Sewell, wife of John, for example, was convicted of adultery in 1790 for bearing a mulatto child. 432 Mrs. Sewell and the “child were condemned to servitude.” 433 Accordingly, intercourse between unmarried men and women was not necessarily a crime, because no husband was injured. However, sexual relations were strongly condemned if the parties did not subsequently marry. 434 The children of such unions were “bastards,” and unless the mother had some independ-
ent means of support, the child was often indentured, that is, placed with a family as a servant until majority.

Unwed white women and their children were not considered families in the eighteenth century. Article 10.3, however, explicitly forbids "discrimination for reasons of parentage." As set out in Article 10.2, moreover, "special measures of protection" are to be accorded mothers, without distinguishing between married or unmarried mothers.

The impact of Article 10 has been slight in States, like eighteenth century America, with strong religious, moral, and social norms against illegitimacy. Harsh eighteenth century laws and practices directed against unwed mothers were intended to encourage marriage, and they were often quite effective. Indeed, as Norton notes, "in some New England towns ... one-third of the [women] were pregnant at the time of their marriage." Most eighteenth century white women wanted to be married because of the stigma and hardship associated with "spinsterhood." Some eighteenth century women, moreover, surely loved the fathers of their unborn children—or at least wanted their compan-

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435. See, e.g., NORTON, supra note 233, at 55 (describing a young woman supported by her wealthy widowed aunt).

436. See, e.g., MARY LEE SETTLE, O BEULAH LAND 41-43 (1956). Settle provides a vivid fictional account of indentured children in describing a pair of brothers sold to a Virginia planter in the mid-eighteenth century. See id. at 42. The older brother, about 12-years-old, kills himself, unable to bear the brutal treatment and harsh conditions. See id. The planter, thus cheated, adds his remaining term to that of his younger brother, who runs away. See id. at 42-43.

437. See supra notes 392-93 (describing "families").


439. See id.; see also Philip D. Morgan, Slave Life in Piedmont Virginia, 1720-1800, in COLONIAL CHESAPEAKE SOCIETY 433, 471 n.68 (Lois Green Carr et al. eds., 1988) (providing an account of the white women cited by grand juries in Piedmont Virginia for having "mulatto bastard[s]").

440. See Stark, supra note 404, at 223-35 (discussing Afghanistan in the context of Article 10); see also Rebecca J. Cook, Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, 30 VA. J. INT'L L. 643, 702-06 (1990) (describing State reservations to the Women's Convention, particularly those provisions dealing with the family).

441. See CLINTON, supra note 274, at 122 (providing an account of the ways in which a "woman's fall plummeted her to a position of irremediable dishonor and unmitigated regret" in the South); cf. GIDDINGS, supra note 6, at 37 (noting that in 1662, Virginia passed a law that "any servant woman who had a child by her master was subject to two additional years of service. The guilty servant was to be 'sold' to the church-wardens, who would employ her in the tobacco fields").

442. NORTON, supra note 233, at 55.

443. See id. at 15 (noting that the term itself refers to the endless hours of spinning in store for the unmarried woman). As Norton notes, "women had no real alternative to an irrevocable marriage." Id. at 57. See also discussion supra Part V.B.4 (describing limits on women's right to work).
ionship and support. Thus, Article 10 probably would have had little appeal for many white women, at least where marriage was an alternative. For those who were deserted, however, such as the unfortunate young Virginian woman abandoned by her French lover, the protections of Article 10, especially if they translated into food and shelter for herself and her baby, would have been invaluable.

7. Article 11—Right to an Adequate Standard of Living

Under Article 11, "[t]he States ... recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." As Professor Ely points out, colonial governments in fact assumed significant responsibility for assuring an adequate standard of living:

[C]olonial governments regulate[d] economic activity for the general welfare of the community.... [C]ounty courts fixed the rates to be charged for food, drink, and accommodations. Similarly, the colonists treated gristmills as public institutions subject to control. Most colonies regulated the operation of mills and set the toll for grinding grain.... [L]awmakers established supervised public markets in colonial cities.... [M]any colonies and localities [regulated by law] the weight, quality, and price of bread .... The purposes of such legislation were to curb alleged abuses by bakers and to make bread cheap.

Thus, rights recognized under the Economic Covenant were also recognized by colonial governments. In some respects, moreover, these rights were better supported than they are today. However, these rights could only be claimed by the head of the household, almost always a white man.

Although most women could not make claims against the State, they generally had the day-to-day responsibility of assuring an adequate standard of living for their families. Women were responsible for pre-

444. See NORTON, supra note 233, at 55. Rachel, the young woman, was "lost to every thing that is dear to Woman[.]") See id. She bore an illegitimate son and lived with her elderly aunt. See id.
446. ELY, supra note 3, at 19-20.
447. See DE PAUW & HUNT, supra note 6, at 12.
448. See COTT, supra note 6, at 40-41 ("Wife-and-motherhood in a rural household of the eighteenth century implied responsibility for the well-being of all the family. Upon marriage a woman took on 'the Cares of the world,' Elizabeth Bowen admitted as she recounted her past life,
paring and growing much of the food the family consumed.\textsuperscript{449} Slave women often had their own garden plots.\textsuperscript{450} Even city women "in the autumn... preserved fruit and stored vegetables, and early in the winter... salted beef and pork and made sausage."\textsuperscript{451} Eighteenth century women were also responsible for providing their families with clothing, often spinning the wool and weaving the cloth which they used. "Farm wives, and especially their daughters, spent a large proportion of their time, particularly in the winter months, bending over a flax wheel or loom, or walking beside a great wheel, spinning wool."\textsuperscript{452} This was especially true after 1765 and the boycotts of British goods.\textsuperscript{453} In short, the eighteenth century household depended on women to provide meals, clothes, bedding, and a comfortable home.

Article 11 rights may be usefully understood as inverted descriptions of eighteenth century women's duties.\textsuperscript{454} They are the dangerous

\textsuperscript{449} See, e.g., \textsc{de pauw \& hunt}, supra note 6, at 45 ("Fresh vegetables, fruit, and a few flowers might be provided by a woman's kitchen garden."); cf. \textsc{hilary charlesworth \& christine chinkin}, \textit{The Gender of Jus Cogens}, 15 \textit{Hum. RTS. Q.} 63, 75 (1993) (arguing that the right to food should be a \textit{jus cogens} norm for women throughout the world).

\textsuperscript{450} \textsc{see black women in white america}, supra note 202, at 17 (noting that these plots, "patches," were usually in the woods or some other undesirable location) (citing \textsc{charles ball}, \textit{slavery in the united states: A narrative of the life and adventures of charles ball, a black man} 163 (1836)).

\textsuperscript{451} \textsc{norton}, supra note 233, at 21-22. To the extent that "adequate" food refers to nutritional value as well as quantity, however, women's work was sometimes counterproductive:

\textsc{[T]he monotonous diet of corn mush, salt meat, and grog, cider, or molasses beer[... made scurvy a constant threat throughout the colonial period. [... Even when fresh vegetables were served, they were boiled for hours beforehand and so lost their vitamin content. The slaves[... also overcooked their vegetables; but they prized the "pot likker" and so did not lose all nutritional benefits.}

\textsc{de pauw \& hunt}, supra note 6, at 45.

\textsuperscript{452} \textsc{norton}, supra note 233, at 15. "This was a time-consuming, never-ending task. Since it took nearly a year and a half to create linen from flax, a man's shirt often wore out by the time a woman could complete a new one." \textsc{de pauw \& hunt}, supra note 6, at 48.

\textsuperscript{453} \textsc{see norton}, supra note 233, at 15. Women were similarly responsible for producing the "bedcoverings [which] were as essential as clothing." \textsc{de pauw \& hunt}, supra note 6, at 51.

\textsuperscript{454} Much of this remains women's work even today. \textsc{see stark}, supra note 108, at 178, 179; \textsc{see, e.g., rose}, supra note 173, at 244-45 (discussing perceived differences between men and women in employment and domestic situations and the pattern which reinforced these beliefs).
supplement of women’s work, the subordinated opposition, situating responsibility for the assurance of those rights in the public sphere.\textsuperscript{455}

While eighteenth century women had the most direct, concrete responsibility for assuring Article 11 rights,\textsuperscript{456} they had no direct access to the mechanisms put in place by the states to assure an adequate standard of living. Instead, they were dependent on the man of the house to secure the family’s share of State resources, and to provide them with a share sufficient, along with what they were able to produce themselves, to meet the needs of the household.\textsuperscript{457}

But eighteenth century men sometimes had other priorities and women could only beseech them to remember their responsibilities. A wife who demanded support was guilty of “'[s]colding,' the contemporary term for nagging . . . a serious fault in a wife, probably as deserving of a beating as any other form of insubordination.”\textsuperscript{458} Women’s attempts to improve their standard of living inspired “frequent, bitter references to female extravagance as the cause of everything from domestic discomfort to financial ruin and the corruption of the moral virtue of the new Republic.”\textsuperscript{459} Rebecca McElwee, for example, sued for divorce in Pennsylvania because her husband John “had flown into a ‘great passion’ and pushed and threatened” her when she had asked for a new carpet and a shawl.\textsuperscript{460} Even if a woman could obtain a divorce, she was not necessarily assured support,\textsuperscript{461} and as noted above, divorce was for the most part unavailable.\textsuperscript{462} Women whose husbands would not support

\textsuperscript{455} See Stark, supra note 119, at 19.

\textsuperscript{456} See Kerber, supra note 6, at 167.

Women were undeniably important to the family economy, and on rare occasions when they refused their services, their husbands were shocked and distressed. David Frisbie, begging for a divorce from his wife in 1783, asserted that he had “never . . . received from her any kind of aid or assistance in Supporting the Family of Children which he had by her.” Ezra Belding, petitioning for a divorce in 1788, complained that his wife had “wholly neglected all care of domestic affairs, and by every method in her Power endeavoured to waste & embezzle his Estate.”

\textsuperscript{457} See, e.g., Salmon, supra note 6, at xv (noting that a recent study of the property rights of eighteenth century women “revealed above all else a picture of their enforced dependence, both before and after the Revolution”).

\textsuperscript{458} Wolf, supra note 6, at 78.

\textsuperscript{459} Id. at 79.

\textsuperscript{460} Id. at 80.

\textsuperscript{461} See Kerber, supra note 6, at 168. “A husband’s failure to support his wife economically . . . was introduced into petitions filed during and after the war.” Id.

\textsuperscript{462} See Salmon, supra note 6, at xvi. Divorce became more available after the Revolution, especially for deserted or abused wives. See Id. For a comparison of the differences in divorce between Massachusetts and Maryland after the Revolution, see Chused, supra note 6, at 18-38.
them were often forced to turn to charity. Mary Wright, for example, applied for assistance from the Philadelphia Almshouse in 1800 because her husband had gone to sea and sent her not “one farthing of his Monthly pay.”

Slaves rarely enjoyed an adequate standard of living. On a South Carolina plantation, for example, Grimké describes the swarms of mosquitoes that required not only white family members, but their horses, to be provided with nets, a necessity denied their slaves. Slaves were allowed “only two meals a day . . . the first at twelve o’clock . . . They are often kept from their meals by way of punishment . . . As the general rule, no lights of any kind, no firewood—no towels, basins, or soap, no tables, chairs or other furniture, are provided.” On a Louisiana plantation each slave received a weekly allotment of “three and a half pounds of bacon, and corn enough to make a peck of meal. That is all.” Even those “slave[s] who worked alongside a poor master and his family . . . shar[ing] the cooked hominy, vegetables, and meat that made up the usual one-pot meal [were frequently] allotted the less-nourishing ‘Hoppin’ John,’ composed only of grits and peas.”

The extent to which Article 11 imposes an affirmative obligation on the State to assure its people an adequate standard of living is not altogether clear. It is clear, however, that laws which effectively deny one segment of the population access to Article 11 rights are prohibited under the Covenant. Thus, women like Rebecca McElwee or Mary Wright could have challenged laws which gave their husbands sole

463. WOLF, supra note 6, at 100 (quoting The Philadelphia Almshouse records for October 7, 1800).
464. See, e.g., HIGGINbothAM, supra note 53, at 263 (noting that in Georgia, the modest protections afforded slaves in the earlier part of the century were dropped in the 1765 laws, which no longer required that a slave “be provided with ‘sufficient’ food and clothing”).
465. See BLACK WOMEN IN WHITE AMERICA, supra note 202, at 19.
466. Id. at 19-20 (second alteration in original) (quoting AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES (1839)).
467. Id. at 16 (alteration in original) (quoting NARRATIVE OF SOLOMON NORTHUP, TWELVE YEARS A SLAVE . . . 165-69 (1853)). But see GENOVESE, supra note 252, at 331 (explaining that house servants generally “had more and better food and clothing, more comfortable quarters, and more personal consideration from the whites”). Professor Jones suggests that, “the advantages of domestic service over field work for women have been exaggerated in accounts written by whites. Fetching wood and water, preparing three full meals a day over a smoky fireplace, or pressing damp clothes with a hot iron rivaled cotton picking as back-breaking labor.” JONES, supra note 327, at 27.
468. WOLF, supra note 6, at 166.
469. See Alston, supra note 185, at 48.
470. See supra text accompanying note 460.
471. See supra text accompanying note 463.
access to State resources.\footnote{472} In conjunction with Article 5, which prohibits derogation from any right,\footnote{473} even by a non-State third party,\footnote{474} Article 11 could also have been relied upon to challenge laws under which white men controlled their wives’ earnings and property.\footnote{475} Finally, insofar as the institution of chattel slavery enabled third parties (slaveowners) to deny slaves their Article 11 rights, it, too, would have been subject to challenge under Article 11 in conjunction with Article 5. Women’s demands for an adequate standard of living in the eighteenth century, albeit discouraged and usually futile,\footnote{476} suggest that many would have been eager to avail themselves of the protections of Article 11.

8. Article 12—The Right to Health

As Virginia Leary has pointed out, “‘right to health’ is . . . shorthand, referring to the more detailed language contained in international treaties and to fundamental human rights principles.”\footnote{477}

This complex and wide-ranging right may be broken down into two major components: one, medical services;\footnote{478} and two, the prevention of health problems through adequate nutrition, safe drinking water, public education, and similar measures.\footnote{479} In the eighteenth century, however, this right would have been unintelligible because of the embryonic state of medical science.\footnote{480}

In fact, medical services were often deadly. Doctors were dangerous:

\footnotesize{472. This assumes, of course, that they would have access to the courts under Articles 2 and 3. See discussion supra Part V.B.2.}
\footnotesize{473. See International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 6.}
\footnotesize{474. See supra notes 293-98 and accompanying text.}
\footnotesize{475. See supra notes 245-46 and accompanying text.}
\footnotesize{476. See, e.g., supra notes 423-30 and accompanying text (discussing black women seeking protection after giving birth); supra notes 458-63 and accompanying text (discussing white women seeking support).}
\footnotesize{477. Virginia A. Leary, The Right to Health in International Human Rights Law, 1 HEALTH & HUM. RTS. 25, 28 (1994); see also HUNT, supra note 40, at 62 (describing the overlap between this right and the first generation “right to life” found in Article 6 of the International Covenant on Civil and Political Rights (“ICCPR”), as set out in general comment on Article 6 of the United Nations Human Rights Committee, which opined that this right requires that States “adopt positive measures [including] all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”).}
\footnotesize{478. See HUNT, supra note 40, at 116.}
\footnotesize{479. See Leary, supra note 477, at 47-49.}
\footnotesize{480. See generally Greenberg & Litman, supra note 129, at 605 (arguing that “scientific beliefs and other beliefs more susceptible of public demonstration affect the application of political and ethical terms”).}
The more highly educated the doctor, the faster and more painfully was the patient likely to die... whatever the patient's complaint, the aim of the physician was to get out the "vile humours" that were causing illness... bleeding, with a blade and bowl or with live leeches, was no doubt often the immediate cause of a patient's death, since it was common to take forty ounces of blood or even more.

Nor would preventive measures have furthered the right to health, given the eighteenth century understanding of such measures. "[T]he rate of child mortality was appallingly high in the eighteenth century, and its marked decline in the early nineteenth century suggests that certain features of colonial child-rearing practices indirectly caused many of the deaths."

In *Some Thoughts Concerning Education,* for example, John Locke urged mothers to bathe infants and young children in icy water and to provide them with thin-soled shoes. Locke also advised mothers to refrain from feeding their children most varieties of fruit, and until they were older, meat. He suggested warm beer as the most appropriate drink for young children. The more diligently the public was educated about such measures, accordingly, the worse it would have been. The text of Article 12, in short, becomes incoherent if it is liberated entirely from its twentieth century moorings.

While this apparent paradox itself offers rich material for deconstruction, that is not the purpose here. Rather, this Article focuses on

481. Wolf, supra note 6, at 20.
482. De Pauw & Hunt, supra note 6, at 27. Unlike the Children's Convention or the Protocol of San Salvador, Article 12 does not refer to primary health care and health education. See Hunt, supra note 40, at 118-19.
484. See id. at 86.
485. See id. at 93-97.
486. See De Pauw & Hunt, supra note 6, at 28; see also Kerber, supra note 236, at 17-19, 25 (providing a sharp analysis of the ways in which Lockean child-rearing linked women to the political community).
487. We might investigate, for example, the relationship between economic, social, and cultural rights and the development of science. Does the realization of the former depend on the latter? Since the conventional wisdom of a particular time and place may simply be wrong, extending its influence can be disastrous. This is not unique to the eighteenth century. In the twentieth century, for example, Third World women were urged by medical professionals to avoid breast-feeding and use formula instead. Mixed with impure water, this resulted in skyrocketing infant mortality before women were instructed to resume breast-feeding. In a recent twist, the United Nations has recommended that women with Acquired Immune Deficiency Syndrome ("AIDS") refrain from breast-feeding. See Lawrence K. Altman, *AIDS Brings a Shift on Breast-Feeding, U.N. Discouraging Practice for Women Infected with H.I.V.,* N.Y. Times, July 26, 1998, at 1. See generally Barbara Ehrenreich & Deirdre English, *For Her Own Good: 150 Years of the*
the eighteenth century American experience as an iteration of the post-colonial, pre-industrial experience.\textsuperscript{488} What is the impact on women in such cultures of Article 12, understood not merely as the actual text of the Article,\textsuperscript{489} but rather, as Leary suggests, including the more detailed “language employed in international treaties”\textsuperscript{490} and at least some of the scientific knowledge that underlies it?\textsuperscript{491}

For example, the right to health could have been promoted in the eighteenth century by supporting women’s control over their own reproduction.\textsuperscript{492} There are at least three good reasons for focusing on this aspect of Article 12. First, reproductive health was in fact a major health issue for eighteenth century women.\textsuperscript{493} Second, reproductive health could have been substantially improved through low technology methods, many of which were well known at the time. Third, the example of reproductive health vividly illustrates the underlying thesis of this Article: that economic rights are inextricably tied to civil and political rights, and that both kinds of rights are crucial, especially for women.\textsuperscript{494}

\begin{footnotesize}
\begin{enumerate}
\item EXPERTS’ ADVICE TO WOMEN (1978) (discussing the medical profession’s inaccurate view on women’s health from a historic perspective through the present day).
\item Cf. ROBERT J.C. YOUNG, COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE AND RACE 29-54 (1995) (arguing that contemporary cultural theory unconsciously replicates nineteenth century patterns of thought on culture and race).
\item Leary, \textit{supra} note 477, at 28.
\item By “some,” I mean to exclude the antibiotics and vaccines that would have radically transformed eighteenth century life:
\begin{quote}
For eighteenth-century Americans, the primary threat to health and life was infectious disease. . . . Yellow fever and pernicious malaria, for instance, were new to the European colonists, and they had no immunity. . . . [B]lacks seemed particularly susceptible to pulmonary diseases—influenza, tuberculosis, and pleurisy . . . .
\end{quote}
\begin{quote}
. . . [S]mallpox was probably the most dreaded disease . . . in the white population . . . [and] one victim in every seven or eight died. Among the blacks, the proportion was slightly lower, since the disease had been endemic in Africa even longer than in Europe.
\end{quote}
\item DE PAUW & HUNT, \textit{supra} note 6, at 35. In the early South, for example, “[f]ew couples reached old age together, and in many families the death of one spouse occurred within a decade of the marriage.” SALMON, \textit{supra} note 6, at 10-11. This created special problems for widows. See discussion \textit{supra} Part V.B.5 (discussing Social Security).
\item See DE PAUW & HUNT, \textit{supra} note 6, at 24.
\item See, e.g., WOMEN AND PROPERTY, \textit{supra} note 46, at 5 (providing an argument that “production and reproduction must be treated” as a “single process” [and how] property as a conceptual focus helps us to do so”) (citation omitted); Davis, \textit{supra} note 5, at 225 (describing “the dis-
\end{enumerate}
\end{footnotesize}
Indeed, to show a more egalitarian approach to marriage after the Revolutionary War, Norton relies on evidence of significantly reduced marital fertility, assuming that this demonstrated a real increase in women’s power within marriage.  

Eighteenth century women were well aware of the “debilitation women suffered as a result of repeated pregnancies.” Complications from pregnancy and childbirth ruined the health of many mothers and were a frequent cause of death. Children were an important source of labor, however, and women were expected to produce them. As historians Gordon and Buhle observe, women were valued for their reproductive as well as productive capacities.

Black women under slavery were often forced to reproduce. Sometimes they were paired with another slave. In addition, as Lerner explains: “The sexual exploitation of black women by white men was so widespread as to be general... [It] was always possible and could in no way be fought or avoided—it was yet another way in which the total helplessness of the slave against arbitrary authority was institutionalized.” The value of children as labor was brutally explicit in this context, unrelieved by any rhetoric of family sentiment. Indeed, it was less trouble if the mother was not attached to her children, since they were legally the property of the slaveholder.

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495. See Norton, supra note 233, at 234.
497. See De Pauw & Hunt, supra note 6, at 24; see also Genovese, supra note 252, at 497 (noting the impact of maternal mortality statistics among slaves between 1845-1860); cf. Sheryl Gay Stolberg, Black Mothers’ Mortality Rate Under Scrutiny, N.Y. Times, Aug. 8, 1999, at 1 (citing a recent study indicating that black women are four times as likely to die from childbirth and related causes as white women, a disparity which remains constant even for middle class black women with health insurance).
498. See Gordon & Buhle, supra note 216, at 279.
499. See id. at 278-81.
500. See Black Women in White America, supra note 202, at 47-48 (describing the “Breeder Woman”). “[S]he was er breeder woman en’ brought in chillum ev’y twelve mont’s jes lak a cow bringin’ in a calf... He orders she can’t be put to no strain ’casen uv dat.” Id. (alteration in original) (quoting Martha Jackson); see also Davis, supra note 217, at 178 (describing a “breeder” male slave).
501. See Davis, supra note 217, at 179 (discussing how two slaves managed to “subvert the breeding system” by secretly agreeing to sleep separately).
503. See Giddings, supra note 6, at 37 passim.
Eighteenth century women knew how to avoid pregnancy. Pro-
longed nursing of a child was a known way of preventing future preg-
nancies. Abortion was known and not illegal at the time. Even under
slavery, notwithstanding the pressures and inducements of their owners,
“[s]ome slave women, perhaps a significant number, did not bear off-
spring for the system at all. They used contraceptives and abortives in
an attempt to resist the system, and to gain control over their bod-
ies.... When contraception failed, slave women took more extreme
measures.” Some women even killed their own infants, rather than
have them grow up to be slaves.

Under the Covenant, as noted elsewhere, slavery would have been
prohibited and children would not have been property. Moreover,
the State would arguably have had an affirmative obligation to educate
women about the benefits of spacing pregnancies to their own health, as

504. See De Pauw & Hunt, supra note 6, at 21. Indeed, this was the practice of most Indians
and many free Africans at the time. See id. at 31.


Abortion was not a pressing social issue in colonial America, but as a social prac-
tice, it was far from unknown. Herbal abortifacients were widely known, and cook-
books and women’s diaries of the era contained recipes for such medicines. Recent
studies of the work of midwives in the 1700s report cases in which the midwives ap-
peared to have provided women abortifacient compounds. Such treatments do not ap-
pear to have been regarded as extraordinary or illicit by those administering them.
Id. at 365; see also Wolf, supra note 6, at 83 (describing “abstinence, prolonged breast-feeding,
and folk medicines that produced abortions,” and noting that “[a]lthough no special strictures—
either religious or moral—were attached to abortion, particularly before ‘quickening’ of the fetus,
most women preferred to think of these ‘decotions’ as ways to safeguard health by ‘regulating
menstruation’”) See generally De Pauw & Hunt, supra note 6, at 31 (noting that slaves nursed
children until the age of three or four).

506. Giddings, supra note 6, at 46.

507. See Davis, supra note 217, at 191.

508. See discussion supra Part V.B.1 (discussing the right to self-determination); discussion supra Part V.B.4.a (discussing the right to work); discussion supra Part V.B.6.a (discussing vio-

lence toward black women); discussion supra Part V.B.7 (discussing the right to an adequate stan-
dard of living). It could be argued, of course, that much of our own law, including much of our
federal and state constitutional law, similarly prohibits slavery—at least in hindsight. The crucial
distinction is that the Covenant is firmly grounded, historically and textually, in anti-slavery, while
the Constitution is grounded in ambivalence. See generally Mark Tushnet, The American Law
the development of southern slave law).

509. See discussion supra Part V.B.6 (discussing the special protection of children and their
subordination to their fathers). As Thomas Jefferson noted: “‘I consider a woman who brings a
child every two years as more profitable than the best man of the farm’... ‘What she produces is
an addition to the capital, while his labors disappear in mere consumption.’” Norton, supra note
233, at 73.
well as that of their children. Since women were primarily responsible for medical services in general, and services in connection with childbirth in particular, they probably would have been the educators.

For eighteenth century women, control over reproduction was available, at best, only to the extent individuals were able to negotiate it within their own relationships, through subterfuge, or through the desperate measures described above. Thus, this right remained culturally and socially privatized, beyond the reach of most women. Yet their own contemporaneous statements and acts show that many would have availed themselves of this right. Surely most slave women, like those who petitioned Francis Kemble, as well as those who repeatedly aborted and even killed their own infants, would have welcomed relief from their exploitation as breeders. These women showed by their acts, as well as their words, that they fully understood the importance of control over their own reproduction.

9. Articles 13 and 14—The Right to Education

Article 13 requires States to "recognize the right of everyone to education . . . directed to the full development of the human personality and the sense of its dignity, and . . . [to] enable all persons to participate

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510. See Chapman, supra note 492, at 1171-73 (providing an excellent outline of this argument).

511. See, e.g., Wolf, supra note 6, at 201 ("On southern plantations and northern farms alike, wives were the primary providers of medical services."); Woody, supra note 260, at 263 ("[I]n Colonial days, in North and South, women advertised themselves freely as proficient in . . . [the medical] profession."). It was well known that "[c]olonial women were more willing than male physicians to borrow treatments from the Indians and black slaves." De Pauw & Hunt, supra note 6, at 36. "Usually . . . their treatments would do no further harm and might make the patient more comfortable." Id.

512. See supra text accompanying notes 503-07.

513. See supra text accompanying notes 421-24 (describing slaves who had miscarried and lost infants because of their owners' refusal to allow them any respite from grueling fieldwork).

514. See, e.g., Black Women in White America, supra note 202, at 47-48 (discussing the exploitation of the "Breeder Woman").

515. Cf. Decker et al., supra note 505, at 353 ("The ability to plan whether to have children, how many, and when, is critical to equality in the workplace, educational plans, political participation—indeed, to control over the way in which our lives are spent in general.").
effectively in a free society." More specifically, Article 13.2 provides: "[P]rimary education shall be compulsory and available free to all [and] secondary education ... shall be made generally available and accessible to all [and] higher education shall be made equally accessible to all, on the basis of capacity[.]."

Article 14 refers more particularly to those States, like America in the early eighteenth century, which have "not been able to secure ... compulsory primary education, free of charge[.]"). This had been the situation in the colonies. Before the Revolution, education was haphazard for everyone, particularly girls. The major opportunity for education for girls in the north was through "adventure schools," which stressed "ornamental" accomplishments, such as music and fancy sewing. Even these were generally only available to wealthy and middle-class urbanites. Southern girls had few opportunities unless they were from wealthy families and their brothers had tutors. For slave girls, any education was rare, although "[a]s early as the 1750s, Sam-

516. International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 8. Article 13 only requires the State to "recognize" or "respect" rights, and Article 14 does not refer to rights at all. See CRAVEN, supra note 117, at 26.


518. Id. at 9. See generally FREDERICK EBY, THE DEVELOPMENT OF MODERN EDUCATION: IN THEORY, ORGANIZATION, AND PRACTICE 238, 266-68 (2d ed. 1952) (describing the "dame schools," the primary schools in New England which prepared pupils to enter grammar schools where they would study reading and writing); HISTORICAL DICTIONARY OF WOMEN'S EDUCATION IN THE UNITED STATES (Linda Eisenmann ed. 1998) (providing a collection of essays on the history of women's organizations and reform efforts).

519. See NORTON, supra note 233, at 256.

520. See id. But see BERNAARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY: NEEDS AND OPPORTUNITIES FOR STUDY 21-45 (1960) (noting that formal education increased significantly in pre-Revolutionary America).

521. NORTON, supra note 233, at 259. These schools have been described as "often marginal commercial enterprises [which] varied greatly in their merits." KERBER, supra note 6, at 202.

522. See, e.g., DE PAUW & HUNT, supra note 6, at 101 (noting that girls were taught basics such as music, needlework, dancing, declamation, painting, and French).

523. See NORTON, supra note 233, at 260; WOLF, supra note 6, at 245.

524. See NORTON, supra note 233, at 260; see also WOODY, supra note 260, at 238-300 (providing a detailed account of the education of the Southern girls before 1800); id. at 277-78 (providing a tutor's own account of his duties in teaching two sons, a nephew, and five daughters in 1773 Virginia).

525. See, e.g., GENOVESE, supra note 252, at 561 (noting "[l]he laws against teaching slaves to read and write").
uel Davies found the slaves eager pupils when he sought to teach them to read as part of his campaign to win converts.526

After the Revolution, public education was open to white girls as well as boys.527 It was well recognized at the time that a participatory democracy required an educated populace.528 Democracy depended on the consent of the governed, and the governed must be educated so that its consent would be intelligent and informed.529 In addition, education would produce a more highly skilled workforce, better able to contribute to the growth of the new Republic. As historian Wood sums up: “[P]rojected public educational systems would open up the advantages of learning and advancement to all.”530

As discussed above, however, women were not among those whose consent was required in the early American democracy.531 Nor were they to participate in the workforce,532 or to have “[e]qual opportunity . . . to be promoted.”533 The prospect of education for girls, accordingly, brought all the troubling contradictions of the Lockean private sphere to the fore.534 As feminists such as Mary Wollstonecraft had pointed out,

526. Id. at 565. See also BLASSINGAME, supra note 224, at 72 (noting that “[t]he Anglican church . . . establish[ed] schools in Charleston, South Carolina and Williamsburg, Virginia to teach young slaves to read” after the Great Awakening of the 1740s).
527. See DE PAUW & HUNT, supra note 6, at 101. There were also a few private academies where girls could learn grammar and rhetoric in the 1780s and 1790s and a “proliferation of schools for young ladies . . . which offered special instruction in feminine accomplishments. . . . [such as] music, dance, painting, needlework, or a language.” Id.
528. See WOLF, supra note 6, at 246. As Thomas Jefferson observed:

[It is] expedient for promoting the public happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education . . . able to guard the rights and liberties of their fellow citizens, and without regard to wealth, birth or other accidental condition or circumstances [should be] educated at common expense of all.

Id. (alteration in original).
529. See FREDERICK EBY & CHARLES FLINN ARROWOOD, THE DEVELOPMENT OF MODERN EDUCATION: IN THEORY, ORGANIZATION, AND PRACTICE 542 (1934) (describing the philosophy of education of the leaders of the American Revolution, including their shared belief “that education is the principal means by which governments can procure the welfare of the people”).
530. WOOD, supra note 134, at 72. But see NEDELSKY supra note 48, at 7 (stating that the Federalists “wanted the elite to rule. They treated the ability to govern as essentially fixed (rather than as a capacity that could be developed) and as class-based. Thus they were not concerned with expanding or enhancing the people’s competence and involvement in public affairs”)

531. See discussion supra Part V.B.1 (discussing the right to self-determination).
532. See discussion supra Part V.B.4 (discussing the right to work).
534. See supra text accompanying notes 268-79.

These disparities in literacy [between women and men]—from the basic ability to sign one’s name and to read simple prose to the sophisticated ability to read difficult or theoretical prose . . . have enormous implications for the history of the relations be-
education would enable women to “study medicine, politics and business,” and to have options besides marriage for supporting themselves.535 But opponents argued that education for girls should be discouraged for precisely this reason.536 Education would distract girls from their proper duties as future wives and mothers; it would masculinize them.537

While education in general was recognized as a good—conducive to democracy and useful to the Republic—education for white women and slaves in particular was considerably more problematic. “Education” meant something quite different for white boys and for the white girls who were to become their wives.538 For slaves, education was generally prohibited, except when it served a particular slave owner’s particular needs.539 Thus, education must be understood as a series of gendered and raced hierarchical oppositions.

The literacy gap between white men and white women closed sometime between 1780 and 1850.540 This reflected the popular consensus that women should be educated, but not in a way that would interfere with their responsibilities in the private sphere.541 Rather, it was accepted that educating girls was important to the nation because, as

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535. See Kerber, supra note 6, at 224. Wollstonecraft continues: “[B]ut whatever they did, they should not be denied civil and political rights[,]” Id.

536. See Gordon & Buhle, supra note 216, at 278. Mercy Otis Warren is said to have told a “young woman that learning was useless to a lady (as useless as virtue to a gentleman, she added).” Id. Judy Cornett, who has written extensively on eighteenth-century feminism, assures me that this remark was satiric; i.e., Warren expected her audience to know that virtue was indispensable to a gentleman. Letter from Judy Cornett, to Barbara Stark (July 27, 1999) (on file with author).

537. See Kerber, supra note 6, at 216; see also 1 THE HARPER AMERICAN LITERATURE 555-56 (Donald McQuade et al. eds., 2d ed. 1994) [hereinafter HARPER] (providing a March 14, 1818 letter from Thomas Jefferson to Nathaniel Burwell which described a “plan of female education” to include “French, dancing, drawing, music and household economy”).

538. See Cott, supra note 6, at 199 (noting that “[t]he employments of man and woman are so dissimilar”).

539. See, e.g., Newman & Sawyer, supra note 249, at 26-27 (describing the slave’s “catechism,” in which slave owners attempted, with decidedly mixed results, to impress upon slaves the inevitability of their servitude).

540. See Cott, supra note 6, at 15 (noting that women’s literacy doubled between 1780 and 1840); Kerber, supra note 6, at 193.

541. See, e.g., Cott, supra note 6, at 119 (discussing Emma Hart Willard’s proposal for a female seminary in 1819, which “would differ as much from a school for men as women’s character and duties differed from men’s”).
Dr. Benjamin Rush explained in a lecture in 1787, they would later pass on their knowledge to their sons. In addition, education would make girls more marriageable. Thus, white girls were educated, but not in the same way or for the same purposes that white boys were. The underlying justification for education—access to and participation in the public sphere—remained as a trace in the education of girls, resulting in recurring challenges to the limits imposed.

Since slave girls were not going to be mothers of future citizens, there was no analogous justification for their education. Education was therefore generally forbidden. Those slaves who nevertheless learned to read were often forced to do so surreptitiously, sometimes at considerable risk. In 1860, Susie King Taylor, for example, was sent with

542. See De Pauw & Hunt, supra note 6, at 97 (noting that women need to be educated because they will educate their children based on this knowledge); Benjamin Rush, Thoughts upon Female Education, Accommodated to the Present State of Society, Manners, and Government in the U.S.A. (1787), noted in Cott, supra note 6, at 105 n.8. Benjamin Rush has been called the “first major American theorist of women’s education.” Gordon & Buhle, supra note 278, at 89 (discussing “complementarity theory,” which held that “women’s mental abilities, while not inferior to men’s . . . fitted them distinctively and solely for the domestic sphere”).

543. See, e.g., Cott, supra note 6, at 110-11 (citing a passage from Sally Ripley’s Journal in which she describes a character in a school graduation play in 1800 who learns that “education might help her acquire a better husband,” to show that education of girls was linked to upward social mobility).

544. See id. at 106 (noting that the purpose of women’s education was to learn skills which would enable them to be good mothers and wives). Judith Sargent Murray insisted that “women were the intellectual equals of men and had the right to cultivate their minds; but she also argued . . . that some intellectual freedom and opportunity would allow women to find more satisfaction in their domestic occupations.” Id.

Education for men in America had to increase in scope—had to be open-ended—in order to be functional. . . . Utilitarian education for women in America narrowed their prospects because it was based on a limited conception of woman’s role. “Every man, by the Constitution, is born with an equal right to be elected to the highest office,” the Reverend John Ogden . . . reminded his readers . . . “[a]nd every woman, is born with an equal right to be the wife of the most eminent man.” Id. at 109 (quoting John Cosens Ogden, The Female Guide (1793)).

545. See, e.g., id. at 201-02 (explaining that “feminists at the end of the [eighteenth] century . . . brought into focus and then aimed their sharpest arrows at the belief that women were inferior to men (in the all-important Enlightenment capacity of reason, especially), and protested the neglect and restriction of women’s minds”). “Improvements in women’s education, although impeded by criticisms, . . . did come. Between 1790 and 1830 facilities for girls’ education expanded and improved, especially in the North . . . .” Kerber, supra note 6, at 199.

546. See Giddings, supra note 6, at 39; discussion supra Part V.B.8 (explaining that the children of slaves were slaves).

547. See Genovese, supra note 252, at 562 (describing how restrictions grew worse over time).

548. See Harper, supra note 537, at 515, 537. “Women and blacks made significant gains as writers and readers during the years between 1776 and 1836. For blacks, a class deliberately kept
other children to the house of a free widow, with "books wrapped in paper to prevent the police or white persons from seeing them." Josepbine White, trained as a "sewing girl[,] ... began to sit in the room with the white children and thus learned to read" when she was nine. Some children attended "midnight school[s,]" in which black women would teach from eleven or twelve at night until two o'clock in the morning.

Articles 13 and 14, mandating education, considered in conjunction with Articles 2 and 3, which explicitly prohibit gender discrimination in education, would have been invaluable tools for eighteenth century women. White women could have challenged the universal ban on women's admission to college, for example. Black women would have been the most profoundly affected. History has shown the crucial importance of education in dismantling the institution of chattel slavery. An education may well have enabled black women to make a place for themselves in the new Republic. Thus, Articles 13 and 14 would probably have been relied upon by those ready to dissolve, or at least blur, the rigid distinctions between the public and private spheres, whether the private sphere was understood as the home and family of New England or the plantations of the South.

10. Article 15—The Right to Take Part in Cultural Life

Article 15 assures three distinct but interrelated rights. Specifically, "the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; [and] (c) to benefit from the protection of the moral and material interests resulting from
any scientific, literary or artistic production of which he is the author." 557 This Part will consider three specific examples which suggest the scope of women’s exclusion from cultural life. First, black women under slavery could be denied the right to preserve their African cultural traditions. 558 Second, all women were precluded from enjoying the benefits of scientific progress and its applications by virtue of the limits on women’s education discussed in the preceding Part. 559 Third, women’s relegation to the private sphere effectively precluded their participation in the emerging literary and artistic life of the new Republic, with a few conspicuous exceptions. 560 Rather, women’s creativity was channeled into unpaid work for consumption in the private sphere of the home and family. 561

Each of these deprivations had profound and long-lasting consequences. More important perhaps, their cumulative impact was to exclude women from the emerging culture and consign them to gendered and raced subcultures.

a. The Suppression of African Culture

From the earliest efforts of slave traders to separate their captives from those who spoke the same language, 562 black women were denied the right to their African heritage. While this was not systematic, and practices varied widely among slave owners, 563 it was always possible and became increasingly common as the plantation system became increasingly institutionalized. 564 Slaves were “compelled to create a new language, a new religion, and a precarious new lifestyle.” 565 Every as-

557. International Covenant on Economic, Social and Cultural Rights, supra note 36, 993 U.N.T.S. at 9; see also HUNT, supra note 40, at 63 (citing the Human Rights Committee’s General Comment on Article 24 of the ICCPR for the proposition that: “In the cultural field, every possible measure should be taken to foster the development of their [children’s] personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant”).

558. See infra text accompanying notes 562-73.

559. See discussion supra Part V.B.9.

560. See infra text accompanying notes 580-88.

561. See discussion supra Part V.B.4.d.

562. See JOYNER, supra note 202, at xx (“The earliest African slaves in South Carolina did not constitute a speech community, as the term is used by sociolinguists. The slaves’ various African languages were often mutually unintelligible.”); WOLF, supra note 6, at 24-25.

563. See BLASSINGAME, supra note 224, at vii.


565. JOYNER, supra note 202, at xxi.
pect of African culture could be suppressed if the owner thought it prudent for the very reasons that such practices are protected under the Covenant; that is, because such practices are conducive to human dignity and flourishing, and therefore, inimical to slavery.

Notwithstanding the need to proceed in secrecy, slaves preserved a wealth of African traditions. The Protestant Church, foisted upon slaves by their white masters, was transformed into the Black Church. Traditional African forms, such as “call and response be-

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566. African culture, of course, was not homogenous and included a wide range of ethnic groups, whose “only common thread... was their slavery and their blackness.” WOLF, supra note 6, at 264. One ethnic group’s “culture was reformulated in the colonies, incorporating bits and pieces of Old World cultures.” Id. For an account of a group like this, see MARGARET WASHINGTON CREEL, “A PECULIAR PEOPLE”: SLAVE RELIGION AND COMMUNITY-CULTURE AMONG THE GULLAHS 29-63 (1988).

567. See generally Schachter, supra note 11, at 849-52 (discussing the meaning of human dignity). As the commentary to Article 15 explains:

Perhaps the most neglected of the rights dealt with in this Article is the right of everyone to take part in cultural life. ... Given the constantly growing awareness of the importance of cultural identity, especially for groups such as minorities, indigenous peoples, immigrants, and others whose cultural roots and traditions differ from those of the majority, this right is often of the greatest importance.

Alston, supra note 185, at 70.

568. See MASTERS & SLAVES, supra note 565, at 4 (noting that the steady stream of new slaves from Africa supported African customs until 1808, when African imports were banned).

569. “[S]laveowners before the mid-eighteenth century seldom attempted to Christianize their slaves.” MASTERS & SLAVES, supra note 565, at 3. However, the half-century following 1740 was the critical period during which some whites broke down their fears and inhibitions about sharing their religion with the slaves in their midst, and some blacks—only a few at first—came to find in Christianity a system of ideas and symbols that was genuinely attractive.

Id. at 5. But see GENOVESI, supra note 252, at 190 (“The strategy of using religion as a method of social control could never have served its purpose had it been only that. The success of the political strategy for attention to the slaves' religious life paradoxically required a considerable degree of genuine Christian concern by the masters...”).

570. See MASTERS & SLAVES, supra note 565, at 6-7; NEWMAN & SAWYER, supra note 249, at 31. Boles and others have described the similarities between West African religions and Christianity. The West African tripartite hierarchy of deities (nature gods, ancestral gods, and an omnipotent creator) was “roughly transferable to the Christian idea of the trinity.” Id.

Luther Jackson divided the history of black Christianity in Virginia into three periods: 1750-1790, 1790-1830, and 1830-1860. During the first period... colonial religion took a popular turn, exhibiting an awakened consciousness and mass enthusiasm. Blacks responded to the roughhewn frontier preaching and were, for the most part, wel-
between leaders and congregation, for example, and the ring shout, a shuffling group circle movement[.], were adapted to the new religion.

b. Denial of the Benefits of Scientific Progress and Its Application

As discussed above, science was in an embryonic stage and its applications were not always beneficial. At the same time, science generated a great deal of intellectual excitement. Human reason, linked with empirical method, was going to transform the world. Pragmatic Americans, like Benjamin Franklin, immersed themselves in lives of rich discovery, focusing on practical applications.

But the frontier of science was essentially closed to women in America. Their limited educations and their domestic duties, combined with the ubiquitous sense of a woman’s place—and the interests appropriate to that place—effectively foreclosed participation in the sciences. As Norton observes: “White American women recognized not only that their domestic obligations were never-ending, but also that their necessary concentration on those obligations deprived them of the opportunity to contemplate ‘any thing new and improving.’”

...comted as participants. No few blacks appeared as preachers and acquired followings among both blacks and whites. The Baptists and Methodists who carried much of the new religious drive often expressed hostility toward slavery and a hope that it would vanish.

GENOVESE, supra note 252, at 185.


572. NEWMAN & SAWYER, supra note 249, at 31; see also BLASSINGAME, supra note 224, at 19 (describing the centrality of music to African culture and noting the rhythmic complexity of traditional African music and the “elaborate, exhausting” African dances that mixed secular and sacred elements).

573. See generally GENOVESE, supra note 252, at 184 (“[T]he mass of the slaves apparently became Christians during the late eighteenth and early nineteenth centuries.”).

574. See discussion supra Part V.B.8 (discussing Article 12).

575. See BENJAMIN FRANKLIN’S AUTOBIOGRAPHY 341 (J.A. Leo Lemay & P.M. Zall eds., 1981) [hereinafter FRANKLIN’S AUTOBIOGRAPHY]. His sister, Ann Franklin, became the first woman newspaper editor in 1762. See Women’s Writing, supra note 15, at 950.


577. NORTON, supra note 233, at 36 (citing an eighteenth century woman’s diary). See generally RICHARD BEALE DAVIS, INTELLECTUAL LIFE IN THE COLONIAL SOUTH 1585-1763 (1978) (de-
Science, moreover, was looked to for paradigms for cultural and political debate.\textsuperscript{578} Because women remained ignorant of science, the Newtonian metaphors which shaped political debate of the time were unavailable to them.\textsuperscript{579}

c. Literacy or Artistic Production

Eighteenth century women were discouraged from any enterprise that might have resulted in "literary or artistic production" subject to the protections of Article 15(c).\textsuperscript{580} There were a few women of letters,\textsuperscript{581} but most black women were illiterate, and most white women received a rudimentary education.\textsuperscript{582} Black poet Phillis Wheatley, whose work was acclaimed on both sides of the Atlantic and who met George Washington,\textsuperscript{583} and white essayist Mercy Otis Warren,\textsuperscript{584} were rare exceptions.\textsuperscript{585} While a few privileged women drew and painted,\textsuperscript{586} women were not

\textsuperscript{578.} See Note, supra note 270, at 146.
\textsuperscript{579.} See discussion supra Part V.B.9.
\textsuperscript{580.} See, e.g., WOMEN'S WRITING, supra note 15, at 952 (noting that not until Ms. Samuel Slater in 1793, was a woman granted a patent for cotton sewing thread). Congress was authorized "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.
\textsuperscript{581.} See, e.g., DE PAUW & HUNT, supra note 6, at 128. Of the many women who wrote poetry, the most famous was Sarah Wentworth Apthorp Morton, whose first long poem, \textit{Ouabi: Or The Virtues of Nature}, was published in 1790. See id.
\textsuperscript{582.} See supra note 526 and accompanying text.
\textsuperscript{583.} See CROSSING THE DANGER WATER, supra note 153, at 39-47. See generally PORTRAITS OF AMERICAN WOMEN, supra note 203, at 65-135. While Phillis Wheatley published the first book of poems by an African American, Poems on Various Subjects, Religious and Moral, the first African American poet was Lucy Terry, who wrote \textit{Bars Fight}, August 28, 1746. See WOMEN'S WRITING, supra note 15, at 951.
\textsuperscript{584.} See WOMEN'S WRITING, supra note 15, at 907-08. Mercy Otis Warren wrote poems and plays in the early 1770s as well as the three-volume \textit{History of the Rise, Progress, and Termination of the American Revolution} in 1805. See id. Hannah Adams was probably the first professional woman writer in the United States. Her works include the \textit{Alphabetical Compendium of the Various Sects} written in 1784. See id., at 951.
\textsuperscript{586.} See DE PAUW & HUNT, supra note 6, at 127. Patience Lovell Wright is the only American woman known to have supported herself entirely through painting or sculpture between 1750 and 1815. See id. She achieved popular and critical acclaim for her realistic waxworks. See generally \textit{Ethel Stanwood Bolton, American Wax Portraits 6-9} (1929) (briefly describing the life and accomplishments of Patience Lovell Wright).
admitted into art schools. Thus, although the household objects of the time show that women had artistic talent and sensibilities, few had the time or materials, and only a handful were able to obtain any instruction or encouragement.

d. Impact of the Denial of the Right to Take Part in Cultural Life

Although each of these deprivations had a profound effect on at least some women, their cumulative impact is more important here. As this Article has shown, rights can only be understood in specific cultural contexts. Because women were precluded in important ways from contributing to—or challenging—the emerging culture, it remained a white male culture, in which white males were not only the primary rights-holders, but through their cultural work explained what rights meant. Thus, not only did white male Framers define rights, but rights were shaped and given meaning by other white males, their contempo-

587. See De Pauw & Hunt, supra note 6, at 127 (noting that not until 1800 was instruction available for girls in art academies). Classes in painting and drawing were available at female seminaries. See id. A handful of women were able to study with professional artists after the Revolution. Hetty Benbridge, for example, learned how to paint miniatures from Charles Willson Peale. See id. at 128; see also Robert G. Stewart, Henry Benbridge (1743-1812): American Portrait Painter 19, 20 (1971) (discussing how Hetty Benbridge, Henry Benbridge's wife, was also a portrait painter influenced by Charles Willson Peale).


589. The notion of a unitary, emerging culture is a simplification, of course, ripe for deconstruction. In what ways, for example, is it assumed that such a culture is most importantly emerging in the North? See, e.g., Davis, supra note 577, at 1652-53 (noting New England character and its Puritan moral code).


One of the founding works of American literature, for instance, is "The Legend of Sleepy Hollow." The figure of Rip Van Winkle, writes Leslie Fiedler, "presides over the birth of the American imagination; and it is fitting that our first successful homegrown legend should memorialize, however playfully, the flight of the dreamer from the shrew." It is fitting because, ever since then, novels seen as archetypically American—investigating or articulating a distinctively American experience—have rung the changes on this basic schema, in which the protagonist struggles against constricting, civilizing, oppressive forces embodied by woman.

Id. (citation omitted) (quoting Leslie A. Felder, Love and Death in the American Novel xx (1960)).
raries, as well as later generations.\textsuperscript{591} Thus, culture must also be understood in terms of gendered and raced hierarchical oppositions.

The privileged culture depended on subordinated subcultures—especially the subordinated subcultures of white women relegated to the private sphere, and black women relegated to the similarly private, but significantly less gendered, subculture of the slave community.\textsuperscript{592} Southern aristocrats depended on slave labor to assure themselves a privileged standard of living, with more time for cultural pursuits than most Americans would enjoy for 150 years.\textsuperscript{593} The northern elites depended upon white women to teach their sons to read and to revere the classics. Thus, American culture remained white, male, and European\textsuperscript{594} until influences from the female and black subcultures were able to percolate.\textsuperscript{595}

VI. CONCLUSION

Deconstruction shows how each legal concept is in fact a "privileging of one concept over another"\textsuperscript{596} and how the privileged conception is always dependent on the hidden, subordinated conception. In our own constitutional jurisprudence, the hidden conception is the inalienable right to property, upon which civil and political rights depend. As Madison understood, the right to property, in turn, depends on civil and political rights.\textsuperscript{597} Madison never defined the right to property because he never had to define it. He was able to take it for granted, along with the lesser economic rights included in the Framers' conception of property.

\footnotesize{\textsuperscript{591} See, e.g., FRANKLIN'S AUTOBIOGRAPHY, supra note 575, at 341; Foner, supra note 179, at 9. For a sharp critique of Franklin, see D. H. LAWRENCE, STUDIES IN CLASSIC AMERICAN LITERATURE 9-21 (Phoenix ed. 1964) (1924). See generally JOHN DOS PASSOS, THE LIVING THOUGHTS OF TOM PAINE 104-39 (1940) (espousing Thomas Paine's belief of the rights of man); HARPER, supra note 537, at 515 ("Most literary historians have tended to dismiss the period between 1776 and 1836, as one put it, 'as a sort of blank space between the Revolution and the mature work of Irving, Bryant and Cooper.'").}

\footnotesize{\textsuperscript{592} See GENOVESE, supra note 252, at 501.}

\footnotesize{\textsuperscript{593} See Richard Rorty, Human Rights, Rationality, and Sentimentality, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111, 121 (Stephen Shute & Susan Hurley eds., 1993).}

\footnotesize{\textsuperscript{594} See HARPER, supra note 537, at 515, 527 ("In the first several decades following the Revolution, newspapers continued as the staple of the American printing trade. . . . American newspapers tried to reproduce a sophisticated, English literary tone. . . .").}

\footnotesize{\textsuperscript{595} But see GENOVESE, supra note 252, at xvi ("[M]any slaveholders even took some pride and pleasure in their slaves' accomplishment; and . . . they imbibed much of their slaves' culture and sensibility while imparting to their slaves much of their own."). I do not mean to suggest that there was not an ongoing process of cross-fertilization.}

\footnotesize{\textsuperscript{596} See discussion supra Part II.A.}

\footnotesize{\textsuperscript{597} See supra note 58 and accompanying text.}
This Article has shown that in fact the "right to property" may be understood as an iteration of the economic rights set out in international human rights law. It has used the Economic Covenant to invert Madison's hierarchy, which privileged civil and political rights, to show how these rights were in fact dependent on economic rights and to examine the role of eighteenth century women in assuring these rights. Finally, this Article has shown how the thorough denial of economic rights for the women of Madison's time made civil and political rights unimaginable for most of them. The legal denial of those rights was a redundant affirmation of a reality most women could not even question.

As shown in this Article, however, some women did question that reality. Whether they challenged the denial of their economic rights directly, like Jenny Slew\textsuperscript{598} and Mary Byrd,\textsuperscript{599} or indirectly, like the anonymous slave women who preserved the African ring shout,\textsuperscript{600} they contributed to an increasingly broad conception of equality\textsuperscript{601} and a still-deepening conception of rights.

\textsuperscript{598} See supra text accompanying note 281.
\textsuperscript{599} See NORTON, supra note 233, at 226.
\textsuperscript{600} See discussion supra Part V.B.8 (discussing Article 12).
\textsuperscript{601} See generally sources cited supra note 10 and accompanying text (analyzing arguments that equal protection should apply more broadly to protect the poor).