

# Reframing Roe:

## *Property over Privacy*\*

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### ABSTRACT

*Roe v. Wade* has received much criticism from both sides of the political spectrum. These critiques diverge divisively but for one commonality. Specifically, commentators from both the pro- and anti-choice camps have expressed concern about the absence of an express constitutional right to privacy, upon which the Supreme Court in *Roe* based its finding of a “fundamental” right to abortion. This lack of express constitutional provision renders the *Roe* decision, and its resulting reproductive rights, vulnerable. Further, pro-choice advocates find fault with the privacy basis because it yields no positive rights to funding or governmental support for accessing abortion services. When based upon a right to privacy, the right to abortion is relegated to the land of negative rights. The negative right to privacy might provide some women with reproductive choice free from government intrusion, but for other women—those with limited resources—the so-called “choice” becomes nonexistent.

This article investigates whether these two shortcomings—the absence of positive rights and the lack of express constitutional language—inherent in the right to privacy might be redressed by reframing *Roe* in the language of property, and specifically a woman’s property right in her uterus. Assuming *arguendo* the anti-choice tenet that the fetus is a person from the moment of conception, this article sets forth an argument that the fetus is an unwanted trespasser in the woman’s uterus whom the woman has a right to eject. Further, this article posits that this property-based notion of abortion might justify government funding for abortions based on a constitutional obligation to maintain a system designed to protect women’s uterine property, similar to states’ obligations to maintain a

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police force in order to protect other forms of private property, including the removal of trespassers. In short, this article provides a new basis for abortion rights that takes advantage of the long-standing traditional notions of property law and the right to exclude, as well as the public support that attaches to that right, manifested through anti-trespass systems. After establishing the property-based argument, the article explores what might be gained, and what might be lost, by adopting such a premise for abortion rights and access. Among these considerations is whether the anti-trespass scheme might push the abortion discourse beyond the typical polarizing rhetoric surrounding both the pro-choice and anti-choice camps, thus generating space for forward movement and meaningful work.

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## INTRODUCTION

[A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . [P]roperty law has long protected an owner's expectation that [s]he will be relatively undisturbed at least in the possession of [her] property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury.<sup>1</sup>

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[P]regnancy is a dangerous, psychically consuming, existentially intrusive, and physically invasive assault upon the body which in turn leads to a dangerous, consuming, intrusive, invasive assault on the mother's self-identity—that best captures women's own sense of the injury and danger of pregnancy. . . .<sup>2</sup>

This article addresses a potential intersection of pregnancy and property in the context of reproductive rights. For a woman who is pregnant against her wishes,<sup>3</sup> the fetus is a stranger—a foreign entity in her body who, as far as she is

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1. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1128, and n.110 (1967)).
  2. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 30 (1988).
  3. A woman might be pregnant against her wishes in a number of different ways, such as rape,

concerned, should not be there. If she is a woman of financial means over the age of eighteen living in the United States, then at least at this point in history, she can probably secure an abortion.<sup>4</sup> If not, likely she is stuck in the “dangerous, pschically consuming, existentially intrusive, and physically invasive”<sup>5</sup> state of pregnancy until such time as nature decides the fetus is ready to emerge.<sup>6</sup>

Abortion proponents and opponents alike have criticized the Court’s decision in *Roe v. Wade*. Both sides of the political spectrum specifically critique the lack of an express constitutional right to privacy,<sup>7</sup> on which the Supreme Court in *Roe* based its decision to find a “fundamental”<sup>8</sup> right to abortion.<sup>9</sup> Indeed, the doctrine of privacy law has a relatively short history, originating not in the Constitution, or even in Supreme Court jurisprudence, but in a law review article written by Justice Louis D. Brandeis and Samuel D. Warren in the late nineteenth century.<sup>10</sup> This lack of constitutional context and legal history renders

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birth control failure, and a post-pregnancy change of circumstances. Each of these situations is addressed herein.

4. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).
5. West, *supra* note 2, at 30.
6. Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services In the United States*, 2001, 35 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 16, 19-20, 23 (Jan./Feb. 2003). See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment prohibition on federal funding for abortions). For an explanation of the Court’s decision in *Harris*, see *infra* note 215.
7. *Roe*, 410 U.S. at 152 (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ . . . are included in this guarantee of personal privacy.”)
8. *Roe*, 410 U.S. at 152-53.
9. See, e.g., EILEEN McDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 107 (1996); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31 (1992); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L. J. 1394, 1419-20 (2009).
10. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis explored the development of the right to be let alone in light of existing constitutional rights of life, liberty, and property, with a particular focus on the latter. Using examples of injunctions against publication of private writings, they concluded that “[t]he principle which protects personal writing and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.” *Id.* at 205 (internal marks and citations omitted). Warren and Brandeis also examined various cases involving certain tort and contract theories, but ultimately determined

that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that work be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.

*Id.* at 213.

the opinion vulnerable to judicial chipping away at the underlying right and potential full reversal.<sup>11</sup> Further, as pro-choice advocates have critiqued, the right to privacy yields no positive rights to funding or access support from the government; it is relegated to the land of negative rights, which might provide the right woman with reproductive choice free from government intrusion, but for the wrong woman—one with limited resources—the so-called “choice” becomes nonexistent.<sup>12</sup>

This article endeavors to address both of these critiques by reframing *Roe* as a property right in the uterus rather than a right to privacy. In an attempt to avoid one of the most basic controversies between the two political camps, the article assumes as true the pro-life tenet that the fetus is a person from the moment of conception.<sup>13</sup> Property rights pre-date the existence of this country,<sup>14</sup> and the legal language and analyses stemming from that longevity provide a vehicle for securing abortion rights more solidly grounded than privacy doctrine. Additionally, property ownership carries certain rights to state protection. “Governmental enforcement of trespass laws . . . is frequently thought simply to ratify existing distributions [of property]. Rather than interfering with them, legal enforcement of property . . . rights is built into and indistinguishable from existing distributions.”<sup>15</sup> To the extent a woman has property rights in her uterus, as this article posits, the distribution of those rights to the woman necessarily pre-exists pregnancy, for the uterus has been in a pregnant woman’s body long before any fertilized embryo might nestle into the uterine wall. Accordingly, a woman’s right to exclude from her uterine property, manifested through anti-trespass laws, provides an alternate basis for abortion rights that carries government support. In short, this article provides a different basis for abortion rights that takes advantage of the long-standing traditional notions of property doctrine, and specifically the right to exclude, as well as the government support that attaches to that right manifested through anti-trespass law.

While this piece offers a viable legal argument for creating uterine property and securing government support for the protection thereof, its goal is not to advocate for adopting that uterine property framework. Rather, the article challenges readers to think about what would be gained, and lost, if uterine property existed. In short, this is a thought piece, designed to provide a new vision of an old problem. Part I provides an overview of other pro-choice efforts to secure alternate bases for abortion rights and briefly shows how such efforts have failed. Part II serves as a primer for the basic tenets of property law

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11. See, e.g., MCDONAGH, *supra* note 9, at 3.

12. *Id.* at 3-5.

13. See, e.g., MCDONAGH, *supra* note 9, at 6 (assuming that the fetus is a private party for purposes of making a pro-choice argument); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48 (1971) (same).

14. See Warren & Brandeis, *supra* note 10, at 193 (“That the individual shall have full protection in person and in property is a principle as old as the common law”).

15. Sunstein, *supra* note 9, at 7.

necessary to the analyses set forth in Part III, which locates a property right in a woman's uterus, and Part IV, which attaches the right to exclude and government support of that right to a woman's uterine property, through the lens of trespass. Part V examines how a uterine property right and an abortion entitlement based on that right might be realized given the existing legal landscape. With the trespass-based argument set forth, Part VI explores some potential benefits and drawbacks of implementing such an argument for securing abortion rights and access, paying particular attention to how uterine property might impact the fragmented "storm center"<sup>16</sup> *Roe* generated. The persistent polarization between the pro- and anti-choice movements precludes further meaningful work on reproductive justice.<sup>17</sup> "[B]oth pro-choice and pro-life arguments are locked into rhetoric and strategies that fail to situate the struggle within the broader context of reproductive control."<sup>18</sup> Property-based abortion rights might push the discourse out of stagnancy, potentially yielding revitalized respect for autonomous decision-making.

### I. OTHER PRO-CHOICE BASES FOR REFRAMING *ROE*

Several scholars have penned alternate visions of abortion rights, rejecting the privacy framework espoused in *Roe v. Wade*. Some scholars posit that the appropriate branch of government to tackle this issue is the legislature, not the judiciary. Others think abortion rights should rest on equal protection doctrine, rather than the right to privacy read into the liberty component of the Due Process Clause. As described in this Part, however, both of these ideas have failed in some distinct way.

Robin West, for example, believes that *Roe* was wrongly decided not because of the constitutional analysis, but because there should have been no analysis at all. Professor West asserts that the abortion decision should be left to the legislatures.<sup>19</sup> She contends that legislative efforts might be better able to secure real access to abortions through government funding<sup>20</sup> and that legislation need not be as movement-limiting as *Roe* has been, constrained by *stare decisis* and the concept of negative rights.<sup>21</sup> Further, legislative efforts to guarantee

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16. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985).

17. GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 2-7 (2009).

18. SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 71 (1993).

19. See West, *supra* note 9, at 1396-97; see also Robin West, *Concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 121-47 (Jack M. Balkin, ed., NYU Press 2005). From the anti-abortion camp, Jeffrey Rosen shares in this belief. See Jeffrey Rosen, *Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 170-86 (Jack M. Balkin, ed., NYU Press 2005). Notably, though, many state legislatures stalled on liberalized abortion laws prior to *Roe*, so perhaps the legislative branch is not the best choice to address this problem. See BURNS, *supra* note 17, at 207-20.

20. West, *supra* note 9, at 1404.

21. *Id.* at 1431.

abortion rights might open the pro-choice movement's eyes to new opportunities for coalition-building, or at minimum, breaking the "logjam" in the current debate.<sup>22</sup> Unfortunately, no legislative efforts on either side of the debate have achieved success, perhaps because it may be political suicide to step into the abortion ring.<sup>23</sup>

A more popular alternative basis for abortion rights, advanced by numerous scholars, advocates for reframing abortion rights in equal protection rather than privacy doctrine.<sup>24</sup> Cass Sunstein posits that an equal protection framework "sees a prohibition on abortion as invalid because it involves a cooptation of women's bodies for the protection of fetuses"<sup>25</sup> and "[n]o parallel [cooptation] is imposed on men."<sup>26</sup> His equal protection argument proceeds on four grounds, namely, that anti-abortion laws: (1) facially discriminate on the basis of sex; (2) are impermissibly selective of women; (3) result from social gender stereotypes that cannot be maintained under the Constitution; and (4) fail to achieve the stated legislative purpose of protecting fetal lives.<sup>27</sup>

Professor Sunstein asserts that the female anatomy and its capacity to bear children do not necessitate the systemic conclusion that women should be compelled to do so by virtue of statutory law.<sup>28</sup> In other words, "the role of motherhood for women should be chosen rather than given."<sup>29</sup> Further, he believes that an equal protection argument "does not and need not take a position on the status of the fetus. It acknowledges the possibility that fetuses are in important respects human beings . . . . But it asserts that . . . the government cannot impose on women alone the obligation to protect fetuses through a legal act of bodily cooptation."<sup>30</sup> According to Professor Sunstein, "[e]ven if the fetus

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22. *Id.* at 1431-32.

23. *Cf.* BURNS, *supra* note 17, at 22-23 ("Contestation over the legal status of something like contraception or abortion results in somewhat of a legislative freeze: Even if the legal situation does not draw much positive support, it is generally easier for legislators to leave in place the status quo. This can be true even when no one in particular is passionately in favor of the status quo. As we shall see in the history of battles over contraception and abortion, legislators would rather avoid dealing with an issue involving moral polarization, even if the group(s) exercising a moral veto are a definite minority.").

24. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93-102 (1987); MCDONAGH, *supra* note 9, at 125-54 (1996); Jack M. Balkin, *Opinion of the Court*, in WHAT ROE V. WADE SHOULD HAVE SAID 31-57 (Jack M. Balkin, ed., NYU Press 2005); Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 146-49 (1991); Ginsburg, *supra* note 16; Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 117-35 (1989); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1621-45 (1979); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Sunstein, *supra* note 9, at 31-44.

25. Sunstein, *supra* note 9, at 31 (citing Regan, *supra* note 24; Thomson, *supra* note 13).

26. *Id.* at 31-32.

27. *Id.* at 32.

28. *Id.* at 33, 40.

29. *Id.* at 33.

30. *Id.* at 32.

has all of the status of human life, the bodies of women cannot, under current circumstances, be conscripted in order to protect it.”<sup>31</sup> The abortion exceptions for survivors of rape and incest, he suggests, lend support to this conclusion.<sup>32</sup> Stated otherwise, many anti-abortion statutes contain exceptions for instances of rape and incest,<sup>33</sup> meaning that at least in these two circumstances, a woman may not be forced to carry the pregnancy to term, even if “life” began at the moment of conception. The woman’s decision about what to do with her body trumps any interest in fetal life.

Reva Siegel, another advocate of the equal protection vehicle for securing abortion rights, offers a position similar to that of Professor Sunstein. Professor Siegel contends that anti-abortion statutes arise, not necessarily from a state interest in the life of the unborn, but instead and more prominently from traditional notions of gender roles and women’s necessary and inherent work as mothers.<sup>34</sup> She traces these stereotypes back to the nineteenth century movement, fostered by medical professionals, to criminalize abortion “to ensure women’s performance of marital and maternal obligations and to preserve the ethnic character of the nation.”<sup>35</sup> These physicians spoke about abortion in their own taxonomy, focusing the debate in medical discourse and utilizing physiology to show that women, by biological necessity, must carry pregnancies to term to ensure the continuation of humanity.<sup>36</sup> Thus, the argument supporting the criminalization of abortion rested on the biological “consequences of a woman’s body—not practices of the community that would regulate her conduct.”<sup>37</sup> Following suit, in *Roe v. Wade*, the Supreme Court essentially “present[ed] the burdens of motherhood as woman’s destiny and dilemma—a condition for which no other social actor bears responsibility.”<sup>38</sup>

This “physiological naturalism”<sup>39</sup> intrinsically relegates the abortion debate to a discourse on sex rather than gender, and the focus on the former distracts

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31. *Id.* at 40.

32. *Id.* at 40-41.

33. *See, e.g.*, ARK. CODE ANN. § 20-16-705 (2011); COLO. REV. STAT. ANN. § 18-6-101(1)(b) (2011); DEL. C. TIT. 24, § 1790(a)(3); IDAHO CODE § 18-608(1) (2011); N.M. STAT. ANN. §§ 30-5-1(C), 30-5-3 (2011); UTAH CODE ANN. § 76-7-302(3)(b)(iii).

34. Siegel, *supra* note 24.

35. *Id.* at 279.

36. *Id.*

37. *Id.* at 274. *See also* then-Professor Ginsburg’s analysis on the equality reasoning in *Roe*. Ginsburg, *supra* note 16, at 382-83 (quoting Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57 (1977)) (“It is not a sufficient answer to charge it all to women’s anatomy—a natural, not man-made, phenomenon. Society, not anatomy, “places a greater stigma on unmarried women who become pregnant than on the men who father their children.” [ ] Society expects, but nature does not command, that “women take the major responsibility... for child care” [ ] and that they will stay with their children, bearing nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring.”).

38. Siegel, *supra* note 24, at 274.

39. *Id.* at 265.

from the possibility of focusing on the latter.<sup>40</sup> Attention to women's reproductive organs comes at the expense of attention to the systemic ways in which women are gendered as mothers through social expectation. So long as medical supremacy and physiological naturalism persist, Professor Siegel contends, the Equal Protection Clause cannot provide a meaningful constitutional critique of reproductive regulation.<sup>41</sup> Once the Court removes the medical lens from its jurisprudence and employs a more encompassing view of gender and women's social roles, however, she posits that equal protection can and should serve as an appropriate basis for striking down anti-abortion statutes as unconstitutional, given the facially discriminatory nature of the statutes, whether implementing an antidiscrimination or an antisubordination framework.<sup>42</sup> "Equal protection doctrine is the only body of constitutional jurisprudence explicitly skeptical about the rationality of gender-based judgments and specifically concerned with the justice of gender-based impositions."<sup>43</sup>

But while equal protection has the capacity to focus on gender, that capacity does not provide much benefit for the abortion analysis. As Professor Sunstein acknowledges, equal protection doctrine necessarily sets white men's bodies, straight men's gender, and upper middle class men's social position as the standard and measures all others, including women, against that norm.<sup>44</sup> And as Joan C. Williams indicates, so long as the goal continues to be achieving parity with the status of men, history teaches that women will continue to run into glass ceilings, maternal walls, and other obstacles that preclude success.<sup>45</sup> Property doctrine, on the other hand, need not set a male goal.

Further, an equal protection argument protecting abortion rights does not secure positive rights to government support for accessing abortions, without

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40. *Id.* at 264-77. Professor Siegel states,

[The] medical analysis displaces social analysis of the exercise of state power entailed in restricting women's access to abortion. For this reason, the interest in potential life recognized in *Roe* can be employed to justify fetal-protective regulation of women in a fashion that is inattentive to the gender-based impact of that regulation as well as to the possibility that it may be gender biased.

*Id.* at 275.

41. *Id.* at 272.

42. *Id.* at 347-81; *see also* Ginsburg, *supra* note 16, at 382 ("If *Roe* had left off at that point and not adopted what Professor Freund called a 'medical approach,' physicians might have been less pleased with the decision, but the legislative trend might have continued in the [liberal] direction in which it was headed in the early 1970s.") (citations omitted).

43. Siegel, *supra* note 24, at 352.

44. *See* Sunstein, *supra* note 9, at 43.

45. *See, e.g.,* Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1 (2003); Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597 (2011); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003); Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89 (1998).

somehow manipulating the Equal Protection Clause out of its negative rights cloak and establishing poverty as a protected class.<sup>46</sup> Conversely, Professor Sunstein posits that private property rights “are uncontroversial, and properly so. . . [and] fully positive. Their existence depends on the willingness of state officials to enforce trespass laws. . . .”<sup>47</sup>

Finally, even if none of the above critiques are persuasive, the Supreme Court has already foreclosed an equal protection argument in favor of abortion rights, holding that discrimination on the basis of pregnancy is not sex-based discrimination, since all non-pregnant persons, including both men and women, receive identical treatment.<sup>48</sup> Though Congress has indicated its disagreement with the Court’s holding by revising Title VII of the Civil Rights Act to expressly include pregnancy as a basis for sex-based discrimination, such revision “is not controlling in constitutional adjudication,” and while hope could persist that the revised Title VII “might stimulate the Court one day to revise its position that regulation governing ‘pregnant persons’ is not sex-based,” nothing stronger than wishes exists.<sup>49</sup> In addition, Title VII only applies in the employment context,<sup>50</sup> which does not extend to securing abortion rights.

In sum, neither a legislative approach nor a judicial restructuring based on equal protection doctrine suffices to address abortion rights in a way that meaningfully alters the current status quo. The legislature is challenged by politicking and the equal protection argument has been preempted. An argument based on property rights, however, remains available and is not subject to Congressional politicking or judicial curtailment, at least vis-à-vis the baseline, fundamental right.

## II. A PROPERTY PRIMER

Before turning attention to recognition of property-based protection sufficient to support abortion rights and government funding to ensure access, a brief primer in general property law is necessary. Property scholars continually debate the definition of property, the nature of property rights, the origins of those rights, and the protections available for those rights.<sup>51</sup> It is beyond the

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46. See Ginsburg, *supra* note 16, at 384-85; Harris v. McRae, 448 U.S. 297 (1980) (quoting Maher v. Roe, 432 U.S. 464, 470-71 (1977) (holding that poverty is not a suspect class)). *But cf.* Lawrence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335-40 (1985) (offering an argument that establishes positive rights to public funding for abortions, grounded in equal protection).

47. Sunstein, *supra* note 9, at 9. Trespass laws are further examined in the abortion context *infra* Section IV.

48. See, e.g., Geduldig v. Aiello, 417 U.S. 484, 496 n. 20 (1974); MCDONAGH, *supra* note 9, at 131; Siegel, *supra* note 24, at 268-72.

49. Ginsburg, *supra* note 16, at 379.

50. 42 U.S.C. § 2000e (West 2010); see also Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 676-82 (1983).

51. See, e.g., Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005) (“[P]roperty law has eluded both a consistent definition and a unified

purview of this article to espouse yet another theory of general property law or recitation of its doctrinal development.<sup>52</sup> Despite the variety of viewpoints and theories in the literature, a few basic premises have achieved consensus<sup>53</sup> or otherwise dominate due to Supreme Court jurisprudence. These premises will suffice here.

First, the predominant view of property is not necessarily concerned with specific things, but rather with the rights that individuals assert in relation to those things vis-à-vis other individuals and within the context of a society.<sup>54</sup> These property rights are commonly referred to as a “bundle of rights” or a “bundle of sticks”<sup>55</sup>—a conceptual view “so pervasive that even the dimmest law student can be counted upon to parrot [it] on command.”<sup>56</sup> Crafted from the works of Wesley Hohfeld, A.M. Honoré, and other legal realists of the early twentieth century,<sup>57</sup> at this stage in the development of property law, even the Supreme Court has adopted the bundle theory.<sup>58</sup> Common property rights in the theoretical bundle include the rights of acquisition, use, disposal, and exclusion.<sup>59</sup>

Second, the most central right in the bundle is the right to exclude others from the property at issue.<sup>60</sup> As the Supreme Court stated, “[t]he power to

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conceptual framework. Indeed, modern property scholarship has utterly splintered the field.”); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *Liberal Conception*]; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); O. Lee Reed, *What is “Property”?*, 41 AM. BUS. L. J. 459 (2004); Laura S. Underkuffler, *When Should Rights “Trump”? An Examination of Speech and Property*, 52 ME. L. REV. 311 (2000).

52. Indeed, providing yet another new theory of property, its history, its development, or its future would subvert this article’s purpose. As indicated herein, one of the main reasons to implement a property analysis in support of abortion is to take advantage of its deep-rooted existence in American jurisprudence.

53. Merrill, *supra* note 51, at 731-33.

54. *Id.*

55. See, e.g., Reed, *supra* note 51, at 470-72.

56. BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26 (1977), quoted in Bell & Parchomovsky, *supra* note 51, at 546; accord J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 U.C.L.A. LAW REV. 711, 712 (1996); Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247 (2007).

57. See, e.g., Bell and Parchomovsky, *supra* note 51, at 545- 46; Merrill, *supra* note 51, at 737-38; Mossoff, *supra* note 51, at 372-75.

58. See, e.g., Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 831-32 (1987); Hodel v. Irving, 481 U.S. 704, 716-18 (1987); *Loretto*, 458 U.S. at 433-36 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979); see also Johnson, *supra* note 56, at 247 (“In recent years, an academic debate has raged about whether the bundle of rights is a correct or useful way of thinking about property rights. Whatever its faults or inadequacies, the bundle of rights is the dominant legal paradigm for the courts and the theory of property that is taught to American law students.”).

59. See, e.g., Mossoff, *supra* note 51, at 376.

60. Cohen, *supra* note 51, at 370-71, 374 (“[L]et us put this down as one more point of

exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."<sup>61</sup> Whether the right to exclude is the *sine qua non* of the rights bundle<sup>62</sup> or an "essential but insufficient component" thereof,<sup>63</sup> the centrality of the right to exclude is well recognized.<sup>64</sup> This centrality can be traced back to James Madison and other Founders,<sup>65</sup> Native American tribes,<sup>66</sup> William Blackstone,<sup>67</sup> early modern rights theorists (such as Hugo Grotius, Samuel Pufendorf, and John Locke),<sup>68</sup> Aristotle,<sup>69</sup> and even to prehistoric tribes.<sup>70</sup>

Third, the removal of any other right from the bundle does not necessarily render the substance at issue non-property.<sup>71</sup> For example, though the rights of acquisition, use, and disposal are traditionally associated with property,<sup>72</sup>

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agreement in our analysis of the meaning of private property. Private property may or may not involve a right to use something oneself. It may or may not involve a right to sell, but whatever else it involves, it must at least involve a right to exclude others from doing something.").

61. *Loretto*, 458 U.S. at 435 (citations omitted). This premise aligns, at least facially, with the libertarian argument of the "Robert Nozick variety" that personal property should be free from interference by the government and other private actors. See, e.g., Peter Halewood, *On Commodification and Self-Ownership*, 20 YALE J. L. & HUMAN. 131, 135 (2008).
62. Merrill, *supra* note 51, at 730.
63. Mossoff, *supra* note 51, at 377-79, 389-90.
64. Radin, *Liberal Conception*, *supra* note 51, at 1671-72; see Susan E. Looper-Friedman, "Keep Your Laws Off My Body": *Abortion Regulation and the Takings Clause*, 29 NEW ENG. L. REV. 253, 256 (1995); John William Nelson, *The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea*, 41 MCGEORGE L. REV. 281, 295 (2010); Reed, *supra* note 51, at 473 ("[I]t is possible to define property as a single negative right, the right of exclusion as applied to limited resources. Property is the constitutional and legal right to exclude others—including the state—from specifiable limited resources originally possessed or acquired without coercion, deception, or theft."); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1527 (1990).
65. Mossoff, *supra* note 51, at 377-78.
66. Krier, *supra* note 51, at 139-40 (citing Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347, 350-53 (1967)); Merrill, *supra* note 51, at 746 (quoting WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (1983)).
67. Bell & Parchomovsky, *supra* note 51, at 534-44; Merrill, *supra* note 51, at 734.
68. Mossoff, *supra* note 51, at 379-389.
69. Bell & Parchomovsky, *supra* note 51, at 541 (citing ARISTOTLE, *THE POLITICS* P 5, at 26 (Stephen Everson ed., 1988)).
70. Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1365 (1993).
71. See, e.g., Merrill, *supra* note 51, at 731, 737-38 ("For the Realists, property was not defined by a single right or definitive trilogy of rights. Rather it is a 'bundle of rights.' Moreover, this bundle has no fixed core or constituent elements. It is susceptible of an infinite number of variations, as different 'sticks' or 'strands' are expanded or diminished, added to or removed from the bundle altogether."); Reed, *supra* note 51, at 472-73; see also Cohen, *supra* note 51, at 369, 370-71 ("ownership can exist without the possibility of the owner's enjoying or using what he owns"); Looper-Friedman, *supra* note 64, at 278; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (positing that the right to sell (alienability) is not necessarily attributed to property and offering a new conception of property rights for things that are still identified as property but should not be sold in a market system (market-inalienability)).
72. See, e.g., Bell & Parchomovsky, *supra* note 51, at 545-46; Mossoff, *supra* note 51, at 376;

Margaret Radin notes that the right to dispose by sale can be limited or completely removed from the bundle for a variety of resources typically described as property without removing the property label from those resources.<sup>73</sup> Supreme Court jurisprudence is consistent with this position. Deciding that a statutory ban on selling eagle feathers did not dissolve the property label in its entirety, the Court stated that “the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”<sup>74</sup>

Fourth, pursuant to the Constitution, the government may not unduly infringe upon an individual’s property rights without providing due process of law<sup>75</sup> and just compensation for the loss.<sup>76</sup> While the Constitution does not provide for specific property ownership,<sup>77</sup> it creates a general principle of communal property protection, and scholars have articulated a variety of reasons why the Constitution may in fact require states to create and implement systems designed to protect individuals’ existing property interests.<sup>78</sup>

Fifth, property—the stuff over which individuals assert rights—is generally defined by bodies of law other than the Constitution, including state law or federal statutes.<sup>79</sup> As the Supreme Court stated, “[p]roperty interests. . . are not

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Nelson, *supra* note 64, at 545; Reed, *supra* note 51, at 472 (identifying “[t]he positive rights comprising this bundle [as] the rights to possess, to use, to manage, to generate income, to consume or destroy, to alienate, and to transmit through devise and bequeath”); *see also* Merrill, *supra* note 51, at 736-37 (acknowledging the rights of “possession, use, and disposition,” as articulated by Blackstone, and the list of eleven “standard” property rights proffered by A.M. Honoré, but arguing that the right to exclude is nonetheless the ultimate and most central property right).

73. Radin, *supra* note 71, at 1855-57 (identifying numerous “contested issues” that might be market-inalienable), 1918-20 (describing work and housing as areas of the market that are not fully commodified because of regulations impacting the ways in which payments may be exchanged), 1921-36 (applying market-inalienability to baby-selling, prostitution, and surrogacy); *accord* Cohen, *supra* note 51, at 369 (“there is such a thing as non-saleable property”); Radin, *Liberal Conception*, *supra* note 51, at 1673.
74. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (citations omitted); *see also* Erik S. Jaffe, “*She’s Got Bette Davis[’s] Eyes*”: *Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 550-51 (1990) (“The right to sell is not necessarily tied to the notion of property.”).
75. U.S. CONST. amend. V; XIV, § 1.
76. U.S. CONST. amend. V. *See generally* Radin, *Liberal Conception*, *supra* note 51 (surveying takings jurisprudence), at 1668-84; Reed, *supra* note 51, at 485-86; Thompson, *supra* note 64.
77. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L. J. 507, 561-62 (1991). *Cf.* Radin, *supra* note 71, at 1900 (citing Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 115-16 (1978)) (“[T]he right to own property is a discretionary right because I may choose to own nothing; it is a nonrelinquishable discretionary right because I cannot morally or legally renounce the right to own property even if I choose not to own any.”).
78. *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 454-59 (2008); Heyman, *supra* note 77; Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964); Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901 (2001).
79. *See, e.g.*, Looper-Friedman, *supra* note 64, at 275; Thomas W. Merrill, *The Landscape of*

created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>80</sup>

It is largely from these five premises that defining the body as property may be accomplished.

### III. PROPERTY RIGHTS IN THE BODY

Relying on the general property principles discussed above, this Part examines the history of body ownership and certain related theories of body property. Such theories, however, do not fully align with the current state of law and society vis-à-vis body property. Accordingly, this Part offers a new theory of body property consistent with both historical and modern body ownership, ultimately applying this theory and current law to support a finding of property rights in the uterus.

Some early legal theorists posited broad general property rights in the body. In the early seventeenth century, Grotius recognized a person’s property right in his or her “life” and “limbs.”<sup>81</sup> Approximately a century later, John Locke stated that “every [Wom]an has a Property in [her] own Person.”<sup>82</sup> One of the Founding Fathers, James Madison, also asserted that a person had property rights in her “safety and liberty” and “the free use of [her] faculties.”<sup>83</sup> Justice Cardozo agreed: “[e]very human being of adult years and sound mind has a right to determine what shall be done with [her] own body . . . .”<sup>84</sup>

Modern scholars have dealt with body ownership in greater complexity, a necessity given biotechnological developments. Margaret Radin, in her seminal piece, *Property and Personhood*, offers an insightful look at property rights generally and posits that there should be two levels of property protection based on how closely tied to personhood a particular thing might be.<sup>85</sup> She identifies “property that is bound up with a person” as “personal property” worthy of heightened protection and “property that is held purely instrumentally” as

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*Constitutional Property*, 86 VA. L. REV. 885, 917-21 (2000).

80. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

81. Mossoff, *supra* note 51, at 383 & n.43-44.

82. *Id.* at 388 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27, 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)). Other scholars have frequently quoted this line. See, e.g., Radin, *Property and Personhood*, *supra* note 51, at 965.

83. JAMES MADISON, *Property*, in 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., Knickerbocker Press 1906), quoted in Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L. J. 127, 135 (1990).

84. See *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914). The plaintiff asserted that physicians performed surgery on her without her consent. Justice Cardozo, writing for the majority, stated that “the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with [her] own body . . . .” *Id.* at 129.

85. Radin, *Property and Personhood*, *supra* note 51, at 960.

“fungible property” worthy only of a milder form of protection.<sup>86</sup> For example, an engagement ring is fungible property for a jeweler, replaceable by insurance proceeds, but that same ring becomes personal property once a soon-to-be fiancé purchases it, and certainly remains personal once the purchaser places the ring on the left ring finger of his or her beloved, rendering insurance proceeds after a theft insufficient.<sup>87</sup>

It appears axiomatic, and Professor Radin acknowledges, that the physical body is a necessary element of personhood.<sup>88</sup> Thus, according to her argument, it could follow that an individual would have what Professor Radin calls “personal property” rights in the body as a whole.<sup>89</sup> According to Guido Calabresi, a legal doctrinalist would come to this initial conclusion.<sup>90</sup> Judge Calabresi’s doctrinalist, however, “would most likely have to concede that such a starting point [of ownership of our own bodies] is not so firm that deviations from it, at times judicial and more often legislative, would necessarily be unconstitutional or in other ways anathema to the system.”<sup>91</sup> Professor Radin comes to a conclusion aligned with the doctrinalist’s concession, and seemingly opposite to the result that might have followed from her starting point, stating that “[b]odily integrity is an attribute and not an object,” and accordingly, that the body in its entirety is “too personal even to be personal property.”<sup>92</sup> She intimates that recognizing property rights in the whole body is too great a risk, ringing too true to slavery, and would cause “violence” to personhood and human flourishing,

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86. *Id.*

87. *Id.* at 959-60, 987-88.

88. *Id.* at 963 (citing P. F. STRAWSON, *INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS* 87-116 (1959); see also BERNARD WILLIAMS, *Are Persons Bodies?*, in *PROBLEMS OF THE SELF* 64 (1973); BERNARD WILLIAMS, *Bodily Continuity and Personal Identity*, in *PROBLEMS OF THE SELF* 19 (1973); BERNARD WILLIAMS, *Personal Identity and Individuation*, in *PROBLEMS OF THE SELF* 1, 12 (1973); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 178 (G. E. M. ANSCOMBE trans., 3d ed. 1958).

89. *Id.* at 966 (“If the body is property, then objectively it is property for personhood. This line of thinking leads to a property theory for the tort of assault and battery: Interference with my body is interference with my personal property.”).

90. Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 *STAN. L. REV.* 2113, 2133, 2136 (2003).

91. *Id.* at 2136. Judge Calabresi also notes the following:

[T]he landscape [of body ownership] is by no means so neat; the marks don’t all point in one direction. Thus, people can be conscripted into the military against their will and be made to put their bodies to the service of the common good. Once there they may be subjected, without their knowledge, to dreadful experiments with drugs, and not even have the right to compensation, let alone the right to prevent such a taking of their bodies and minds . . . . And in more than a few jurisdictions [people] are, or were in the past, far from free to destroy [their bodies] in part (self-mutilation) or in whole (suicide). Finally women for the longest of times were obliged to give their bodies to save their fetuses or unborn children. And some courts in some states have indicated that women may be punished if they don’t care for their bodies, that is, make them, for a time, a public utility, for the benefit of their unborn.

*Id.* at 2134-35 (internal marks and citations omitted).

92. Radin, *supra* note 71, at 1880-81.

despite her market-inalienability modification of traditional notions of property and market rhetoric.<sup>93</sup> Yet, the position that the body as a whole is not property seems to run afoul of the legal truth that whole dead bodies are recognized as at least quasi-property in certain circumstances.<sup>94</sup> Perhaps, then, the line of demarcation for whole-body property ownership falls between whole living bodies and whole dead bodies.<sup>95</sup>

As for body parts, Professor Radin posits that they appropriately can be considered property after removal from the whole.<sup>96</sup> At least one other scholar has followed suit, delineating body parts as property only after removal.<sup>97</sup> This theory of body ownership, however, fails to recognize the impetus for removing the part in the first instance, which necessarily arises while the part is still attached to the whole. Stated otherwise, the property value—whether monetary or otherwise—must be cognizable to the person prior to the part's removal; people do not randomly remove body parts without motivation for doing so. There must be some reason for removing those parts, and in many circumstances, that reason is to dispose of the parts by transferring them to others, whether by donation or monetary sale.<sup>98</sup>

Indeed, the reality of ova or oocyte sales defies the theory that body parts can only be called property once removed. In ova or oocyte sale process, a young woman (the so-called “donor”) enters into a contract with a recipient woman, and potentially with other parties, for the transfer of donor eggs prior to their actual retrieval.<sup>99</sup> An egg donation contract might expressly stipulate that the

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93. *Id.* at 1884-85.

94. For example, quasi-property rights are recognized in dead bodies, vested with surviving family members or with other designated persons, to ensure disposal in accordance with the decedent's wishes. See Lisa Milot, *What Are We—Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1083-86, 1106 (2010); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 382-87, 446-53 (2000).

95. See Rao, *supra* note 94, at 446-53. *But see* Looper-Friedman, *supra* note 64, at 276-77 (discussing property rights in the live bodies of debtors, slaves, and wives).

96. Radin, *Property and Personhood*, *supra* note 51, at 966. Radin posits:

The idea of property in one's body presents some interesting paradoxes. In some cases, bodily parts can become fungible commodities, just as other personal property can become fungible with a change in its relationship with the owner . . . . On the other hand, bodily parts may be too “personal” to be property at all. We have an intuition that property necessarily refers to something in the outside world, separate from oneself. Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line, still the idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system.

*Id.*

97. Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 203-19 (1996).

98. See *supra* notes 59, 72-74 and accompanying text.

99. *The Process*, EGG DONATION, INC., <https://www.eggdonor.com/egg-donation-process/egg-donor-legal-process/> (last visited Oct. 20, 2011). Young women at top universities are highly

donor owns her eggs while in her ovaries, but relinquishes ownership rights in those eggs once removed.<sup>100</sup> The property rights thus preexist the “aspiration” of the eggs.<sup>101</sup> Similarly, property rights, and specifically the right to dispose of the property in a manner of the owner’s choice, necessarily arise prior to the removal of blood and hair, which may be sold or donated, and kidneys, which may be donated.<sup>102</sup> Therefore, the theory that removal from the body gives rise to property rights in the removed body parts fails; these rights inherently arise in advance of removal from the whole.

An alternative legal theory delineating the body parts for which people receive property rights turns on renewability. This theory might seem the most obvious, and potentially the most accessible, but if true, it would defeat a claim for property rights in the uterus. Blood, hair, and sperm, for example, are all regenerative body resources for which property rights have been recognized.<sup>103</sup> The property rights in these body parts even include commercial alienation, considered by some to be the “norm of property.”<sup>104</sup> A segment of the liver may be donated by a living donor, though not sold, and the remaining organ will regenerate the missing piece.<sup>105</sup>

However, this theory of body property based on renewability also can be refuted. For example, consider egg donations, as discussed above. Ova exist only

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desirable egg donors and are recruited through college newspapers, popular websites such as Facebook and craigslist, and even highway billboards. Advertisements in newspapers at Harvard, Yale, and Princeton have offered as much as \$35,000 for an egg donor, far exceeding the recommended compensation limit of \$10,000. A study published in The Hastings Center Report stated that with every 100-point increase in a university’s average SAT scores, the egg donor advertisements in campus newspapers increased by \$2,000. See David Tuller, *Payment Offers to Egg Donors Prompt Scrutiny*, N.Y. TIMES, May 11, 2010, at D5.

100. Mark A. Johnson, *Prototype Egg Donation Contract with Commentary*, at ¶ 1(c), AM. SURROGACY CTR., INC., [http://www.surrogacy.com/articles/news\\_view.asp?ID=79](http://www.surrogacy.com/articles/news_view.asp?ID=79) (last visited Oct. 20, 2011). The egg donation process is too invasive for the process to go forward without a preexisting contract in place. After applying to become an egg donor and successfully completing medical and psychological screening tests, the donor receives injections of Lupron to suppress her natural menstrual cycle and synchronize it with that of the recipient. Once the menstrual cycles have been synchronized, the donor receives daily injections of a fertility drug to stimulate the ovaries. When the ovarian follicles reach a sufficient maturity level, the donor receives yet another injection, this time of human chorionic gonadotropin (hCG), to replicate the hormone normally produced by a fertilized embryo. The eggs can be retrieved approximately 36 hours after the hCG injection, during which retrieval the donor receives “mild sedation” and a physician inserts a needle, fitted onto an ultrasound probe, into the follicles to extract the eggs, essentially via vacuum. See *The Process*, *supra* note 99; *In-Vitro Fertilization Process: Egg Retrieval*, DUKE FERTILITY CTR., <http://dukefertilitycenter.org/treatments/in-vitro-fertilization/egg-retrieval/> (last visited Oct. 20, 2011).
101. *The Process*, *supra* note 99.
102. See Calabresi, *supra* note 90, at 2134 & n. 85-86.
103. Milot, *supra* note 94, at 1060-61; Rao, *supra* note 94, at 371-73.
104. Rao, *supra* note 94, at 433-39.
105. *Living Donation: Information You Need to Know*, UNITED NETWORK FOR ORGAN SHARING, Aug. 2009, at 3, 11, available at [http://www.unos.org/docs/Living\\_Donation.pdf](http://www.unos.org/docs/Living_Donation.pdf) (last visited Oct. 20, 2011).

in a finite amount within each woman's body, but they can be donated and sold, evidencing the recognition of property rights. Similarly, modern medical technology and science have achieved transplants from live donors of entire kidneys, recognizing the property right of disposal, but the donor's body does not create a new kidney to replace the one donated.<sup>106</sup> Likewise, living donors may donate a lobe of the lung and portions of both the pancreas and the intestine, again inherently recognizing the existence of a property right of disposal, despite the fact that none of these body parts regenerate.<sup>107</sup> Thus, regeneration cannot be the theory giving rise to property rights in body parts.

A more viable theoretical demarcation lies in recognizing property rights in body parts that can be safely removed without causing death or dismemberment to the living donor.<sup>108</sup> All of the parts discussed above—blood (one pint at a time), hair, sperm, eggs, a kidney, a lung lobe, and portions of the pancreas and intestine—may be removed without seriously harming the donor. Bone marrow also may be donated without causing the donor's death or dismemberment.<sup>109</sup> Property rights have also been recognized in spleen cells, which may be removed in reasonable proportion without the donor sustaining serious harm.<sup>110</sup> A living individual may not, however, donate an arm, a leg, a heart, eyes, skin, a tongue, a stomach, a penis, a breast, a liver, a pancreas, or a whole intestine,<sup>111</sup> likely because such a donation would lead to the donor's death or dismemberment.

Under this safe removal theory, property rights could be recognized in the uterus. Physicians can perform a total hysterectomy on a woman and, although she will have lost her reproductive capacities,<sup>112</sup> barring serious medical

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106. *Id.*; see also Milot, *supra* note 94, at 1063.

107. *Transplant Living: Organ Donation and Transplantation Information for Patients*, UNITED NETWORK FOR ORGAN SHARING, INC., <http://www.transplantliving.org/livingdonation/facts/organs.aspx> (last visited Oct. 20, 2011).

108. Stated otherwise, the tenet might be that property rights are recognized in the body if the original user no longer needs it. This phrasing would also account for the donation of whole dead bodies, for which purposes quasi-property rights are recognized in that dead body to ensure disposal in accordance with the decedent's wishes, while still avoiding recognition of a property right in a whole living person. Obviously, a living person needs a body.

109. *See Steps of Bone Marrow or PBSC Donation*, NAT'L MARROW DONOR PROGRAM, [http://marrow.org/Registry\\_Members/Donation/Steps\\_of\\_Donation.aspx](http://marrow.org/Registry_Members/Donation/Steps_of_Donation.aspx) (last accessed Nov. 24, 2011).

110. *Cf.* *Moore v. Regents of the Univ. of CA*, 793 P.2d 479, 488-89 (Cal. 1990) (declining to extend a continuing property interest in spleen cells after excision from the body when the donor intended for the cells to be removed, tested, and destroyed); Rao, *supra* note 94, at 374-75 (“A . . . possible reading [of *Moore*] is that, even if the spleen was initially Moore's property, it had been essentially abandoned by its 'owner' for whom the diseased organ bore little value and hence became capable of appropriate by another.”).

111. *Cf.* *Living Donation*, *supra* note 105, at 1.

112. Notably, removal of reproductive capacity might constitute a disability protected by the Americans with Disabilities Act. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (holding that reproduction is a “major life activity” impaired by HIV infection, impairment warranting protection under the ADA). Likewise, decreased kidney function might constitute a disability, depending on the extent of the symptoms associated with that decreased function. Nonetheless, property rights exist in the kidneys. Accordingly, property rights might also exist in the uterus.

complications, the procedure will not endanger her life or result in the loss of a limb.

Recognizing a woman's property right in her uterus is not, of course, without concern, the most prominent of which might rest in commodification of women's reproductive systems. After all, one of the bundled rights most frequently associated with property among the general population is perhaps the right to sell. Though current medical science and technology allow for the body to be fragmented into a variety of parts,<sup>113</sup> each of which might be considered property as described above, the right to sell that property does not necessarily follow. Just as liver lobes and kidneys may be donated but not sold,<sup>114</sup> so too can a uterus, all without the property label being revoked.<sup>115</sup> Stated otherwise, under the safe removal theory, these parts can be recognized as property despite being unavailable for sale.

Professor Radin's market-inalienability concept allows for the uterus to be considered property, worthy of a variety of other rights and protections in the bundle, but safe from market forces. Like the kidney, a woman's uterus can be her property, entitling her to the right to exclude, without it being available for monetary sale. The Supreme Court has already demonstrated that removal of this particular stick from the bundle does not obviate the property label, or other property rights.<sup>116</sup> Market-inalienability also protects against fears of commodification of the living body as a whole.<sup>117</sup> The same protection might even apply to surrogacy because of the whole-body nature of pregnancy.<sup>118</sup>

Accordingly, under the safe removal theory, the uterus can be considered a woman's property. This ownership would carry in its bundle the right to use, the right to exclude, and the right to dispose by donation, but not the right to dispose by sale.

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113. Halewood, *supra* note 61, at 140.

114. *Living Donation*, *supra* note 105, at 3.

115. See *Andrus v. Allard* 444 U.S. 59 (1979) (revoking the market-alienability of eagle feathers without revoking the feathers' status as property).

116. *Id.*

117. See Radin, *supra* note 71, at 1880-81. These fears come to the foreground through prostitution and pornography. The author subscribes to the feminist perspective that women only engage in such activities because of financial compensation and not some burning internal desire to sell their sexuality. Further, the author suspects that if such activities were not market-compensable, the frequency of such activities would significantly decrease and, in the case of normalized pornography, perhaps disappear entirely, although "sexts" (the practice among youngsters to send sexually explicit picture messages to each other via cellular phone texting) and amateur pornographic endeavors might persist, even without monetary compensation.

118. As women who have been pregnant can attest, pregnancy is a whole-body experience. For descriptions of the biological processes of pregnancy, including nausea, weight gain, and the details of how a fertilized embryo implants in the uterine wall, see Jeffrey D. Goldberg, Comment, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 U.C.L.A. L. REV. 1597, 1609-12 (1991); Regan, *supra* note 24, at 1579-82. Selling the body to engage in this activity, in some sense, commodifies the whole rather than merely the part that serves as the locus, i.e., the uterus.

#### IV. GAINING GROUND WITH UTERINE PROPERTY

Identifying property rights in the uterus gains much ground for advancing abortion rights and access. First, as others have argued, the state may not appropriate private property for public good without providing just compensation, or the appropriation becomes an unconstitutional taking pursuant to the Fifth Amendment.<sup>119</sup> As discussed in legal scholarship,<sup>120</sup> the basis for the takings argument in the abortion context might stem from the oft-cited philosophical article by Judith Jarvis Thomson, *A Defense of Abortion*, published two years before the Supreme Court issued its decision in *Roe v. Wade*.<sup>121</sup> Thomson provides a quintessential hypothetical:

You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, ". . . To unplug you would be to kill him. But never mind, it's only for nine months. . . ."<sup>122</sup>

The argument proceeds that, despite what might be the nice thing to do, or even the "moral" thing to do—what the "Good Samaritan" would do<sup>123</sup>—the government may not mandate that you donate your body to save the life of the violinist. Stated otherwise, the government may not mandate that women devote their bodies to pregnancy in the name of a state interest in preserving potential fetal life.<sup>124</sup>

The problem with the Takings Clause argument is that, like the argument rooted in the Equal Protection Clause, no positive rights to government protection and funding come from it. Only the negative right to keep the government out arises. While this might satisfy a Libertarian, it fails to solve the plight of low-income women seeking abortions. A constitutional prohibition on anti-abortion laws does not, on this ground, carry affirmative rights to public

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119. See Goldberg, *supra* note 118; Looper-Friedman, *supra* note 64. Both of these authors base their takings arguments on a property right in the body as a whole. As noted herein, however, such a premise runs afoul of the special nature of women's personhoods. See Radin, *Property and Personhood*, *supra* note 51.

120. See Goldberg, *supra* note 118, at 1598.

121. Thomson, *supra* note 13. The Thomson article has also served as a basis for abortion rights arguments grounded in equal protection doctrine. See, e.g., Regan, *supra* note 24; Sunstein, *supra* note 9, at 31-32.

122. Thomson, *supra* note 13, at 48-49.

123. *Id.* at 62-64; see also Regan, *supra* note 24, at 1571-1610.

124. See Goldberg, *supra* note 118, at 1641-45; Looper-Friedman, *supra* note 64, at 281-83.

funding for abortion procedures, abortion clinics, or even abortion education.<sup>125</sup> Further, the Takings Clause constricts only government action, not the action of private citizens. In the matter at hand, the government might argue it has an interest in protecting potential fetal life, but the fetus itself is not a government actor, so the Takings Clause falls short.

In addition, an unconstitutional taking can, by the textual terms, be remedied once the government offers the property owner just compensation.<sup>126</sup> Susan Looper-Friedman offers a justification for this compensation scheme, stating that “it is precisely this requirement of compensation that may result in giving women what they have not achieved from abortion legislation to date: that is, consideration of all the costs of such legislation, including the burdens it places on women.”<sup>127</sup> How is it possible, though, to assign a market value to the appropriation of a woman’s body purely for the benefit of a potential other, for a period of nine months, when “for a woman who does not want a child, pregnancy is very burdensome indeed”<sup>128</sup>? Another scholar posited that the taking would be cost-prohibitive, given the more easily quantifiable costs of medical care, extra food, maternity clothes, and lost wages, as well as the costs associated with a woman’s labor which, inherently, are harder to quantify.<sup>129</sup> These assessments miss the point. To put a price on a woman’s body, her internal and external labor, her coerced step into the relegated role of mandatory mother,<sup>130</sup> commodifies her personhood.<sup>131</sup> It renders her, in her entirety, a market good. This result stinks of slavery—the government buys her servitude. This simply cannot be the justifiable end to the abortion debate.

Hence an argument under the Takings Clause is both insufficient and inappropriate. A woman’s uterine property rights cannot be so limited. As indicated above, the most central right associated with property—the *sine qua non*, according to some—is the right to exclude others from it.<sup>132</sup> Private property exists for the use of the owner. Pursuant to the right to exclude, owners can eject unwanted persons and objects from their property.<sup>133</sup> Some of the earliest cases recorded in the legal history of the United States confirm this

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125. See Goldberg, *supra* note 118, at 1654 (citing Olsen, *supra* note 24, at 112-13) (“Olsen is greatly concerned that poor women frequently lack sufficient funds to obtain abortions if necessary and a property-based theory of abortion-choice [resting on the Takings Clause] fails to address this problem.”).

126. See Looper-Friedman, *supra* note 64, at 283.

127. *Id.*

128. Regan, *supra* note 24, at 1582.

129. Goldberg, *supra* note 118, at 1645-46.

130. See SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT: PERSONS, WOMEN AND THE LAW* 10 (1979); CAROLE PATEMAN, *THE SEXUAL CONTRACT* 128 (1988).

131. See Radin, *Property and Personhood*, *supra* note 51.

132. See *supra* Part II.

133. Looper-Friedman, *supra* note 64, at 281 (citing 6A AMERICAN LAW OF PROPERTY §§ 28.1-28.21 (Andrew James Casner, ed., Little, Brown 1954); RESTATEMENT (SECOND) OF TORTS §§ 928-30 (1979)).

premise.<sup>134</sup> It follows that a woman with property rights in her uterus may therefore eject a fetal trespasser.<sup>135</sup>

Similarly, with regard to the body, the Supreme Court has recognized the right to exclude in the context of bodily integrity.<sup>136</sup> Perhaps Thomson's violinist hypothetical is more appropriately located at this point in the discourse.<sup>137</sup> Simply stated, individuals may not be forced to sacrifice their bodies, in any way, to save the life of another.<sup>138</sup> In the seminal case of *McFall v. Shimp*, the plaintiff required a bone marrow transplant from the defendant in order to survive, to which the defendant refused to consent.<sup>139</sup> Holding that it could not issue the injunctive relief sought by the plaintiff, the court stated that "one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue."<sup>140</sup> The court continued:

For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forceable [sic] extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre [sic] of the swastika and the Inquisition, reminiscent of the horrors this portends.<sup>141</sup>

Notably, the result should not change even if a potential bone marrow donor is listed on a registry, indicating at least some willingness to go forward with the transplant.<sup>142</sup> Supreme Court jurisprudence confirms that this right to exclude from bodily invasion exists even when the body resisting invasion is that of a suspected drug dealer<sup>143</sup> or robber.<sup>144</sup> The Court nonetheless upheld the

134. See, e.g., *Danforth v. Sargeant*, 14 Mass. 491 (1780) (finding former tenants liable for trespass because tenants remained on the leased property after the lease expired).

135. This is particularly true in the case of a woman whose life is at stake because of a pregnancy. As Thomson states, "it cannot be concluded that you can do nothing, that you cannot attack [the fetus] to save your life. However innocent the child may be, you do not have to wait passively while it crushes you to death." Thomson, *supra* note 13, at 52.

136. See BORDO, *supra* note 18, at 72 (quoting *Union Pacific Railway v. Botsford*, 141 U.S. 250, 251 (1891)); see also Calabresi, *supra* note 90, at 2134 (recognizing a right to refuse medical treatment); Looper-Friedman, *supra* note 64, at 281 (same).

137. See *supra* notes 120-124 and accompanying text.

138. See Sunstein, *supra* note 9, at 33-35 ("It is striking that no American legislature has imposed such a duty and that courts have refused to do so as well."); see also Thomson, *supra* note 13, at 61 ("nobody is morally *required* to make large sacrifices, of health, of all other interests and concerns, or all other duties and commitments, for nine years, or even for nine months, in order to keep another person alive") (emphasis in original).

139. *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (Allegheny County 1978).

140. *Id.* at 91; accord *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (refusing to compel toddler twins to donate bone marrow to their half brother, who suffered from leukemia).

141. *McFall*, 10 Pa. D. & C. 3d at 92.

142. This is similar to a situation in which a woman voluntarily becomes pregnant and then changes her mind. For a discussion of the issues surrounding this circumstance in the context of a right to exclude a fetus from a uterus, see *infra* notes 184-212 and accompanying text.

143. *Rochin v. California*, 342 U.S. 165 (1952). In *Rochin*, the police broke into Rochin's bedroom and forced him to take expectorant in order to regurgitate two morphine capsules,

rights of these individuals to bodily integrity.<sup>145</sup> The question at hand is whether a viable method exists to secure the same rights for women with regard to their reproductive lives.<sup>146</sup> As explained herein, this article posits that one method to consider is recognition of uterine property rights and, accordingly, the right to exclude a fetus.

Although the right to exclude, on its own, might be sufficient grounds to strike down anti-abortion laws,<sup>147</sup> like the arguments based on and the results stemming from the Takings and Equal Protection Clauses, it insufficiently addresses the issue of access, particularly for poor women. To achieve universal access to abortion, the uterine property right to exclude would need to receive government sanction and support. In other words, the government must have a duty to protect a woman's right to exclude a fetus from her uterus and, more pointedly, to protect her from the violence that the fetus inherently commits.<sup>148</sup>

This duty to protect is the "first duty of government."<sup>149</sup> Professor Steven Heyman traces the right to governmental protection from violence to the very

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which the state intended to use as evidence against him. The Court felt compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting [sic] crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

*Id.* at 172.

144. *Winston v. Lee*, 470 U.S. 753 (1985). In *Winston*, the Court refused to allow the state to compel the surgical removal of a bullet fired by a robbery victim into the perpetrator only to use that bullet as evidence against the perpetrator in prosecution.

Both lower courts in this case believed that the proposed surgery, which for purely medical reasons required the use of a general anesthetic, would be an "extensive" intrusion on respondent's personal privacy and bodily integrity. When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive . . . . In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to "drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness," and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.

*Id.* at 764-65 (internal citations omitted).

145. *But see* BORDO, *supra* note 18, at 74-76 (pitting the rights of suspected criminals against those apparently absent from women's reproductive lives, relying on involuntary sterilization and court-ordered obstetrical interventions).
146. *See id.* at 75-78. Professor Bordo recites instances in which pregnant women, in contrast to the alleged criminals, have utterly lacked a right to bodily integrity and been forced to submit to a cesarean section or cervical surgery, pursuant to court orders.
147. Perhaps the Privileges or Immunities Clause would be the appropriate constitutional vehicle, were the analysis to end here. *See* Heyman, *supra* note 77, at 526.
148. *See supra* note 118 and accompanying text.
149. Heyman, *supra* note 77, at 507; *accord* MCDONAGH, *supra* note 9, at 37, 101, 115-17, 127-31; Gardbaum, *supra* note 78, at 455-56; West, *supra* note 78, at 1922-23.

formation of this country.<sup>150</sup> Just as the colonists received protection from the king prior to their arrival on this continent, they formed a Union government to acquire the same protection.<sup>151</sup> Relying on the teachings of John Locke, Professor Heyman notes that “an individual often lacks the power to defend himself against invasion by others” and for this reason, individuals form communities that, with greater numbers, are better able to provide protection for their members.<sup>152</sup> Such protection is “[o]ne of the principal benefits” of joining an organized society.<sup>153</sup> Early state constitutions expressly recognized the citizens’ positive right to protection.<sup>154</sup> For example, the Massachusetts Constitution stated that “[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws.”<sup>155</sup>

By design, Professor Heyman contends, the federal Constitution provided for the federal protection of the states, and the states in turn provided protection for their respective citizens, since such responsibility was not an enumerated federal power.<sup>156</sup> “In this light, it is hardly surprising that the federal Bill of Rights contained no guarantee of a right to protection similar to those found in the state constitutions.”<sup>157</sup> Essentially, the Founding Fathers trusted the states to adequately and appropriately protect the rights of their citizenry, and when the states blatantly failed to do so in the mid-nineteenth century vis-à-vis slavery and civil rights, Congress created the Fourteenth Amendment to ensure that the federal government would have a mechanism of ensuring that states perform the duty to protect originally reserved for them.<sup>158</sup> As Professor Heyman explains, the Congressional debates over the Fourteenth Amendment prove as much,<sup>159</sup> and the Supreme Court has since confirmed it.<sup>160</sup>

The duty to protect includes government protection of private property against not only governmental intrusion but also private violence.<sup>161</sup> Such protection necessarily functions both retrospectively, through government prosecution and punishment of offenders, and prospectively, through various

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150. Heyman, *supra* note 77, at 512-14.

151. *Id.* at 515.

152. *Id.*

153. *Id.* at 517-18.

154. *Id.* at 522-24.

155. *Id.* at 523-24 (citation omitted).

156. *Id.* at 524-25.

157. *Id.* at 525 (citation omitted).

158. *Id.* at 526, 547-48.

159. *Id.* at 546-57, 562-70.

160. *See Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 670, 673, 690-91, 694 (1978) (holding that municipalities, like states, are subject to suit under 42 U.S.C. § 1983 for alleged violations of individuals’ constitutional rights based on a finding that the Fourteenth Amendment creates a federal right to protection by the state or local government).

161. Heyman, *supra* note 77, at 533 (referencing Blackstone’s absolute rights to “security of person and property”).

government efforts to prevent violence,<sup>162</sup> such as a legislature's obligation to enact laws that protect life, liberty, and property.<sup>163</sup> Police officers who failed to enforce the laws and keep the peace were subject to criminal punishment, but not civil liability to the person injured, due to sovereign immunity.<sup>164</sup> In sum, the original state constitutions required states to create and implement systems of laws, whether by legislative enactment or judicial interpretation, that protected people from private actors' intrusions upon life, liberty, and property, and the Fourteenth Amendment provided a vehicle for the federal government to force the states to do so.<sup>165</sup> As one delegate at the Congressional debates over the Fourteenth Amendment stated, "if [a person] is assailed by one stronger than himself the Government will protect him to punish the assailant . . . . [I]f an intruder and trespasser gets upon [a person's] land he shall have a remedy to recover it."<sup>166</sup>

Accordingly, to protect individuals' property rights, states have enacted and judicially written into common law numerous prohibitions against trespass.<sup>167</sup> Every state in the country prohibits trespass either civilly, criminally, or both.<sup>168</sup> Though individual state actors might not have a duty to enforce the trespass statute for a particular person,<sup>169</sup> the state must maintain and enforce, generally, an anti-trespass system to protect its citizens' property rights.<sup>170</sup>

Applying this framework to the pregnancy and abortion context, the fetus is an intruder on a woman's uterine property, and the state should at minimum maintain a system designed to assist in the intruder's removal.<sup>171</sup> Since the state cannot prevent the fetal intrusion from occurring in advance,<sup>172</sup> it is left with only one option, namely, to support its removal after the fact, in much the same way that a police officer would remove a burglar or dangerous intruder, regardless of the intruder's legal intent, from a person's house.<sup>173</sup>

So, the anti-trespass argument has progressed through the establishment of uterine property to the right to exclude a fetal trespasser from that private property. Further, the government has a primary duty to create and implement a

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162. *Id.* at 534-36.

163. *Id.* at 536.

164. *Id.* at 539.

165. See Gardbaum, *supra* note 78, at 456-58.

166. Heyman, *supra* note 77, at 565 (citation omitted).

167. See, e.g., Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1095-98 (2011); Merrill, *supra* note 51, at 747; 87 C.J.S. *Trespass* § 154 (2011).

168. See, e.g., CONN. GEN. STAT. ANN. §§ 53a-107, 53a-110a (West 2010).

169. See *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

170. See *supra* note 167.

171. Cf. MCDONAGH, *supra* note 9, at 36-37, 173-74. McDonagh employs the "fetus as intruder" theory as a method of justifying self-defense, whereas usage of the theory herein rests in trespass doctrine.

172. See *supra* note 162 and accompanying text.

173. See *infra* Part V for an analysis of how Supreme Court jurisprudence could generate this result. Additionally, for a discussion of the use of lethal force against intruders, see *infra* notes 189-212 and accompanying text.

system designed to protect its citizens from harm, including harm caused to property by trespassers. In the abortion context, that system of protection might provide government funding for abortions.

Of course, the anti-trespass scheme is not above criticism. One critique of the anti-trespass basis for abortion rights and access might be that it inherently pits the interests of the woman against the interests of the fetus, something that some feminists and pro-choice advocates have been trying to circumvent. It seems untenable that any abortion rights analysis can truly avoid this clash.<sup>174</sup> The interests of a fetus and a woman who does not want to be pregnant necessarily conflict.

The conflict, however, is not simply one between a fetus' interests and a woman's interests, narrowly conceived, nor is the overriding issue state versus private control of a woman's body for a span of nine months. Also in balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.<sup>175</sup>

By recasting the interests of all the parties involved, including the fetus, and acknowledging those interests as real, perhaps the debate could move forward. Instead of awarding "super-subject" status to the fetus (rendering it as the most important player), "true parent" status to the man-father (assuming the father is both known and present), and mere "object" status to the woman-mother, the discourse might benefit from a more neutral perspective on each of the involved parties, including the state.<sup>176</sup> Such could be the result of abortion rights based on property doctrine, and specifically anti-trespass law. Though the fetus might have an interest in growth and development—"life" when more broadly construed—and the state might have an interest in protecting that potential fetal life, such an interest might not outweigh a woman's property interest in her uterus and the corresponding right to exclude intruders.<sup>177</sup> At

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174. *Contra* Looper-Friedman, *supra* note 64, at 263; Sunstein, *supra* note 9, at 32.

175. Ginsburg, *supra* note 16, at 383 (internal marks and citations omitted).

176. *See* BORDO, *supra* note 18, at 72, 75-78, 88-95.

177. It may become even more challenging to ascribe value to a position that the fetal/state interests (and potentially the interests of the father) in protecting potential life outweigh the uterine property rights of a pregnant woman with the advent of a fully artificial womb. Scientists are developing a way for a baby to grow completely separate from a woman's body. *See, e.g.*, Sharon Guynup, *Scientists Try to Build a Better 'Womb' for IVF*, THE BOSTON GLOBE, Oct. 22, 2007, at C1; Scott LaFee, *Spare Womb; Will Artificial Wombs Mean the End of Pregnancy?*, SAN DIEGO UNION-TRIBUNE, Feb. 25, 2004, at F1; Jeremy Rifkin, *Evolution's Pregnant Pause: Artificial Wombs*, L.A. TIMES, Jan. 21, 2002, at California Metro, part 2, p. 11; Sacha Zimmerman, *ECTOGENESIS: Development of Artificial Wombs: Technology's Threat to Abortion Rights*, SAN FRANCISCO CHRONICLE, Aug. 24, 2003, at D3. Once this technology reaches fruition, the interest in using a woman's uterus against her will to support the potential life of a fetus, when a viable alternative exists, seems to fall flat. Of course, the question of payment for use of this technology would still remain. If the state is the party interested in preserving potential fetal life, then perhaps the state must pay for the transfer of the fetus to the artificial womb, and the continued use of the

bottom, this property-based framework can provide a new basis for grounding the dialogue about these competing interests.

A second critique might be mounted against the governmental support argument, suggesting that other government-supported programs are not as costly as an abortion program might be. However, the state already provides funding for childbirth, and the costs of pregnancy, delivery, and post-natal care exceed those of abortion procedures.<sup>178</sup> Notably, the federal government also funds contraception,<sup>179</sup> and an argument could be made that contraception (like abortion, as posited herein) rests on a woman's property right to exclude invaders from her uterus. For fiscal year 2010, the federal government appropriated over \$300 million to Title X, the program that provides federal funding for contraception through agencies like Planned Parenthood.<sup>180</sup> That same amount could pay for hundreds of thousands of low-income women to access abortions.<sup>181</sup> The cost of government-funded abortion, therefore, does not appear to be prohibitive.

A third set of critiques—and perhaps the most forceful—arises out of property law defenses.<sup>182</sup> One component of this set posits as follows: if the woman invites the fetus into her uterus by engaging in consensual sex, then the fetus is not an intruder; it is, instead, a guest. This critique inappropriately assumes that consent to sex equals consent to pregnancy.<sup>183</sup> A woman can consent to sexual intercourse without consenting to becoming pregnant. Realistically, contraception methods fail; it is possible for women to become pregnant through protected sex, thus consenting to the sex without consenting to the pregnancy. Agreeing to the former does not inherently constitute an acceptance of the latter. The discourse must unpack sex from reproduction.<sup>184</sup>

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womb until birth. The fetus cannot pay these costs; the state funding might be something akin to welfare or Medicaid coverage. On the other hand, perhaps the costs would be imposed upon the fetus as a lien on future earnings.

178. Tribe, *supra* note 46, at 338.

179. See 42 U.S.C. §§ 300 et seq. (2010).

180. See Erik Eckholm, *Planned Parenthood Financing Is Caught in Budget Feud*, N.Y. TIMES, Feb. 17, 2011, at A16; Aimee Miles, *A Guide to GOP Proposals On Family Planning Funds*, KAISER HEALTH NEWS (Mar. 9, 2011), [www.kaiserhealthnews.org/Stories/2011/February/18/planned-parenthood-title-10.aspx](http://www.kaiserhealthnews.org/Stories/2011/February/18/planned-parenthood-title-10.aspx) (last visited August 4, 2011).

181. See *In-Clinic Abortion Procedures at a Glance*, PLANNED PARENTHOOD OF AM., <http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp> (last visited November 18, 2011) (listing the cost of abortions in the first trimester at \$300-\$950).

182. Cf. Goldberg, *supra* note 118, at 1632 (discussing the defense of estoppel, when the property right was a revocable license).

183. Cf. Thomson, *supra* note 13, at 58-59 (“If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, ‘Ah, now he can stay, she’s given him a right to the use of her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle.’”).

184. See, e.g., Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1359 (2010). The LGBT rights movement might lend much support to the existing push to unbundle sex from reproduction. See Shelley Mains and

Sex for pleasure is a real possibility for both men and women only because of the advent birth control.<sup>185</sup> Beyond contraception use, and particularly in light of contraceptive failures, women should be allowed to consent to sex without consenting to pregnancy.<sup>186</sup>

However, even segregating consensual sex from consensual pregnancy does not help a woman who initially consented to the pregnancy but later changes her mind. It is not difficult to imagine situations that might give rise to this predicament. Perhaps a husband is killed during the course of a wife's pregnancy and the wife no longer wants to carry the pregnancy to term. Perhaps a woman's financial situation turns dire—not uncommon in today's economy—and she wants to wait for more fiscal stability before bringing a child into the world. The specifics are somewhat irrelevant; the predicament remains. Essentially, a woman who owns the property of her uterus invited in a fetus who, for somewhat obvious reasons, refuses to leave, and will suffer harm if forced to do so. In this circumstance, the woman arguably owes the fetus a duty of reasonable care.<sup>187</sup> That having been said, the status of an invitee or licensee can be reduced to a trespasser if the property owner revokes the privilege.<sup>188</sup> A trespasser may be ejected by force, even deadly force in some cases.<sup>189</sup>

A recent case from Connecticut, the state that gave rise to foundational jurisprudence in contraception,<sup>190</sup> illustrates this point. In *State v. Terwilliger*,

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Stephanie Poggi, "Together We Will Get Somewhere": Working Together for Lesbian/Gay Liberation and Reproductive Freedom, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 281-90 (Marlene Gerber Fried ed., South End Press 1990).

185. See, e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 199-201, 203 (2001).

186. See, e.g., MCDONAGH, *supra* note 9, at 38; Sunstein, *supra* note 9, at 30; Tribe, *supra* note 46, at 337-38.

187. See, e.g., 65A C.J.S. *Negligence* § 459 (2010).

188. For example, a home owner who invites people over for dinner and catches one of the guests trying to steal something from the house would likely ask that guest to leave. Once the invite is revoked, if the guest refuses to vacate the premises, he or she becomes a trespasser.

A similar situation arose in the case of *Depue v. Flateau*, 111 N.W. 1 (Minn. 1907). In that case, the plaintiff had dinner at the defendant's home and, shortly thereafter, became ill. The defendant refused to allow the plaintiff to spend the night, and instead sent the plaintiff on his way. The plaintiff fainted en route to his home, fell into the snow on the side of the road, and spent the night there. When he was found in the morning, the plaintiff was nearly dead from frostbite and, though he survived, he suffered serious injuries including the loss of some fingers. The defendant was held liable for negligence because he failed to exercise reasonable care for his guest. *Id.* at 2-3.

*Depue* can be distinguished from the uterine property and fetal trespass situation in two important ways. First, the plaintiff in *Depue* fell ill while he was still an invitee. Once he was told to leave, he did so. A fetal trespasser refuses to leave. The case does not stand for the proposition that a property owner has duty to provide reasonable care to trespassers. Second, and perhaps more persuasively, the plaintiff in *Depue* would not have caused any serious or lasting harm to the defendant's home by spending the night. Conversely, a fetus stays in a uterus for nine months, and has a significant impact while there.

189. 65A C.J.S. *Negligence* §§ 460, 465; 6A C.J.S. *Assault* §§ 32, 115. "The use of a dangerous weapon or shooting of a trespasser may be justifiable in some circumstances, as where it is necessary for self-defense . . ." 6A C.J.S. *Assault* § 32 (internal notations omitted).

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

the defendant shot his step-daughter's husband, from whom the step-daughter had separated.<sup>191</sup> The defendant established that the victim was intoxicated, acted in a threatening, violent, and uncontrollable way near the defendant's home, and refused to leave even after being ordered off the defendant's property.<sup>192</sup> Thus, the defendant was entitled to jury instructions that deadly force can be used against a trespasser in order to prevent the victim "from committing or attempting to commit a crime of violence on the premises."<sup>193</sup> State statutory law is consistent with this holding, which statutes provide that a property owner may use deadly force against a criminal trespasser "when he reasonably believes such to be necessary to prevent an attempt by the trespasser to commit . . . any crime of violence" or "to the extent that he reasonably believes such to be necessary to prevent or terminate an unlawful entry by force into his dwelling . . . and for the sole purpose of such prevention or termination."<sup>194</sup> Jurisprudence and statutory law from Texas, where *Roe* started, provide a similar result.<sup>195</sup> The applicable sections of the Texas Penal Code state that deadly force may be used when immediately necessary to prevent trespass or other "unlawful interference with the property", to prevent criminal mischief in the nighttime or some other aggravated offense, and when the property cannot be protected any other way.<sup>196</sup>

In the uterine property context, these doctrines justify abortion as a method of removing a fetal trespasser, even if the abortion results in the death of the fetus. At present, the uterine property cannot be protected in any way other than aborting the pregnancy. Further, the fetus causes at least interference with a woman's use of her uterus and body; usually pregnancy causes a severe impact on the uterus and the rest of a woman's body.<sup>197</sup>

A second critique arising from property law defenses concerns the conflicting rights of the opposing parties—namely, the property owner and the trespasser. In the broader property law context, both the trespasser and property owner have basic rights that must be acknowledged. As will be shown herein, however, this critique does not apply in the uterine property context because

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191. 984 A.2d 721, 724-26 (Conn. 2009).

192. *Id.* at 729.

193. *Id.*

194. CONN. GEN. STAT. ANN. § 53a-20 (West 2010); *see also* CONN. GEN. STAT. ANN. § 53a-107(a) (West 2010) (defining criminal trespass).

195. *See, e.g.*, Sparks v. State, 177 S.W.3d 127, 132 (Tx. App. 2005) (holding that defendant was entitled to a jury instruction on defense of premises with deadly force); Hernandez v. State, 914 S.W.2d 218, 223-24 (Tx. App. 1996) (affirming that deadly force may be used to protect property in certain circumstances, and holding that criminal mischief must be in progress or imminent in order to justifiably use deadly force); Jackson v. State, 753 S.W.2d 706, 708-10 (Tx. App. 1988) (same).

196. TEX. PENAL CODE §§ 9.41(a), 9.42 (West 2011). Notably, a trespasser might have a right to remain on the property to "prevent serious harm" to himself under the tort doctrine of private necessity, but those circumstances are generally shorter in duration than nine months, and carry liability to any harm done to the owner's legally protected interests. *See* REST. (SECOND) OF TORTS § 197 (1965).

197. *See, e.g., supra* note 118 and accompanying text.

fetuses are not “persons” within the context of the Constitution and thus do not yet have such rights.

Several cases help to demonstrate the balance between the rights of owners and trespassers. In *State v. Shack*, the Supreme Court of New Jersey held that a field worker and an attorney who, over a farmer’s objection, entered the farmer’s land to deliver services to migrant farmworkers living on the farm were beyond the reach of the criminal trespass statute.<sup>198</sup> Though the farmer had rights connected with his property ownership, those ownership rights could not trump the workers’ rights to “live with dignity and to enjoy associations customary among our citizens.”<sup>199</sup> Similarly, in *PruneYard Shopping Center v. Robins*, the Supreme Court held that the shopping mall had no authority to oust a small group of students seeking petition signatures.<sup>200</sup> While rights of expression arising under the First Amendment do not overcome a landowner’s property rights under the Fifth and/or Fourteenth Amendments,<sup>201</sup> more expansive free speech rights guaranteed by the California Constitution conquered the landowner’s property rights.<sup>202</sup> In both these cases, other constitutional rights defeated the right to exclude.

The major distinction between these two cases and the abortion case at hand is that the constitutional rights at issue in *Shack* and *PruneYard* belonged to people already living outside the womb. Simply put, regardless of when life may or may not begin,<sup>203</sup> as far as constitutional rights are concerned, “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>204</sup> Even “[i]n areas other than criminal abortion, the law has been reluctant to

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198. 277 A.2d 369 (N.J. 1971).

199. *Id.* at 374.

200. 447 U.S. 74 (1980).

201. *Id.* at 80-81 (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569-70 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 517-21 (1976)).

202. *Pruneyard*, 447 U.S. at 81-83. The Supreme Court held that “the requirement that [PruneYard] permit [the students] to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of [PruneYard’s] property rights under the Takings Clause.” To reach this holding, the Court relied on the following tenets:

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. [] And here there has literally been a “taking” of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property.[] But it is well established that “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.” [] Rather, the determination whether a state law unlawfully infringes a landowner’s property in violation of the Taking Clause requires an examination of whether the restriction on private property “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” [] This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”

*Id.* at 82-83 (internal citations and notations omitted).

203. *Roe v. Wade*, 410 U.S. 113,159 (1979).

204. *Id.* at 158.

endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn. . . . In short, the unborn have never been recognized in the law as persons in the whole sense.”<sup>205</sup> Whatever discrete rights might be recognized for fetuses, such as the right to inherit property, such rights do not vest until the fetus is born alive.<sup>206</sup> Nothing in the string of cases forming the progeny of *Roe* changes the holding that a fetus is not a person within the context of constitutional rights.<sup>207</sup> In the uterine property context, given this Supreme Court jurisprudence, a fetus can be considered a person for purposes of committing the trespass (and perhaps for other discrete rights mentioned above) but cannot hold all of the constitutional rights of a living born person. Indeed, if this basic premise no longer held true, then all abortions would be criminal, because each procedure would deprive a “person” of “life” in violation of the Fourteenth Amendment. Although the state in *PruneYard* asserted its interests in promoting free speech by affording free expression and petition rights beyond the floor set by the Constitution, those rights still belonged to individuals existing outside the womb.

Further examination of the Court’s holding in *PruneYard* offers additional points of distinction between the case of unwanted petitioners in a shopping mall and the case of an unwanted fetus in a uterus. First, the shopping center could restrict the petitioners’ activity “by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.”<sup>208</sup> A pregnant woman does not have that option; the pregnancy has systemic bodily effects for its duration, and potentially continuing thereafter, not to mention the life-altering result of motherhood. Second, dismissing the shopping center’s asserted First Amendment right not to be compelled to use its property to express the opinions of others, the Court states that the shopping center was not part of the owners’ personal daily lives.<sup>209</sup> A pregnant woman uses her body every day, all day, without fail.

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205. *Id.* at 161-62.

206. See KRISTIN LUKER, ABORTION & THE POLITICS OF MOTHERHOOD 3-4 (1984).

207. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 912-14 (1992) (Stevens, J., concurring in part and dissenting in part) (“[A]n abortion is not ‘the termination of life entitled to Fourteenth Amendment protection.’ . . . From this holding [in *Roe v. Wade*], there was no dissent; . . . indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a ‘person’ does not have what is sometimes described as a ‘right to life.’ This has been and, by the Court’s holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.”) (internal marks and citations omitted); *Webster v. Reproductive Health Services*, 492 U.S. 490, 568 n.13 (1989) (Stevens, J., concurring in part and dissenting in part); see also *U.S. v. Montgomery*, 635 F.3d 1074, 1086 (8th Cir. 2011) (holding that “Congress did not . . . expand the term ‘person’ to include the unborn in its enactment of the Unborn Victims of Violence Act of 2004.”); *Lewis v. Thompson*, 252 F.3d 567, (2d Cir. 2001) (“Lacking the status of a Fourteenth Amendment ‘person,’ a fetus cannot validly claim a denial of equal protection . . . and there is no basis for contending that such a claim fares any better under the equal protection component of the Fifth Amendment.”).

208. *PruneYard*, 447 U.S. at 83.

209. *Id.* at 87 (distinguishing *Wooley v. Maynard*, 430 U.S. 705 (1977)).

Additionally, the Court in *PruneYard* held that the shopping center owners were not “being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers.”<sup>210</sup> It is hard to envision how a pregnant woman can avoid sending a message, whether or not intentional, that she supports child-bearing. The pregnancy is usually apparent by the second trimester.<sup>211</sup> Poor women who would rather abort the pregnancy but lack the funds to do so are essentially “compelled to affirm their belief in [the] governmentally prescribed position”<sup>212</sup> that childbirth is preferred over abortion. Accordingly, although the right to exclude lost in the shopping center context, it might succeed in the abortion context.

## V. SECURING ABORTION RIGHTS AND ACCESS THROUGH UTERINE PROPERTY

The question still remains how to get there from here. Interestingly enough, neither *Roe* nor the cases forming its progeny address a property-based theory supporting abortion rights and access thereto.<sup>213</sup> All of these cases proceeded on a privacy-based argument, advanced through the liberty right in the Fifth and Fourteenth Amendments.<sup>214</sup> The property-based argument has not been foreclosed; it has never been offered. The doctrine of *stare decisis* does not preclude a new argument based on a different theory. In the current post-*Harris* world where federal dollars may not be spent on abortions,<sup>215</sup> a property-based

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210. *Id.* at 88.

211. This may not be the case for extremely overweight women.

212. *PruneYard*, 447 U.S. at 88.

213. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *Casey*, 505 U.S. 833; *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

214. Again, it is the liberty-based right to privacy that, as the foundation for abortion rights, gives rise to so much skepticism, and it is precisely this widely-criticized foundation that this article attempts to circumvent by providing a viable alternative. Supreme Court Justices have offered several examples of that skepticism. *See Roe*, 410 U.S. at 174 (Rehnquist, J. dissenting); *Casey*, 505 U.S. at 951-53 (Rehnquist, J., concurring in the judgment in part and dissenting in part); *Casey*, 505 U.S. at 980, 983-84 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* *Roe*, 410 U.S. at 152 (“The Constitution does not explicitly mention any right of privacy.”)

215. *See Harris*, 448 U.S. 297. In *Harris*, the Supreme Court considered certain statutory and constitutional questions raised by the Hyde Amendment, which prohibited the use of federal funds to reimburse under the Medicaid program any costs associated with abortions. *Id.* at 301-02. The first iteration of the Hyde Amendment emerged in 1976, but the 1980 version was current when the Court decided *Harris*, which version stated, in pertinent part, that no federal funds appropriated to Medicaid “shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.” *Id.* at 302 (internal citation omitted). Some earlier versions of the Hyde Amendment contained “an additional exception for ‘instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.’” *Id.* at 303 (internal marks and citation omitted). Plaintiffs in *Harris* alleged,

abortion entitlement argument might proceed under the following framework.

Janet Jones is a pregnant woman who receives welfare payments and Medicaid coverage. She desires to have an abortion but cannot afford to pay for the procedure. The state maintains a policy and custom<sup>216</sup> of refusing to pay for abortions, even though Jones receives other forms of state financial support due to her poverty. Because a fetus is trespassing in her uterus, and Jones has a property right therein, the state's policy of refusing to cover abortion costs—thereby refusing to eject the trespasser—deprives Jones of her property in violation of the Fifth and Fourteenth Amendments.

*Harris* may be distinguished because the underlying analysis of that case differs from the reasoning offered here. *Harris*, like *Roe* and other cases that came before it, as well as the progeny that came after, relied on a privacy-based analysis, yielding a discussion of whether the absence of federal funding violated any constitutional liberty guarantees.<sup>217</sup> Answering this question in the negative, in *Harris*, the Court stated that the Hyde Amendment “places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.”<sup>218</sup> The Court continued, holding that “although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.”<sup>219</sup> The right to

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among other things, that the Hyde Amendment violated the First, Fourth, Fifth, and Ninth Amendments of the Constitution because it fully funded childbirth but denied such funding for abortions, including medically necessary abortions, except in the narrow circumstances expressly iterated. *Id.* The Court upheld the constitutionality of the Hyde Amendment. *Id.* at 316-18, 319-20, 322-26.

[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.

*Id.* at 316-17. Further, “the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life.” *Id.* at 325.

216. See *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690-91, 694.

217. *Harris*, 448 U.S. at 312, 316-17.

218. *Id.* at 315 (citing *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

219. *Id.* at 316.

privacy did not carry sufficient weight to prevent the government “from making a value judgment favoring childbirth over abortion, and implementing that judgment by the allocation of public funds.”<sup>220</sup>

Property rights, however, might carry the necessary weight. The Court’s decision about the validity of the Hyde Amendment fails to comport with other decisions finding that property rights, and particularly property rights arising out of poverty, deserve funded protection. In *Goldberg v. Kelly*, decided a decade before *Harris*, the Court “recognize[d] that forces not within the control of the poor contribute to their poverty.”<sup>221</sup> As support for this recognition,<sup>222</sup> the Court relied on a law review article by Charles A. Reich that assigned blame for poverty, at least in part, to the government.<sup>223</sup>

[T]oday we see poverty as the consequence of large impersonal forces in a complex industrial society—forces like automation, lack of jobs and changing technologies that are beyond the control of individuals. It is closer to the truth to say that the poor are affirmative contributors to today’s society, for we are so organized as virtually to compel this sacrifice by a segment of the population. Since the enactment of the Social Security Act, we have recognized that they have a right—not a mere privilege—to a minimal share in the commonwealth.<sup>224</sup>

The Court held that welfare entitlements, by virtue of their property-like nature, could not be terminated without due process of law.<sup>225</sup> Similarly, it has held “that the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created ‘property’ interest protected by the Fifth Amendment.”<sup>226</sup> The Court has also described Medicaid benefits as “protected property interests.”<sup>227</sup> While privacy rights at issue in *Harris* did not “confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom [of choice],”<sup>228</sup> uterine property rights might do just that. Using property law could reframe abortion as an entitlement to uterine property protection, manifested through abortion funding.

The Court’s decision in *Boddie v. Connecticut* is also instructive with regard to due process rights that must be provided to the poor.<sup>229</sup> In *Boddie*, the plaintiffs challenged the state requirement that to obtain a divorce, payment of a

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220. *Id.* at 314 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)) (internal marks omitted).

221. 397 U.S. 254, 265 (1970).

222. *Id.* at 265 n. 13.

223. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L. J.* 1245, 1255 (1965).

224. *Id.*

225. *Goldberg*, 397 U.S. at 261-64.

226. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

227. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982).

228. *Harris*, 448 U.S. at 318.

229. 401 U.S. 371 (1971).

sixty-dollar fee and additional costs associated with service of process be made.<sup>230</sup> The plaintiffs, by virtue of their poverty, could not pay the fees and costs.<sup>231</sup> The state did not provide a fee waiver, even though judicial proceedings were the only way to dissolve a marriage.<sup>232</sup> In short, the Court held that:

[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.<sup>233</sup>

Likewise, the government may not deny a woman, solely because of inability to pay, access to the only legal method of obtaining an abortion, particularly in light of the centrality of reproduction within this society. Just as the state created a monopoly over the only means of obtaining a divorce,<sup>234</sup> so too has the state created a monopoly over the one viable means of obtaining an abortion. Abortion clinics and individual providers must be licensed by the state.<sup>235</sup> Realistically, an abortion from a licensed provider is—or should be—the only option. At minimum, it is the only safe option. When the state creates a single meaningful method of providing a service central to “interests of basic importance” in society, such as reproduction, then the state may not deny access to that service solely because of an inability to pay.<sup>236</sup> Accordingly, to comply with federal due process requirements, if a uterine property doctrine is realized, then the state would need to maintain a system of providing abortion funding, and some meaningful process must be associated with the revocation of that funding.<sup>237</sup>

In sum, if women are entitled to protection of uterine property rights,<sup>238</sup> the state must create and implement a policy<sup>239</sup> pursuant to which it generally provides payment for abortions. Deprivation of that entitlement payment should

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230. *Id.* at 372.

231. *Id.*

232. *Id.* at 374-76.

233. *Id.* at 374.

234. *Id.* at 375.

235. *See, e.g.*, ARIZ. REV. STAT. § 36-449.02 (2011); FLA. STAT. ANN. §§ 390.0111, 390.014 (2011); IND. CODE § 16-21-2-10 (2011); MASS. GEN. LAWS ch. 112, § 12Q (2011).

236. *Boddie*, 401 U.S. at 376-78.

237. It is true that due process is not required when the state has a “countervailing . . . interest of overriding significance” as compared with the right, or deprivation thereof, at issue. *Id.* at 377. In the abortion context, if the state had such a countervailing interest of overriding significance, then all abortions would be illegal. It makes little sense that the state’s interest is merely to prevent poor women from obtaining abortions. To be a countervailing interest of overriding significance, the state’s interests in preventing abortions and protecting potential fetal life should need to be so great that there could be no room for abortions whatsoever. However, this is known not to be the case.

238. *See Goldberg*, 397 U.S. 254; *Mathews*, 424 U.S. 319; *Blum*, 457 U.S. 991.

239. *See Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 690-91, 694.

be the outlier, not the rule, and instances of deprivation or other infringement on that entitlement must be afforded due process.<sup>240</sup> Perhaps that process will mean that the state will not issue payment for women who use abortion as a means of contraception, rather than condoms, birth control pills, or other available methods (which, as noted above, are federally funded through Title X<sup>241</sup>). The Court in *Boddie* did place some emphasis on the “good faith” of the plaintiffs in their pursuit of divorces;<sup>242</sup> the same good faith might be required in the abortion context as well. The details of the due process can be left for another day. The point for now is that the state should not be permitted, within the context of this legal scheme, to sit on the sidelines when its policy of refusing to fund abortions deprives women of their rights to uterine property, and specifically the right to exclude trespassers from that property.

## VI. CONCLUSION

This article has progressed through the thinking exercise of how a pro-abortion argument based on anti-trespass law and uterine property principles might be envisioned. Property rights in the uterus could be created without subjecting women’s reproductive organs to market forces. Unwanted fetuses could be considered trespassers in a woman’s uterus. The government could be responsible for establishing a system of protecting uterine property from fetal trespassers, which could provide federal funding for abortions. Since fetuses are not full persons under the Constitution,<sup>243</sup> arguably aborting them does not deprive them of life without due process. Even if they were accorded full personhood status, deadly force may be used to protect uterine property.

The thinking, however, must not stop there. Is it useful to progress in this way? Consider some possible positives. First, most simply, it might work. It might be that reframing *Roe* as uterine property, complete with the right to exclude and a governmental system designed to protect that property, could secure national public funding for abortions. For poor women, the right to choose is somewhat bare without that funding. In light of recent legislative efforts to thwart all government dollars that might in any way be spent on abortions,<sup>244</sup> this new property-based abortion discourse might prove to be particularly useful.

Property-based abortion discourse could also shift the language of the current debate. The “specter of the evil mother”<sup>245</sup> advanced by the anti-choice camp does little to create space for meaningful dialogue with women who, for

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240. See *Boddie*, 401 U.S. 371.

241. See *supra*, notes 179-180 and accompanying text.

242. *Boddie*, 401 U.S. at 381-82.

243. See *supra* notes 203-207 and accompanying text.

244. See, e.g., Naftali Bendavid, *Republicans Push Antiabortion Bills*, WALL ST. J., Feb. 9, 2011, at A6; David M. Herszenhorn, *As House Passes Big Budget Cuts, Standoff Looms*, N.Y. TIMES, Feb. 20, 2011, at A1.

245. BORDO, *supra* note 18, at 81.

one reason or another, want to choose to end a pregnancy. Likewise, little room is left for negotiation when the opposing camps focus so much attention on defining when life begins.<sup>246</sup> The fiercely bitter opposition between the pro- and anti-choice camps may be the most frustrating result of *Roe*.

*Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend ‘toward liberalization of abortion statutes’ noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings, including notification and consent requirements, prescriptions for the protection of fetal life, and bans on public expenditures for poor women’s abortions.<sup>247</sup>

Changing the language of the debate from privacy doctrine to property doctrine could shift the dynamics. The property principles and application discussed above simultaneously recognizes a fetus as a “life” and a woman as an autonomous decision-maker, and then evaluates the juxtaposed interests of those two parties. Maybe a shift in the legal framework applicable to the abortion debate can push that debate forward and generate progress. At minimum, abortion rights and access based on uterine property could change the ways in which the players most involved in the debate think about the underlying issues.

Conversely, reframing *Roe* in terms of uterine property rights might carry some negative consequences. As much as new language might shift thinking, it does not change the underlying anti-choice sentiment that abortions kill living things. Thus, consensus may still be elusive. Also, anti-trespass laws are creations of each state; relying on a state-based system of enforcement rather than a federal system may create more problems instead of solutions. Along similar lines, different states have different rules about when deadly force may be used against trespassers. Further, what is lost by envisioning the fetus as an intruder? This conception might devalue the lived experiences of women seeking abortions, who may not feel quite so hostile against the fetuses, but nonetheless believe they cannot bring a child into the world at the particular point in time of their pregnancies.<sup>248</sup>

The point of this piece has not been to find the right answer, but rather to offer a thought exercise focused on a different legal framework for establishing abortion rights and access. What might happen if a new lens is applied to an old problem? Where to go from here, with a new basis for discussion in hand, is a question that activists, advocates, and lawmakers must now address.

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246. See LUKER, *supra* note 206, at 4-8.

247. Ginsburg, *supra* note 16, at 381-82 (internal marks and citations omitted).

248. See Lisa H. Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, 16 (31 Supp.) REPRODUCTIVE HEALTH MATTERS 74, 79 (2008).