THE REPRODUCTION OF CITIZENSHIP: HOW THE U.S. GOVERNMENT SHAPED CITIZENSHIP DURING THE 20th CENTURY BY REGULATING FERTILITY, PROCREATION, AND BIRTH ACROSS GENERATIONS

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For my grandmother and my mother,

Leta and Carol

ABSTRACT

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Who qualifies, with full status, as an American citizen? Like all modern nation-states, the United States erects and maintains various types of legal and geographic boundaries to demarcate citizens from noncitizens. The literature in political science tends to focus on the ways in which immigration law structures citizenship over time, but this is only half the story. As this dissertation demonstrates, governments also regulate the birth of citizens from one generation to the next. The concept of a 'civic lineage regime' is introduced as the domestic counterpart to the 'immigration regime,' when it comes to structuring civic membership in the United States (and other nations). To bring visibility to this deeply constitutive yet largely unexamined dimension of American political development, the project engages in a close analysis of U.S. Supreme Court cases targeting civic lineage during the twentieth century. Examining eugenic sterilization laws, birth control, abortion, and welfare reform, the dissertation maintains that the federal and state governments regulate the intimate lives of Americans for many of the same reasons governments seek to control immigration. In both realms, the state makes legal distinctions between who can and cannot become a member by coercively privileging certain visions of American identity over others. This often entrenches hierarchies of citizenship based on race, gender, ethnicity, class, disability, religion, and sexuality. These state-building policies, involving the regulation of reproduction and birth, have the ability to define and redefine the meaning and scope of U.S. citizenship across time by shaping the future "face" of the American polity. Finally, although many older inegalitarian conceptions of civic membership are now discredited, the dissertation concludes with evidence that the conflictual politics involved in constructing an American civic lineage regime continue today in the form of the rise of a new 'neoliberal ideal of citizenship.'

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CHAPTER 1:

Introduction

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.—Citizenship Clause, Fourteenth Amendment to the U.S. Constitution

> I am speaking of the average citizens, the average men and women who make up the nation…Into the woman's keeping is committed the destiny of the generations to come after us…the foundation of all national happiness and greatness.—Theodore Roosevelt, 1905

> Perhaps our brightest hope for the future lies in the lessons of the past. As each new wave of immigration has reached America it has been faced with problems…[but] Somehow, the difficult adjustments are made and people get down to the tasks of earning a living, raising a family, living with their neighbors, and, in the process, building a nation. –John F. Kennedy, 1964

> Children are, after all, our country's most precious resource and our most important responsibility.—William J. Clinton, 1996

In May 2002, Virginia's Governor Mark Warner issued a formal apology for the more than eight thousand Virginians who were forcibly sterilized from 1924 to 1979, under a state law that permitted such treatment of individuals deemed likely to produce "socially inadequate offspring."[1] The first in a series of governors to apologize for their state's eugenics programs during the twentieth century, Warner's act coincided with the 75th anniversary of the U.S. Supreme Court's ruling in *Buck v. Bell*, which upheld Virginia's

[1] William Branigin, "Virginia Apologizes to the Victims of Sterilizations," *Washington Post*, May 3, 2002.

eugenic sterilization law as constitutional, making the law a legal model for over thirty states across the nation.[2] Facing growing pressure from civil rights and mental health groups to acknowledge and renounce this disgraceful past and apologize to living survivors of the policy, Governor Warner expressed his remorse for "Virginia's participation in eugenics," labeling it as "a shameful effort in which state government never should have been involved."[3] The governors of Oregon, North Carolina, South Carolina, and California quickly followed his example, delivering similar apologies over the next year for the involvement of each of their states in the eugenics movement. Following the Supreme Court's 1927 decision in *Buck v. Bell*, over 65,000 Americans were sterilized across the nation, with the practice extending into the early 1980s in locations like Oregon.[4] The victims of these eugenic sterilization laws were selected because they lived at the margin of mainstream "respectable" society, often due to their ancestry, class, race, religion, sexual promiscuity, marital status, sexual orientation, disability, criminality, or lack of economic self-sufficiency. The explicit purpose of these laws: To breed "better" Americans by preventing "less desirable" segments of the population from producing future generations of citizens.

Prior to the media attention to victims of these laws and apologies issued by state leaders, most Americans were unaware that eugenics played such a significant role in U.S. reproductive policy, associating eugenics largely with the atrocities of Nazi

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[2] *Buck v. Bell*, 274 U.S. 200 (1927).
[3] Peter Hardin, "Apology for Eugenics Set: Warner Action Makes Virginia First State to Denounce Movement," *Richmond Times-Dispatch*, May 2, 2002.
[4] Laurence M. Cruz, "Eugenics Yields Dark Past," *Statesman Journal* (Salem, OR), December 1, 2002; Randi Bjornstad, "Sterilization Apology Offered in Oregon," *Register-Guard* (Eugene, OR), December 3, 2002.

Germany. Yet the Court's opinion in *Buck v. Bell* unabashedly linked the state's interest in controlling the fertility of its citizens to its ambition of building a "better" American polity in the future. Comparing the involuntary sterilization of inferior citizens to the civic duty required from America's "best citizens," expected to defend the nation through military conscription during times of war, the Court suggested that it was the civic responsibility of less valuable members of society, like Carrie Buck, who was erroneously diagnosed by her doctor as "feebleminded," to submit to state-sponsored sterilization. "It is better for all the world," wrote Justice Oliver Wendell Holmes, Jr., "if instead of waiting to execute degenerate offspring for a crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind...Three generations of imbeciles is enough."[5]

With these fateful words, the Supreme Court declared eugenic sterilization constitutional in the United States, allowing Virginia to proceed with the involuntary sterilization of Carrie Buck, who was institutionalized at the age of 17 for becoming pregnant out of wedlock and falsely diagnosed as mentally impaired. Although the Supreme Court's ruling in *Buck v. Bell* is often classified as an anomaly in American law and politics, as we shall see, eugenic sterilization continued as a norm within many state hospitals, mental institutions, and prisons for over fifty years. Moreover, this Supreme Court decision is worth highlighting in the introduction of my dissertation—though the issue of eugenics serves as just one of many examples addressed in the chapters that follow—precisely because *Buck v. Bell* provides a striking example of a much broader

[5] *Buck v. Bell*, 274 U.S. 200 (1927).

and more pervasive pattern in American political development. From the founding of the nation to the present, the American government has often engaged in state-building efforts aimed at shaping the composition and character of its polity across generations by coercively regulating the actual *reproduction* of its citizens.

The purpose of this dissertation is to document empirically and explore normatively an under-examined, under-analyzed, and generally overlooked political process, which I refer to as "the reproduction of citizenship." Who counts as an American citizen? And how has this changed over time? Like all modern nation-states, the government erects and maintains various types of legal and geographic boundaries of inclusion and exclusion, aimed at regulating the intergenerational transmission of civic membership within its polity. The most familiar example of this phenomenon is the state's juridical control over immigration, since laws pertaining to immigration and naturalization function as easily discernible instances of direct governmental control over who can become a future U.S. citizen. By using laws to distinguish between members and nonmembers of its political community, the United States inevitably privileges certain visions of nationhood and civic identity over others in a manner that shapes the future composition of its citizenry. As scholars of immigration emphasize, one of the primary ways in which modern nation-states, like the United States, define themselves is by determining who qualifies as a new member of their political community. For this reason, the literature in political science tends to focus almost exclusively on the ways in

which immigration law structures citizenship over time.[6] I argue that this is far less than half the story. By examining federal court cases in the United States pertaining to domestic population control during twentieth century, this dissertation demonstrates that a similar political process also occurs through governmental regulation of the actual birth of citizens from one generation to the next. As the example above illustrates, such regulations often entrench various types of group hierarchy based on gender, race, class, ethnicity, religion, sexuality, and disability. And though many older inegalitarian conceptions of civic membership—including the eugenic ideal for citizenship during the Progressive Era—are now discredited, I argue in the chapters that follow that the conflictual politics involved in regulating the fertility and birth of citizens continue today in the form of a new significantly inegalitarian 'neoliberal ideal of citizenship.'

The Concept of a Civic Lineage Regime:

I introduce the concept of a 'civic lineage regime' as the domestic counterpart to the 'immigration regime,' when it comes to structuring civic membership in the United States (and other nations). Scholars frequently use the term 'immigration regime' to refer to the set of laws and practices that together comprise a nation's immigration policy

[6] See e.g.: Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, MA: Harvard University Press, 2006); Douglass Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York: Russell Sage Foundation, 2002); Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002); Caroline Brettell and James Hollifield, eds., *Migration Theory: Talking Across Disciplines* (New York: Routledge, 2008); T, Alexander Aleinikoff and Douglass Klusmeyer, eds., *From Migrants to Citizenship: Membership in a Changing World* (Washington D.C.: Brookings Institution Press, 2000); Andrew Geddes, *Immigration and European Integration: Beyond Fortress Europe* (New York: Manchester University Press, 2008); Carol M. Swain, ed., *Debating Immigration* (Cambridge: Cambridge University Press, 2007).

(broadly construed) at a given political moment. I coin the term 'civic lineage regime' in a similar manner to describe reproductive policies targeting citizenship. Just as nations inevitably regulate immigration in the modern world, they also regulate the birth of citizens. These state-building policies have the ability to redefine the meaning and scope of U.S. citizenship across time by shaping the future "face" of the American polity. For instance, when we reflect upon the thousands of children (and their children, grandchildren, and so on) that were never born due to involuntary sterilization laws during the last century, there is little doubt that this civic lineage policy will continue to have lasting repercussions on the demographic landscape of the United States. Indeed, as the case of *Buck v. Bell* illustrates, the government's historic and contemporary regulation of reproductive policy (by both state governments and the federal government) tends to function as a powerful, yet relatively invisible and frequently overlooked, mechanism for producing and perpetuating numerous and intersecting forms of civic hierarchy as well as avenues for civic inclusion across generations.

The chief aim of this project is to launch an inquiry into the reproduction of citizenship by focusing on the ways in which 'civic lineage' policies targeting fertility and family are frequently rooted in formal governmental attempts to shape the boundaries of the political community. While I often use these terms interchangeably in the chapters that follow, there is a slight difference in how I conceptualize them. I consider the term 'reproduction of citizenship' to refer to this *state-building process*, while the concept of a 'civic lineage regime' addresses the *outcome* of this process. Any given civic lineage regime is comprised of alliances and coalitions among political actors supporting specific

civic lineage policies designed to institutionalize certain ideals of citizenship and national identity. Since a broad range of reproductive policies comprise our civic lineage regime at any given political moment, for the sake of clarity, let me list some of the most noteworthy examples (many of which I address in my case studies). Perhaps the most obvious civic lineage policy involves the scope of "birthright citizenship" under the Citizenship Clause of the Fourteenth Amendment, which confers U.S. citizenship to most children born on American soil. However, since scholars often treat birthright citizenship laws as part of the 'immigration regime,' particularly because the U.S. government applies birthright citizenship to the U.S. born children of undocumented immigrants, I focus in this dissertation on less overt yet equally influential policies targeting citizenship through the regulation of birth. For instance, a sampling of civic lineage policies encompasses: eugenic sterilization; birth control and abortion laws selectively encouraging and discouraging motherhood; discriminatory marriage restrictions; the coercive regulation of fertility in federal welfare policy; laws encouraging and discouraging various types of adoption; and the complex landscape of access to new reproductive technologies with the explosion of recent scientific breakthroughs in human genetics.

In this regard, I intentionally define "reproductive policies" broadly to encompass myriad ways in which the government has sought to regulate and shape citizenship, through measures targeting family, intimacy, lineage, and fertility. Just as immigration laws often perpetuate civic hierarchies by policing the boundaries of citizenship, laws regulating who can give birth to full legal citizens and under what circumstances have the

same result. In his work on immigration, Daniel Tichenor writes that: "Nations define themselves through the official selection and control of foreigners seeking permanent residence on their soil. Immigration policy involves not only regulating the size and diversity of the population, but also the privileging of certain visions of nationhood…"[7] Pursuing a similar line of analysis, I argue that the U.S. government and state governments regulate the intimate lives of Americans for many of the same reasons that governments seek to control immigration. In both realms, the state makes legal distinctions between who can and cannot become a member by coercively privileging certain visions of American identity over others. For instance, just as Congress passed the Johnson-Reed Immigration Act of 1924 to restrict immigration from "undesirable" groups on eugenic grounds during the Progressive Era—which had the effect of placing substantial limitations on the numbers of Catholics, Southern and Eastern Europeans, Jews, Asians, and indigent Mexicans that could legally move to the United States—the Supreme Court during this time also upheld state involuntary sterilization laws to prevent "defective" citizens from procreating on similar eugenic grounds.[8] Additionally, the Court issued rulings supporting the exclusion of Native Americans and Puerto Ricans from birthright citizenship under the Citizenship Clause of the Fourteenth Amendment based on the convenient legal reasoning that these groups purportedly belonged to semi-sovereign (neither foreign nor entirely domestic) nations.[9] As these examples illustrate, both the regulation of immigration and the regulation of birth can entrench a wide range

[7] Tichenor, *Dividing Lines*, 1.
[8] *Buck v. Bell*, 274 U.S. 200 (1927).
[9] Most importantly, see: *Elk v. Wilkins*, 112 U.S. 94 (1884); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

of intersecting and overlapping forms of group-based civic hierarchy in the name of policing the boundaries of national identity and membership in the political community.

The place of slavery in American law and society provides the clearest political example of how public policies can perpetuate invidious structures of civic exclusion. Although my project focuses on the twentieth century, the institution of slavery serves as a disturbing reminder of the fact that our nation was, in many respects, founded upon an uneasy "civic lineage compromise." While the U.S. Constitution institutionalized slavery as a legitimate part of the Union, most notably in the form of the three-fifths clause for voting and representation in national government, the survival of slavery also rested upon the political manipulation of the racial meaning of African ancestry through reproductive policy. Control over the reproduction of enslaved women, and rules specifying racial classification based upon ancestral African hypodescent, were vital for the survival of slavery in antebellum America. Prior to the Civil War, the government's legal regulation of black women's procreation, as Dorothy Robert's puts it, "helped to sustain slavery," giving masters both an economic incentive and the legal authority to govern the reproductive lives of their slaves.[10] Since the children of female slaves were the property of the slave-owner irrespective of their paternity, female slaves were financially valuable to their masters not only as bounded laborers, but also as the producers of more slaves. For this reason, law rarely recognized marriage between slaves. The exclusionary link between racial ancestry and American citizenship under slavery was spelled out explicitly and upheld by the Supreme Court in *Dred Scott v.*

[10] Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage Books, 1997), 22-24.

Sandford (1857). Here Chief Justice Roger Taney emphasized that no person of African descent, whether a slave or free, could rank as a member of "the political community formed and brought into existence by the Constitution of the United States," for as he put it, "…they are not included, and were not intended to be included, under the word, "citizens," in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."[11] Ultimately, this disgraceful civic lineage ruling by the Court—which excluded those with known African ancestry from national citizenship and overturned the "Missouri Compromise"—would further fuel the growing conflagration between the North and South culminating in the Civil War.

Like the *Buck* case, the ignominious legacy of slavery shines a disturbing light on the government's historical role in politically regulating the 'reproduction of citizenship' in ways that overtly harnessed law to foster extreme forms of civic inequality and exclusion. To bring visibility to this deeply constitutive yet frequently veiled and largely unexamined aspect of American political development, my dissertation analyzes actual court cases involving state and national laws targeting civic lineage heard by the Supreme Court during the twentieth century. As primary texts addressing this under-analyzed process, occurring throughout American history, Supreme Court cases bridge many of the complexities of our (often obscuring) system of federalism, because state and national public policies targeting civic lineage can both end up in federal court. [12] The fact that the

[11] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[12] Since it is impossible to quantitatively measure the how public policy has influenced who was born or not born, the best way to document this phenomenon is by examining actual primary sources in which

issues of intimacy and childbirth are often treated as *non-political* or *pre-political* has added to the public veiling and relative lack of sustained scholarly scrutiny of this process. In this dissertation, I hope to demonstrate just how deeply political the issue of procreation and birth have historically been, and continue to be, when it comes to actual government policies and laws shaping the meaning and scope of citizenship. It is one of my central theoretical contentions that the federal and state governments frequently shape the meaning and boundaries of citizenship, a quintessentially public category, through policies aimed at structuring purportedly private issues and institutions relating to reproduction, such as sexuality, intimacy, and the family.

Global Implications:

The United States is not exceptional in this. All nation-states have a clear interest in regulating the reproduction of their citizenry. While I seek to bring greater empirical visibility and theoretical understanding to this phenomenon by focusing on the United States as an in-depth case study, it is important to emphasize at the outset that I see my thesis as having far-reaching global implications. A fundamental dimension of the way in which nations define and shape their membership in the modern world, all countries

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officials link reproductive policy to citizenship. Given the structural hurdle of federalism in the American political system, I use federal court cases as a springboard from which to locate, document, and analyze broader reproductive policy orderings within the United States. The practical benefit of focusing on the judicial system is that it allows me to address cases concerning both *national* and *state* laws because the Supreme Court is the "Court of last resort" for disputes emerging at both levels of government, allowing me to take federalism seriously in my analysis of civic lineage policy. Moreover, as Robert Dahl (1957) persuasively argued in his classic article on the role of the Supreme Court in the American political system, the Court rarely exercises its power of judicial review in a manner that is contrary to the interests of the dominant governing coalition in the other branches of government for very long.

institute civic lineage regimes of various kinds to govern and construct their political communities. I hope this project will help fuel a broader conversation about the role that civic lineage regimes play in other nations around the globe.

Let me briefly touch upon a few noteworthy examples. Consider China. The "one-child" policy in China has not only helped achieve its intended purpose of controlling the nation's once exploding population, but the policy has also produced one of the most skewed sex ratios in the world. After reaching their goal of declining fertility, China's younger generation is now comprised of almost 20% more males than females. Partly in response to this uneven sex ratio, the Chinese government recently introduced a two-child policy.[13] Conversely, in other parts of Asia and much of Europe, many nations are struggling to keep their populations stable (at replacement rate). Several countries, including Japan, Russia, Germany, and Taiwan, have responded by offering to pay citizens—usually ethnically-native women and couples—to have children.[14] The goal of these programs is to replace their current declining population with future generations of citizens that are ethnically "Japanese," for instance, as opposed to expanding their citizenship laws to incorporate immigrants of other ethnicities as full citizens. Also noteworthy is the fact that Israel actively embraces population control policies aimed at recruiting Jewish immigrants from around the world as citizens while, at the same time, increasing the numbers of Jewish settlers in contested territory claimed

[13] For instance, see e.g. http://www.pewresearch.org/fact-tank/2013/11/15/will-the-end-of-chinas-one-child-policy-shift-its-boy-girl-ratio/ (last checked 12/9/2015)
[14] See e.g., Robert Smith, "When Governments Pay People to Have Babies," *National Public Radio,* November 3, 2011. This article is available online at: http://www.npr.org/sections/money/2011/11/03/141943008/when-governments-pay-people-to-have-babies (last checked 12/9/2015)

by Palestinians and refusing to permit many Arab Israelis from bringing their non-Jewish spouses to Israel. The Israeli government was recently implicated in not allowing Jewish Ethiopian women to enter the country without first receiving shots of a contraceptive drug, Depo-Provera.[15] These policies have much in common with U.S. government efforts to displace Native Americans with Anglo settlers on the western frontier, during the nineteenth century, and more recently, as we shall see in Chapter 6, to control the fertility of women on welfare, and particularly women of color, by coercively promoting semi-permanent forms of birth control.

Familiar to many scholars of comparative politics, laws targeting population control in other nations share many features with those I document in the United States. In each instance, governments sponsor civic lineage regulations in order to ideologically promote and structurally entrench particular visions of national membership within their political communities. Thus, just as we expect states to police their borders through the laws comprising their immigration regime (as a definitive feature of statehood), so too should we expect them to institute civic lineage policies aimed at regulating who can be born a potential citizen. As Jacqueline Stevens points out, the regulation of boundaries of "kinship" among citizens is a universal feature of statehood in the modern world, but it is also a site for the production of a host of inegaliterian inequalities both within and between nations.[16] Precisely because they play such a fundamental role in structuring

[15] For instance, see e.g., http://mic.com/articles/25070/forced-birth-control-in-israel-shows-population-control-can-violate-human-rights (last checked 12/9/2015)
[16] Jacqueline Stevens, *Reproducing the State* (Princeton: Princeton University Press, 1999).

political communities over time, governments have always constructed civic lineage regimes of various kinds, and they will continue to do so in the future.

Citizenship and State-building:

A central theme in this dissertation is to frame 'citizenship' as an institution that has undergone significant "political development" throughout American history via state-sponsored reproductive policy. By focusing on political membership, I am analyzing citizenship in its most basic sense (of simple belonging), while nonetheless examining the ways in which civic hierarchies are both driving and being reinforced by state regulations of reproduction. Hence, while I have identified a relatively *consistent historical pattern* of governmental regulation of 'the reproduction of citizenship,' it is crucial to emphasize that the precise institutional orderings and policy configurations driving this phenomenon have been *far from static* throughout American history. Recognizing this as a dynamic political phenomenon that the government pursues in different ways over time, the heart of my project involves an effort to grasp what Karen Orren and Steven Skowronek term "the processes of change and their broader implications on the polity."[17]

Normally, in democratic theory, we expect the public to be shaping and regulating the government through various forms of political participation, far more than the other way around. Yet my focus here is on the ways in which the government uses 'reproductive policy' to mold the status, composition, and boundaries of citizenship. It is axiomatic that no state can survive in the absence of a base population of people for it to

[17] Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004), 6.

govern and represent. Although the question of "people-making" is often assumed to be prior to statehood and national politics in the contemporary era, this elides a more complex and interesting reality. As Rogers Smith has emphasized, political elites frequently engage in ongoing people-building projects by striving to unite citizens to embrace a common ideological, cultural, and national vision.[18] Neither states that label themselves as democracies, like the United States, nor the citizens they purport to represent, are natural phenomena. Rather, governments make rules and laws designating the boundaries of membership within their polity (i.e. such as determining who counts as a citizen), in addition to shaping the substantive possibilities for political participation available to citizens. While most theories of citizenship in the United States reflexively presume the prior existence of such a political community (or national body politic), the fact nonetheless remains that the ability of modern nation-states to continue to exist and thrive over time in the current global order is dependent upon the intergenerational perpetuation and continuation of their citizenry through various policies regulating certain forms of lineage within the nation. When states such as ours address people differently through rules and procedures aimed at regulating the makeup of their citizenry, this is likely to reinforce and undermine notions of sociopolitical standing and participatory capacities in the political system. Speaking of the role of the state in defining membership, Suzanne Mettler and Joe Soss write that, "public policies define the boundaries of the political community, establishing who is included in membership,

[18] Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (United Kingdom: Cambridge University Press, 2003).

the degree of inclusion in various memberships, and the content and meaning of citizenship."[19]

This raises an obvious but important point: The reproduction of citizenship is a highly *gendered* phenomenon. While laws regulating reproduction have historically influenced the status and opportunities of many different groups in American society, including different groups of men, I would be remiss not to highlight that these coercive policies have disproportionately targeted the sexual behavior and reproductive capacities of women. But while *women as a group* tend to bear a disproportionate burden when it comes to the government's regulation of reproduction of citizenship—as the "mothers of tomorrow's children"—the goal of fostering sexual inequality is rarely the sole or even primary focus of these laws. Despite the fact that women represent the disproportionate victims of this coercive legislation, many of these laws appear to effectively "hijack" women's bodies as a means towards achieving another end: breeding future generations of citizens according to specific civic lineage ideals of national identity and community membership. The politics of regulating the reproduction of citizenship intersects with the goals of American state-building in multiple (and sometimes conflicting) ways, and in the process, the biological capacity of women to bear children has been treated as both an asset and a threat to the future of the American state and its polity during many, if not most, times in history. For instance, the governmental manipulation of women's sexuality and motherhood has often been conducted in the name of broader state-building

[19] Suzanne Mettler and Joe Soss, "The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics," *Perspectives on Politics* 2, no. 1 (2004): 55-73, 61.

goals, ranging from the perpetuation of slavery, to the settling and taming of the western frontier, to the contemporary regulation of welfare. Civic lineage policy is not reducible purely to "a woman's issue," because it shapes multiple and intersecting hierarchies in the realms of race, class, and disability—and influences the status of men as well as women in vulnerable minority groups. Nonetheless, the government's regulation of reproduction functions in practice as a profoundly gendered phenomenon precisely because it depends upon the control of sexuality, fertility, procreation, childbirth, and family in the name of shaping the future of American citizenship.

The United States can quite literally be said to "make citizens" through the reproductive policies it sponsors and enforces in society. This should not be taken to imply, however, that biological factors determine citizenship. The boundaries of citizenship are not rooted in any intrinsic features involving a community's ancestry or physical appearance. Citizenship is fundamentally a political category and not a biological one. To call a person a "citizen" of the United States—or any other country—is to invoke a political relationship between this person and her country's government and fellow members. Hence, the question of whether or not a person qualifies as a citizen is determined not by the circumstances of her birth in a biological sense, but rather by the political qualifications stipulated in the nation's constitution and citizenship laws, which in turn shape the boundaries of citizenship, in part, through the avenue of birth. With this logical distinction in mind, the central question motivating this dissertation can be rearticulated more narrowly to address, with greater precision, the pivotal link I hope to draw between "*state-building*" and "*people-making*": that is, how does the state make

citizens through the avenue of reproductive policy? Furthermore, under what contexts, and for what reasons, has the state constructed citizenship differently or similarly through this process over time? What factors help explain these developments and shifts in reproductive policy alliances? Finally, and perhaps most importantly, how have the political actors sponsoring these governmental policies linked their goals and efforts at "people-making" to broader trends in state development, including ideas about what constitutes proper American civic identity and what sort of American body politic is desirable in the future?

An Overview:

The overarching goal of this dissertation is to provide convincing evidence in support of my central "civic lineage regime" thesis. The chapters that follow each address a particular arena of the U.S. government's regulation of fertility and birth during the twentieth century, focusing on U.S. constitutional law to trace its development. Chapter 2 begins with eugenic sterilization during the Progressive Era. Chapter 3 examines the early movement to legalize birth control in the name of public health and doctor's rights during the same period. Chapter 4 turns to the later, more successful, movement to legalize both birth control and abortion under the constitutional doctrine of reproductive privacy. Chapter 5 examines the development of Medicaid health insurance for impoverished Americans in the 1960s and judicial struggles over whether or not Medicaid required states to fund abortion in addition to childbirth. Finally, Chapter 6

turns to the topic of welfare reform in 1996 at the end of the twentieth century. These examples of civic lineage policies are not meant to be exhaustive of all those within our civic lineage regime (i.e. there are multiple and overlapping civic lineage policies comprising it), but together I maintain that they provide powerful empirical documentation supporting my thesis that the American government, like all modern nation-states, regulates citizenship by targeting reproduction and birth across generations to promote certain national ideals.

In addition to demonstrating that civic lineage policies exist, I also trace and document important common themes and several fundamental shifts from one dominant civic lineage regime to another throughout the twentieth century. Like policies targeting immigration, as we shall see, those aimed at birth change over time to reflect shifting values and ruling coalitions in the United States. I document at least three dominant civic lineage regimes during the twentieth century. These are: the *fitter families* regime reflecting a dominant eugenics coalition during the Progressive Era, the *white picket fence* regime reflecting the ideals of a nuclear family with a breadwinner husband and homemaker wife during postwar America, and our new dominant *neoliberal* civic lineage regime. In this overview, I will briefly summarize the main civic lineage developments addressed in each chapter.

Chapter 2 focuses on the fitter-families ideal, which was the dominant civic lineage regime associated with the eugenics movement during the Progressive Era. During the Progressive Era, the federal and state governments instituted civic lineage structures that placed issues of gender, race, class, ethnicity, deviant sexuality, and

disability at the forefront of their hierarchical ideal of U.S. citizenship. This regime embraced the notion that state and federal governments could (and should) regulate reproduction—through mechanisms such as endorsing involuntary eugenic sterilization, banning birth control and abortion, and prohibiting interracial marriage—in the name of protecting the public health and morality of the entire political community. There is little doubt that the goals of these policies were intended by government actors to influence civic membership and status across generations. By labeling reproduction as the public concern of the state, the Supreme Court in *Buck v. Bell* was clear about its eugenic intentions regarding breeding the "best" Americans. But who were these ideal American citizens celebrated by the government's civic lineage regime during this period? Was there a positive ideal for the reproduction of citizenship that fueled these negative eugenics laws?

The short answer is yes. To this day, we can find images of this "ideal citizen" in archival photographs from the "Fitter Families" contests at state fairs, which were sponsored across the country by eugenics organizations to educate the public about the importance of better breeding. These positive eugenics exhibitions awarded prizes to the "fittest families" in several categories for being not only "prime racial specimens," but also "good citizens," and these events were popular until the Nazi's forever gave eugenics a bad name in the aftermath of World War II.[20] The photographs from these contests reveal a specific stereotype of the ideal citizen: the winners invariably look like "wholesome" white upper-middle class families, often with several generations residing

[20] Theodore Roosevelt, "Letter to Mr. and Mrs. R. T. Bower," *Letters III* (February 14, 1903): 425.

together, conforming to traditional gender roles, and with several children—the bigger the family, the better![21] This "Fitter Family" prototype is definitive of the Progressive Era's civic lineage regime, for it provides an image of the ideal citizen and family.

Chapter 3 focuses on the early birth control movement during the Progressive Era. This chapter is an important transitional part of my analysis because it introduces a competing ideal of civic lineage, which I term "voluntary motherhood." Spearheaded by Margaret Sanger, founder of Planned Parenthood, in the name of the freedom of women to decide whether and when to become mothers, the early birth control movement focused on challenging anti-contraceptive laws that pre-dated the eugenics movements and, as I shall argue, were relics of the nineteenth century Victorian ideal of "moral purity." By forming strategic alliances with the dominant eugenics coalition during the Progressive Era, Sanger was able to successfully overturn many of these laws—particularly at a state and local level—based on a shared interest with eugenicists in protecting public health. However, as we shall see, the breadth of her success was limited by the fact that her proposed ideal of voluntary motherhood clashed with the dominant fitter families civic lineage regime. Although eugenicists supported birth control for "unfit" citizens, Sanger asserted that all women ought to have access to contraceptives, irrespective of "eugenic fitness." Specifically, she spearheaded what I call her "clinic plan," establishing public birth control clinics to provide access to contraceptives and family planning advice to all women, rich and poor alike.

[21] Theodore Roosevelt, "The Strenuous Life," Speech Before the Hamilton Club, Chicago, April 10, 1899.

This highlights the fact that there is always contestation, uneasy alliances, and compromises within civic lineage regimes. The ideal of voluntary motherhood for all women remained an unrealized possibility during the progressive era as well as the years that followed. In subsequent chapters, I appropriate and expand this ideal of "voluntary motherhood" to encompass a broad range of voices advocating for voluntarism in reproductive choice, irrespective of race, ethnicity, religion, disability, or sexual behavior. Although never a dominant regime, I argue that voluntary motherhood arose as a genuine yet, as it turns out, unrealized possibility after the victories of the civil rights and women's movements during the 1960s and 1970s. If this had occurred, we would have seen the rise of a much more egalitarian civic lineage regime instituted in government policy and state institutions today. As we shall see in Chapters 5 and 6, however, the rise of voluntary motherhood was hijacked in the late twentieth century by an emerging neoliberal coalition of political elites within government, championing a new inegalitarian neoliberal civic lineage regime.

Chapter 4 traces the judicial development of a fundamental right to privacy protecting reproduction and its influence on the civic lineage regime. In *Griswold v. Connecticut* (1965) the director and chief doctor of a Planned Parenthood clinic in the city of New Haven were convicted for distributing contraceptives to married couples under an 1879 Connecticut "Comstock law" that made it illegal to prescribe or distribute contraception. The Supreme Court reversed this criminal conviction by creating a new line of constitutional jurisprudence on the grounds that there is a fundamental right to marital privacy, which protects the right of married couples to use birth control in the

Constitution. In the words of Justice William Douglas, there are "penumbras" (or shadows) to the Bill of Rights located in the First, Third, Fifth, Ninth, and Fourteenth Amendments, which create "zones of privacy" that constitute a fundamental right to reproduction. As I argue in this chapter, the concept of marriage celebrated by the majority of the Court in *Griswold* is the postwar ideal of the homemaker mother and breadwinner father in the 1940s and 1950s, which I call the "white picket fence" ideal of the reproduction of citizenship. After the atrocities committed by Nazi Germany turned Americans against eugenics, the white picket fence ideal eclipsed the inegalitarian eugenic fitter families ideal as the new dominant civic lineage order in postwar America. While it extolled a smaller (nuclear) family—illustrated in television shows like *Leave it to Beaver*, *Father Knows Best*, and *The Donna Reed Show*—this ideal continued to prioritize a white, middle-class, highly gendered, and Christian vision of proper American civic reproduction. Albeit a new dominant civic lineage regime with its emphasis on a nuclear family and marital privacy, given these demographic commonalities, the postwar regime was not a complete break from the past.

Moreover, somewhat ironically, I suggest that the Supreme Court intentionally celebrated traditional marriage in *Griswold* as a tactic of "camouflaged conservatism," cloaking the right to use birth control under the cover of traditional family values during the social and political upheavals of the 1960s. Within the next decade, the Court expanded its new reproductive privacy doctrine to cover the right of individuals to use contraceptives and obtain an abortion in *Eisenstadt v. Baird* (1971) and *Roe v. Wade* (1973), rooting reproductive rights firmly in the new privacy doctrine divorced from

marriage. By constraining the state from invading the reproductive lives of citizens, the development of a right to privacy in reproduction and marriage would appear, at first glance, to suggest the weakening of a hitherto stringent and explicit civic lineage regime. But this belies a more complex story regarding the reproduction of citizenship. During the Progressive Era, when the goal was to regulate the reproduction of citizenship in the name of the public health of the larger political community, the Court used the language of "citizenship" in a direct manner to justify state action. Moving away from explicit language linking reproductive regulations to citizenship, the Court began to rely on a discourse of human rights to prevent the state from invidiously interfering in reproductive freedom after the Second World War. "If the right to privacy means anything," wrote Justice William Brennan in *Eisenstadt,* "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[22]

Nonetheless, as I shall argue, this de-emphasis on citizenship in the discourse on privacy by no means suggests that the resulting civic lineage regime was weaker than before. Indeed, as Chapters 5 and 6 illustrate (on Medicaid and welfare, respectively), treating reproduction as a private choice has facilitated the rise of public policies denying government assistance to poor, disproportionately non-white women seeking contraceptive and abortion services, whose children often grow up with fewer resources and the burdens of social stigma associated with their under-privileged status. Moreover, though far less brutal or overtly discriminatory than forced sterilization, the transition to

[22] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

classifying reproduction as a *private* issue has significant ambiguities and limits that government actors have used to perpetuate old and new forms of civic hierarchy through more subtle mechanisms.

Chapter 5 on Medicaid traces the beginnings of a new neoliberal civic lineage regime in the 1970s, which I continue to analyze in Chapter 6 on welfare. From a civic lineage standpoint, the 1960s and 1970s was a time of transition. The Supreme Court developed a fundamental constitutional right to reproductive privacy over a relatively short period of time, starting with birth control for married couples in 1965 and expanding this right to abortion in 1973. These legal developments in reproductive jurisprudence happened at the same time as significant social upheavals, including the victories of the civil rights movement, the advent of the women's movement, and the sexual revolution. Furthermore, Congress passed President Lyndon Johnson's proposed "War on Poverty" healthcare Amendments to the Social Security Act (i.e. Medicare and Medicaid), ushering in the first governmental health insurance program for the poor in 1965, and President Richard Nixon signed the Title X Family Planning Program in 1970, establishing public family planning clinics and services for the poor. Since these developments happened separately but in the same timeframe, it was unclear how they would fit together, and a number of political paths were open at this juncture.[23] In fact, I argue there was a period of time in which it genuinely looked as if something like a voluntary motherhood ideal might prevail in future civic lineage policy. Since the Court in its early privacy rulings was not clear about what a fundamental right to reproduction

[23] Public Law 91-572.

required from the government, it was quite possible that it would link access to birth control and abortion to a robust version of equal protection in federal and state anti-poverty programs.

However, in a series of cases from 1977 to 1991, which I broadly refer to as the "abortion defunding cases," a closely split Court used the initial framing of abortion as a privacy right (not equal protection) to allow states and the national government to effectively privatize abortion by withdrawing public funding for abortion and instead funding only childbirth for pregnant poor women. Under this formulation, the right to privacy is the ultimate form of negative liberty, so it sets up a barrier against "undue" state intrusion but in practice does not protect against all state regulations—nor does it guarantee a woman's access to birth control, abortion, or medical assistance in procreation. In these cases, I introduce the beginnings of a neoliberal civic lineage regime, and show how the dissenting voices on the Court argued that the majority's narrow reading of reproductive rights would serve to reinforce civic inequality in reproduction and birth.

Chapter 5 introduces and Chapter 6 develops the concept of a neoliberal civic lineage ideal of citizenship, which I contend underlies the contemporary civic lineage regime. In contrast to the earlier "Fitter-Families" and "White Picket Fence" ideals of citizenship, I suggest that today we have a *neoliberal ideal of citizenship* upheld and reinforced through government policy. The idea of 'neoliberal citizenship' may initially seem like a contradiction in terms. The concept of 'neoliberalism,' at first glance, appears to undermine the significance of citizenship as a meaningful distinction in an

increasingly globalized world. But the hallmark of this new civic lineage regime is that the government is actively endorsing *public policies* that channel direct governmental oversight and public accountability to the whims of the private market. Definitive of this regime is the manner in which political actors actively cloak these *public* state-sponsored laws in the clothes of the *private* market. The vitality of neoliberalism, as Wendy Brown has recently argued, depends upon state laws and regulations that reshape identity and the political landscape by supporting market based policies of privatization and framing liberties in commercial and economic terms.[24] The dominant neoliberal civic lineage regime no longer links good citizenship to the anachronistic goal of having large families, as it did during the Progressive Era. Rather, the emphasis now is on self-sufficiency, personal responsibility, and providing market opportunities to one's children.

This newly emerging civic lineage regime expands the ability for many women and men to take advantage of reproductive opportunities and technologies not available to them before. But neoliberalism also cuts against equal citizenship. By reinforcing old patterns of inequality in the American demographic landscape through market forces—such as differential economic access and the aggregation of discriminatory personal preferences—we end up with a public regulatory system that often keeps civic hierarchies reinforced by reproductive regulation, and is empowered to do so by the very mechanism purportedly intended to protect reproductive autonomy: Namely, a thin version of "the right to privacy."

[24] Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015), 9-45.

To give a face to this new neoliberal civic lineage regime and the ideals of civic reproduction that it promotes, I compare, in Chapter 6, the popular stereotypes of the irresponsible "welfare queen" and the responsible "soccer mom," two important (and contrasting) tropes during the 1996 election, one denounced and the other lauded by the press. In a similar manner as the fitter-families contests of the progressive era and the white-picket-fence ideal of the postwar period, the soccer mom—coined in the media as both a key citizen-consumer and the most important political voice (swing voter) in the 1996 presidential election—gives us a picture of what it meant to conform to the reproductive norms of our dominant civic lineage regime at the end of the twentieth century. As my analysis of the "soccer mom" illustrates in Chapter 6, the ideal neoliberal female citizen is a self-sufficient market actor (akin to her male counterpart), who has the economic agency to take full advantage of her right to privacy and engage in self-conscious and deliberate family planning such that her children have access to numerous developmental and educational opportunities, thereby giving them a head start in an increasingly competitive market economy.

In this regard, the mainstream feminist movement succeeded in its push to normalize the concept of the professional woman (e.g. with a new one to two child norm). The problem is that this market ideal of self-sufficiency and independence itself produces (and I argue depends upon) civic inequalities, particularly among those who are economically dependent and poor—which intersects with the already uneven socioeconomic landscape of race, gender, and ethnicity in the United States. Indeed, for those dependent upon government Welfare and Medicaid programs and within the ready

grasp of agents of the state, the promise of a reproductive "right to privacy" can sometimes seem elusive, both because they are subject to state programs and because they cannot always afford to exercise their right to birth control or abortion.[25] Speaking of the unequal access to privacy rights women now experience based upon their socioeconomic status, Justice Ruth Bader Ginsburg stated in an interview in the *New York Times* in 2009, "There will never be a woman of means without choice anymore. That just seems to me so obvious. The states that changed their abortion laws before *Roe* are not going to change back. So we have a policy that only affects poor women."[26]

Framed as a tool for liberty and a great achievement for reproductive freedom won by the feminist movement (which isn't wrong), the right to privacy in reproduction is a huge step towards equality. On the flip side, the policies flowing from this discourse on privacy tend to obscure and reify the coercive underbelly of the neoliberal ideal promoted by civic lineage laws today. As a result of a long history of invidious discrimination and segregation, class in the United States is inextricably connected to structural hierarchies in areas such as race, ethnicity, and gender (intersecting with issues of age, sexual orientation, religion, and disability). Hence, while the neoliberal ideal of citizenship is facially more inclusive than the explicitly hierarchical rhetoric of the Progressive Era, and lessens concerns of overt discrimination, as I shall argue, its practical outcome produces and reinforces relatively extreme civic lineage inequalities by

[25] See e.g. Johanna Schoen, *Choice & Coercion: Birth Control, Sterilization, and Abortion in Public Health and Welfare* (Chapel Hill: The University of North Carolina Press, 2005); and Roberts, *Killing the Black Body*, 159.
[26] Interview of Ruth Bader Ginsburg: Emily Bazelon, "The Place of Women on the Court," *The New York Times Magazine*, July 7, 2009.

translating liberties (via privatization) to the forces of "supply and demand" in the market.

Chapter 6 traces the rise and triumph of this new dominant neoliberal civic lineage regime through the lens of welfare policy at the end of the twentieth century. Dubbed by President Bill Clinton as "the end of welfare as we know it," the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) replaced the sixty-year Aid to Families with Dependent Children (AFDC) program of the 1935 Social Security Act with Temporary Assistance for Needy Families (TANF). Not only does TANF bar most legal immigrants from receiving public assistance for their first five years residing in the United States, thereby placing the boundaries of citizenship front and center in this civic lineage policy, but it prioritizes getting welfare recipients into the labor market as quickly as possible and also promotes a broad set of "traditional" family values associated with marriage and sexual responsibility. As I shall argue, there is strong evidence that the emergence of this regime is no accident, but was a conservative response to the victories of the civil rights and women's movements of the 1960s and 1970s, spearheaded by a coalition of strange bedfellows—fiscal conservatives, religious right "family values" proponents, and racial conservatives—who were able to find common ground on welfare reform for a host of different reasons, including in part maintaining the previous hierarchical status quo. Acting in concert, the different branches and levels of government shaped a narrow conceptualization of reproductive freedom under the "right to privacy," which in turn meant that a woman's ability to take advantage of this right depended upon her opportunities as a market actor.

In sum, the chapters that follow seek to demonstrate the existence of a 'civic lineage regime' by focusing on specific examples of the U.S. federal government and state governments shaping citizenship through regulating reproduction during the twentieth century. In addition to my chief goal of demonstrating that a civic lineage regime exists, I also trace shifting political coalitions sponsoring various ideals of civic reproduction in the form of the three dominant civic lineage orders in the United States, discussed above. Drawing attention to how these regimes have developed over time and the role of constitutional law in this process of political development, the chapters that follow point to noteworthy areas of continuity and disjuncture in civic lineage policies during the last century. Ultimately, as we shall see, while the governmental mechanisms for regulating the reproduction of citizenship have changed over time, with the rise and fall several dominant civic lineage regimes, the face of the future generations of citizens these policies seek to reproduce has remained surprisingly similar. Despite the legal civil rights victories in the 1960s and 1970s, the ideal remains white, middle-class to affluent, able-bodied enough to work, conforming to mainstream Christian family values, and displaying norms of responsible sexual and parenting behavior of the day.

CHAPTER 2

Citizens Never Born:
Eugenic Sterilization & Breeding "Better" Americans

Introduction

In the landmark case of *Buck v. Bell* (1927), the Supreme Court upheld the constitutionality of a eugenic law passed by the Virginia legislature in 1924, permitting the involuntary sterilization of people deemed by the state to be mentally or morally deviant and likely to produce "socially inadequate offspring."[27] Carrie Buck, the plaintiff in this case, was shortly thereafter compelled by law to submit to surgical sterilization (via tubal ligation) at the age of twenty-one.[28] The Court's opinion was pithy and blunt. "It is better for all the world," wrote Justice Oliver Wendell Holmes, Jr., "if instead of waiting to execute degenerate offspring for a crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[29] Explicitly comparing the involuntary sterilization of inferior citizens to the civic duty required from America's "best citizens," who are expected to defend the nation through military conscription during times of war, the Court suggested that it was the civic responsibility of less valuable members of society, like Carrie Buck, to submit to state-sponsored sterilization to protect society from the birth of unfit citizens. In the words of

[27] "The Virginia Sterilization Act," Virginia Acts (1924), 570; the Buck case involved a challenge to the constitutionality of this Virginia Statute.
[28] Roberta M. Berry, "From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of *Buck v. Bell*," *Notre Dame Journal of Law, Ethics, & Public Policy* 12 (1998): 5.
[29] *Buck v. Bell,* 274 U.S. 200 (1927).

the Court, "We have seen more than once that the public welfare may call upon the best citizens for their lives [i.e. military service]. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices [i.e. sterilization]…The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes." Highlighting the fact that both Carrie and her mother were committed to the same state mental institution for alleged sexual promiscuity and hereditary feeblemindedness, and that Carrie's sixth month old baby daughter Vivian was also ambiguously labeled as "not quite normal" for her age, Justice Holmes sharply concluded his opinion for the Court with the now infamous proclamation: "Three generations of imbeciles are enough."

This Virginia law would ultimately provide the justification for the sterilization of more than 8,300 inmates in mental institutions in the state of Virginia between 1927 and 1972.[30] With the enthusiastic endorsement of the Supreme Court, it also set the stage for similar laws to be passed in over 33 states, which would together sanction the mass sterilization of more than 65,000 Americans classified by government officials as "unfit" for procreation, in addition to emboldening doctors in other states and territories to perform large numbers of undocumented sterilizations.[31] Any accurate estimate is impossible to measure.[32] Today, both the facts of the *Buck* case and the subsequent

[30] Paul A. Lombardo, "Three Generations, No Imbeciles: New Light on Buck v. Bell," *New York University Law Review* 60 (1985): 30-62.
[31] In the decade following the Supreme Court's decision, 20 states passed eugenic sterilization statutes, with most of them patterned closely after the Virginia law. During the twentieth century, at least 33 states have had such statutes at one time or another. See Lombardo, "Three Generations, No Imbeciles," 1985.
[32] 65,000 is likely a vast underestimate of the number of people sterilized during this time. This number accounts only for the cases in which doctors filed official paperwork documenting the procedure with the government. In the aftermath of Buck ruling, many states allowed and encouraged doctors to perform private (often undocumented) sterilizations. Moreover, while these statistics end in the 1960s, many state

statistics associated with the Court's ruling appear to be shocking violations of reproductive rights, particularly given the fact that neither Carrie nor her daughter were truly mentally defective but were simply stereotyped as the Progressive Era's equivalent of "poor white trash" in the rural south, making them vulnerable to being condemned to dependence upon public charity and state institutions. Yet, although *Buck v. Bell* is frequently labeled as an anomaly in American law and political history, associated with the "eugenics craze" during the Progressive Era,[33] this particular Court decision is worth highlighting here, precisely because it is NOT an anomaly. Rather, the case provides one of the clearest and most striking judicial examples of the Supreme Court rigorously endorsing a coercive civic lineage agenda aimed at curtailing the fertility of less desirable citizens in the name of fostering a stronger nation. A triumph for the eugenics movement during the Progressive Era, the *Buck* ruling serves as a critical juncture in paving the way for the proliferation of the "sterilization agenda" across the United States—which remained active behind the closed doors of state and local mental institutions, prisons, and hospitals until the late 1970s.

In the realm of reproductive policy, the Progressive Era represents a fascinating period in American political development. Whereas the Victorian Era framed sexuality

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policies continued well into the 1970s. Finally, some states never officially legalized sterilization, like Colorado, but doctors in institutions nonetheless performed undocumented sterilizations on patients without the legal authorization to do so. When questioned later, they emphasized it was a national norm. On Colorado, see: Harry Bruinius, *Better for All the World: The Secret History of Forced Sterilization and America's Quest for Racial Purity* (New York: Vintage Books, A Division of Random House, 2006). See also: Alexandra Minna Stern, *Eugenic Nation: Faults and Frontiers of Better Breeding* (Berkeley: University of California Press, 2005); Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore: The Johns Hopkins University Press, 2008); Berry, "From Involuntary Sterilization," 1-38.

[33] The phrase "eugenics craze" was, as far as I know, coined by Richard Hofstadter, *Social Darwinism in American Thought* (New York: G. Braziller, 1959).

as an intimate matter that ought to remain outside of the public sphere, as discussed in the next chapter on the early birth control movement, the eugenics movement during the Progressive Era succeeded in its campaign to flip these norms. The case of *Buck v. Bell* serves as the juridical highpoint of this trend by clearly labeling reproduction as the *public* concern of the state. Since the Supreme Court made no attempt to sugarcoat its eugenic intentions about breeding the best citizens, there is a tendency for scholars to frame *Buck v. Bell* as about gender, class, race, sexuality, disability, and indeed the case concerns *all* these intersecting issues. However, as I shall argue, these avenues of discrimination, taken together, paint a picture of the broader civic lineage regime promoted by politicians during the Progressive Era. I label this the 'fitter-families' civic lineage regime.

What did the fitter families ideal of citizenship look like? To this day, we still have access to archival photographs from popular Fitter-Families Contests, sponsored by eugenics organizations during the Progressive Era to educate the public about good breeding, at state and county fairs across the country. The trophy wining (or "fittest") families in these pictures are invariably white, middle-class, Christian, born and raised in America, often with multiple generations living together in the same home, all appearing healthy and able-bodied (i.e. during a time in which sicknesses such as polio and tuberculosis were widespread), with husband and wife both present, and with several children of different ages. There is no doubt that this fitter family civic lineage regime was racist, sexist, and classist (among other things), but my larger point is that these policies targeting civic lineage across generations were first-and-foremost aimed at shaping the future composition of the American citizenry, just we see in laws regulating

immigration in the United States. During this time, politicians spoke openly about using public policy to breed desirable citizens and curtail the fertility of less desirable members of society, and we have a clear picture of the ideal they had in mind in the winners of these eugenic Fitter Families contests.

Broadly, this chapter is divided into ten parts. In Parts 1 and 2, I begin by defining eugenics, and describing how this movement fit into the spirit of the Progressive Era—a time, in which political actors turned to experts to come up with scientific solutions for social problems, including population control. The growth of larger and more dispersed governmental bureaucracy provided the perfect recipe for elites to transform eugenic ideas into a major top-down political movement mobilized around the goal of breeding "better" American citizens. In Section 2, I first introduce the Fitter Families Contests sponsored by eugenics organizations, which I continue to reference throughout this chapter. After discussing how Virginia adopted a model eugenic sterilization law, Sections 3 and 4 examine how the state selected a young woman named Carrie Buck to serve as the test case to convince the Supreme Court to declare eugenic sterilization constitutional. By the time *Buck v. Bell* made it to the Supreme Court, the justices were increasingly sympathetic to state-based regulations in the name of social welfare, particularly those involving the issue of motherhood. I examine this contextual background in Part 5, before turning in the next section to a detailed analysis of Justice Holmes' majority opinion for the Court in *Buck v. Bell* (1927). Not only did Holmes explicitly frame the Court's ruling as about the patriotic duty of citizens to make personal sacrifices for the greater good of the nation, but most significantly, Justice Brandeis—the intellectual founder of a "right to privacy"—joined the majority opinion in casting the

issue as the *public* concern of the community as opposed to a matter of *privacy*, differentiating this case from the prevailing "right to privacy" approach to reproductive law today. After discussing how *Buck v. Bell* became law of the land, I briefly examine the ways in which involuntary sterilization skyrocketed throughout the nation—in the name of preventing "unfit" members of society from spreading their traits to the next generation of citizens.

This chapter concludes with the political puzzle of why eugenic sterilization did not disappear in the United States after the Nazis forever gave eugenics a bad name in the aftermath of World War II. During this period, the Court in *Skinner v. Oklahoma* (1942) cast reproduction as a fundamental right yet nonetheless upheld its basic ruling in *Buck*. To explain how coercive sterilization continued in America, Part 9 looks at the ways in which the Court's *Buck v. Bell* ruling ceded power to state legislatures to pass sterilization laws. Using the Virginia Law as a model, state governments invariably left the implementation of their eugenic sterilization laws to the superintendents of local institutions through a bureaucratic dispersion of power, with little to no federal oversight. This effectively froze the architecture of this civic lineage policy in time, allowing it to continue in a path dependent fashion within the shadows of institutions long after the public abandoned support for eugenics in the wake of the atrocities of the Nazis during the Second World War—a type of persistence through neglect, which I term "shadow continuity."[34] Although the fitter families ideal of citizenship is specific to the

[34] Although beyond the scope of this chapter focusing on the "eugenic ideal" during the Progressive Era, it is worth noting that: not only did the Court in *Buck* offer the veneer of judicial legitimacy to the practice of coercively sterilizing "defective" citizens, like Carrie Buck, within institutions, but the Court's ruling in this case would later enable the Nixon Administration to seamlessly incorporate sterilization into federal

Progressive Era, some of the civic lineage policies that were a part of this regime took longer to abolish. Not only did the Court in *Buck* offer the veneer of legitimacy to the practice of coercively sterilizing "defective" citizens, like Carrie Buck, within institutions, but as Part 10 documents, the Court's ruling in this case would later enable local bureacrats and doctors during the 1960s and 1970s to target underprivileged and minority women—until a public and legal backlash by civil rights groups. Despite the advent of a new civic lineage regime with the repudiation of eugenics after World War II and the rise of the judicial doctrine of "reproductive privacy," discussed in Chapter 4, during the mid twentieth century, it is worth noting that the Supreme Court has never overturned its ruling in *Buck.* In fact, the Court has continued to cite this case as precedent supporting state intervention into reproduction in the name of the welfare of society. Let us turn now to the eugenics movement and the fitter-families civic lineage regime, which endorsed the eugenic sterilization of "unfit citizens" during the Progressive Era.

1. Background: What was Eugenics during the Progressive Era?

Given the multifarious coalitions that formed the dominant civic lineage regime during the Progressive Era, it is useful to begin by first defining eugenics and relating it to the politics of this period. At least as far back as Plato's *Republic*, scholars have hypothesized about the possibility that the fertility of citizens could be controlled in ways

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Welfare and Medicaid policy in the name of population control, targeting the reproductive capacities of hundreds of thousands of underprivileged minority women. These women were targeted by local doctors working within institutions until the civil rights movement publicized what was happening in a series of court challenges.

that politically strengthen the state through eugenic breeding practices. Sir Francis Galton, a pioneer statistician and Charles Darwin's cousin, coined the term 'eugenics,' which he derived from the Greek *eugenes*, meaning "well-born" or "good in birth," in the 1880s to refer to organized and selective breeding among human populations.[35] For Galton, this mainly involved encouraging the fittest citizens to reproduce (positive eugenics), but also logically extended to discouraging and even preventing the weakest from reproducing (negative eugenics). In this sense, eugenic ideas were not new in the Progressive Era. Rather, these ideas ripened over time and hit their stride with the advent of more expansive government during the early twentieth century. In the words of historian Diane Paul, legislation pertaining to eugenics first required "the rise of the welfare state," or at least the beginnings of larger government and public health initiatives.[36] During this period, the United States government turned to increasingly bureaucratic and locally dispersed policies targeting the domestic issues within the nation. In a world marked by rapid industrialization and the rise of capitalism, combined with massive immigration and worries about overpopulation and other social ills, the growth of state bureaucracy and institutions offered ways of trying to regulate the population in a more direct way than before. Aimed at social engineering and population control, the field of eugenics fit perfectly within the political spirit of the Progressive Era.[37]

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[35] Francis Galton, *Inquires into Human Faculty and its Development* (London: J.M. Dent and Sons, 1883).
[36] Diane Paul, *Controlling Human Heredity: 1865 to the Present* (Atlantic Highlands, NJ: Humanity Press International, 1995), 6.
[37] At least seven trends created the conditions for eugenics to become a successful sociopolitical movement during this particular time period: First, rapid industrialization and the growth of capitalism led to major technological advancements and a mass trend towards urbanization. Second, with these geographic upheavals and changes in the family, we see a proliferation in academic analysis of widespread social

The Progressive Era was a time in which virtually everybody embraced eugenics, in one form or another. As Thomas Leonard puts it, "Progressive Era eugenics was, in fact, the broadest of churches. It was mainstream; it was popular to the point of faddishness; it was supported by leading figures in the newly emerging science of genetics; it appealed to an extraordinary range of political ideologies," including progressive reformers, liberal idealists, social conservatives, birth control advocates, feminist reformers, environmental conservationists, Fabian Marxists, economic Malthusians, evolutionary scientists, opponents of immigration, proponents of American imperialism, and even preachers in the Calvinist tradition who took genes as markers of predestination.[38] As an academic discipline, most colleges offered biology classes in eugenics, which had their own textbooks consisting of a mix between evolutionary genetics and dubious political conclusions about heredity. This was considered good science. As a political movement, Eugenics depended upon the state control of differential fertility, and sought to direct human breeding and heredity in such a way that it improved the vigor of the population. The assumption was that factors like intelligence, mental health, temperament, moral character, and even civic virtue were

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problems associated with urban decay; including poverty, hunger, overpopulation, homelessness, combined with an emphasis on Malthusian concerns about population collapse. Next, this period in time also witnessed major advancements in the science of heredity, by Charles Darwin and Gregor Mendel (among others). Forth, new medical advancements in surgery made operations like sterilization much less invasive and dangerous than before: Now, a simple vasectomy could replace castration in men, and women could simply have their "tubes tied" without removing any organs from their bodies. Fifth, state governments became increasingly bureaucratic and emboldened to regulate the lives of citizens. Additionally, government agents and politicians turned to "experts" to come up with scientific solutions to socioeconomic problems facing the nation. Finally, during the Progressive Era, the United States government turned to increasingly bureaucratic and locally dispersed policies targeting domestic issues within the nation. Due to this confluence of events, existing ideas about eugenics finally ripened and hit their stride in the structural milieu of the Progressive Era.

[38] Thomas C. Leonard, "Retrospectives: Eugenics and Economics in the Progressive Era," *Journal of Economic Perspectives* 19, no. 4 (2005): 216.

based in large part on differences in heredity, and passed directly as genetic traits from parents to children. For instance, in his popular 1924 book on eugenics, *The Fruit of the Family Tree*, Albert Edward Wiggam told his readers that "good and bad citizenship" was something inherited by nature. Wiggam rhetorically asked: "Do you know that good and bad citizenship, bright and dull minds, good and bad health…are largely due to the sort of ancestors a man had, and that such things can be attained only to a limited extent by any economic 'system' or scheme of education?"[39]

This raises a vital point. Although often downplayed in the literature on the eugenics movement in the United States, the future of *American citizenship* appears to have been one of the most prominent themes driving the politics of "better breeding" during the Progressive Era. By the 1890s, it was popular for social commentators to declare that the U.S. frontier was finally "closed," and to hypothesize about what this meant for the identity of the nation. At the same time, scholars began to sound the alarm that the birthrate among immigrants from southern and eastern Europe was eclipsing that of "old-stock" or "native" (Anglo) Americans, the former of which were having much larger families. Politicians and economists at the time were particularly concerned about the connection between immigration and overpopulation, but somewhat ironically, their concern was not framed as a strictly Malthusian worry about too many mouths to feed and the corresponding danger of population collapse *per se*; rather, "what worried economists," emphasizes Thomas C. Leonard, was "the population's changing racial composition" in the United States.[40] These concerns not only resulted in Chinese

[39] Albert E. Wiggam, *The Fruit of the Family Tree* (Indianapolis: Bobbs-Merrill, 1924), 292.
[40] Thomas C. Leonard, '"More Merciful and Not Less Effective': Eugenics and American

Exclusion laws and other restrictions on immigration to keep "undesirable" groups from migrating to the United States, but they also inspired frequent laments about the specter of internal "race suicide" in America. Often attributed to Edward A. Ross (1901), the idea of 'race suicide' quite literally turned the principles of Darwinian evolution on its head.[41] Invoking the fears of the social Darwinist, Herbert Spencer, scholars like Ross warned that America (and the industrial world more generally) was entering a dysgenic nightmare in which the best citizens were increasingly being outbred by the unfit. The most frequently cited cause of this differential fertility was the advent of industrial capitalism, which purportedly resulted in "unnatural" modes of life, with technological innovation interfering with "the natural discipline of the survival of the fittest," and in turn, "making it more likely that the unfit would survive and reproduce."[42] While the fittest citizens were having fewer children in response to the unnatural conditions of industrial urban life, scholars bemoaned statistical evidence that immigrants and the lowest classes tended to have the largest families.[43]

The term "race suicide" gained the attention of President Theodore Roosevelt in 1907, when he labeled it as the "greatest problem of civilization."[44] Rather than a right of all members of society, Roosevelt framed reproduction as both a privilege and duty of the best citizens. The eugenics movement dominated civic lineage policy during the early twentieth century. Disposing of Victorian Era notions that sexuality was an intimate

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Economics in the Progressive Era," *History of Political Economy* 35, no. 4 (2003): 692-3.
[41] Edward A. Ross, "The Causes of Race Superiority," *Annals of the American Academy of Political and Social Science* 18, no. 1 (1901): 67-89, 88.
[42] Leonard, "More Merciful," 693.
[43] Ibid., 694.
[44] Theodore Roosevelt, "A Letter from President Roosevelt on Race Suicide," *American Monthly Review of Reviews* 35: no. 5 (1907): 550-1.

concern of the family and had no place in the public sphere, Roosevelt and many other prominent politicians of his day, labeled childbirth as the public concern of the entire nation and vital for the preservation of the "American race."[45]

Here it is important to emphasize that the term 'race' carried multiple and vague meanings during the Progressive Era, and its imprecision was exploited and conflated in discussions about population control and U.S citizenship. 'Race' was sometimes used to refer to all of humanity (the "human race"), sometimes to the citizens of a particular nation (i.e. the American race), and often to something closer to what it colloquially means today (i.e. the "White race" or "Negro race"). For instance, *The Universal Dictionary of the English Language*, with a publication date of 1902, lists two main definitions: 1) Race could refer to "lineage, line, family, [or] descent," and it could also refer to 2) "a class of individuals sprung from common stock; the descendants of a common ancestor; a family, tribe, nation or people belonging to the same stock."[46] In this vein, when the topic of "race suicide" came up, it was almost always a dual reference to anxieties about the future of American citizenship (the American race) and racist concerns about the outbreeding of those of superior racial stock by inferior races (i.e. including blacks, Catholics, Jews, Chinese, southern and eastern Europeans, Mexicans, and various other unpopular immigrants). In a letter to his friend and soon-to-be President, William Howard Taft, the outgoing President Roosevelt emphasized the national danger that differential fertility and race suicide posed to the United States: "Among the various legacies of trouble which I leave you there is none as to which I

[45] Ibid.
[46] *Universal Dictionary of the English Language,* III (New York, 1902), 879.

more earnestly hope for your thoughts and care than this [i.e. race suicide]…I do not know whether you yourself realize how rapid the decline in the birth rate is, how rapid the drift has been away from the country to the cities. In spite of our enormous immigration, there is good reason to fear that unless the present tendencies are checked your children and mine will see the day when our population is stationary, so far as the native stock is dying out."[47]

President Roosevelt was remarkably preoccupied with the relationship between fertility and American citizenship. Speaking of the duties of fatherhood to prevent "national death, [or] race death" he announced, "I feel pretty melancholy when I see how in this country, when there is no war to kill our bravest men, the best men nevertheless seem content [that] *the citizens of the future* come from the loins of others" [italics mine].[48] Likewise, comparing mothers to both saints and soldiers, he told the American people that the primary civic duty of women was to take up the mantle of motherhood. President Roosevelt compared the woman who refused to marry or flinched at the idea of having children to the soldier who fled from enemy fire, calling her "a criminal against the [American] race."[49] The worth of the female citizen could be determined by counting how many healthy children she contributed to the nation, for not only do the "the pangs of childbirth make all men the debtors of all women," but also those who have large

[47] Theodore Roosevelt, "Letter to William Howard Taft," *Letters VI* (December 21, 1909): 1433-34, cited in Thomas G. Dyer, *Theodore Roosevelt and the Idea of Race* (Louisiana State University Press, 1980), 158.
[48] Theodore Roosevelt, "Letter to David Star Jordan," (December 12, 1908), Roosevelt Collection, Library of Congress, cited in Dyer, *Theodore Roosevelt*, 158.
[49] Theodore Roosevelt, "Letter to Hamlin Garland," *Letters III* (July 19, 1903): 520-1, cited in Dyer, *Theodore Roosevelt,*152.

families were fulfilling their patriotic duty as "good citizens."[50] While Presidents Taft, Wilson, Harding, Coolidge, and Hoover would also publicly praise the importance of proper breeding and childrearing (embracing the eugenics agenda, one after the other), no U.S. President was as outspoken about differential fertility as Teddy Roosevelt. He celebrated parenthood as one of the most fundamental duties and privileges of citizenship.

However, Roosevelt was careful to note that, just as the best citizens had a civic duty to reproduce, the weakest citizens have the opposite duty to restrict their fertility and refrain from passing on their undesirable traits to the future generation of Americans. Speaking to Charles Davenport, the head of the Eugenics Records Office, Roosevelt wrote in 1913 after his presidency, "I agree with you that…society has no business to permit degenerates to reproduce their kind…Some day we will realize that the prime duty of *a good citizen of the right type* is to leave his or her blood behind him in the world, and we have no business perpetuating *citizens of the wrong type*" [italics mine].[51] Ultimately, Roosevelt's gendered (and otherwise exclusionary) views about the importance of childbirth as essential for preventing 'race suicide,' gives us a glimpse into the ideational connections between eugenic principles and popular definitions of what it meant to be a good citizen.

[50] Theodore Roosevelt, "Letter to Mrs. Bessie Van Vorst," *Letters III* (October 18, 1902): 355-56, cited in Dyer, *Theodore Roosevelt,*152.
[51] Theodore Roosevelt, "Letter to Charles Benedict Davenport," (January 3, 1913), Roosevelt Collection, Library of Congress, cited in Dyer, *Theodore Roosevelt* 160.

2. The Eugenics Movement

The American eugenics campaign was not a fringe movement. Spearheaded by a select cadre of scientists and economists at the national level, these academics in turn convinced wealthy philanthropists like Carnegie, Rockefeller, and Kellogg to fund scientific research stations and organized propaganda outlets for disseminating their agenda.[52] Although ideas about eugenics were popular among the American people in general, the campaign to establish involuntary sterilization as a legal and institutional norm in the United States was the mission of eugenics experts. These so-called academic specialists and their allies in government worked in coalition with doctors in local institutions to make sterilization a routine practice in state institutions across the country. Their research and publications were dispersed widely in the press and through propaganda outlets, convincing every U.S. President—and many other prominent public and political figures—during the heart of the Progressive Era to speak out in support of eugenic principles. In this section, I briefly examine the ideas associated with this elite-driven movement, paying particular attention to the most influential figures and early (well-organized) interest groups driving the political dissemination of their eugenic agenda to shape the future of American citizenship. These same figures were key players in the case of *Buck v. Bell*, which was orchestrated specifically by elite eugenicists to legalize involuntary sterilization.

[52] See Steven Selden, *Inheriting Shame: The Story of Eugenics and Racism in America* (New York: Teachers College Press, Columbia University, 1999), 4-21.

Charles Benedict Davenport, the recipient of Roosevelt's letter above (see excerpt), is arguably the most important figure in campaign for eugenic sterilization.[53] A Mendelian geneticist, Davenport argued that traits such as good and bad citizenship, poverty, alcoholism, laziness, and promiscuity were all heritable.[54] When the Carnegie Institute in Washington, DC formed the American Breeders Association (ABA) in 1903 to study breeding in animals, Davenport petitioned the ABA to fund a research facility for the study of human breeding and evolution in Cold Spring Harbor, NY, called The Station for Experimental Study of Evolution.[55] He became the newly appointed director of the Eugenics Section of the Carnegie Institute, forming a Committee in 1906, "to investigate and report on heredity in the human race, and emphasize the value of superior blood and the menace to society of inferior blood."[56] By 1910, he left the Carnegie Institute form his own organization, the Eugenics Record Office (ERO), as "a center for research in human genetics and for propaganda in eugenics," funded largely by wealthy philanthropist, Mrs. E.H. Harriman, the widow of the successful Railroad magnate, and also sponsored by the Carnegie Institute and John D. Rockefeller (among others).[57] With the ERO as an institutional base and scientific luminaries like Alexander Graham Bell, inventor of the telephone, on its board of directors, Davenport set out to popularize what

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[53] See Ibid. For more on Davenport's central role in the eugenics movement, see: Daniel L. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (Cambridge: Harvard University Press, 1998), 40-56.
[54] See e.g., Charles Benedict Davenport, *Heredity in Relation to Eugenics* (New York: Henry Holt, 1911); Charles Benedict Davenport, ed., *Eugenics, Genetics, and the Family*: Vol. I *Scientific Papers of the Second International Congress of Eugenics* (Baltimore: Williams and Wilkins, 1923); Charles Benedict Davenport, ed., *Eugenics in Race and State:* Vol. II. *Scientific Papers of the Second International Congress of Eugenics* (Baltimore: Williams and Wilkins, 1923).
[55] See Kevles, *In the Name of Eugenics*, 42. See also: Selden, *Inheriting Shame,* 4-9.
[56] L.C. Dunn, ed., *Genetics in the Twentieth Century* (New York: Macmillan, 1951), 60-65.
[57] M.H. Haller, *Eugenics: Hereditarian Attitudes in American Thought* (New Brunswick, NJ: Rutgers University Press, 1963), 64.

he referred to as, "the religion of eugenics."[58] In 1911, he published *Heredity in Relation to Eugenics*, which was cited in over a third of high school biology textbooks until World War II, and tied fears of social degeneration to themes of racial contamination through immigration and bad breeding.[59] In his words, "The population of the United States will, on account of the recent influx of immigrants from Southeastern Europe, rapidly become darker in pigmentation, smaller in stature, more mercurial, more attached to music and art, more given to crimes of larceny, kidnapping, assault, murder, rape, and sex-immorality…than were the original English settlers."[60] A scientist with a mission, Davenport was instrumental in organizing eugenics into a powerful political movement in the United States.

The ERO was concerned with promoting research and legislation aimed at *policing the boundaries of U.S. citizenship*, both through restricting *immigration* from abroad and *reproduction* at home. Davenport appointed Harry Hamilton Laughlin the superintendent of the ERO, charging him with overseeing daily activities.[61] Initially, the ERO collected thousands of family records—many willingly submitted by families proud of their racial fitness and others collected from asylums as examples of unfit citizens—in order to create genealogical charts and document traits and disorders that seemed to run in families. As an expert on eugenics at the ERO, Laughlin would enthusiastically testify before Congress, during the hearings on the "Johnson-Reed" Immigration Act of 1924,

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[58] Bruinius, *Better for All the World*, 220.
[59] Davenport, *Heredity in Relation to Eugenics*. See also: Selden, *Inheriting Shame,* 6.
[60] Selden, *Inheriting Shame,* 6.
[61] See: Philip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore: The Johns Hopkins University Press, 1991), 56-70.

about the importance of building eugenics into immigration policy.[62] The bill that Congress subsequently passed, and which President Coolidge signed into law, followed Laughlin's recommendations on immigration restrictions targeting southern Europeans and Jewish immigrants (among others), which would later prevent large numbers of Jewish refugees from seeking safety in the United States during the rise of the Third Reich in Germany.[63] Given the fact that the Nazis glowingly cited his work as inspiration for their eugenics program a decade later, Laughlin's role in spurring U.S. Congress to restrict the immigration of "unwanted" Jewish applicants is particularly tragic.[64]

In addition to limiting immigration from undesirable groups, the Eugenics Records Office and other eugenics organizations like the American Eugenics Society (AES) focused on making sure that, on a domestic level, the best citizens would become parents.[65] In the name of public education, the ERO engaged in "eugenic" marriage counseling to ensure that couples were well matched to produce healthy and strong offspring. The organization also funded Fitter Families and Better Babies contests at state fairs across the country, aimed at instructing the American people about the importance of eugenics and good breeding.[66] The winners of these contests received awards for their good heritage as "prime specimens," and were also routinely praised as

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[62] Statement of Dr. Harry Laughlin, "The Eugenical Aspects of Deportation," *Hearings Before the Committee on Immigration and Naturalization*, HR, 17th Congress, 1st sess., February 21, 1928.
[63] The Immigration Act of 1924 (The Johnson-Reed Act) *U.S. Department of State Office of the Historian*. Retrieved July 15, 2015. http://history.state.gov/milestones/1921-1936/immigration-act
[64] Bruinius, *Better for All the World*, 290.
[65] Selden, *Inheriting Shame*, 22-38.
[66] For an excellent discussion of these Fitter Families contests at local Fairs, see: Laura. L. Lovett, *Conceiving the Future: Pronatalism, Reproduction, and the Family in the United States, 1890-1938* (Chapel Hill: The University of North Carolina Press, 2007). Chapter 6 in this book titled, "Fitter Families for Future Firesides: Florence Sherbon and Popular Eugenics," looks at the role of eugenics at state fairs and in popular culture in great detail.

"good citizens."[67] But despite this public propaganda promoting positive eugenics, Paul Lombardo argues that the ERO "seemed organized to marshal support for sterilization," and indeed among its primary goals was the study of the "best methods of restricting the strains that produce the defective and delinquent classes of the community."[68] This double positive/negative agenda resulted in a normative dichotomy between the "mother of tomorrow" (whose duty it was to bear children for the nation) versus the wayward feebleminded woman in society (whose duty it was to remain barren).[69] While the former had the patriotic responsibility to save the American race by raising large families, the obligation of the latter was to refrain from passing her tainted genes to the next generation. Since race suicide could happen as a result of either internal or external mechanisms, and many factors can weaken a population, it followed that defective citizens had the civic duty *not* to bear children by submitting to sterilization. Ultimately, Laughlin spent the bulk of his efforts devising ways to prevent weak and defective people from contaminating the nation's gene pool, through the joint avenues of curtailing both immigration and reproduction from less desirable groups. His work would play a vital role in *Buck v. Bell*, the key legal case to which we now turn.

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[67] For example, praising the patriotism of the parents of a large family, President Roosevelt wrote in a letter: "Three cheers for Mr. and Mrs. Bower and their really satisfactory American family of twelve children. That is what I call being *good citizens*" [italics mine]. "Letter from Theodore Roosevelt to Mr. and Mrs. R.T. Bower," *Letters III* (February 14, 1903), cited in Dyer, *Theodore Roosevelt,* 153.
[68] Lombardo, *Three Generations,* 2008*,* 47.
[69] See e.g., Wendy Kline, *Building A Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* (Oakland: University of California Press, 2001), 29.

3. The Model Sterilization Law

Indiana was the first state to pass eugenic sterilization legislation in 1907, with Washington, California, and Connecticut following soon after.[70] But many of these early eugenic sterilization laws hit a major legal roadblock in the court system.[71] After 12 states passed eugenic sterilization laws, victims and members of their families contested a total of 7 of these laws in court between 1913 and 1918.[72] Every judicial challenge succeeded at the state level on due process grounds, as detailed below. To address this problem, Harry Laughlin took matters into his own hands, publishing a Model Sterilization Law first in 1914 as an ERO pamphlet and later as part of a lengthy book.[73] A key recipient of a copy was Dr. Albert Priddy, the superintendent of the Virginia Colony for Epileptics and Feeble-minded in Lynchburg, Virginia.[74] After setting out to have Laughlin's Model Law passed in Virginia, Dr. Priddy and the directors of his Virginia Colony searched for a test case to get the courts to uphold the law. Their goal was to create a legal record that would legitimize eugenic sterilization not only in Virginia, but also throughout the nation. Using Laughlin's book as a legal roadmap, the test subject they selected was a young woman named Carrie Buck.

Laughlin's book, *Eugenical Sterilization in the United States,* is essentially a "how-to manual" for crafting and enacting his model sterilization law. His entire book is

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[70] See: Jason S. Lantzer, "The Indiana Way of Eugenics: Sterilization Laws, 1907-74," in *A Century of Eugenics in America: From the Indiana Experiment to the Human Genome Era,* ed. Paul A. Lombardo (Bloomington: Indiana University Press, 2011), 26-41.
[71] See Paul, *Controlling Human Heredity*, 82.
[72] See an essay by Paul Lombardo on the topics, available at: http://www.eugenicsarchive.org/html/eugenics/essay8text.html
[73] Harry Hamilton Laughlin, *Eugenical Sterilization in the United States* (Psychopathic Laboratory of the Municipal Court of Chicago, 1922); see, in particular, "Chapter XVI: Explanatory Comments on the Model Sterilization Law," 454-60.
[74] Lombardo, *Three Generations,* 2008, 90.

devoted to a detailed legal analysis of past eugenic sterilization cases on a state-by-state basis, identifying strengths and flaws found by various courts, and ending with suggestions for how to overcome these weaknesses in the future. Covering over 500 pages, the volume was commissioned by Chief Judge Harry Olson of the Municipal Court of Chicago, where Laughlin was officially appointed as a legal consultant on eugenics.[75] After conducting several studies on the enforcement of eugenic sterilization policies throughout the country, Laughlin concluded that physicians were often hesitant to perform involuntary sterilizations because they feared prosecution by patients in court. Furthermore, the main problem cited by courts about sterilization statutes involved the patient's lack of access to due process of the law, because most patients were given little recourse to procedurally challenge their doctor's diagnosis. What the eugenics movement needed, according to Laughlin, was a model law specifically designed to circumvent the (due process) concerns raised by state courts and insulate doctors from judicial backlash in the future. To pass legal muster, Laughlin drafted his Model Law to set up state and local Eugenics Boards to examine each individual case, weigh the evidence, and allow patients the opportunity to dispute decisions by challenging their diagnoses with new information. In his book's preface, Laughlin specifically wrote that his project "was intended primarily for practical use" by government agents who wanted to pass and uphold successful laws relating to eugenic sterilization, including 1) "law-makers" interested in drafting legislation, 2) "judges of the courts…deciding upon the

[75] On the front page of the book, Laughlin's official positions are listed as: Assistant Director of the Eugenics Records Office, Carnegie Institution of Washington, Cold Spring Harbor, Long Island, New York and Eugenics Associate of the Psychopathic Laboratory of the Municipal Court in Chicago.

constitutionality of new statues," and 3) "administrative officers who represent the state in locating, and genetically analyzing persons" as candidates for sterilization.[76]

Laughlin's procedural suggestions did not detract from the breadth of his Model Law, which cut as widely as possible when it came to labeling people as candidates for eugenic sterilization. The primary goal of Laughlin's book remained that of breeding "better" American citizens. In the book's Introduction, Judge Olson argued that eugenics is necessary for democracy to function properly, because it breeds good citizens and a democratic nation requires a vigorous citizenry to function.[77] Quoting Irving Fisher, a well-known economist and board member of the ERO, Olson wrote that, "Eugenics…represents the highest form of patriotism and humanitarianism, while at the same time it offers immediate advantages to ourselves and our children."[78] In this spirit, Laughlin proposed that "socially inadequate" people supported in institutions or "maintained wholly or in part by public expense" ought to be authorized for sterilization in the name of protecting the public health of the community.[79] The law included a wide range of people under its umbrella—all afflicted with problems that the ERO claimed were largely hereditary in nature—including the "feebleminded, insane, criminalistics, epileptic, inebriate, diseased, blind deaf; deformed; and dependent"—such as, "orphans,

[76] Laughlin, *Eugenical Sterilization*, vii.
[77] In Olson's preface to Laughlin's book, he writes the following about the connection between eugenics and citizenship: "America…needs to protect herself against indiscriminate immigration, criminal degenerates, and race suicide... The success of democracy depends upon the quality of its individual elements. If in these elements [or citizens] the racial values are high, government will be equal to all the economic, educational, religious, and scientific demands of the times. If, on the contrary, there is a constant and progressive racial degeneracy, it is only a question of time when popular self government will be impossible, and will be succeeded by chaos, and finally a dictatorship." See Laughlin, *Eugenical Sterilization*, v.
[78] Harry Olson quoting Irving Fisher in Laughlin, *Eugenical Sterilization,* v.
[79] Laughlin, *Eugenical Sterilization*, see, in particular, "Chapter XVI: Explanatory Comments on the Model Sterilization Law," 454-460.

ne'er-do-wells, tramps, the homeless and paupers."[80] In sum, Laughlin's Model Law was specifically designed to address the procedural "due process" weaknesses of the early legislation struck down by state courts. But while these Eugenics Boards would serve to insulate individual doctors from being sued by patients from a practical standpoint, the ideas driving his engagement with the topic were fears about race suicide and the erosion of meaningful democratic citizenship in America. Now, Laughlin just needed a state to adopt his proposal!

The Commonwealth of Virginia delivered. On March 20, 1924, Virginia passed the "Eugenical Sterilization Act," signed into law on the same day as its new "Racial Integrity Act," the latter of which banned interracial marriage in order to protect white racial purity.[81] Under the Eugenical Sterilization Act, any individual confined to a state institution could be sterilized, if this person was "afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy."[82] With the help of Dr. Priddy, the procedural part of the law was modeled directly after Laughlin's recommendations. A patient could only be sterilized after the superintendent of the colony or hospital in which they were housed petitioned a special board of directors for sterilization on a case-by-case basis. A copy of the paperwork for the petition must be

[80] Ibid.
[81] The fact that both laws were signed into law on the same day is a testament to the fact that the legislature viewed them both as complimentary eugenic policies. During the Progressive Era, anxieties about race suicide combined concerns about protecting white purity with anxieties about maintaining vitality among those considered legally "white." Indeed, the fact eugenic sterilization mainly targeted poor whites, like Carrie Buck—mainly as a result of racial segregation of blacks from state institutions—but nonetheless relied upon the logic of preventing "race suicide," reveals the multiple and nuanced meanings of race during this time. These complexities can easily be eclipsed in accounts that focus narrowly on "whiteness" as an ideal. The full text for the Racial Integrity Act of 1924 is available online here: http://www2.vcdh.virginia.edu/lewisandclark/students/projects/monacans/Contemporary_Monacans/racial.html
[82] Virginia Acts (1924) 570.

presented to the patient and their legal guardian, who then had 30 days to challenge the decision before the sterilization was permitted to proceed (as directed by the board).[83] Regardless of whether or not appeals were taken seriously, the point was to provide evidence of "due process" to the judiciary.

Following the procedures outlined in the law, Dr. Priddy at the Virginia Colony submitted a list of sixteen patients he recommended for sterilization to the institution's board later that year.[84] Before he performed the surgeries, Priddy set out to test the law's constitutionality in the courts. The board selected Carrie Buck as the test case. Carrie was a 17 old girl from Charlottesville, Virginia, who had been diagnosed as "feebleminded." In his petition, Dr. Priddy emphasized to the Board that both Carrie and her mother shared the hereditary traits of sexual promiscuity and feeblemindedness. For not only had Carrie recently given birth to a baby daughter out of wedlock (subsequently placed in foster care), but her mother Emma was already a resident at the same asylum. Since Carrie had likely passed her defective traits on to her baby daughter, Vivian, Dr. Priddy emphasized that this young woman was an ideal candidate for the new law's qualification of being a "probable potential parent of socially inadequate offspring."[85] With three generations of "feebleminded" women in the same family, all of whom were under state supervision and care, the board enthusiastically selected Carrie as their test case.

[83] Ibid.
[84] Lombardo, *Three Generations,* 2008, 102.
[85] Virginia Acts (1924) 570.

4. The Show Trial of Carrie Buck

The case against Carrie Buck was on its face relatively straightforward: First, the state argued that Carrie Buck was feebleminded (a moron). Second, it maintained that she was afflicted with a hereditary form of feeblemindedness that she inherited from her mother and had already passed on to her baby daughter. Third, the state maintained that it possessed a legitimate state interest in sterilizing "defective persons who if now discharged or paroled would likely become by propagation of their kind a menace to society."[86] The state interest in promoting the welfare of society grants it the police power to sterilize feebleminded people such as Buck in the name of public health. Finally, it emphasized that Buck received proper due process under the law, because her case was examined on its individual merits by the board members of the Virginia Colony, and Carrie was able to appeal the ruling of the board on the off-chance that she was mistakenly selected for sterilization. This was all spelled out in the original petition to sterilize Carrie Buck, in which Priddy stated bluntly that Buck was a "moral delinquent," for she "had just given birth to a mentally defective child before admission" to the Virginia Colony.[87]

The case began in the Circuit Court of Amherst County, and the trial took five hours.[88] Since his purpose was to establish the constitutionality of the law, Dr. Priddy hired State Senator Aubrey Strode, the lawyer who had drafted the sterilization law for Virginia's legislature, to defend the Colony's position. He also hired Irving P.

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[86] Virginia Acts (1924) 570, copy available online at: https://www.dnalc.org/view/11213-Virginia-Sterilization-Act-of-3-20-1924.html
[87] Bruinius, *Better for All the World*, 60.
[88] Lombardo, *Three Generations*, 2008, 135.

Whitehead, a former Colony board member and accomplished lawyer, to defend Carrie Buck on the Virginia Colony's own budget. These two lawyers were good friends. Not only were they connected to the Virginia Colony, but Senator Strode and Mr. Whitehead shared a strong commitment to eugenic sterilization and appear to have collaborated in their efforts to get the law declared constitutional by colluding with the Colony's officials to work against Carrie Buck. Strode would construct a powerful case for sterilization, and Whitehead would focus almost solely on the issue of due process. After drafting the Virginia eugenical sterilization legislation, with the help of Dr. Priddy, Aubrey Strode used his legal knowledge and skills to smoothly steer it through the court system. As Strode and Whitehouse knew, the original trial was their main opportunity to structure the evidence and testimony that would later be reviewed by higher courts. While Whitehead filed a short brief on behalf of his client (approximately 5 pages) and called no witnesses of his own to testify in defense of Carrie, the brief by Strode defending the Virginia sterilization law was over 40 pages in length and he had a dozen witnesses to defend it.[89] By making Carrie Buck, the subject of a eugenics "show trial," the two lawyers went to great lengths to provide the most compelling case possible to the Circuit Court.

The Local Witnesses:

After Whitehead presented his short introductory argument in defense of Buck's rights to due process and equal protection under the law, Aubrey Strode called 8 witnesses from Charlottesville to support sterilizing Carrie Buck under the new Virginia law. None of them knew Carrie well and most had never met her, but all painted a negative picture of

[89] Strode and Whitehead briefs, *The Circuit Court of Amherst Country.*

Carrie Buck, with rumors and negative remarks about her family. The main local witness—the seventh witness in the trial that morning—was Caroline Wilhelm, a Red Cross nurse who had moved to Charlottesville the year before to become the county's administrator of public welfare. She began her comments by admitting that the real reason that Mr. Dobbs, Carrie's foster father, reported Carrie to the welfare office was not because she was feebleminded *per se*, rather Carrie was pregnant and, "he wanted her committed somewhere…sent to some institution."[90] When she first took the stand, Wilhelm announced that she sympathized with Carrie's situation, stating that girls like her were, "more and more at the mercy of other people."[91] However, when Strode pressed her about whether Carrie was "obviously feebleminded?," Wilhelm took the bait and agreed, emphasizing her expertise: "I should say so, as a social worker."[92] Moreover, although she had previously told Dr. Priddy that she could not label Carrie's baby daughter as feebleminded at such a young age and she saw no evidence of any "defect" in the child, Wilhelm changed her position before the trial.[93] In her words, "It is difficult to judge the probabilities of a child as young as that, but it seems to me a not quite normal baby…There is a look that is not quite normal, but just what it is, I can't tell."[94]

The Experts:

The afternoon was dedicated to expert testimony. The first "eugenics expert" called to testify was Dr. Joseph S. DeJarnette, who had worked in mental health for over fifty

[90] Testimony of Caroline E. Wilhelm, *Buck Record*, 63-35.
[91] Ibid.
[92] Ibid.
[93] See Lombardo, *Three Generations*, 2008, 117.
[94] Testimony of Caroline E. Wilhelm, *Buck Record*, 63-35.

years and was now superintendent of Virginia's Western State Hospital. Proud to have the nickname "Sterilization DeJarnette," he was not only an avid supporter for sterilization at his own prison, but he was also known to compose poems about eugenics as a hobby ("Oh why do we allow these people/ To breed back to the monkey's nest/ To increase our country's burdens/ When we should only breed the best?"[95])[96] In his testimony, DeJarnette emphasized that it was absurd to allow "defective" humans to be a "social burden" on the state and harm "our own race," when the farmer "breeding his hogs, horses, cows, sheep…selects a thoroughbred."[97] DeJarnette firmly stated that sterilizing Carrie Buck would be of great benefit to social welfare. He pointed out that sterilization was a "cheap and effective" procedure, and hence much less of the state's income would have to go to housing "the defective portion of our population."[98]

The main witness was Dr. Arthur H. Estabrook. Strode was an old acquaintance of Estabrook, who had visited the area a number of times doing research for his book, *Mongrel Virginians,* on the weaknesses of mixed race people.[99] A well-known eugenicist at the Carnegie Institute and the Eugenics Records Office (which had merged in 1917), the Virginia Colony paid to have Estabrook travel to Virginia and spend a day examining the entire Buck family, and then return to testify in court.[100] Estabrook announced in court that he was certain that the Bucks were all feebleminded after his "sufficient

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[95] Joseph S. Dejarnette, "Mendel's Law: A Plea for a Better Race of Men," available at: https://www.dnalc.org/view/11212-Mendel-s-Law-Poem-by-Joseph-DeJarnette-MD-witness-in-Buck-vs-Bell-case.html

[96] For a reference to the nickname "Sterilization DeJarnette," see Lombardo, *Three Generations,* 2008, 121.

[97] Testimony of Dr. J.S. Dejarnette, *Buck Record*, 71-82.

[98] Ibid., 122.

[99] Lombardo, *Three Generations,* 2008, 128. See: Arthur H. Estabrook and Ivan E. McDougle, *Mongrel Virginians: The WIN Tribe* (Baltimore: Williams and Wilkins, 1926).

[100] See Lombardo, *Three Generations*, 2008, 128, 135.

examination" (in a single afternoon), and concluded that the family's "*germ plasm* [italics mine], of which Emma Buck [Carrie's mother] is a member carries a defective strain in it."[101] Carrie and her daughter were both feebleminded, a weakness they inherited from her mother's side.[102] Putting aside the difficulties of testing the intelligence of babies, and particularly those taken from their mothers at infancy with the stigma of being "born defective" and placed in foster care, Estabrook announced with confidence: "I gave the child the regular mental test for a child of the age of six months and judging from her reactions to the tests I gave her, I decided she was below the average for a child of eight months of age."[103]

After testifying that Carrie and her family members were all feebleminded, Estabrook then volunteered the analogy of the Kallikak family. Widely cited during the Buck trial, Henry Goddard's book, *The Kallikak Family: A Study in the Heredity of Feeble-Mindedness*, published in 1912, examines the history of two family bloodlines allegedly fathered by a soldier in the Revolutionary War.[104] The soldier was given the pseudonym Martin Kallikak, but readers were assured of the authenticity of the family. The Kallikak descendants divided into two bloodlines, one wholesome and the other a

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[101] Testimony of A.H. Estabrook, *Buck Record*, 82-90.
[102] Strode emphasized that the pathology of being "feebleminded" was an official diagnosis of disorder in Virginia during this time, by reading "the definition of a feebleminded person…taken from section 1075 of the Code of Virginia" out loud in court to Estabrook, who confirmed that Carrie was indeed feebleminded and had passed her feeblemindedness to her baby daughter too. . "The words 'feebleminded person'…shall be construed to mean any person with mental defectiveness from birth or from an early age so pronounced that he is in capable of caring for himself or managing his affairs, or being taught to do so, and is unsafe to himself and others, and to the community, who consequently requires care, supervision, and control for the protection and welfare of himself, others and the community, but is not classable as an 'insane person' as usually interpreted" (82-3).
[103] Testimony of A.H. Estabrook, *Buck Record*, 82-90.
[104] Henry H. Goddard, *The Kallikak Family: A Study in the Heredity of Feeble-Mindedness* (New York: Macmillan, 1912).

"race of defective degenerates."[105] The degenerate offspring were all descended from Martin's liaison with a barmaid (identified as "the nameless feeble-minded girl") during his military service, which resulted in the birth of an illegitimate son. After the war, Martin married a normal girl of wholesome ancestry from an upstanding Quaker family. His legitimate offspring and their descendants grew up to become distinguished members of society, including "doctors, lawyers, judges, educators, traders, landholders," and none were problems to society.[106] As Goddard emphasizes, "There have been no feeble-minded among them; no illegitimate children; no immoral women..."[107] In contrast, Martin's illegitimate son, whom he abandoned in infancy (later nicknamed, "Old Horror"), produced a line of miscreants, scoundrels, deviants, criminals, prostitutes, and alcoholics with a vast majority being feebleminded.[108] Importantly, Goddard's analysis attributed the prosperity of Martin's legitimate line of descendants to his wife, and the degeneracy of his illegitimate line of descendants to his feebleminded lover. The assumption was that feeblemindedness was a dominant trait on the female side. Rooting his findings in nature and not the environment, Goddard brushed aside the notion that there could be a more persuasive explanation than genetics for why Martin Kallikak's legitimate children, growing up with both parents in a financially stable household, might end up becoming more successful than the illegitimate child of a working-class lover that he abandoned to a life of poverty during the war. Nor did Goddard reflect upon how the

[105] Ibid., 103.
[106] Ibid., 16.
[107] Ibid.
[108] Ibid., 18-19.

advantages and disadvantages of one's upbringing might be transmitted though socioeconomic factors from generation to generation.

The Kallikak Family was so popular that it went through twelve editions in twenty-five years, from the date of its publication to 1939.[109] As Diane Paul emphasizes, references to the Kallikaks were common in scholarly books, journals, high school and college biology textbooks, and even popular magazines.[110] Like Richard Dugdale's earlier family pedigree study, *The Jukes: A Study in Crime, Pauperism, Disease, and Heredity*, which found a family marked by criminal behavior traced back a number of generations through the prison system in upstate New York,[111] Goddard's Kallikaks capitalized on the fears of feebleminded people invading communities, and weakening the body politic in a similar manner as a plague or internal parasite.[112] Estabrook did not hesitate to draw attention to his own follow-up study for the ERO of "The Jukes in 1915" at the trial, and he stated that the best cure for the problem (of a family of morons) was to curb their ability to reproduce.[113] As far as the public was concerned, the Jukes and the Kallikaks were like an invading army of degenerates (akin to locusts), who would sap the vitality of America from within her own borders. The implication was that the Buck family, like the notorious Jukes and Kallikaks, would surely produce more defective and degenerate citizens without state intervention via sterilization.

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[109] Paul, *Controlling Heredity,* 50.
[110] Ibid.
[111] Richard L. Dugdale, *"The Jukes": A Study in Crime, Pauperism, Disease, and Heredity* (New York: G.P. Putnam's Sons, 1877).
[112] For a direct reference to these families being "true parasites" on society: See e.g., George William Hunter, *A Civic Biology: Presented in Problems* (New York: American Book, 1914), 263.
[113] Arthur Howard Estabrook, "The Jukes in 1915," Paper No. 25, The Station for Experimental Evolution (Cold Spring Harbor, NY: *Carnegie Institute*, 1916).

Although he couldn't make it in person, it is worth noting that Laughlin himself—by far, the most famous figure in the nationwide eugenic sterilization campaign—submitted an official deposition to the court, which Strode read out loud as the final expert witness on the topic.[114] When asked to state the facts of the case, Laughlin simply quoted Priddy's claim in a letter to him that Carrie Buck "has a life-long record of moral delinquency and has borne one illegitimate child, considered feebleminded."[115] He had never met Carrie Buck, but based on secondhand information from Priddy, Laughlin surmised that Buck was clearly feebleminded, and her feeblemindedness was almost certainly the result of heredity not environment: "These people belong to the shiftless, ignorant, and worthless class of anti-social whites of the South."[116] In addition to referencing numerous chapters from his own book, *Eugenical Sterilization*—which "contains pedigree charts and other analytical data, and demonstrates, beyond a reasonable doubt that…the particular inadequacy was inborn"—Laughlin also cited two of his own forthcoming articles in *Eugenical News*, "Segregation Versus Sterilization" and "Purging the Race." These publications, he emphasized, supported "the right of the State to limit human reproduction in the interest of race betterment."[117] Laughlin concluded his deposition by asserting that the Virginia law was an effective and appropriate statute for limiting fertility in the name of public health and welfare.

[114] Deposition of Harry Laughlin, *Buck Record in Circuit Court of Amherst County*, 37-50 .
[115] Ibid., 32.
[116] Ibid.
[117] Ibid., 31-41.

Without a Defense:

What is surprising is that Carrie's own defense lawyer (Irving Whitehead) did not call any witnesses from Carrie's hometown to defend her character and mental abilities. There is no evidence that he met with his client before the trial to hear Carrie's side of the story.[118] Nor did he expose any of Strode's witnesses to a strenuous cross-examination, or draw attention to the rather puzzling fact that few of the witnesses had even met Carrie. Instead, Whitehead's questioning involved polite inquiries regarding the witnesses' personal conjectures about Carrie, which often resulted in more damning hypotheses about her mental capacities than came out during Strode's initial examination. Perhaps most importantly, Whitehead never questioned the principle allegation that Carrie was feebleminded, and instead repeated to witnesses that her mental condition was a fact.[119] Ironically, we now have ample evidence that Carrie's sterilization was based upon a false diagnosis. Although Whitehead never called a single one of Carrie's grammar school teachers to the witness stand in defense of her academic capabilities, her school records confirm that she was a fine student. Until the Dobbs' took her out of school in the sixth grade to help around the house as more of a maid than a foster child, her grades were good and she was promoted to the sixth grade with the official remark from her teacher, "very good—deportment and lessons."[120] In addition to this glaring failure to question the validity of her diagnosis, Whitehead also never challenged the claim that Carrie was sexually promiscuous, which is offset by the fact that Carrie stated

[118] Note: Through extensive historical research, Paul Lombardo uncovered ample evidence that Whitehead failed to properly represent Carrie Buck. For an excellent and more detailed discussion of her lawyer's failure to represent her in Court, see: Lombardo, *Three Generations,* 2008, 136-48.
[119] Ibid., 138-139.
[120] "Register of Students," McGuffy School, Charlottesville, VA, 1916-1917, cited in Lombardo, *Three Generations,* 2008, 139.

on a number of occasions that the nephew of her foster parents raped her. Whitehead never aggressively cross-examined the social worker about these inconsistencies in her testimony, or called any member of the Dobbs family to the witness stand. Nor did he call any expert scientists of his own to question some of the controversial (and downright false) claims made by Strode's crew of experts about heredity. Throughout the case, Whitehead simply focused on procedural formality.

Paul Lombardo has persuasively argued that Whitehead's inadequate representation of Carrie Buck was not a sign of incompetence, but rather he was working for the Virginia Colony.[121] The Colony and its board rewarded Whitehead handsomely for his loyalty. This is one of the few examples in which the "public defense" received more money than the prosecution, and Whitehouse's efforts in this case are linked to a series of significant professional advancements.[122] Yet his failure to represent his client properly in court not only left Carrie defenseless, but was also an egregious breach of professional ethics and his duties to his client as a lawyer. Carrie Buck's fate was sealed from the outset. She was a pawn in a scheme devised by Virginia's most avid eugenicists—and their allies throughout the nation—to get involuntary sterilization upheld by the Supreme Court. Nobody questioned the assertion that Carrie was a "moron," or that her mother and daughter shared this defect. The family studies of the Kallikaks and Jukes connected the dots more effectively than any references to the science of heredity. The implication of Strode's argument was that the Bucks were no better than these families of popular notoriety in discussions of race suicide. They were

[121] Lombardo, *Three Generations,* 2008, 136-48.
[122] Ibid.

the worst kind of citizens, and appeared to only grow worse from one generation to the next. Surely, asked Strode, three generations of the feebleminded Buck family is all the good people of Virginia ought to be forced to endure and support with taxpayer money? He would find a friendly ear to this argument from Justice Holmes when the case was appealed to the Supreme Court.[123]

The initial trial went very well for Dr. Albert Priddy, but he died of Hodgkin's disease before Judge Gordon formally announced his opinion in favor of sterilizing Carrie Buck.[124] After the ruling, the institution's board remained determined to see the case through to the next level, so Whitehead filed an appeal on Carrie's behalf to the Virginia Supreme Court of Appeals. When Virginia's highest court agreed to hear the case, Dr. John H. Bell, who was Priddy's former assistant and had replaced him as superintendent of the Virginia Colony, became the newly named defendant in the case—thereafter labeled, *Buck v. Bell*.[125]

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[123]Since Aubrey Strode had already set up a strong legal record in the original trial, the Virginia Supreme Court of Appeals upheld the previous order for Carrie Buck's sterilization on November 12, 1925. At the state level, Justice John West stated that the "legality and regularity of the proceedings" under which the Virginia Colony diagnosed her as feebleminded were in order. No controversy had been raised to contest her diagnosis of feebleminded' nor its hereditary nature, and the state had provided evidence that the operation of salpingectomy was "harmless" to the inmate and promoted her welfare by allowing her to live a life of liberty outside the institution' rather than keeping her quarantined from society due to the danger of her childbearing capacity. Indeed, the court noted that the Virginia law was different than the sterilization laws overturned in other states, because the Virginia law had the added due process protection that the state must prove how the operation would benefit the patient, so Justice West and his colleagues on Virginia's highest court looked at the same material presented at the trial and ruled that the state had the legitimate police powers to sterilize Carrie in the name of public health. The next step was the Supreme Court of the United States.

[124] See: Lombardo, *Three Generations,* 2008, 149-51.

[125] Like Priddy, Bell declared that he was "in entire sympathy with the effort being made to reach a final conclusion as to the legality of this sterilization procedure," and he left the fate of Carrie Buck to the decisions of Judges in the name of the larger goals of the eugenics movement. Lombardo, *Three Generations,* 2008, 150-51.

5. The Supreme Court and Public Health Regulations

The United States Supreme Court that agreed to hear *Buck v. Bell* in 1926 was presided over by Chief Justice and former President, William Howard Taft. Although Taft was not known for being racist—in fact, he rejected "race prejudice" as irrational when it came to mandated racial segregation[126]—he shared Theodore Roosevelt's concerns about 'race suicide' and had spoken out in favor of eugenics in the past.[127] The Taft Court was acutely concerned about the changing face of the American polity and maintaining national integrity in the midst of American imperialism, as demonstrated by its decision, written by Taft, to arguably exclude Puerto Rico from statehood in *Balzac v Porto Rico* (1922) in part to preserve the cultural, ethnic, and racial face of America's citizenry.[128] The Court ruled 8-1 in favor of sterilizing Carrie Buck. With only Justice Pierce Butler dissenting, purportedly because he was a Roman Catholic (but he offered no written dissent), Chief Justice Taft assigned the task of writing the majority opinion to Justice Oliver Wendell Holmes, Jr. [129]

Before proceeding to a detailed analysis of the *Buck v. Bell* opinion, it would be useful to consider this case in the context of the Progressive Era. During the Progressive

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[126] Alpheus Thomas, *William Howard Taft: Chief Justice* (New York: Simon and Schuster, 1965), 40, 275, citing a letter from William Howard Taft to Helen Taft Manning, on March 15, 1926.

[127] Taft was good friends with Irving Fisher, and wrote the Introduction to each edition of a book he coauthored with Dr. Eugene Lyman Fisk (with a final section by Charles Davenport), called *How to Live*. Extremely popular, the book went through 16 editions. Filled with recommendations on healthful practices and eugenic ideology, it establishes Taft's deep ties with the American Eugenics Movement. The book listed "prevention of reproduction by the markedly unfit" and sterilization of "gross and hopeless defectives" as important national goals (Lombardo, *Three Generations,* 2008, 161).

[128] *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

[129] Holmes accused Butler of being wedded more to the Church than the Court when mentioning his dissent, but all the other justices joined Holmes' opinion. Roman Catholics were the most outspoken opponents of eugenical sterilization during the Progressive Era, frequently labeling it was an unjust invasion of procreation and a form of mutilation.

Era, states increasingly sought to pass legislation regulating the welfare of their citizens, which helped to pave the way for the development of a much more expansive and localized civic lineage regime. Although *Buck v. Bell* was the first case before the Supreme Court that dealt explicitly with the issue of "eugenics," the legal concerns raised in the case built upon a recent rise in jurisprudence related to state laws seeking to regulate issues concerning the "public health" of their citizens. In his early years on the Court, Justice Holmes staked out a clear-cut position in this ongoing debate about the constitutional legitimacy of such regulations. Ranking *Buck* as part of this broader trend—despite the fact that the public health claims of the case seem grossly misguided today—sheds light on the Court's decision in support of involuntary sterilization. It also explains why Justice Holmes wrote such a bold opinion endorsing the policy. Since he participated in almost all of these early "public health" cases during his long tenure on the Supreme Court, let us briefly examine Holmes' own positions in these cases to gain a better understanding of his opinion in *Buck v. Bell*.

By the time *Buck v. Bell* reached the Supreme Court, Oliver Wendell Holmes, who would author the opinion, was in his late eighties and the most celebrated jurist on the court.[130] Justice Holmes was particularly famous as a "champion of the common man," a reputation he earned early in his tenure on the Supreme Court beginning with the now infamous case of *Lochner v. New York* (1905).[131] When the Court's majority struck down a New York "public health" law limiting the workweek of bakers to 60 hours a week, Holmes wrote a scathing dissent rejecting the majority's analysis as imposing the

[130] See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993), 378-411.
[131] *Lochner v. New York*, 198 U.S. 45 (1905).

will of judges on the democratic process, and bluntly declaring that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*." [132] Today, many remember *Lochner* as one of the worst decisions in Supreme Court history, because the Court rejected a law regulating basic worker safety and workplace sanitation in the name of supporting the prerogative of employers to make contracts with employees, irrespective of the conditions.[133] Most now celebrate Holmes' bold dissent in *Lochner*. Nonetheless, despite his rejection of the Court reading social Darwinism into the Constitution, Holmes was never really a justice of the common man (or woman), as *Buck v. Bell* (1924) would starkly illustrate more than twenty years later.

Holmes believed that judges ought to defer to state laws, rather than impose their own views on democratically elected legislatures.[134] According to Holmes, a good judge follows the democratic will of the people whenever possible, for it is "the majority vote of that nation that could lick all others."[135] Importantly, his support of the democratic process was consistent with the decision to uphold the state of Virginia's eugenic sterilization law in *Buck v. Bell*. In a similar manner to *Lochner*, the *Buck* case concerned a state law that was passed by the legislature in the name of protecting the welfare of society.

Moreover, Holmes had already expressed his conviction that women warrant differential treatment from men, by virtue of their unique reproductive capacity to

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[132] *Lochner*, *Holmes dissent.*
[133] The Court's majority ruled that the law violated the constitutionally protected right of an employer to make a contract with employees to work as long as they both deemed fit, dismissing the state's argument that bakers were being overworked in dangerous conditions and it therefore had the police powers to regulate their hours and working conditions in the name of public health and worker safety.
[134] White, *Justice Oliver Wendell Holmes*, 378-411.
[135] Cited in Edwin Black, *War Against the Weak: Eugenics and America's Campaign to Create a Master Race* (New York: Four Walls Eight Windows, 2003), 119.

become mothers. In *Muller v. Oregon* (1908), soon after *Lochner*, the Court switched positions and unanimously upheld the idea that the freedom of contract could be limited by the state's interest in protecting the health and welfare of its people (i.e. see the Brandeis brief). The grounds on which it reached this decision was specifically in the name of protecting women as the mothers of future generations of citizens.[136] The case did not overturn *Lochner* based on worker's rights or the state's interest in protecting public health in general, rather it qualified the Court's earlier position on the basis of sex discrimination. In his opinion for the Court, David Brewer (joined by Holmes) wrote, "As healthy mothers are essential to vigorous offspring, the physical well-being of women becomes the object of public interest and care in order to preserve the strength and vigor of the race."[137] Although the labor movement lauded the Court's decision in *Muller* as a victory—because they sought workplace protections for both men and women—it is important to note that the Court rejected any broader class-based arguments and upheld *Lochner.*[138] The unique role of women versus men in childbirth was enough for the Court to reach precisely the opposite decision in *Muller* than it did in *Lochner*. From the standpoint of the Court, the decision rested upon concerns about civic lineage and motherhood, not class: "the performance of maternal functions place [woman] at a disadvantage which justifies a difference in legislation in regard to some of the burdens which rest upon her."[139] The Court unanimously concluded that the issue of 'reproduction' justified the state using its police powers to grant special protections to

[136] Louis Brandeis, *The Brandeis Brief*, in Muller v. Oregon, 208 U.S. 412 (1908).
[137] *Muller v. Oregon*, 208 U.S. 412 (1908).
[138] Ibid.
[139] Ibid.

women's safety in the name of the community's legitimate interest in the health of children. The public interest in mothers bearing and raising healthy offspring justified sex discrimination in the workplace by providing women with greater safeguards than men. Although Holmes supported the constitutionality of state laws protecting male workers as well as females, his endorsement of this highly gendered and racialized phraseology in *Muller* casts light on the role of civic lineage in *Buck v. Bell*.

How does *Muller* connect to *Buck v. Bell*? As we have seen, during the Progressive Era, just as healthy women were told by eugenicists that it was their civic duty to give birth to the next generation of citizens, those labeled as unfit, like Carrie Buck, were told that they had no right to procreate at all. So, could women's ability to bear children also justify preventing purportedly defective mothers from producing offspring in the first place in the name of what Justice Brewer termed in *Muller*, the "vigor of the race"?[140] Holmes's answer was a firm yes. His colleagues on the Court agreed with this conclusion.

6. The *Buck v. Bell* Opinion

In *Buck v. Bell*, Justice Holmes voted to uphold a public heath law passed by the democratically elected legislature in Virginia.[141] Likewise, moving away from their (anti-regulation) position in *Lochner,* eight out of nine justices agreed that sterilizing Carrie Buck fell under the legitimate police powers of the state, because it protected society from degenerate offspring. As in *Muller,* the Court cast the reproduction of

[140] Ibid.
[141] 1924 Va Acts 570.

citizenship as a fundamentally public matter open to state regulation. The language about civic duty is particularly noteworthy, for Holmes frames reproduction as a public matter of citizenship rather than a private concern of the individual or family. Based on the *Buck* opinion, we can conclude that during the Progressive Era many including the Supreme Court viewed the issue of reproduction as the legitimate interest of the entire community. The concept of "reproductive bodily integrity" was neither a fundamental right nor a matter of a right to privacy, as it is framed under constitutional law today.

In his opinion for *Buck v. Bell*, Holmes begins by listing "the facts" of the case, with an emphasis on Carrie's diagnosis as feebleminded and the presumed heredity nature of her condition. Reviewing the testimony at the trial, he then turns to the state's compliance with procedural regularity under the law. In his words,

> Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child. She was eighteen years old at the time of the trial of her case in the circuit court, in the latter part of 1924. An Act of Virginia, approved March 20, 1924, recites the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard…that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and society; and that experience has shown that heredity pays an important part in the transmission of insanity, imbecility…[142]

After summarizing the extensive procedural safeguards Virginia gave Carrie Buck, Holmes concludes, "there is no doubt that, in that respect, the plaintiff in error has had

[142] *Buck v. Bell*, 274 U.S. 200 (1927) at 205.

due process of law."[143] At this point, it becomes clear that Laughlin's strategy for overcoming due process difficulties worked.

Next, Holmes mocks Whitehead's suggestion that the state could not, for any legitimate reason, violate a person's "bodily integrity" under the Constitution through involuntary sterilization. Whitehead added this "bodily integrity" argument to his Brief at the last minute, as an attempt to cover all bases—including equal protection. Dismissing the argument, Holmes simply cites Carrie Buck's mental insufficiencies, and reiterates that the state granted her due process:

> It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon existing ground. The judgment finds the facts have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, like-wise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," and thereupon makes the order…[144]

The concept of a 'fundamental right to reproduction' was not yet a part of mainstream judicial discourse at the time. This is why Holmes could so readily dismiss the "bodily integrity" argument. Far from extending to encompass a broad protection of "bodily integrity," the notion of a right to reproductive privacy was still inchoate. Indeed, Justice Brandeis, who is typically identified with the idea of a right to privacy, joined Holmes in favor of sterilizing Carrie Buck.

Despite his reputation as the founding theoretician of a "right to privacy" in American Constitutional law, Justice Brandeis voted for the sterilization of Carrie Buck, precisely because the Court framed the reproductive capacity of Carrie Buck as a public

[143] Ibid., at 207.
[144] Ibid.

rather than a private matter. The fact that Brandeis voted for the sterilization of Carrie Buck raises a crucial point about the early development of the idea of "a right to privacy," and its original limits. In a groundbreaking article published in the *Harvard Law Review* in 1890, coauthored with his law partner Samuel Warren, Brandeis famously articulates a new legal concept that he calls a "right to privacy," and summarizes it most succinctly as the "right to be left alone."[145] Brandeis argued that an individual ought to be protected against undue invasion of his personal space and integrity (most broadly), except—and this is a crucial exception—for a compelling reason of public welfare.[146] This "right to be left alone" treats a man's home as a hallowed space, protected from unsolicited intrusion, and prevents the press from exposing intimate details about a person's life to the public, but Brandeis and Warren exclude matters of public health from their original concept of 'privacy.' The early views of Brandeis fail to reflect the direction in which the concept of "a right to privacy" would evolve when the Court later applied it to issues of birth control and abortion. At this point in time, birth control was illegal under the Comstock Laws (addressed in detail in the next chapter on the early birth control movement), and the Court explicitly supported a civic lineage regime in which regulating the reproduction of women was a *public* matter. In fact, only a year

[145] Louis Brandeis and Samuel Warren, "The Right to Privacy," *Harvard Law Review* 4 (1890): 93-220.
[146] In their *Harvard Law Review* article on "The Right to Privacy" in 1890, Brandeis and Warren articulate this "right to privacy." Although they trace its roots from ancient times, they frame 'privacy' as a right necessary to meet changing times: "That the individual shall have full protection in in person and in property is a principle as old as common law; but it has been found necessary from time to time to define anew the exact nature and extent of such a protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society…The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy [particularly in the form of the Press], subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."

after he joined in the *Buck* majority, Justice Brandeis highlighted his classic "right to be left alone" in his dissent in *Olmstead v. U.S.* (1928), while directly referring to the *Buck* case as an exception in order to argue that the Fourteenth Amendment does not stand in the way of the government rising to meet new demographic challenges posed by "modern conditions."[147] For Justice Brandeis, the sterilization of Carrie Buck was a matter of protecting social welfare in a swiftly evolving industrial society—nothing more.

Holmes was even more outspoken on this issue. The son of an eminent physician, who was an early public advocate of eugenic ideas within the scientific community, Justice Holmes was an candid supporter of eugenic principles, expressing disappointment in welfare reformers for being too passive about interfering with the composition of the population, for "I should expect more from systematic prevention of the survival of the unfit."[148] To drive home the idea that sterilization is a civic duty for people like Carrie, Holmes adds a particularly powerful analogy, comparing the duty of Carrie Buck to submit to sterilization to that of a solider defending his nation in war. As he put it, both were duties of citizenship, assigned to different members of the polity based on their civic value to the nation:

> We have seen more than once that the public welfare may call upon the *best citizens* for their lives. It would be strange if it could not call upon *those who already sap the strength of the state* for these *lesser sacrifices*, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence [italics mine].[149]

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[147] *Olmstead v. U.S.*, 277 U.S. 438 (1928) at 472.
[148] See e.g., Lombardo, *Three Generations,* 2008, 165.
[149] *Buck v. Bell*, 274 U.S. 200 (1927) at 207.

This is harsh language in a case about sterilizing a young woman, irrespective of her mental acuity. But Holmes was a former soldier in the military. An honored veteran of the Civil War, he seemed to be invoking the memory of his comrades who had fallen on the battlefield. As a young man, Holmes served in a Union regiment that suffered more losses than any other during the War. He was severely wounded three times. After the War, in a speech at Harvard University, Holmes described the brave men who had fallen in the Civil War, fighting for the Union in the name of a cause greater than themselves, as "the best and noblest of our generation."[150] This rhetoric about citizenship is almost identical to that of Teddy Roosevelt, and it is clear that both men would agree that someone like Carrie Buck could never even approximate the contribution to society of a war hero. Rather than fighting for her country, people like Carrie lived like parasites off the state, embodying an internal threat to the integrity of America by the specter of their defective progeny.

In this regard, Holmes makes it clear that his argument is fundamentally about the reproduction of citizenship. Referring back to *Muller*, we can conclude that Holmes bore a highly gendered view of the obligations of citizenship: The duty of men, he suggested, was to defend the nation in times of war, while the duty of women was to breed the next generation of citizens. It was in the interest of the community to protect women so that they would bear and raise healthy children, according to the Court in *Muller*. But if a woman is defective and deemed by the state as lacking fitness for motherhood, then it follows that she has a patriotic duty to submit to sterilization in the name of protecting

[150] "Memorial Day" address delivered May 30, 1884, in *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and other Writings of Oliver Wendell Holmes, Jr.* ed. Richard A. Posner (University of Chicago Press, 1992), 80-87, quotation at 87.

social welfare. This is a much less significant sacrifice than that of the soldier on the battlefield, and promotes the welfare of society: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[151]

The only case that Holmes cites as precedent in his entire *Buck* opinion is *Jacobson v. Massachusetts* (1905).[152] He participated in this decision twenty years before, upholding a state law for a mandatory smallpox vaccination. He references the case near the end of his opinion, as a justification for coercive state action in the name of protecting public health. In his words, "The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes."[153] Less than a decade after the Great Influenza of 1918—with the nation still struggling to conquer diseases like polio and tuberculosis—the invocation of smallpox seems like more than merely a handy precedent. Comparing compulsory vaccination to compulsory sterilization projects imagery of infection and contagion onto the procreation of "unfit" citizens. It treats faulty genes in a similar manner to germs. Frequently called "germ plasm," following August Weismann's pioneering work in Mendelian genetics, the differences between the role of genes and germs in transmitting disease and genetic material remained a topic of some degree of scientific uncertainty and debate.[154] Surely this precedent would have stirred anxieties that defective citizens were akin to a plague threatening the vitality of the

[151] *Buck v. Bell,* 274 U.S. 200 (1927) at 207.
[152] *Jacobson v. Massachusetts,* 197 U.S. 11 (1905).
[153] *Buck v. Bell*, 274 U.S. 200 (1927) at 207.
[154] August Weismann, *The Germ-Plasm: A Theory of Heredity* (Charles Scribner's Sons, 1893), online at: http://www.esp.org/books/weismann/germ-plasm/facsimile/

nation. Finally, declaring eugenic sterilization constitutional, Holmes boldly proclaimed: "Three generations of imbeciles are enough."

Carrie Buck was sterilized via tubal ligation on the morning of October 19, 1927. The notes from her surgery are atypical from a medical standpoint, because they include remarks from her doctor about the political significance of the procedure. In his assessment of the status of his patient, Dr. Bell records that Carrie responded normally to the surgery and her hemorrhaging was contained, before writing that "this was the first case operated on under the sterilization law."[155] He then summarizes how the Virginia Colony had won the authorization to sterilize the patient through the court system. [156]

In many respects, as I have suggested above, *Buck* represents the other side of the coin of the same gendered principle expressed in *Muller*. Both *Muller* and *Buck* were civic lineage cases concerning the public's interest in shaping citizenship across generations, with women selected because they had the capacity to become mothers of the next generation. But of course the story is also much more complex than this, for the trial can be framed as a case about the intersecting categories of gender, class, sexuality, race, and presumed disability. More than anything, I would argue that this is a case about reproduction and its constitutional limits. Although *Buck v. Bell* played out in a highly gendered fashion, the ruling could (and would) apply to the sterilization of men as well, because the decision legalized eugenic sterilization as a general principle endorsed by the highest court in the country. Furthermore, as *Buck* starkly illustrates, during the Progressive Era, reproduction was a matter of legitimate *public* interest, which trumped

[155] Lombardo, *Three Generations,* 2008, 185.
[156] Ibid.

any meaningful idea of procreation as a matter of individual or familial *privacy*. This case involved the judicial sanction of a civic lineage policy that labeled fertility and childbirth as a public rather than a private concern, boldly supporting the idea that the state ought to shape reproduction in the name of creating a stronger citizenry through highly coercive mechanisms such as involuntary sterilization. In a path dependent fashion, the ruling in *Buck* had far-reaching consequences. This case continues to shape the face of America today, for it not only legitimized the sterilization of at least 65,000 citizens, preventing innumerable Americans from being born—but, as I shall discuss below, the *Buck* ruling has never been overturned by the Court.

7. A Tyranny of Institutions: The Aftermath of the *Buck* ruling

The Supreme Court's *Buck v. Bell* decision had an immediate and lasting effect on the development of sterilization and the trajectory of reproductive law in America. In the twenty years between the first state law legalizing sterilization in Indiana in 1907, and the *Buck* decision in 1927, the practice of involuntary sterilization was fairly low in all states except for California.[157] A total of 6,244 documented sterilizations are recorded during this period, and many states with laws on their books recorded no sterilizations at all.[158] Of course, it is important to recognize that this does not mean that individual physicians weren't "taking matters into their own hands," so to speak, but it does mean that compulsory sterilization was not considered an aboveboard or routine procedure in most areas of the nation. This *status quo* changed overnight after the Supreme Court issued its

[157] Black, *War Against the Weak,* 122.
[158] Ibid.

Buck decision. Of the 65,000 documented involuntary sterilizations in the country (and remember this merely refers to a minority of cases in which paperwork was officially filed!), nearly 60,000 of these procedures occurred after the Court sided with Dr. Bell against Carrie Buck.[159] In the aftermath of this case, new laws were passed, old laws were updated and revised to meet Laughlin's standards, and doctors began to more actively take advantage of their constitutional ability to sterilize patients. In the words of Edwin Black, "Many state officials were simply waiting for the outcome of the Carrie Buck case. Once Holmes' ruling was handed down, it was cited everywhere as the law of the land."[160]

Most states in America enacted and revised eugenic sterilization legislation in the after this ruling, and lower courts now had a national precedent to follow to uphold these laws. Although the Supreme Court made this possible, the most important actors in the actual implementation of these laws were the bureaucrats and doctors associated with the institutions in which the patients (i.e. candidates for sterilization) were housed, including prisons, hospitals, and above all, mental institutions and homes for the "feebleminded." In fact, as Randall Hansen and Desmond King have noted, the most influential person determining whether or not sterilization became routine practice at the local level was the superintendent of each institution, who occupied a number of important roles in this local political process as, "a carrier of ideas and a policy advocate outside the institution and a policy implementer within it."[161] Examples include Doctors Priddy and Bell, who were

[159] Ibid., 123.
[160] Ibid., 122.
[161] Randall Hansen and Desmond King, *Sterilized by the State: Eugenics, Race, and the Population Scare in the Twentieth-Century North America* (New York: Cambridge University Press, 2013), 21.

superintendents at the same local institution and managed to organize a successful campaign to legalize sterilization at a national level. In fact, when states established eugenic boards to oversee sterilization recommendations in the wake of *Buck*, the superintendents routinely became influential members of the boards.[162] While doctors like DeJarnette bragged that he sterilized at least 600 patients himself, others avoided implementing the practice on a routine basis.[163] This role of the local institution adds a twist to the eugenics story. Above all, what the Court did in *Buck* did was empower local bureaucrats to make permanent decisions about the reproductive fate of their patients, without their informed consent.[164] Whether or not these doctors and bureaucrats decided to take advantage of this new "medical treatment" was variable and unpredictable, which meant that a patient's outcome depended upon the particular leadership and locality of the institution in which they were housed. Indeed, Philip Reilly concludes, "When sterilization data are analyzed by institution, the influence of the superintendent is readily apparent."[165] With national endorsement from the Court, the reach of local superintendents was so complete over the reproductive fate of their patients that, I would argue, this seems to qualify as a classic example of the tyranny of local bureaucracy in America (i.e. *a la* theorists as different as Tocqueville or Foucault).

This raises a crucial question: How can we call such a decentralized policy a civic lineage regime? One can argue that there is not a central driving force that makes these

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[162] Ibid., 19.
[163] See e.g., Bob Burhans, "Dejarnette Presses Campaign for Sterilization of Unfit," *Richmond VA News Leader*, January 23, 1947.
[164] See e.g., Bruinius, *Better for All the World*; Gregory Michael Dorr, "Defective or Disabled? Race, Medicine, and Eugenics in Progressive Era Virginia and Alabama," *Journal of the Gilded Age and Progressive Era* 5 (2006): 359–392; Gregory Michael Dorr, *Segregation's Science: Eugenics and Society in Virginia* (Charlottesville: University of Virginia Press, 2008).
[165] Reilly, *The Surgical Solution,* 49.

state and local civic lineage policies identical at one point (or place) in time, insofar as the federal government did not pass a single overarching law regulating involuntary sterilization. Yet the fact that so many states passed similar laws legalizing sterilization, based upon the same basic template provided by Laughlin's book, points to a unified national trend in favor of a particular strategy for regulating the reproduction of citizenship. Combined with the fact the Supreme Court explicitly accepted this policy as constitutional at the federal level (giving legitimacy and momentum to this trend), it demonstrates that these laws and institutional practices nonetheless add up to a set of interconnected policies aimed at sterilizing the unfit, sanctioned by constitutional law, which together form a configuration substantial enough to label as a crucial component of the decentralized "civic lineage regime" of the Progressive Era. More than anything, this civic lineage regime focused on preventing the specter of 'race suicide.' Furthermore, it is important to note that the prototypical citizen that these policies celebrated can be seen in the pictures of the winners of the "Fitter Families" contests at state fairs.[166] This ideal, which was part of the propaganda of the positive side of the eugenics campaign, paints a picture of a specific stereotype of the ideal citizen bearing children (i.e. of a preferred racial and class background, gender expression, relationship status, sexual orientation, birthrate, evidence of physical fitness, and signs of healthfulness). They were invariably attractive looking "wholesome" white upper-middle class families, usually with multiple generations living in the same home, and conforming to traditional gender roles with

[166] See Lovett, *Conceiving the Future*, 132-61.

three or more healthy children—the bigger, the better![167] Far from an elusive concept, there was an identifiable positive image of what it meant to embody (and act like) a good citizen promoted as the flip side to the eugenics movement's negative campaign to sterilize certain members of the population.

8. The transitional Case of Skinner v. Oklahoma

This brings us to the case of *Skinner v. Oklahoma* (1942).[168] This case emerged at precisely the right political moment for a judicial rehearing of the issue of involuntary sterilization. At the height of the Great Depression, Americans were increasingly unsympathetic to the classic (sweeping) eugenics arguments, which blamed factors like poverty, homelessness, indebtedness, and criminality on hereditary weakness and one's ancestral stock.[169] Moreover, even before the United States entered World War II, ominous articles about the ambitious eugenics program of Nazi Germany spread across the pages of newspapers.[170] Indeed, three major political factors—which emerged in tandem—inspired a judicial reexamination of eugenic sterilization: 1) the Great Depression with rampant poverty and organized crime, 2) the rise of Nazi Germany with its genocidal eugenic policies, and 3) a "new" Supreme Court, with different justices now operating under the "New Deal" judicial realignment. Although the assumption that these events ended the tide of involuntary sterilization is false, the rise of the Nazi

[167] Theodore Roosevelt, "Letter to Mr. and Mrs. R. T. Bower," *Letters III* (February 14, 1903): 425, cited in Dyer, *Theodore Roosevelt,* 153.
[168] *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942).
[169] See Victoria F. Nourse, *In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics* (New York: W.W. Norton & Company, 2008), 82, 107, 118.
[170] See Ibid., 128, 130.

eugenics program and the Court's *Skinner* ruling nonetheless had a lasting influence on the trajectory of civic lineage policy in America.

In 1935, the state of Oklahoma passed its Habitual Criminal Sterilization Act, which allowed the state to impose compulsory sterilization as part of its sentence against any individual convicted of three or more crimes "amounting to felonies involving moral turpitude."[171] The Governor of Oklahoma advertised the Act as a mechanism to deter criminals from coming to the state during the Great Depression, and as a way of reducing crime from convicts who wanted to avoid sterilization in the future. The law stipulated that anyone who committed three felonies was by definition eugenically unfit, but it excluded a variety of classic white color crimes such as tax cheating, embezzlement, and various political offenses. Claude Briggs, a state senator, objected to the idea of sterilizing people when the medical establishment was not united on the issue. With past experience as a lawyer and litigator, Briggs agreed to defend the inmates rallying against the "three strikes and you're out" sterilization policy.[172] His test case would be Jack Skinner, who was college educated, but encountered severe hardship during the Great Depression and had been convicted once for chicken stealing, then twice for armed robbery.[173] Skinner stated that his infractions were due to desperation during the Depression, because he was unable to find a job to support himself and his wife after loosing his foot in an accident at work. During the trial phase, Briggs questioned Skinner about what he hoped to do after being released from the penitentiary, and Skinner's answer was simple: "I hope when I have served the judgment of the court to be released

[171] *State of Oklahoma Session Laws of 1935*, chapter 26, "Sterilization of Habitual Criminals."
[172] Lombardo, *Three Generations,* 2008, 222.
[173] *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942).

and become an *honest citizen* and marry and settle down and raise possibly a child or maybe two…I don't hold any grudge against society for sending me to the penitentiary" [italics mine].[174]

When Briggs sent his appeal to the Supreme Court, there was a good chance that the Court would decline to hear the Skinner case due to the existing *Buck* precedent. However, the Supreme Court was a remarkably different than the one that decided *Buck v. Bell*.[175] The only member still on the bench from the original decision was Chief Justice Harlan Stone, and the Court had recently changed its tenor regarding President Franklin D. Roosevelt's New Deal government programs, by upholding the constitutionality of legislation calling for a minimum wage in *West Coast Hotel v. Parish* (1937).[176] Against this backdrop of cultural and institutional change, *Skinner v. Oklahoma* would get its hearing. Noting a number of procedural irregularities with the law, the Justices voted unanimously to review Skinner's appeal. This was a prime moment of convergence for the Court to reflect critically on eugenic practices.

The Court picked Equal Protection under the Fourteenth Amendment as the justification for striking down the Oklahoma law.[177] Justice Felix Frankfurter, a former

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[174] State v. Jack T. Skinner, Prelim Information, Okla. County District Court. No. 9743 (offense July 1934), cited in Nourse, *In Reckless Hands,* 106.

[175] In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court overturned its earlier decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). The Supreme Court had wrestled with President Franklin D. Roosevelt over his efforts to expand federal programs to combat the Depression via the New Deal from 1935 to 1937, and then in the face of public backlash and even a controversial court-packing proposal by the President, the Court had reversed its course and taken a new road in interpreting the Constitution reversing itself on issues like the minimum wage and leaving the *Lochner* era behind regarding economic initiatives. But, as Victoria Nourse points out, "If the constitutional theory that had "won" the New Deal revolution was Justice Holmes's theory of deference to majority will, then Skinner's case may well have looked even harder than it had before." See Nourse*, In Reckless Hands*, 120.

[176] See e.g., Nourse, *In Reckless Hands*, 139.

[177] Briggs provided the Court with a number of compelling reasons to reverse Skinner's conviction to be sterilized, including the question of the narrow *ex post facto* clause. Since Skinner's last conviction

Harvard law professor and known as the resident scholar on the Court, took the unexpected position that the Oklahoma law violated equal protection, because it specifically exempted white-collar felons like tax cheaters and embezzlers but would sterilize a person convicted of stealing chickens three times, despite the fact that both types of crimes involved theft.[178] The only Jewish member of the Court, after Brandeis's retirement, Frankfurter was acutely aware of the eugenic policies of Nazi Germany and the legacy of racism in the United States. He argued that eugenics had become transformed in the 1940 to become, a "cloak for class snobbery, ancestor worship, and race prejudice."[179] Somewhat ironically, the member of the Court most skeptical of this equal protection argument was Chief Justice Stone, who had recently authored his famous Caroline Products Footnote 4 in 1938.[180] In an otherwise unremarkable case, Stone's Footnote 4 would later be cited to protect "discrete and insular" religious and racial minorities from the laws of hostile or unsympathetic majorities.[181] Following Frankfurter's recommendation, the Court ruled that treating similar crimes (felonies) differently violated the Equal Protection Clause of the Fourteenth Amendment. Albeit issuing his own concurring opinion highlighting due process instead of equal protection,

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happened a year before the new law was passed, this legislation should not apply to him as a punishment. Likewise, as form of punishment rather than therapeutic medical treatment, sterilization in Skinner's case was akin to "double jeopardy" under the Fifth Amendment. Finally, the Justices noted numerous problems with procedural due process. The law applied to everyone with "three strikes" regardless of their mental state, and there were no eugenics boards, as Laughlin had recommended.

[178] William O. Douglas, *The Court Years: 1939-1975*, 1st ed. (New York: Random House, 1980), 44.

[179] Cited in Nourse, *In Reckless Hands*, 147.

[180] *United States v. Carolene Products Co.,* 304 U.S. 144 (1938): Footnote 4.

[181] See e.g., Louis Lusky, "Footnote Redux: A 'Carolene Products' Reminiscence," *Columbia Law Review* 82, no. 6 (1982): 1093–1109.

Chief Justice Stone assigned the majority (equal protection) opinion to Justice Douglas, who had recently replaced Brandeis on the Court.[182]

Few would have guessed at the time, but *Skinner* would become one of the most influential opinions of the twentieth century—particularly insofar as it is an early bellwether glimpse into the direction the Court would later take regarding both privacy and equal protection. Douglas's choice of language at the beginning of the opinion is noteworthy as an early iteration of the path the Court would later follow regarding reproductive rights. In his words, "This case touches a sensitive and important area of *human rights*. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of the race—*the right to have offspring*" [italics mine].[183] Later in the opinion, Douglas repeats this point, "We are dealing here with legislation which involves one of the basic *civil rights* of man. *Marriage and procreation are fundamental* to the very existence and survival of the race" [italics mine].[184] The implication of this rhetoric is that reproduction represents a fundamental right. At the time, the idea of a fundamental right to reproduction was an amorphous concept, not yet theorized in any depth. However, *Skinner* would later serve as crucial precedent in the most significant reproductive rights cases involving marriage, birth control, and abortion during the mid to late twentieth century. The *Skinner* case opened up the ideological and judicial space for the development of a meaningful fundamental right to reproduction.

The equal protection argument in *Skinner* is narrow (and in this respect unexceptional), but it too provides a discursive frame that would set the stage for lasting

[182] Douglas, *The Court Years*, 44.
[183] *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942) at 536.
[184] Ibid., at 541.

political change. Following the logic suggested by Frankfurter, Douglas focuses on an arbitrary distinction the Oklahoma law made between two classes of criminals, with no basis in science to make a hereditary distinction between them. Framed as a eugenic sterilization law, the law must logically assume that a chicken thief has bad genes while an embezzler does not. By not justifying distinctions between white and blue collar crimes, the arbitrariness of the law in this respect violated equal protection: "A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted," but the same principle does not apply to the clerk who "appropriates over $20 from his employers till," for "no matter how habitual his proclivities for embezzlement are, and no matter how often his conviction, he may not be sterilized…Embezzlers are forever free."[185] The former is a common thief and will be sterilized, while the latter will not. This distinction violates equal protection in a very rudimentary manner, but Douglas also includes another pivotal concept in this case relating to equal protection: Strict scrutiny. Speaking of equal protection and the significance of the right to reproduce, by using language that borrowed from Chief Justice Stone's Footnote 4, Douglass writes:

> The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. *In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.* There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to be his irreparable injury. He is *forever deprived of a basic liberty.* We mention these matters not to reexamine the scope of the police power of the States. We avert to them merely in emphasis of our view that *strict scrutiny of the classification which a state makes in a sterilization law is essential lest unwittingly or otherwise individual discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal*

[185] *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942) at 538-9.

> *laws*. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws [italics mine].[186]

This Douglas formula for "strict scrutiny" still guides the Supreme Court's examination of laws that threaten fundamental Constitutional rights today.

The *Skinner* case created an important foundation for civil rights jurisprudence concerning "privacy" and "equality," yet the Court unanimously agreed that their decision in *Skinner* did not overrule the earlier *Buck* decision. Still convinced that his vote in *Buck* was correct, Justice Stone notes that the basis for the decision was the strong testimony linking mental defects with hereditary traits, so the problem with *Skinner* is that the law wasn't properly based upon eugenic logic.[187] Likewise, in the majority opinion focusing on equal protection, Justice Douglas explicitly distinguishes the Court's conclusion in *Skinner* from *Buck*, emphasizing that the Virginia law does a much better job at meeting the basic requirements of equal protection: The Virginia law "seeks to bring within the lines all similarly situated so far and so fast as its means allow [and]…applied only to feeble-minded persons in institutions of the State."[188] Finally, Justice Robert Jackson—who sides most radically with both the due process and equal protection arguments against the Oklahoma law—nonetheless reserves ample room to uphold *Buck* in his concurrence. Highlighting imagery of the spread of an infectious

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[186] Ibid., at 545.

[187] As Justice Stone put it, "Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies…But until now we have no been called upon to say that it may do so without giving him a hearing and opportunity to challenge the existence as to him of the only facts which could justify so drastic a measure…Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend—nor can there be any pretense—that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable."

[188] *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942) at 541-2.

disease used by Holmes in *Buck*, Jackson notes that "This Court has sustained such a [sterilization] experiment with respect to an imbecile, a person with definite and observable characteristics, where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in future generations to come."[189] Despite the future trajectory of Douglas's reasoning in *Skinner*, the case staunchly upholds the *Buck* decision.

What does the *Skinner* ruling reveal about the civic lineage regime of the time? As I argue above, this was an important transitional case—which would later contribute to significant doctrinal change under the Fourteenth Amendment in the areas of both reproductive rights and antidiscrimination law—but its direct effects were relatively minor. After the ruling, American eugenicists issued statements emphasizing that the Court's decision in *Skinner* did not interfere with most sterilization laws, because the Court unanimously upheld *Buck v. Bell*. In addition to addressing two different populations of Americans (i.e. criminals vs. diagnosed morons), the two cases also endorse extremely gendered visions of citizenship. For instance, the trial transcripts in *Skinner* suggest that "desexing" a man (i.e. rendering him impotent) was considered a much greater violation of his identity and bodily integrity as a "red-blooded" male, than sterilizing a woman was to her feminine integrity.[190] Given that sterilization is more medically invasive and dangerous for women than men, and that motherhood was widely

[189] Ibid., at 546.

[190] In his closing comments to the jury at the Circuit Court level, Briggs stated: Wouldn't an "operation of this sort…make you resentful, *men, you red-blooded men on this jury*. I wonder what would be your attitude or mine if we were…incarcerated in that institution out there [facing sterilization]…I wonder if it would not build up in our minds a feeling of resentment and hatred," and in turn "cause us to become enemies of society, most desperate enemies of society" [italics mine]. Trial transcript, cited in Nourse, *In Reckless Hands*, 108.

promoted as vital to a woman's expression of good citizenship, this double-standard was nothing short of sexist. But since both rulings applied to men and women alike, with an emphasis on Carrie Buck's purported faulty heredity as the key distinguishing factor between the two decisions, many scholars rank *Buck v. Bell* as first-and-foremost a disability case.[191] The Court agreed that Carrie Buck could never be a productive member of society because her genes were defective, whereas it endorsed Jack Skinner's dream to be an "honest citizen" when he was released from prison by settling down and raising a family. While acknowledging that both factors of disability and gender are significant, I want to emphasize that together they point to a more general concern regarding population control and the role of coordinating fertility across generations.

In a nation that accepted birthright citizenship as the law of the land, rooted in the Citizenship Clause of the Fourteenth Amendment, the fertility and procreative capacities of women quite literally made them the most direct "reproducers of nationhood," in a manner not feasible for men. According to the Court in *Muller*, this was enough to warrant sex discrimination in the workplace. Furthermore, as we shall see in later chapters, the idea that the community has a special investment in motherhood has continued to be cited by the Court in support of various government regulations of fertility, birth, and childbearing today.

[191] For an excellent argument about *Buck* as a disability case, see: Allison C. Carey, *On the Margins of Citizenship: Intellectual Disability and Civil Rights in Twentieth-Century America* (Philadelphia: Temple University Press, 2009); See also: Reilly, *The Surgical Solution.*

9. After Skinner: In the Shadows of institutions

During the years between the Buck decision in 1927 and the *Skinner* decision in the early 1940s, doctors and eugenics boards documented over 30,000 involuntary sterilizations.[192] The pace of sterilizations skyrocketed in barely more than a decade, but they soon began to decline. In 1937, at the height of the Great Depression, Georgia became the last state to pass a new sterilization statute, and the Governor of Puerto Rico also signed a sterilization law—encouraged by the U.S. federal government as a mechanism of population control—that same year.[193] At this point a vast majority of states had legislation condoning various forms of eugenic sterilization, but public support for eugenics ended abruptly after World War II. In addition to the questions raised by the Court in *Skinner* about the permissibility of certain sterilization laws, making courts and legislators less certain about what constituted legitimate eugenic laws after *Buck*, the atrocities of Nazi Germany in the name of breeding a master race has forever given eugenics a bad name.

The Nazis directly credited American eugenicists for many of their strategies to control racial heredity.[194] At the end of the War, President Harry Truman appointed sitting U.S. Supreme Court Justice Robert Jackson—who had participated in the *Skinner* case—to oversee the prosecution of the atrocities of the leaders of the Third Reich in the Nuremberg Trials.[195] One of the first acts of Adolf Hitler, after achieving total control over Germany, was to pass the Law for the "Prevention of Hereditarily Diseased

[192] Black, *War Against the Weak*, 123.
[193] Lombardo, *Three Generations,* 2008*,* 227.
[194] See e.g., Black, *War Against the Weak*.
[195] Bruinius, *Better for All the World*, 363.

Offspring" (*Gesetz zur Verhütung erbkranken Nachwuchses*) in July 1933, which created over 200 eugenic courts in the country and required all doctors to report patients they deemed intellectually disabled, mentally ill, epileptic, blind, deaf, suffering from alcoholism, or physically deformed.[196] An estimated 450,000 Germans were sterilized under this law, using methods and courts based directly on Laughlin's recommendations in his 1922 book.[197] In 1936, the University of Heidelberg awarded Harry Laughlin an honorary doctoral degree for his work spearheading the "science of racial cleansing," and Laughlin proudly accepted the award.[198] However, by the time the United States joined the War against Germany in the early 1940s, information about extensive Nazi sterilization and euthanasia programs appeared in American newspapers, denounced by scholars and politicians around the country as bad science and the result of totalitarianism run amuck. During World War II, the term 'eugenics' became synonymous with racial bigotry and despicable violations of human rights. Interestingly, before the Nuremberg Trials and in the midst of the Holocaust, the Supreme Court openly embraced this ideological global trend towards "human rights" in its *Skinner* ruling.

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[196] The law for the prevention of hereditarily diseased offspring. (Approved translation of the "Gesetz zur Verhütung erbkranken Nachwuchses"). Enacted on July 14th, 1933. Published by Reichsausschuss für Volksgesundheitsdienst. (Berlin: Reichsdruckerei, 1935). (Official translation of the law into English). See the following article at the time by well-known U.S. eugenicist Paul Popenoe, for praise and analysis of the German law: Paul Popenoe, "The German Sterilisation Law," *Journal of Heredity* 25, no. 7 (1934): 257-60.

[197] See e.g., Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books,1986); George J. Annas and Michael A. Grodin. *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (New York: Oxford University Press, 1992); Claudia Koonz, *Mothers in the Fatherland: Women, the Family, and Nazi Politics* (New York: St. Martin's Press, 1981).

[198] See: Bruinius, *Better for All the World*, 294; Lombardo, *Three Generations*, 2008, 211. See also: Stefan Kühl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (Oxford University Press, 2002); Jonathan P. Spiro, *Defending the Master Race: Conservation, Eugenics, and the Legacy of Madison Grant* (Burlington: University of Vermont Press, 2009); Bruinius. *Better for All the World.*

What is, however, surprising is that these events did not end the tide of involuntary sterilization in the United States. While Germany abolished involuntary sterilization in 1945 after the War, in striking contrast, the United States continued this policy for over 30 years after this into the late 1970s. Given the fact that eugenics was no longer popular among either the public or scientists, how could eugenic sterilization continue after these genocidal revelations about Nazi Germany? What political factors allowed this policy survive so long?

Most significantly, we must remember the role of local institutions in the implementation of sterilization laws. Aubrey Strode drafted the model Virginia law, endorsed by the Supreme Court in *Buck v. Bell*, specifically to empower local institutions to implement the state's policy. The Virginia policy thrived within institutions. The structural design of these state laws allowed the practice of eugenic sterilization to silently persist within institutions, outside the eyes of the public, for decades after the end of the Progressive Era. The vitality of these laws depended upon bureaucratic dispersion, without serious governmental oversight—or persistence by neglect. By continuing to operate behind the doors of institutions and largely neglected by higher levels of state and national government, these policies did not succumb to the "policy drift" that Jacob Hacker associates with neglect (i.e. allowing a program to wither through neglect or permitting its purposes and impact to change via inaction in the face new political realities), but rather remained durable on a local level in a path dependent fashion, veiled behind the protective barriers of institutions (and relatively immune to judicial challenge

after *Buck*).[199] This, I suggest, can be viewed as a sort of *shadow continuity,* a particular type of path dependency in which lack of government oversight creates the conditions for outdated policies to remain alive through bureaucratic dispersion at the local level.[200] When policies are designed to function in a relatively self-sufficient manner within local institutions (and particularly without much publicity), then it follows that the design of a policy can freeze political agendas in ways that long outlast the political commitments and coalitions that first created them. As discussed already, it was primarily the superintendents and doctors in institutions such as hospitals and mental institutions, who were empowered to make decisions about sterilization. While many did not routinely perform involuntary sterilizations, those who desired to do so remained insulated within their institutions, supported by state and national law. Since about 30,000 of the documented involuntary sterilizations within the United States took place after the Skinner case and after the Second World War, it seems reasonable to estimate that the phenomenon of 'shadow continuity' accounts for more than one-third of the documented sterilizations in America during the twentieth century.

In response to the Holocaust, former American eugenicists made efforts to distance themselves from coercive eugenics and focus instead on promoting the reproduction of the fit. Harry Laughlin avoided this problem. After his epileptic seizures became too debilitating to continue working for the Eugenics Records Office, he was

[199] Jacob S. Hacker, "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States," *American Political Science Review* 98, no. 2 (2004): 243-60.
[200] On the concept of "path dependence" in Political Science see e.g., Paul Pierson, *Politics in Time* (Princeton: Princeton University Press, 2004); Paul Pierson, "Increasing Returns, Path Dependence and the Study of Politics," *American Political Science Review* 94, no. 2 (2000): 251-67.

forced to retire in the late 1930s and died at the age of 62 in 1943.[201] Renouncing any interest in funding research on eugenics, the Carnegie Institute shortly thereafter closed the Eugenics Records Office during the height of World War II, leaving behind the largest collection of genealogical records in the United States.[202] The eugenic organizations that managed to survive past the Second World War took 'eugenics' out of their names, and replaced the term with 'genetics' if they concentrated on scientific research, or with references to 'family planning' and 'population control' if they focused on public and political outreach.

In this vein, a well-known sterilization advocate in California, Paul Popenoe would go on to build a new career in positive eugenics as a public marriage counselor, writing regular articles for the American Institute of Family Relations. Popenoe "achieved fame and popularity in the mainstream media," for writing a series for *The Ladies' Home Journal* in the 1950s called "Can This Marriage Be Saved?"—featuring success stories about couples who had turned to the Institute for help and subsequently revitalized their marriage.[203] While his motive was still eugenic, Popenoe framed it in terms of promoting marital happiness. He even emphasized the importance of husbands taking the time to sexually pleasure their wives, because "marriage is not complete

[201] See Bruinius, *Better for All the World*, 299-30; and Rachel Gur-Arie, "Harry Hamilton Laughlin (1880-1943)," *The Embryo Project Encyclopedia*, available at https://embryo.asu.edu/pages/harry-hamilton-laughlin-1880-1943

[202] Note: To this day, the sheer size of the ERO's family records housed at the University of Minnesota are only surpassed on a national level by those more recently collected by the Mormon Church. Reilly, *The Surgical Solution*, 58, 70.

[203] Betty Hannah Hoffman, "The Man Who Saves Marriages," *Ladies' Home Journal*, September 1960, 125; Paul Popenoe, "The Writings of Dr. Popenoe," *Family Life: Special Memorial Issue* 39, no. 5, September and October 1979; For an excellent discussion of Popenoe's transition from negative to positive eugenics, see: Stern, *Eugenic Nation,* 150-81.

without children."[204] Popenoe also set out to educate young people about how important the family is, stating that, "social and racially, [it is necessary in America to] provide a citizenship that will work and vote intelligently for the conservation of the family."[205] For eugenicists like Popenoe, the advent of the postwar "baby boom" was a cause for celebration. Although, in my view, economic explanations seem most persuasive in explaining the "baby boom," Wendy Kline attributes the post war turn to marriage and parenthood in part to positive pronatalist propaganda by eugenicists, which is a fascinating hypothesis considering their efforts to encourage marriage and birth during this time.[206] Regardless of whether or not she is correct, what is most important for our purposes here is that eugenicists made a concerted move from publicly supporting negative polices toward switching to marriage and family counseling as their most prominent strategy for strengthening American citizenship.

10. Civil Rights and the Expansion of Welfare

Although the primary goal of this chapter is to introduce the dominant fitter-families civic lineage regime of the Progressive Era, it is both informative and shocking to draw attention in this last section to the fact that a strong public backlash against eugenic sterilization in America did not happen until the 1970s (i.e. long after the eugenic civic lineage ideal was eclipsed by another civic lineage regime as we shall see in subsequent chapters). From World War II until the 1960s, the practice of 'involuntary sterilization'

[204] Cited in Kline, *Building A Better Race*, 155.
[205] Paul Popenoe, "How Can Colleges Prepare Their Students for Marriage and Parenthood?" *Journal of Home Economics* 22:3, 1930: 169-178.
[206] Kline, *Building A Better Race*, 124-64.

appears to have continued behind the doors of state institutions throughout America, with little popular awareness of the phenomenon. The population affected by these policies was, for obvious reasons, dependent upon the individuals the state had access to within these institutions, which tended to be poor white women and men. Due to racial discrimination in the form of Jim Crow segregation, African Americans and other people of color were excluded from most governmental aid programs in the United States and therefore not generally targets for eugenic sterilization during the Progressive Era.[207] But with the many gains of the Civil Rights Movement and Feminist Movement in the realm of antidiscrimination law and reproductive rights, the government finally extended its programs to incorporate people of color in the name of equal protection.[208] Ultimately, when local government officials gained access to people of color within institutions and hospitals, they increasingly targeting women of color.[209]

Let me briefly explain the (largely unintended) role of federal policy in this, and particularly the role of anti-poverty measures, which were ironically meant (mainly) to help the poor by expanding the reproductive opportunities and choices available to them. Under the Johnson Administration's War on Poverty, federal funding for family planning rose markedly in the 1960s, and the Nixon Administration continued to expand government funding for family planning in the early 1970s.[210] The Johnson

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[207] See e.g., Steven Noll, "Southern Strategies for Handling the Black Feeble-Minded: from Social Control to Profound Indifference," *Journal of Policy History* 2, no. 3 (1991): 130-51.
[208] On the exclusion of blacks from welfare programs, see Robert C. Liebermann, *Shifting the Color Line: Race and the American Welfare State* (Cambridge: Harvard University Press, 1998).
[209] Rebecca M. Kluchin, *Fit to Be Tied: Sterilization and Reproductive Rights in America 1950-1980* (New Brunswick, NJ: Rutgers University Press, 2001), 74.
[210] Martha J. Bailey and Sheldon Danziger, eds., *Legacies of the War on Poverty* (New York: Russell Sage Foundation, 2013); Annelise Orleck and Lisa Gayle Hazirjian, eds., *The War on Poverty: A New Grassroots History, 1964–1980* (Athens, GA: University of Georgia Press, 2011); Irwin Unger, *The Best of*

Administration formed the Office of Economic Opportunity (OEO) to oversee and administer most of its programs associated with its War on Poverty, and along with the Department of Health, Education, and Welfare (HEW) these two agencies sponsored family planning education programs to millions of women. In 1971, the OEO began funding voluntary sterilization through anti-poverty programs aimed at civic responsibility and arming poor women with the ability to control and limit their fertility. This was part of a broader push to foster population control, but the legislative emphasis was on voluntarism.[211] During the same time, the federal government announced that Medicaid would reimburse up to 90% for sterilization procedures performed to qualifying poor women in hospitals.[212] (Note: Chapter 5 addresses Medicaid and reproductive policy in detail, focusing on birth control and abortion.) While it is important to emphasize that Medicaid funded sterilization as an "elective procedure" (i.e. with an emphasis on choice and consent), in practice this was not always the case.[213] After these federal developments, the rate of sterilizations covered by the government was 100,000 to 150,000 annually, and it is difficult to disentangle which of these count as elective procedures.[214] In theory, the advent of reproductive health programs and education about family planning could provide millions of women (and men) access to birth control and

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Intentions: The Triumphs and Failures of the Great Society Under Kennedy, Johnson, and Nixon (New York: Doubleday, 1996); Marshall Kaplan and Peggy L. Cuciti, *The Great Society and Its Legacy: Twenty Years of U.S. Social Policy* (Durham, NC: Duke University Press, 1986).

[211] Gregory Michael Dorr, "Protection or Control?: Women's Health, Sterilization Abuse, and *Relf v. Weinberger*," in *A Century of Eugenics in America: From the Indian Experiment to the Human Genome Era*, ed. Paul A. Lombardo (Bloomington: Indiana University Press, 2011), 163.

[212] Elena R. Guiérrez, "Policing 'Pregnant Pilgrims': Situating the Sterilization Abuse of Mexican-Origin Women in Los Angeles County," in *Women, Health, and Nation: Canada and the United States since 1945*, eds. Georgiana Feldberg, et al., (Montreal: McGill-Queen's University Press, 2003), 381.

[213] "O.E.O. Cuts off Funds in Sterilizing Girls," *The New York Times*, June 29, 1973 Online at: http://www.nytimes.com/1973/06/29/archives/oeo-cuts-off-funds-in-sterilization-of-girls.html?_r=0

[214] See e.g., Shapiro, *Population Control Politics*, 115.

reproductive information, but many local bureacrats and doctors sought to discourage procreation among poor Americans—not to maximize their decisional opportunities.

The most infamous instance of the abuse of sterilization under this government policy is the case of *Relf v. Weinberger*, which came out of Alabama in the early 1970s.[215] Two African American sisters, aged 12 and 14, lived in Montgomery with their disabled father, illiterate mother, and older sister in government subsidized housing.[216] The family subsisted almost entirely off food stamps and welfare payments, receiving regular visits from social workers. On June 13, 1973, their mother Minnie Relf greeted two local welfare officials, who escorted her and her two younger daughters to a nearby hospital and asked her to sign forms consenting to what she believed would be routine inoculations for her girls. She placed an X on the form as her signature, without knowing that the document she signed was actually a consent form for the surgical sterilization of both her underage daughters.[217] After learning about the sterilizations two weeks later, the Southern Poverty Law Center (SPLC) filed a lawsuit for $1 million on behalf of the Relf family, and spearheaded a media campaign about the frequency of coercive sterilization under welfare programs.[218] The public learned that African Americans were being selected for sterilization at alarming rates across the nation. For instance, while African Americans made up 23 percent of the sterilizations in North Carolina in the mid-

[215] *Relf v. Weinberger*, 372 F. Supp. 1196 (1974); *Relf v. Mathews*, 403 F. Supp. 1235 (1975); *Relf v. Weinberger,* 565 F. 2nd 722 (1977).
[216] Dorr, "Protection or Control?," 161.
[217] Nancy Ordover, *American Eugenics: Race, Queer Anatomy, and the Science of Nationalism* (Minneapolis: University of Minnesota Press, 2003), 169.
[218] Happening in Alabama only one year after the world learned about the Tuskegee syphilis experiment funded by U.S. Public Health Service doctors, the similarities between the cases caught the attention of civil rights and feminists working on women's health. These cases both involved exploiting poor blacks in ways that involved a lack of consent to reproductive-related medical treatment (or lack thereof). See: Dorr, "Protection or Control?," 162.

1930s, the numbers of blacks sterilized in North Carolina skyrocketed to around 65 percent of all sterilizations by the mid-1960s.[219] In the words of Gregory Michael Dorr, "Before the year ended, Americans learned that doctors and overzealous social workers had been targeting poor women, and especially poor women of color, in a nationwide epidemic of sterilization."[220]

In the midst of this controversy, another lawsuit was filed in California charging doctors with a pattern of coercion to sterilize Spanish-speaking Mexican women in Los Angeles.[221] The women initiating the *Madrigal v. Quilligan* lawsuit in 1975 claimed that they were duped into consenting while they were in labor and given forms printed only in English.[222] Reports of sterilization abuse also surfaced in Puerto Rico.[223] Since the 1937 passage of a eugenic sterilization law in Puerto Rico during the tail end of the "eugenics craze," federally-funded family planning programs on the island touted sterilization to Puerto Ricans as the best (and generally only) method of contraception.[224] In 1965, a survey of Puerto Rican residents found that about one-third of all women of childbearing age were sterilized, and many incidents did not involve informed consent, but instead

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[219] Hanson and King, *Sterilized by the State*, 243.
[220] Dorr, "Protection or Control?," 161.
[221] Ordover, *American Eugenics*, 173.
[222] Madrigal v. Quilligan," No. CV 74-2057-JWC, Reports Transcript of Proceedings, Tuesday, May 30, 1978. For analyses of sterilization abuse among Mexican-Americans see: Virginia Espino, "Women Sterilized as They Give Birth: Forced Sterilization and the Chicana Resistance in the 1970s," in *Las Obreras: Chicana Politics of Work and Family*, eds.Vicki L. Ruiz and Chon Noriega (Los Angeles: *UCLA Chicano Studies Research Center Publications*, 2000), 65-82; also see Elena R. Guiérrez, "Policing 'Pregnant Pilgrims,'" 379-403.
[223] Lombardo, *Three Generations*, 2008, 248.
[224] Laura Briggs, *Reproducing Empire: Race, Sex, Science, and U.S. Imperialism in Puerto Rico* (University of California Press, 2002); Annette B. Ramirez de Arellano and Conrad Seipp, *Colonialism, Catholicism, and Contraception: A History of Birth Control in Puerto Rico* (Chapel Hill: The University of North Carolina Press, 1983).

occurred as routine practice during childbirth in hospitals.[225] Puerto Rican women were ten times more likely to be sterilized than women living on the mainland United States. The procedure was so common that Puerto Ricans on the island referred to it as simply "la operacion."[226]

Although it is important to note that many of the women who underwent sterilization surely did so by choice—benefiting from the federal funding of this method of birth control—all too often consent was ambiguous, perfunctory, coerced, or nonexistent. With eugenic sterilization laws still on the books, empowering doctors to use them at their own discretion, reproductive choice and coercion came into conflict in welfare programs aimed at population control.[227] Bluntly put, while these operations were no longer being performed under the auspices of purifying the gene pool of undesirable traits (as in *Buck*), the policies were justified using reworked (neo-eugenic) arguments that focused instead on environmental factors, such as the popular idea that poverty begets poverty, and (discussed in more detail in chapter 6) that women on welfare have no business giving birth.[228] In effect, the allegory of the "degenerate" side of Goddard's Kallikak family was retold with a new more explicitly Malthusian economic frame, highlighting the culture of poverty and implying that children of poor women would

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[225] See Harriet B. Presser, "The Role of Sterilization in Controlling Puerto Rican Fertility," *Population Studies* 23, no. 3 (Nov. 1969): 343-361. After determining sterilization abuse was widespread in Puerto Rico, Dr. Helen Rodriquez-Triaz began a public education campaign to fight for reproductive rights in Puerto Rico.

[226] See the following: Bonnie Mass, "Puerto Rico: A Case Study of Population Control," *Latin American Perspectives* 4 (Jan. 1977): 66-79; Elena R. Gutierrez and Liza Fuentes, "Population Control by Sterilization: The Cases of Puerto Rican and Mexican-Origin Women in the United States," (*Latino(a) Research Review* 7, no. 3 (2009-2010); Iris Lopez, "Agency and Constraint: Sterilization and Reproductive Freedom Among Puerto Rican Women In New York City," *Urban Anthropology and Studies of Cultural Systems and World Economic Development* 22, no. 3 (1993).

[227] See Schoen, *Choice and Coercion*.

[228] Kluchin*, Fit to Be Tied*.

inevitably live like parasites off society as the "underclass." Regardless of whether the cause of this "cycle of poverty" was cultural instead of hereditary, the conclusion was the same: These are not the people that state officials wanted to reproduce the next generation of American citizens, so their fertility should be regulated by the state in the name of civic fitness.

The Native American case is particularly disturbing given the limited size of the indigenous population in the United States. The Indian Health Service (IHS), organized and funded by the United States Department of Health, Education, and Welfare (HEW) and the Public Health Service, began offering family planning services to Native American families as part of the War on Poverty in 1965.[229] Less than decade later in 1974, Dr. Connie Uri wrote an article expressing her shock that several of her patients in an Oklahoma IHS facility were sterilized without their informed consent.[230] In response, Senator James Abourzek of North Dakota, Chairman of the Senate Select Committee on Indian Affairs, asked the General Accounting Office (GAO) to launch an economic investigation of federal funding of sterilizations at IHS facilities.[231] The investigators focused on four Native American facilities in different regions of the country, and concluded that none of these facilities complied with IHS regulations. This GAO study revealed that many tribal women believed that they would lose Bureau of Indian Affairs

[229] Brint Dillingham, "American Indian Women and IHS Sterilization Practices," *American Indian Journal* 3 (Jan. 1977): 27-28; Jane Lawrence, "The Indian Health Service and the Sterilization of Native American Women," *American Indian Quarterly* 24, no. 3 (2000): 400-19; See also: *American Indian Journal of the Institute for the Development of Indian Law*, February 1977; Janet Karston Larson, "And Then There Were None," *Christian Century* 26 (January 1977).
[230] "Sterilization of Young Native Women Alleged at Indian Hospital—48 Operations in July 1974 Alone," *Akwesasne Notes,* Summer 1972; "Killing Our Future: Sterilization and Experiments," *Akwesasne Notes,* Spring 1977; see also: Gail Mark Jarvis, "The Theft of Life," *Akwesasne Notes,* September 1977.
[231] Dillingham, "American Indian Women," 27-28.

(BIA) federal benefits, access to governmental services, or custody over their existing children if they refused to submit to sterilization.[232] According to the report, 3406 Native American women between the ages of fifteen and forty-four were sterilized at these facilities in just three years, between 1973 and 1976.[233] Senator Abourezk noted that: "Given the small American Indian population, the 3,400 Indian sterilization figure would be compared to sterilizing 452,000 non-Indian women [out of 55,000 Indian women of childbearing age,]" but the Senator failed to realize that the numbers only reflected a fraction (four total) of the IHS facilities, so the actual numbers would likely be three to four times his estimate! These statistics suggest at least 25% of Native American women of childbearing age were sterilized.[234] While Dr. Connie Uri defined the actions of the IHS as "genocide of the Indian people" in her original article, the federal government (IHS and BIA) instead labeled these actions as "tragic anomalies," because the sterilizations did not spring from any coordinated state plan to exterminate Native Americans as a group.[235]

These sterilizations happened at the local bureaucratic level from "the warped thinking of doctors," many of whom decided on their own that "the solution to poverty is

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[232] Sally J. Torpy, "Native American Women and Coerced Sterilization," *American Indian Culture and Research Journal* 24, no. 2 (2000): 1-22.
[233] Comptroller of the United States, *Investigations of Allegations Concerning Indian Health Services* (Washington DC: Government Printing Office, 1976), 4, 18-25.
[234] Bill Wagner, "Lo and the Poor Sterilized Indian," *America*, January 29, 1977.
[235] According to Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, the label of "genocide" requires "coordinated intent" on a governmental level "to destroy, in whole or in part, a national, ethnical, racial or religious group, such as…imposing measures intended to prevent births within the group…" (cited from cited from Lucille Whalen, *Human Rights: A Reference Handbook* (Santa Barbara, CA: *ABC—CLIO*, 1989), 169. In short, whether or not this qualifies as genocide depends upon if one emphasizes political intent, which appears lacking on the part of the government, or the end result, which clearly involved coercive medical intervention to curb fertility and birth within an already small, insular, and disadvantaged minority group.

not to allow people to be born."[236] In other words, federally funded doctors decided to "take matters into their own hands," focusing on the high poverty levels and birthrates among Native Americans in the context of the federal push towards population control.[237] There is no doubt that their actions have curbed the number of children born into poverty on Indian reservations, and in the process they have also dramatically reduced the numbers of indigenous children and tribal membership in the United States.

Let us now return to the *Relf* case. The sterilization of the two Relf girls spurred lasting change in federal policy. In *Relf v. Weinberger*, U.S. federal Judge Gerhard Gesell confirmed that the evidence pointed to the fact that "an indefinite number of poor people have been improperly coerced into accepting a sterilization operation." Acknowledging that the problem arose "during a rapid change in the field of birth control," and that contraception and family planning education was now "widely accepted," Judge Gesell nonetheless emphasized the blurry area between reproductive choice and state efforts to control "the specter of overpopulation."[238] In his words, "Surely the Federal Government must move cautiously in this area, under well-defined policies determined by Congress after full consideration of constitutional and far-reaching social implications. *The line between family planning and eugenics is murky*"

[236] Dr. Pinkerton-Uri acknowledged that she didn't think that the sterilizations were motivated by "any plan to exterminate Indians," and instead blamed the individual doctors for deciding to curb poverty themselves by taking advantage of population control mechanisms funded by the federal government. For a discussion of this, see Lawrence, "Indian Health Service," 412.
[237] In the words of Jane Lawrence, "The United States government agency personnel, including the HIS, targeted America Indians for family planning because of their high birth rate. The 1970 census revealed that the average Indian women bore 3.79 children, whereas the median for all groups in the United States was 1.79 children" (402).
[238] *Relf v. Weinberger* 372 F. Supp. 1196 (1974), 1199. at 1203.

[italics mine]."[239] Gesell stated that the program set the stage for a "drift into a policy that has unfathomed implications and which *permanently deprives unwilling or immature citizens their ability to procreate*…[italics mine]."[240] He struck down the sterilization guidelines issued by HEW and ordered the agency to create new rules with better safeguards limiting federal funds only to voluntary sterilizations procedures in the future. In 1978, HEW issued official guidelines requiring a mandatory 30-day waiting period for all federally funded sterilizations and the provision of language translators when necessary. These new guidelines also banned doctors getting patients to sign consent while under the duress of labor, childbirth, or an abortion, and required a statement that the patient's government benefits would not be influenced by their decision about whether or not to undergo sterilization.[241]

The *Relf* case never made it to the Supreme Court. Just as the gains of the Civil Rights Movement placed minorities at risk for sterilization in the first place (i.e. due to more inclusive government programs), it also provided an infrastructure of rights advocates and public interest groups that soon challenged these differential outcomes in court. Interestingly, the role of the local bureaucrat in this story closely parallels the influence of the superintendent under the older eugenic sterilization policies at the state level, but the federal policy targeted a much broader range of Americans, and particularly people of color.

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[239] Ibid., 1204.
[240] Ibid.
[241] Linda Gordon, *Woman's Body*, *Women's Rights: A Societal History of Birth Control in America,* Rev. ed. (New York: Penguin Books, 1990), 435; Dorr, "Protection or Control?," 81.

This raises an important point. When we think about 'eugenics' today, the concept tends to evoke ideas about racial bigotry associated with selective breeding projects coordinated by the state. While much of this association is due to the atrocities Nazi Germany, as I argue above, the idea of race (in its many iterations) also played a central role in the American eugenics movement. Yet, for practical purposes, the targets of eugenic sterilization laws during the Progressive Era were people housed within institutions, because they were under the control of government agents. Due to racial segregation and exclusion from government programs, African Americans and other people of color were not generally targets for eugenic sterilization during the Progressive Era.[242] But with the rise of the Civil Rights Movement and Lyndon Johnson's War on Poverty, the government finally incorporated people of color into federal assistance programs; this, in turn, meant that people of color were vulnerable to new forms of abuse by local officials, bureacrats, and doctors.[243] Thankfully, this tragic exposure of an inhumane practice (after decades of 'shadow continuity') inspired political and legal backlash against it, yet the broader pattern of vulnerability to abuse within government programs is clear. Although the War on Poverty was initially introduced to help the worst off in society, the initial lack of oversight over these federal "family planning" programs proved particularly damaging to minority groups. Already disproportionately impoverished—as a result of centuries of discrimination, persecution, and forms of ethnic and racial segregation from mainstream society—the marginalized status of minority

[242] See e.g., Noll, "Southern Strategies," 130-51.
[243] On the exclusion of blacks from welfare programs, see Liebermann, *Shifting the Color Line*.

women made them even more vulnerable to governmental abuse from programs professing to offer health and financial assistance to needy families.

How do these later events connect to the fitter families civic lineage regime of the Progressive Era? Clearly long after the political demise of the organized eugenics movement, we encounter a nexus of old and new laws promoting an ideal of good citizenship (i.e. of a white, middle-class, responsible "citizen-mother"), which continues to share many similarities with the winners the Fitter Families contests in state fairs during the Progressive Era. In the chapters that follow, we will see that—while different civic lineage regimes rise and fall several times during the twentieth century—they each tend to idealize many of the same demographic features of good citizenship, including being white, middle-class to wealthy, Christian, able-bodied, married, and making responsible sexual and procreative decisions depending upon the mainstream expectations of the day.

Conclusion:

In the name of protecting the welfare of society, the Court in *Buck v. Bell* ruled that it is constitutionally permissible for the state to coercively sterilize "defective" citizens. The American government, as I argue throughout this dissertation, has often engaged in state-building efforts aimed at shaping the composition and character of its polity across generations by regulating the actual birth of American citizens. The *Buck* case is a harrowing example of this broader phenomenon in American political development, and it also more specifically illustrates a turn inward toward domestic efforts at population control and social engineering during the Progressive Era. In the words of Paul

Lombardo, "The legal high point of the eugenics movement was the 1927 U.S. Supreme Court case of *Buck v. Bell.*"[244] The rhetoric of this case makes it clear that the justices viewed coercive sterilization as first-and-foremost about maintaining a robust civic lineage regime in America, which I have labeled as the fitter families civic lineage regime associated with the Progressive Era during the early twentieth century.

The agenda of eugenic sterilization began as an elite driven policy (or set of policies), pushed by scientists, bureaucrats, and legislators, who evoked national anxieties about declining birthrates among native-born Anglo-Americans and raised dire concerns about the rising tide of immigration from less popular "inferior" groups. Importantly, for individuals like Carrie Buck, the Court's ruling in this case empowered local bureaucrats in mental institutions, prisons, and hospitals throughout the nation to take eugenic policy "into their own hands," resulting in a distinct type of path dependency (i.e. persistence by neglect), which I have termed 'shadow continuity.' These practices continued behind the closed doors (in the shadows) of institutions, thereby allowing involuntary sterilization to persist outside the public eye long after the withering of its popularity following World War II. Given the design of the policy to encourage local dispersion and bureaucratic autonomy—combined with the approval of the Supreme Court—this policy agenda of the eugenic movement effectively became codified in law, and frozen in political time for most of the twentieth century. Eugenic sterilization played a surprisingly prominent role in population control policies for over fifty years, and this, as I have argued above, was largely made possible by the ruling of the Supreme Court in *Buck v. Bell*.

[244] Lombardo, *Three Generations,* 2008, ix.

So, what happened to the precedent set in *Buck v. Bell*? On a local level, the last sterilizations at the Virginia Colony occurred in 1979. After the nationwide publicization of sterilization abuse, during the mid-1970s, the state of Virginia decided to repeal all laws condoning coercive sterilization.[245] Moreover, following media attention to the Buck family during this time, the American Civil Liberties Union (ACLU) urged Virginia to identify and names people who had been involuntarily sterilized, sometimes without their knowledge.[246] Facing resistance, the ACLU filed a class action lawsuit against Virginia in 1980 on behalf of four unnamed victims (and others who stepped forward during the process). One of the unnamed plaintiffs in this lawsuit was Doris Buck, the younger sister of Carrie Buck, who was sterilized by the Virginia Colony, shortly after Carrie, at the age of thirteen.[247] Designed specifically to overturn *Buck v. Bell*, the plaintiffs in *Poe v. Lynchburg Training School and Hospital* did not ask for any money for damages from Virginia, but instead simply requested their involuntary sterilizations to be declared unconstitutional. Since many of the victims of compulsory sterilization were never informed (even retrospectively) that they had been sterilized, the plaintiffs also requested that the state notify all those who had been involuntary sterilized and offer them free medical and mental health care. Most of the unnamed petitioners had been sterilized as teenagers, and often multiple family members were sterilized. The ACLU assembled a detailed set of interviews and depositions from the victims of the policy. But Virginia had already repealed its eugenic sterilization law, so the federal

[245] Code of Virginia, sec. 54.1-2975 to 2980. Also, for a discussion of the end of sterilization at the Virginia Colony, see Lombardo, *Three Generations*, 2008, 250.
[246] Ibid., 251.
[247] Ibid., 186, 253.

court ruled that it could offer no retrospective relief to the victims. Their case rested upon tenuous legal standing from the outset, because the Supreme Court settled the constitutionality of this *repealed* Virginia law in *Buck v. Bell*.[248] Virginia agreed to a modest settlement in 1985, which included a media campaign and health assistance to the victims.[249] To this day, the precedent of *Buck v. Bell* remains the law of the land. The Supreme Court has never overruled it.

This case serves as the zenith of the Court's treatment of reproduction as a *public* matter. In contrast, in *Skinner v. Oklahoma* (1942), we see the Court beginning to make a path-breaking transition towards framing reproduction as a fundamental right, which would later culminate in the birth control and abortion cases *of Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), and *Roe v. Wade* (1973), protecting reproduction through a fundamental constitutional "right to privacy." In less than fifty years, reproduction went from being labeled by the Supreme Court as *public* to *private* under constitutional law. In theory, this ought to protect individuals from government invasions into their reproductive autonomy, but in practice the story is more complex. For instance, as we saw in the last section of this Chapter, after the successes of the Civil Rights and Feminist Movements, the expansion of federal programs to hitherto excluded groups introduced new forms of government coercion into the reproductive lives of hundreds of thousands of minority women. For those dependent upon government programs and within the ready grasp of agents of the state, the promise of a reproductive "right to privacy" can sometimes seem elusive, a point which Chapters 5 and 6 focus on.

[248] Ibid., 253-54.
[249] Ibid., 254.

Moreover, the transition to classifying reproduction as private has significant ambiguities and limits. For instance, many scholars view *Roe v. Wade* as the ultimate statement on reproductive privacy, because it guaranteed women the right to make their own decisions about whether or not to seek an abortion in the first two trimesters of a pregnancy, but as Chapter 4 discusses, Justice Harry Blackmun cites *Buck v. Bell* in his *Roe* opinion to emphasize that the Court still denies, "the claim…that one has an unlimited right to do with one's body as one pleases."[250] The Court's move to approach issues concerning reproduction as private rather than public under the Constitution ushered in a new civic lineage alignment during the late twentieth century, and yet in path dependent fashion both *Skinner* and *Roe* explicitly upheld the Court's earlier *Buck v. Bell* ruling as "good law."

In sum, during the Progressive Era, the government endorsed a civic lineage regime that publicly supported coercive regulation of reproduction in the name of entrenching numerous forms of civic exclusion and marginalization, including unabashedly discriminating on the basis of gender, disability, class, race, ethnicity, religion, and presumed sexual promiscuity. The ideal of citizenship promoted by this fitter family regime, as I have argued, is captured in the archival photographs from Fitter-Families Eugenics Contests at state and county fairs across the country. Based on photographs of the "fittest" gold metal-winning families in these eugenic contests, this ideal of citizenship was quite specific: the families are invariably white, large with multiple generations, many children, middle class, able-bodied and healthy, displaying traditional gender norms, and abiding by Christian family values. The fitter families civic

[250] *Roe v. Wade*, 410 U.S. 113, at 154.

lineage regime was built upon the presumption that the government should promote and regulate the reproduction of good citizenship through both positive and negative eugenics policies; most strikingly, this included laws allowing doctors to coercively sterilize citizens, like Carrie Buck, deemed eugenically unfit to procreate. Ultimately, in the name of breeding a "better" citizenry in the future, the federal government and state governments during the Progressive Era actively regulated the reproduction of its citizens in the name of the public health and morality of the entire nation.

CHAPTER 3

Birth Control in the Shade of Eugenics: Family Planning, Public Health, and Doctor's Rights

Introduction

Margaret Sanger opened the first birth control clinic in the United States on October 16, 1916 in Brooklyn, New York. A trained nurse who crusaded passionately for "voluntary motherhood" and "family planning" during a time in which contraception was illegal, yet many women died in childbirth and child mortality was high throughout the nation, Sanger spearheaded the early birth control movement in America and founded the organization Planned Parenthood.[251] Her first birth control clinic in Brooklyn was raided by police and forcefully shut down just ten days after it opened its doors to the public.[252] Sanger and two coworkers were arrested and imprisoned to await trial for violating a New York anti-contraception law, modeled after the federal 1873 Comstock Act, which prohibited circulating information and distributing devices that "could be used or applied for preventing contraception."[253] Although public opinion increasingly supported access

[251] Jean H. Baker, *Margaret Sanger: A Life of Passion* (New York: Hill and Wang, 2011), 45-52. In 1921, Sanger founded the American Birth Control League, which would change its name to Planned Parenthood Federation of America in the 1942.
[252] See Ellen Chesler, *Woman of Valor: Margaret Sanger and the Birth Control Movement in America* (New York: Simon & Schuster, 1992).
[253] The Comstock Act, Section 211 of the U.S. Criminal Code. Public—No 133, "An Act for the "Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use," *Acts and*

to contraceptives for married couples during the twentieth century, Sanger and her allies in the birth control movement were unsuccessful in their goal to overturn the Comstock laws at the national level and instead won piecemeal victories in courts and at the state level for nearly fifty years.[254] Finally, in 1965 in *Griswold v. Connecticut*, the Supreme Court struck down a similar Connecticut anti-contraceptive law from the 1870s used by police to arrest the director and doctor of a local Planned Parenthood clinic providing contraceptives to married women.[255] Finding a fundamental constitutional right to privacy that protects the choice of married couples to use contraception, this famous Supreme Court ruling is considered the backbone of the subsequent reproductive privacy decisions, including the right to use contraception to unmarried individuals in *Eisenstadt v. Baird* (1972) and for women to seek an abortion in *Roe v. Wade* (1973).[256]

This is the first of two chapters on the topic of the government's regulation of birth control during twentieth century America. So, before proceeding, I want to emphasize that laws targeting birth control—or "the decision whether to bear or beget a child," to quote the Supreme Court in *Eisenstadt*—are always an important part of the civic lineage regime. Not only does access to contraception influence women's opportunities in society, both economically and politically, but the governmental policies that structure contraceptive choices (or lack thereof) also shapes the broader context in

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Resolutions of the United States of America, 42nd Cong., 3rd sess., March 3, 1873 (Washington DC: Government Printing Office, 1873), 234-36.

[254] A study in 1922 of on thousand married women reported that less than ten percent disapproved of birth control, and 73 percent used contraceptives themselves. See Peter C. Engelman, *A History of the Birth Control Movement in America* (California: Praeger, 2011), 143.

[255] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[256] *Eisenstadt v. Baird,* 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973).

which citizens are (and are not) born.[257] By regulating the domain of fertility, birth control laws impact the nation's changing demographic composition over time through shaping factors such as: who in society bears children, whether babies are planned or unplanned, the number of children mothers bear and raise, and the opportunities and resources parents have to provide for their children. These laws are about the citizenship or civic status of women. And, by targeting the fertility of women, they also shape the birth of future generations of citizens and the opportunities and status accorded to them. (These two aspects of citizenship—the status and participatory experience of potential mothers and the standing of children—go hand in hand.) As I have argued, the broad set of laws targeting birth together make up what I term the 'civic lineage regime' at any given political moment. This includes laws both prohibiting and endorsing contraception and family planning, for such policies seek to shape procreation in ways that invariably end up treating the reproduction of citizens unequally based on issues such as gender, class, race, disability, sexuality, and the list goes on. Since the institutional and policy design of regulations targeting fertility, conception, and birth almost always affects groups differently, these laws serve as important governmental avenues for creating and perpetuating group-based inequalities in citizenship and civic status.

In the next two chapters, I examine birth control politics as a key part of the civic lineage landscape in the United States. This chapter focuses on the early birth control movement in the United States and its emphasis on public health during the Eugenics Period, and the next focuses on *Griswold v. Connecticut* and the development of the right

[257] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

to reproductive privacy. The *Griswold* decision, as I argue in these chapters, was in many ways the culmination of a clash between two civic lineage agendas, one a relic of Victorian Era morality ensconced in federal and state law by the anti-vice movement during the Gilded Age, and the other challenging anti-contraceptive laws by rallying for the legalization of birth control during the Progressive Era. Specifically, the trajectory of contraceptive legislation in the early twentieth century is exemplified by the political agendas of two key reformers: Anthony Comstock and Margaret Sanger. Anthony Comstock was a Civil War veteran who sought to enshrine Victorian morality in law by making contraception illegal throughout the 1870s and enforcing the "Comstock Laws" until his death in 1915.[258] In contrast, Sanger—who was young enough to be Comstock's granddaughter and born in 1879—burst onto the political scene in 1914 and sought throughout her life to challenge the Comstock Laws, winning her most substantial victories in the 1930s.[259] Each exemplifies a prominent civic lineage alliance during his

[258] Craig L. LaMay, "America's Censor: Anthony Comstock and Free Speech," *Communications and the Law* 19, no. 1 (September 1997): 1-59.

[259] Margaret Sanger is a controversial figure in feminist history. Linda Gordon, in her path-setting history of the politics of women's reproductive rights, *Women's Body, Woman's Right* (1976, 1990), offers a critical analysis of Sanger's role in the birth control movement. In her first two editions of the book, Gordon originally suggested that Sanger abandoned her early roots with radical feminism and socialism, and ultimately did more harm than good for the birth control movement by aligning with eugenicists and supporting a racist agenda. However, Gordon's discussion of Sanger in her updated version of her book from 2002, titled *The Moral Property of Women: A History of Birth Control Politics in America*, has toned down many of these accusations after new information on Sanger has become public. (For instance, Ellen Chesler offers a groundbreaking analysis of Sanger's letters, and her biography has added a more sympathetic glimpse into a flawed leader of a movement.) In her new edition, which is arguably the best political history of birth control available, Gordon continues to suggest that Sanger's role in the birth control movement is exaggerated by many, emphasizing that Sanger belonged to a broad birth control movement in America. Although I grant that Sanger was part of a broader birth control movement (i.e. with other important figures such as Mary Ware Dennett. Blanch Ames Ames, and Emma Goldman), Gordon nonetheless overstates her claim against Sanger's integral role in the legalization of birth control. In fact, I focus on Sanger here because it was Margaret Sanger who spearheaded the court action that overturned anti-contraception laws, founded Planned Parenthood, and even coined the term 'birth control.' For my purposes, Margaret Sanger offers a glimpse into the most influential legal and political strategies of the early birth control movement, and highlights its civic lineage agenda during the Progressive Era.

or her time, with Comstock crusading to protect social purity against moral vice, and Sanger championing the legalization of birth control in the name of women's health and liberation. As I argue in this chapter, both Comstock and Sanger frequently articulated their agenda by expressing their hopes and fears about the future of national identity and citizenship in the United States.

This chapter consists of three parts. In Part 1, I examine the Comstock Laws of the Gilded Age, and what I term the Comstockian "moral purity" ideal of the reproduction of good citizenship within the family. Part 2 turns to Margaret Sanger's challenges to the Comstock laws through civil disobedience and in court. Sanger and her early birth control movement were successful in getting many of Comstock's anti-contraception laws abolished, but her victories against Comstock were won using the dominant discourse of the eugenics period: Public health. Part 3 examines the early birth control movement's connection to the eugenics movement. Appropriating the popular discourse of the eugenics movement and sometimes forming alliances with eugenicists and doctors, Sanger successfully challenged many of these anti-contraceptive laws in court by focusing on public health concerns and lobbying for "doctor's rights" to treat patients. In her more radical writings, Sanger also proposed an alternative civic lineage ideal (voluntary motherhood), which directly conflicted with the ideal of the dominant fitter families civic lineage regime of the Progressive Era. Sanger's voluntary motherhood ideal, as I shall argue, never became a mainstream civic lineage regime in America precisely because it clashed with the dominant fitter families ideal, which at the

beginning of the twentieth century took the place of Comstock's moral purity regime as the dominant ideal of good citizenship.

However, in less than fifty years, the Supreme Court moved from supporting involuntary eugenic sterilization, in the name of the public interest of the entire community in *Buck v Bell*, to ruling that the use of birth control is protected by a "fundamental right to privacy" for married couples in *Griswold*. Since Sanger never supported a right to privacy, this raises a fascinating question: How can we explain this apparent reversal in judicial doctrine, with reproduction framed first as a *public matter* and later as a *private right* by the Supreme Court? Moreover, is the right to privacy actually a repudiation of eugenics, or is it a separate line of jurisprudence? And, most importantly for my purposes here, what does the birth control movement and the development of reproductive privacy jurisprudence mean when it comes to restructuring the configuration of the civic lineage regime? These questions are the focus of this chapter and the next, beginning with Sanger's public health challenges to Anthony Comstock's anti-contraception laws in this chapter.

The answers to these questions, as we shall see in the next two chapters, rest in the rise of a new dominant civic lineage regime after the Second World War (i.e. the postwar white picket fence regime), which idealized a small nuclear family and placed great value on privacy between husband and wife within marriage. With the end of the eugenics public health movement of the Progressive Era and the advent of a different ideal of citizenship during the Postwar Period, the Supreme Court constructed a separate line of constitutional jurisprudence recognizing a fundamental right to reproductive

privacy. For now, however, let us turn to the early birth control movement with its (unrealized) ideal of voluntary motherhood.

1. The Comstock Laws

The topic of contraception became a major issue in the press and American political discourse when Margaret Sanger was arrested twice for violating the Comstock Act, first in 1914 and then in 1916. This section introduces the Comstock Act, not only as important background to the *Griswold* case, in which the Supreme Court finally declared such anti-contraceptive laws unconstitutional based on a right to privacy, but also as a centerpiece of the dominant civic lineage order at the outset of the twentieth century. Before the fitter families ideal, as I shall argue below, the civic lineage landscape was marked by a "moral purity" ideal of the family and childrearing that constituted the dominant civic lineage regime during the Gilded Age and lasted until the Eugenics Movement gained sufficient popularity in the early 1900s to eclipse these moral regulations in the name of public health during the Progressive Era. This raises an important point: At the same time that involuntary eugenic sterilization was becoming routine and enshrined in most state laws, the voluntary use of contraceptive devices and abortion to prevent unwanted pregnancy remained illegal in most states and under federal law. The birth control movement, which was far less successful in its political influence than the eugenics movement prior to the Second World War, highlights a striking tension between widespread support for *involuntary* sterilization, examined in the previous

chapter, and governmental opposition towards *voluntary* motherhood during the Progressive Era. This section begins by focusing on Anthony Comstock and his nineteenth century "moral purity" ideal of civic reproduction.

What was the Comstock Act? Named after Anthony Comstock, this 1873 amendment to the U.S postal code, passed by Congress, made it illegal for any "obscene, lewd or lascivious" material to be delivered by U.S. mail, in addition to prohibiting any method of production or publication of information pertaining to the prevention of contraception or procurement of an abortion.[260] Comstock not only successfully lobbied Congress, with the full support of the Young Men's Christian Association (YMCA) and anti-vice organizations in New York, to pass this legislation, but he also managed to convince Congress to appoint him as a special agent or "inspector" for the Post Office, with the authority to investigate potential violations of the law and arrest individuals he determined were sending obscene items through the mail.[261] Comstock held this position until his death in 1915, and with the blessing of Congress, he proceeded to conduct his own raids for the next 42 years as a "policeman" of public and private morals, confiscating tens of thousands of pounds of materials, ranging from literature to "rubber articles" (i.e. condoms and diaphragms), and also arresting thousands of individuals, including physicians and journalists.[262] He became a household name in the late 1800s and early 1900s for crusading in a zealous public manner against the evils and vices he

[260] The Comstock Act, Section 211 of the U.S. Criminal Code. Public—No 133, "An Act for the "Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use," *Acts and Resolutions of the United States of America,* 42nd Cong., 3rd sess., March 3, 1873 (Washington DC: Government Printing Office, 1873), 234-36.
[261] Susan C. Wawrose, *Griswold v. Connecticut: Contraception and the Right of Privacy* (New York: Franklin Watts, 1996), 19-21.
[262] LaMay, "America's Censor.

found in society.[263] In this manner, prior to the dominant fitter families eugenic order of the Progressive Era, Comstock became the face of its predecessor—or what I term the "moral purity" ideal of good citizenship. Both the eugenics movement and birth control advocates waged intersecting battles against this regime, and the eugenics ideal prevailed from the early 1900s until World War II. We have already examined the eugenic "fitter families" ideal in the last chapter, so what did this earlier "moral purity" ideal look like at the dawn of the century?

The Comstock Act was an anti-obscenity law that banned almost everything having to do with sex from escaping the bedroom and becoming public. Comstock's idea of what might be "obscene, lewd or lascivious" was astoundingly broad. For this reason, *The New York Times* coined the term "Comstockery" in 1895 to refer to his extreme and sweeping censorship of anything perceived to be obscene, including banning one of George Barnard Shaw's plays in 1905.[264] After Congress passed the federal Comstock Act, there were proposals in state legislatures across the nation to enact similar restrictions on "obscene materials" (broadly defined). These additional state laws were referred to as the "little Comstock laws," and they also banned various forms of obscenity, including information about preventing unwanted pregnancies and the circulation or sale of contraceptive materials.[265] The New York prohibition of obscenity, under which Margret Sanger was convicted in 1916 for opening the first birth control clinic, was such a law. Likewise, the 1879 Connecticut legislation in question in

[263] Ibid.
[264] C. Thomas Dienes, *Law, Politics, and Birth Control* (Urbana: University of Illinois Press, 1972), 32.
[265] John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence: University of Kansas Press, 2005), 7-8.

Griswold was another little Comstock law, and both state laws adopted similar language to the original federal Comstock Act. Whereas the use of contraception was rarely regulated or prohibited by the government before Comstock—for it was considered to be a private matter and beyond the reach of public law enforcement—Comstock transformed these previously personal decisions into political "problems" of great consequence to society, making them a legitimate area of widespread government criminalization.[266] In the words of Craig LaMay, "Anthony Comstock is known, if at all [today], as America's most formidable prude and energetic censor during the late nineteenth and early twentieth century."[267]

Given the damaging effect the Comstock Laws had on women's reproductive freedom, it is understandable that scholars often portray these laws as an attempt to control women by forcing them to bear and rear children.[268] But interestingly, Comstock's speeches and writing portray his primary concern as about protecting the moral purity of children. Comstock famously stated that, "the world's the devil's hunting ground, and children are his choicest game."[269] In a groundbreaking analysis of Comstock's language and references throughout his career, Nicola Beisel documents that Comstock and his supporters again and again emphasized protecting children from corruption as their main concern and rarely mentioned the impact of his laws on

[266] Contraception has been a relatively normal part of women's lives throughout most of American (and world) history—from potions, to folk remedies, to more effective blockage devices made out of animal membranes—and the use of these items was not generally prohibited or regulated by the government.
[267] LaMay, "America's Censor," 1.
[268] See, for instance, Caroll Smith-Rosenberg, "The Abortion Movement and the AMA, 1850-1880, in *Disorderly Conduct*, ed. Carroll Smith-Rosenberg (New York: Oxford University Press, 1985), 217-44. Janet Farrell Brodie, *Contraception and Abortion in Nineteenth-Century America* (Ithaca: Cornell University Press, 1994).
[269] Anthony Comstock, *Traps for the Young,* 3rd ed. (New York: Funk & Wagnalls Company, 1883), 240.

women.[270] And in my own overview of many of Comstock's statements and speeches on the subject, I can add that he expressed virtually no anxieties about the national birthrate or differential group-based fertility.[271] While the outcome of the law clearly had the effect of controlling the reproductive lives of women, these laws were intended to shape the reproduction of citizenship by targeting childrearing and ensuring the proper development of children into good citizens. In fact, they reveal a new avenue for the reproduction of citizenship. By focusing on the moral development of children, Comstock sought to shape future generations of citizens and strengthen the nation through the avenue of the family.

Comstock was immensely concerned about the state's regulation of civic lineage, but his focus was on preserving a Victorian ideal of the family. He maintained that families were the seedbeds of good moral character and upright citizenship. In his book, *Traps for the Young*, Comstock presented a puritanical (Protestant Christian) argument that parents have the religious duty to protect children from the "Household Traps" of "lewd literature" and to "nourish" the younger "generation" of Americans on "noble things."[272] He connected this to "good citizenship." In this vein, Comstock compared lewd literature and public forms of obscenity to "a contagious disease…imported to this shore," stating that it was his personal mission "to send a message in advance to parents, so that they may avert from their homes a worse evil than yellow fever or small-pox"—a

[270] Nicola Beisel, *Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America* (Princeton: Princeton University Press, 1997).
[271] Charles Gallaudet Trumbull, *Outlawed! How Anthony Comstock Fought and Won the Purity of a Nation* (Published by Scott Matthew Dixon, 1913, 2013).
[272] Comstock, *Traps for the Young*, 7-12.

concern of "every good citizen."[273] Since there are "grand possibilities locked up in the future of every child, if kept pure [of illicit passions]," it follows that good Christian parents who are also "good citizens" have the "responsibility for the future welfare of their offspring" to ensure that they neither corrupt or are corrupted by "the community."[274] Speaking of the importance of the home to the health of the future generation, he writes:

> It is in the home that we must look for [a child's] first impressions. Here is foundation of the character of the future man or woman is laid. Here the parent exerts an incalculable influence upon the offspring. Associations of good or evil nature are thus fixed in the mind in almost permanent character…Why rob the future ages of the high order of men and women, which would of necessity appear if the children of today were properly cared for and developed in keenest intellect and highest morals?[275]

Comstock recognized that the reproduction of good citizens is a process that occurs within families, and that parents traditionally engaged in a range of caring, educational, and policing activities to ensure proper child development. But the power that operates within the family is not simply that of parents over children or husbands over wives, it was also a power of the state over the family itself.[276] Hence, his mission was *political*: to pass and enforce anti-obscenity laws within government. To save America's youth from corruption and make upright citizens out of them, Comstock focused on keeping homes morally pure by governmental intervention into the labors (both figuratively and literally) of motherhood.

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[273] Ibid., x.
[274] Ibid., ix.
[275] Ibid., 7, 12.
[276] Beisel makes a somewhat similar argument about Comstock's emphasis on the reproduction of children within families, but her focus is less on civic reproduction and national identity than my analysis here.

This brings me to an important (yet generally overlooked) point regarding Comstock's argument against birth control. Rather than opposing the private use of contraceptives per se, Comstock's primary concern was the mass commercialization of contraceptives on the economic market.[277] The marketization of the devices opened new avenues for information about sex to negatively impact the moral development of children. Comstock appears to have been particularly worried about the impact of two major technological developments, which together spurred the mass commercialization of contraceptive literature and devices during his day: The vulcanization of rubber in the mid-nineteenth century, leading to innovations in the creation and mass production of condoms and diaphragms, and the completion of the Transcontinental Railroad following the Civil War, which fostered the centralization of the U.S. Postal Service in a manner that allowed these rubber products to be advertised openly as "rubbers," "pessaries," "womb veils," and "female protectors" across the nation through mail order.[278] In his view, the task "of reproducing a moral citizenry" was threatened by the mass marketization and commercialization of obscene "rubber materials."[279] This distain for the marketization of a swath of purportedly "obscene" items appears to be the crux of Comstock's crusade against birth control. As Andrea Tone puts it, "Comstock's demonization of contraceptives was a direct response to their newfound commercial visibility, not their invention or use."[280] Echoing similar concerns about the emergence of these new technologies and markets, Representative Clinton Merriam of New York,

[277] Comstock, *Traps for the Young*, 209.
[278] Andrea Tone, *Devices & Desires: A History of Contraceptives in America* (New York: Hill and Wang, 2001).
[279] Beisel, *Imperiled Innocents,* 69.
[280] Tone, *Devices & Desires*, 13.

who introduced the original Comstock Act in Congress, defended his proposed bill on the grounds that the rise of these new markets of prurient information and materials posed a danger to the future vitality of the nation because it "threatened to destroy the future of this Republic by making merchandise of the morals of our youth."[281]

It follows that Comstock was not, as is typically assumed, opposed to birth control in principle. Rather than focusing on private behaviors, he set out to curtail public advertisement and the mass distribution of these devices. The most direct support for this interpretation comes from the mouth of Anthony Comstock himself. In a 1915 interview published in *Harper's Weekly*, not long before he died, Comstock spoke plainly about his opposition to the mass commercialization of these "obscene" devices to the public, which he distinguished from the private use of contraception.[282] In fact, when the author of the article, Mary Alden Hopkins, asked Comstock if "these laws handicap physicians?", his response was that "They do not."[283] Comstock emphasized that he did not oppose private physicians advising married couples on contraceptives or performing abortions when a woman's health was in danger. In his words, "No reputable physician has ever been prosecuted under these laws…Only infamous doctors who advertise or send their foul matter by mail."[284] In fact, private physicians often advised married couples on birth control in the early twentieth century, but they avoided doing so publicly: "A reputable doctor may tell his office what is necessary, and a druggist may sell on a doctor's written prescription drugs which he would not be allowed to sell

[281] "Obscene Literature," *The New York Times*, March 15, 1873.
[282] Mary Alden Hopkins, "Birth Control and Public Morals: An Interview with Anthony Comstock," *Harper's Weekly*, May 22, 1915.
[283] Ibid., 5.
[284] Ibid.

otherwise."[285] He also noted that "A doctor is allowed to bring on an abortion in cases where a woman's life is in danger," and there is nothing in the laws that "forbids a doctor from telling a woman that pregnancy must not occur for a curtain length of time or at all."[286] In sum, the Comstock laws focused on curtailing public advertisement—particularly mail and the mass distribution of these devices—but not on private behaviors.

The rhetoric Comstock used was replete with religious imagery. Yet, contrary to standard interpretations focusing purely on the control of the reproductive capacities of women, Comstock's crusade was waged in the name of saving the souls and civic integrity of children.[287] Comstock utilized the power of the state to reach into the home to shape the development of the nation's youth by "reforming [the] family."[288] These laws were civic lineage policies, both through their intent and outcome.[289] By steering the development of children into proper moral citizens within the family, the Comstock provisions sought to protect an already imperiled Victorian ideal of the family from broader changes in the economic market and society. Somewhat ironically, Comstock called upon the state to use its power to protect the separate sphere of the family from the corrupt public influence of the economic market. His reason for doing so was nothing

[285] Ibid.
[286] Ibid.
[287] Comstock, *Traps for the Young*.
[288] Quoted in Beisel, *Imperiled Innocents.*
[289] Comstock's own discussion of "Infidel Traps, Liberal Traps" focuses on "liberals and infidels...who have undertaken by systematic and organized effort, to defend the dealers in obscene literature, or repeal the laws [Comstock's laws] of Congress prohibiting the transmission through the mails of infamous matter." In short, Comstock is forthright in his aim to use the law and courts to uphold his civic lineage agenda. See Comstock, *Traps for the Young*, 184.

less than to save the soul of the nation through ensuring that the next generation of citizens remained morally pure as the foundation of national strength.

The Comstockian "Moral Purity" Ideal of Civic Reproduction:

It follows that, prior to the eugenic fitter families ideal of civic reproduction, we encounter a popular (and legally successful!) anti-vice crusade, which passed laws to regulate the family in the name of protecting a pseudo-Victorian ideal of citizenship aimed at directing the development of children. At the start of the twentieth century, prior to political successes of the Eugenics Movement, the dominant civic lineage regime appears to have endorsed an ideal of the "morally pure" family and citizen. When this ideal came into conflict with eugenic ideas in the early twentieth century, it was eclipsed by the new eugenic fitter families ideal of citizenship. Moreover, as we shall see, neither of these two ideals fully meshed with Margaret Sanger's crusade for "voluntary motherhood" and the legalization of birth control.

The birth control movement, led by Margaret Sanger (and others), took on Comstock's anti-contraceptive laws. Sanger also had a complex relationship to eugenics. Appropriating the popular discourse of the eugenics movement and sometimes forming alliances with eugenicists and doctors, Sanger successfully overcame many of the Comstock laws in court by focusing on public health concerns and lobbying for "doctor's rights. In her speeches and writings, Sanger also proposed her own alternative civic lineage ideal (voluntary motherhood), which directly conflicted with the fitter families

ideal and never became a mainstream ideal of citizenship in America during the Progressive Era for that reason. Campaigning to strike down the Comstock laws in the heyday of eugenics, Sanger could only form alliances with the negative (not positive) goals of the Eugenics Movement. Sanger never saw her own ideal become the dominant civic lineage order (on her terms). To win victories, Sanger focused on issues of public health and tried to build alliances with eugenicists and doctors. In other words, she set out to tear down the civic lineage order of moral purity sponsored by Anthony Comstock. Hence, while she presented "voluntary motherhood" as an alternative idea during her assault on the Comstockian regime, Sanger's alternative vision of civic reproduction never became the dominant civic lineage regime and instead won victories using the popular eugenicist discourse of the day—that is, Sanger won her victories in the name of public health.

2. Margaret Sanger & The Birth Control Movement

Margaret Sanger was the key figure and leader of the birth control movement in the United States—indeed, she invented the term 'birth control.'[290] Whereas Anthony Comstock's mission was passing laws to restrict everything he classified as obscene, including the marketization of information about sex and the sale of contraceptive devices, Margaret Sanger's quest conversely was to make information about preventing unwanted pregnancies available to all women. Sanger became one of the few "sex radicals" during the Progressive Era, as they were termed, who dared to openly challenge

[290] Baker, *Margaret Sanger.*

the Comstock laws.[291] Although private physicians sometimes advised married couples in confidence about birth control options in the early twentieth century, a phenomenon which Comstock condoned in private (according to his excerpted statement above), doctors avoided publishing on the topic or consulting patients in public venues. The penalties of the Comstock laws were an effective deterrent, for few doctors wanted to spend time in prison or a workhouse. In contrast, Sanger challenged these laws through direct civil disobedience, which brought her everything from regular hate mail to stints in prison.[292] She expressed particular dismay that these laws disproportionately disadvantaged poor women, who could not afford their own private doctors yet were most in need of help with limiting their family size to make ends meet and care for existing children. Her goal of "voluntary motherhood," Sanger realized, required the demise of the Comstock laws. For over fifty years, she dedicated her life to challenging them by crusading to "free women from incessant childbearing…[and] undesired pregnancy."[293]

A nurse in Manhattan, Sanger came face to face with the toll that unwanted and frequent pregnancies caused on women's health. In her speeches and writing, Sanger often spoke of the story of a young immigrant woman named Sadie Sachs as a defining moment in her career.[294] Already a mother of multiple children at the age of twenty-eight and lacking the funds to provide for another, Sadie became dangerously ill following a

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[291] Ibid.
[292] James Reed, *From Private Vice to Public Virtue: The Birth Control Movement and American Society Since 1830* (New York: Basic Books, 1978).
[293] Quoting a 1923 Speech by Margaret Sanger at Hartford's Parson's Theater: David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Open Road Media, 2015), xviii.
[294] Margaret Sanger, *An Autobiography* (New York: Dover Publications, 1971), 89-92.

botched five-dollar (illegal) abortion. Sanger was called to accompany a doctor treating Sadie's infection. While recovering, the young woman asked the presiding doctor what she could do to avoid getting pregnant in the future? Instead of offering useful information, the doctor chided his patient for the question and joked that "It can't be done," unless you tell your husband "to sleep on the roof."[295] When Sanger saw Sadie three months later, the young woman was suffering from fatal septicemia as a consequence of a self-inflicted abortion. Sanger watched Sadie die in the grieving company of her husband and children. Although the authenticity of the Sadie Sachs story has never been confirmed, Sanger used this story as an allegory to dramatize the plight of poor women seeking to avoid pregnancy and to highlight the needless deaths to women and children, which resulted from the lack of information and availability of contraceptives.[296] Largely an opponent of abortion (except as a last resort), Sanger believed that birth control could solve the rise in unsafe abortions by preventing pregnancy in the first place. After the tragic death of Sadie Sachs, writes Sanger, "I resolved that women should have the knowledge of contraception…I would tell the world what was going on in the lives of these poor women….No matter what the cost, I would be heard."[297]

She called this her "Great Awakening."[298] The Comstock laws provided the opportunity for women who could afford their own personal physician, to receive

[295] Ibid., 90-1.
[296] Baker, *Margaret Sanger*, 51.
[297] Quotation in Baker, *Margaret Sanger,* 50.
[298] Margaret Sanger, "Early Years of Margaret Sanger's Work in the Birth Control Movement,"

information about contraception and obtain access to these devices (i.e. middle-class and wealthy women). But the privatization of contraception made information and access to birth control nearly impossible for poor women to procure. Since they did not have the luxury of hiring their own private doctors, Sanger emphasized that indigent women were disproportionately burdened by the costs of frequent childbirth, ranging from the toll it took on their health to difficulties providing for existing children. Condemning these laws as an unjust limitation on women's freedom and anathema to public health, Sanger proclaimed: "Against the State, against the Church, against the silence of the medical profession, against the whole machinery of dead institutions of the past, the woman today arises."[299] From that point forward, she began writing about sex and birth control in newspapers and journals. This brought Sanger directly into conflict with Anthony Comstock when he discovered her column "What Every Girl Should Know," which openly discussed sex and reproduction. Now an elderly man in his seventies, Comstock still served as chief U.S. Post office censor. He banned the column. In response, the paper printed a blank space in place of the article with the headline: What Every Girl Should Know—Nothing; by order of the U.S. Post Office."[300]

Here it is important to note that Sanger's publications were more than merely "obscene" under Comstock's laws, her ideas about "family planning" posed a blatant threat to Comstock's increasingly anachronistic (pseudo-Victorian) family model and

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Margaret Sanger Papers, Library of Congress, Library of Congress Microfilm 28:349. A copy is available online at: https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=101826.xml

[299] Margaret Sanger, "Shall We Break This Law?," *Birth Control Review*, February 1917, 4. Margaret Sanger Microfilm: Collected Documents (Smith College Collection). A copy is available online at: https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=240298.xml

[300] Engelman, *A History of the Birth Control Movement*, 32.

moral purity ideal of good citizenship. Whereas Comstock argued that the state ought to use its power to "protect" a Victorian ideal under assault from emerging markets of obscene materials, Sanger attacked the Comstock laws by arguing that the state ought to instead use its power to ensure that information and advice about birth control was available to all women. She framed this as a matter of public health and liberated motherhood, but also argued that smaller families would produce better American citizens. In contrast to Comstock's claim to be protecting children from corrupting their future through encounters with obscene materials outside the home, Margaret Sanger relied on more direct references to the role of women in (physically) reproducing the nation's future generations of citizens. Sanger rarely discussed birth control without making broader civic lineage statements about its significance to citizenship and to the future of the nation. For instance, in 1940 during World War II, Sanger wrote that birth control has implications "far beyond" the situation of "individual parents," for contraception was vital "to this democratic nation."[301] Likewise, speaking of the potential for poor women to raise good citizens with the help of family planning, she writes: "Give the woman of the poorer classes a chance to limit and control their families, and it will be found that in very many cases the material is equally good. The difference is that, like plants crowded too close together in poor soil, there is no chance to develop and the whole families are left impoverished in mind and body. Give room for each [to] grow

[301] A. Elizabeth Stearns, Susan F. Sharp, Ann M. Beutel, "Women as Political Bodies in the International Speeches of Margaret Sanger," *Feminist Formations* 27, no. 2 (Summer 2015): 121-45, 134. More of the quote: "Now, in this time of crisis, we are arming; preparing with the full vigor of the nation to defend the rights and freedoms so deeply imbedded in our way of living."

and all may become fine and healthy American citizens."[302] (Sanger can be legitimately accused of encouraging the poor, immigrants, and people of color to have fewer children, but she also assumed that they would want to *voluntarily* practice family planning if given the opportunities already available to middle-class women.) With fewer children, she argued that poor women, and other marginalized women in America, might have the time and resources to devote to children so that "all may become fine and healthy American citizens."[303] In her capacity as birth control advocate, Sanger offered an alternative vision for what the American family should look like and suggested that "family planning" would strengthen the nation.

Not long after her first encounter with Comstock, Sanger started her own radical monthly paper in 1914, which she named *Woman Rebel*.[304] The banner across the first issue boldly proclaimed: "No Gods, No Masters."[305] In her paper, Sanger attacked the Comstock laws directly. Sanger's writings in *Woman Rebel* were strongly influenced by her socialist and anarchist ties in her radical circles in Manhattan, stating, "deep down in woman's nature lies slumbering the spirit of revolt."[306] Like her early mentor Emma Goldman, the anarchist and radical feminist, Sanger criticized the patriarchal elements in everything from marriage to motherhood, but she consistently emphasized that control over their reproductive capacities was key for women to have the ability to achieve full

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[302] Margaret Sanger, "A Better Race Through Birth Control," *The Thinker* (November 1923): 60-62. A copy is available online at: https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=306638.xml
[303] Ibid., 60-2.
[304] Chesler, *Woman of Valor*, 74-104.
[305] Ibid., 98.
[306] Margaret Sanger, *The Woman Rebel* 1, no. 2 (April 1914), reprinted in *Woman Rebel*, ed. Alex Baskin (Stonybrook, N.Y, 1976).

citizenship and break the shackles of patriarchy. In her words, "I believe that woman is enslaved by the world machine, by sex conventions, by motherhood and its present necessary child-rearing, by wage-slavery, by middle-class morality, by customs, laws and superstitions."[307] After the first issue of *Woman Rebel*, Sanger was warned by the post office to stop publishing it. When she ignored the warning, Sanger was charged with violating the Comstock laws by using mail to circulate "obscene" information. Facing multiple charges, with a penalty of up to twenty years in prison, Sanger fled to Europe to study population control and plan a stronger strategy for combating the Comstock laws.

2.1 The Clinic Plan

During her time in Europe, Sanger embraced what I call her "clinic plan." Birth control, she decided, was more than simply a First Amendment issue of being able to teach women about sexuality in published articles, as she did in her popular educational pamphlet on *Family Limitation.*[308] In addition to the importance of distributing information manuals, she took a new proactive stance that the goal of effective birth control required opening public clinics like those she visited in Holland; a nation, which provided actual face-to-face contraceptive advice by professionals, fitted women for

[307] Baskin, *Woman Rebel,* 1.
[308] First drafted in 1914, Sanger's pamphlet, *Family Limitation*, was considered one of the best guides to contraception during the Progressive Era. A copy of the sixth edition of the pamphlet, published in 1917, is available online at: http://archive.lib.msu.edu/DMC/AmRad/familylimitations.pdf Sanger's first husband served thirty days in prison for delivering a pamphlet she drafted on *Family Limitation* while she was in Europe. When she returned to the country in 1916, she not only resumed her lectures on the topic, but she was prepared to open the first birth control clinic in the United States. After spending thirty days in jail, Sanger became a well-known and controversial public figure, and a heroine to advocates of women's rights. See Engelman, *A History of the Birth Control Movement.*

diaphragms with individual care, and successfully reduced the mortality rates of mothers in childbirth through proper gynecological and prenatal healthcare. As she prepared to defy the law by opening up public clinics throughout America (i.e. via direct civil disobedience), she also appears to have strategically refined her rhetoric into a less radical tone; perhaps hoping to win over public opinion and change the minds of lawmakers. Of particular note, rather than attacking institutions like marriage and motherhood as beyond salvation from the stain of patriarchy, Sanger began citing the value of these treasured cultural and political institutions to defend her cause by articulating a more free and equal (i.e. reformed) vision of them. In this vein, Sanger's ultimate success stems not from her early radical (anarchist and socialist positions in favor of "free sex") but rather her ability to tailor her agenda to the ideational constraints of her time—or what Carole McCann calls "a refinement of her rhetoric to fit the discursive horizons of class-consciousness and feminist politics, rather than the abandonment of those politics."[309] But during the Progressive Era, as we shall see, this meant trying to form alliances with eugenicists and doctors, and prioritizing concerns about public health over women's equality in the political arena.

When Sanger returned to America from Europe, she opened her first clinic in Brooklyn. After she was convicted for violating the Comstock law, she served thirty days in prison and became famous for her civil disobedience. Following her release from prison, Sanger earned her first major legal victory in 1918 when she appealed her conviction for opening the clinic, and a court ruled that physicians were exempt from the

[309] Carole R. McCann, *Birth Control Politics in the United States 1916-1945* (Ithaca: Cornell University Press, 1994), 42-3.

law. Without striking down the entire law, this ruling held that contraceptive devices could be prescribed by doctors and sold by pharmacists for prevention of disease and to protect public health in the state of New York. Sanger exploited the new loophole by establishing the Clinical Research Bureau (CRB) in lower Manhattan in 1923, operated by an entirely female medical staff, which was the first *legal* birth control clinic in the United States.[310] But since the American Medical Association (AMA) was clear that it "would not endorse birth control until" it was *legal for doctors to prescribe* contraceptives and "removed the taint of obscenity," Sanger faced a serious impediment to her goal of establishing public clinics across the nation.[311] So, in addition to lobbying Congress to change the broad language and application of the obscenity law, she set out to challenge the federal anti-contraceptive law in court.

To attack the federal Comstock law, Sanger sought the legal advice and assistance of Morris Ernst, an eminent civil rights litigator, who had successfully challenged an obscenity ban against the distribution of James Joyce's novel *Ulysses*, overturning the Comstockian prohibition on provocative literature.[312] Ernst suggested arranging a legal test case—similar to his well-known *Ulysses* case—to chip away at the federal law against distributing information about birth control and contraceptive devices by mail.[313] The goal, as Ernst explained in a 1932 article in *The Nation*, was to use the courts to rule

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[310] Marilyn J. Coleman and Lawrence H. Ganong, eds., *The Social History of the American Family: An Encyclopedia* (Thousand Oaks, CA: Sage Publications, 2012), 1040.
[311] "Tracing One Package—The Case the Legalized Birth Control," *The Margaret Sanger Papers* 59 (Winter 2011). Online at: https://www.nyu.edu/projects/sanger/articles/tracing_one_package.php
[312] *United States v. One Book Called Ulysses*, December 6, 1933. Judge John M. Woolsey concluded in his opinion that Joyce's book was both sexual and offensive, yet it was clearly not pornography but literature. As a result, Woolsey concluded that the Comstockian obscenity ban does not apply to Random House importing, publishing, and distributing the book.
[313] Morris Ernst, "How We Nullify," *The Nation* 134 (Jan. 27, 1932): 113-14.

that birth control prescribed by doctors was not banned by anti-obscenity laws, because devices that foster public health are, like good literature, simply could not be properly labeled as 'obscene.' Even if Congress refused to abolish the outdated Comstock law, Ernst argued that Sanger could use the judicial process to, in his words, "nullify" the anti-obscenity law's application to doctor-prescribed contraceptives, thereby making birth control widely accessible to most women through public clinics for the poor and private physicians for those who could afford them.

Morris Ernst's legal strategy at the time worked. Sanger ordered a package of diaphragms from Japan to be delivered to Dr. Hannah Stone, director of her CRB clinic.[314] When the package was seized by U.S. customs under its authority to confiscate "obscene articles," Ernst then challenged the seizure of the "rubber pessaries" on behalf of Dr. Stone. At the initial trial, the Judge and the jury listened to a series of respected doctors in New York testify on the side of Dr. Stone that they prescribed birth control for child-spacing, mental health problems, and to prevent disease. Then, the chief medical witness called by the government, Dr. Frederic Wolcott Bancroft, a renowned surgeon in New York, surprised everyone in the courtroom by admitting that he too "prescribed the diaphragm to address medical needs, including a number of diseases, neurological disorders, insanity, epilepsy and venereal diseases."[315] In a telegram to Sanger, who was traveling abroad during the trial, her friend Florence Rose reported that Dr. Bancroft was

[314] Chesler, *Woman of Valor*, 278-84, 372-3.
[315] "Tracing One Package" Online at https://www.nyu.edu/projects/sanger/articles/tracing_one_package.php

"so helpful to our side that one wondered whose witness he really was!!"[316] Dr. Stone won her jury trial, an unexpected victory at this early stage of the litigation process, and the government appealed the case to the U.S. Circuit Court of Appeals for the Second Circuit.

In *United States v. One Package*, Morris Ernst—recruited by Sanger and representing Dr. Stone—won a sweeping medical exemption in the federal law from the Second Circuit in 1936, again with an emphasis on public health.[317] Avoiding any discussion of whether the articles were obscene or not, Judge Augustus Hand, simply deferred entirely to the medical authority of doctors to promote and protect the health of their patients. In his words,

> The Comstock law's design, in our opinion, was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients.[318]

Although Comstock had often targeted doctors as dealers in illicit materials—ranging from contraceptives to anatomy textbooks—he was no longer alive to challenge this re-interpretation of his law. This ruling by the Second Circuit in *One Package* was taken by many in the press as a signal of the end of the reign of Comstockery. Shortly thereafter, true to its word, the American Medical Association (AMA) Committee on Contraceptive Practices cited the *One Package* decision as a reason in 1937 for adopting a favorable

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[316] Quoted in "Tracing One Package."
[317] *United States v. One Package of Japanese Pessaries*, 86 F .2d 737 (2d Cir. 1936) Online at: http://law.justia.com/cases/federal/appellate-courts/F2/86/737/1567252/
[318] *United States v. One Package,* at 739.

stance towards the "dissemination and teaching of the best methods of birth control."[319] When the government decided not to appeal the case to the Supreme Court, Sanger herself called it "an emancipation proclamation to the motherhood of America."[320] After *One Package*, she was confident that this federal precedent meant that women would be able to obtain birth control from doctors under her ongoing clinic plan. Ultimately, this federal public health ruling all-but signaled the death knell of the moral purity civic lineage ideal of citizenship, garnering widespread public acceptance for the use of birth control in the name of public health.

In 1921, Sanger founded an organization named the American Birth Control League, which would later change its name to Planned Parenthood Federation of America in 1942.[321] By 1945, Planned Parenthood Federation of America documented that American birth control movement has succeeded in establishing more than eight hundred clinics nationwide.[322] Sanger's "clinic plan" proved to be a success. But, in reality, Sanger's victories were not entirely on her terms.

In her writing and speeches, Sanger framed birth control as vital for the freedom of all women and also defended birth control as a matter of women's liberation, equality, bodily integrity, decisional autonomy, and pleasure without anxiety. In her words: "No woman can call herself free who does not own and control her body. No woman can call

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[319] William Laurence, "Birth Control is Accepted by American Medical Body," *The New York Times,* June 9, 1937.
[320] Margaret Sanger, "The Birth Control of a Nation," 1937: *Margaret Sanger Papers,* Library of Congress Microfilm. Available online at: https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=101878.xml
[321] Coleman and Ganong, eds., *Social History,* 1039-40.
[322] Planned Parenthood Federation of America, *Organization, Objectives, Services* (New York, 1942), 3, PPFA-SSC.

herself free until she can choose consciously whether she will or will not be a mother."[323] For Sanger, birth control was a feminist issue, and she emphasized that women needed access to contraceptives in order to become liberated from male tyranny and control their own bodies and lives: Reworking the terms of possessive individualism, she argued that the "woman" must "fight for the right to own and control her own body, for the ownership of her body to do with it as she desires…and it is no [one else's] business what those desires might be."[324] Against this backdrop, it is striking that the vast majority of her political victories depended upon the willingness of the courts to make exceptions in the Comstock laws for doctors and medical professionals, rather than ruling that birth control was an issue of women's rights of any sort. Sanger won piecemeal victories that chipped away at these laws as part of her "clinic plan," but the discourse that persuaded judges was not her goal of empowering women. Rather, Sanger's message was most successful in the political arena when framed in terms of public health. The courts proved willing to undermine the anti-contraceptive laws, but only by deferring to the professional expertise and rights of doctors with little consideration to the sexual and parental interests of women.

[323] Margaret Sanger, *Woman and the New Race* (New York: Truth Publishing Company, 1922), Chapter 8.
[324] Patrician Walsh Coates, *Margaret Sanger and the Origin of the Birth Control Movement, 1910-1930: The Concept of Women's Sexual Autonomy* (Lewiston, NY: Edwin Mellen Press, 2008), 97, quoted from Margaret Sanger in a speech given at a Fabian Society Hall, London, July 15, 1914.

3. Was Margaret Sanger a Eugenicist?

Voluntary Motherhood vs. Fitter Families

Sanger maintained a complicated and vexed relationship with the eugenics movement, and is sometimes given the label 'eugenicist.'[325] So, was she a eugenicist? At first glance, one might intuitively assume that eugenicists would support birth control, particularly to limit the procreation of less desirable members of society. During a time in which virtually everyone (but Catholics) supported eugenic ideas, Sanger sought to form alliances with eugenicists. Appealing to their mutual interests in controlling fertility to promote public health, the journal she founded in 1917, *Birth Control Review*, included numerous articles that spoke favorably of eugenics, some written by Sanger herself.[326] As she put it, "eugenics without birth control seemed to me to a house built upon sands."[327] Like most during the Progressive Era, Margret Sanger was indeed a eugenicist. Nonetheless, Gerald V. O'Brien has emphasized that she was "a tangential figure who sought, and largely failed, to co-opt the growing eugenics movement as a means of supporting her efforts to increase support for the birth control movement."[328] Sanger stated that she only accepted part of their "philosophy." In fact, by arguing that all citizens, including the wealthy, ought to have access to birth control and family planning, she presented a vision of civic reproduction that clashed with the positive fitter

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[325] See, in particular: Angela Franks, *Margaret Sanger's Eugenic Legacy: The Control of Female Fertility* (Jefferson, NC: McFarland & Company, Inc., 2005). See also, Hansen and King, *Sterilized by the State*, 44-47; Gordon, *Moral Property of Women.*

[326] Hansen and King, *Sterilized by the State*, 46.

[327] Sanger, *An Autobiography*.

[328] Gerald V. O'Brien, "Margaret Sanger and the Nazis: How Many Degrees of Separation?" *Social Work* 58, no. 3 (July 2013): 285-287.

families eugenic ideal of citizenship. Her relationship with eugenics in many ways points to a tension in her own civic lineage goals during the Progressive Era.

Sanger spoke out in favor of negative eugenics for the grossly "defective," something for which she is justly criticized today, but her position was more nuanced and contradictory than that of the mainstream the eugenics movement. Even when speaking about the disadvantaged in society, Sanger argued that poverty and a lack of education was usually environmental (not hereditary), and expressed hopes that birth control would help poor women voluntarily limit their families like their wealthier counterparts so they too could focus on raising their children as good citizens. Although eugenicists sometimes supported the use of birth control to limit procreation of the unfit (something Sanger emphasized to establish common ground), raising anxieties about "race suicide," eugenicists were quick to express concerns that the wealthiest and most educated women were having fewer children. These were the women who were more likely to gain access to contraceptives from their private doctors, and they were the women that Theodore Roosevelt called traitors to the American race, addressed in the last chapter, because they would not bear children out of a patriotic duty to strengthen the vitality of the nation.[329] Supporting some eugenics ideas, Sanger stuck by her stance of "voluntary motherhood," except for the truly feebleminded, which she agreed ought to be sterilized by the state if incapable of using birth control. But though she supported many eugenic principles, neither Sanger nor her birth control agenda were accepted as part of the agenda of the eugenics movement. This is because she generally refused to support birth control based

[329] See, for instance, Dyer, *Theodore Roosevelt*.

purely on the basis of class, wealth, education, heritage, or race, and instead argued in favor of granting women more control over their own fertility. She suggested that access to voluntary contraceptives would help all women keep their families at a more manageable size, including middle class women. Her opposition to positive eugenics sparked an uncomfortable rift between her birth control movement and leaders of eugenics groups, such as Laughlin and Davenport at the Eugenics Records Office. Yet as Ellen Chesler has argued in her groundbreaking biography of Margaret Sanger, Sanger's ambitious goals of birth control legalization, sex education, and later infertility assistance would have had no political chance without her appealing to the mainstream rhetoric and ideals of the time, which included groups with unsavory agendas.[330]

Just as Sanger was an ambivalent eugenicist, the eugenics movement was ambivalent about her birth control movement. Eugenicists generally did not trust allowing people of questionable "stock" to voluntarily practice family limitation, preferring an emphasis on state coercion via forced sterilization; nor did they support the proposal that women of "good stock" be allowed the choice to practice family limitation through birth control. They were generally skeptical of voluntarism concerning reproductive matters, and maintained that reproduction was of national import and thus ought to be open to state control. Moreover, while Sanger supported certain negative eugenic ideas either out of personal conviction or brute political tactics (and probably a mix of both), her very vision of the role of birth control in the American family was interpreted by many eugenicists as posing a direct threat to the eugenic fitter families

[330] Chesler, *Woman of Valor*, 15.

ideal of citizenship. On this point, they were correct. Her advocacy of birth control sought to replace the "fitter families" ideal with a smaller and more equitable family defined by "voluntary motherhood," which rejected the positive eugenic ideal of the fitter families. Despite noteworthy matters of agreement and intersection between the two movements, the vision of civic lineage that Sanger supported was eclipsed by the dominant eugenics fitter families regime during her day.

Out of step with her time, Sanger had difficulty courting allies to oppose the dominant fitter families ideal. Somewhat surprisingly, this includes suffragettes. While the eugenicists managed to garner support from the League of Women voters for involuntary sterilization as a "woman's issues," Sanger failed in her attempts to persuade these mainstream suffragettes to support birth control as a general political concern of women in America.[331] In rejecting birth control as a political issue that ought to concern most American women, the LWV's Citizenship Committee specifically cited their dedication to "the family" and their value as "upright mothers" as a reason for not taking up Sanger's controversial cause of birth control.[332]

Sanger's (sometimes successful but often failed) attempts to build alliances with eugenicists and doctors reveals a great deal about the civic lineage policies and ideals she supported; and perhaps most importantly, to what extent she diverged from the dominant eugenics fitter families order of the Progressive Era. Like the most avid eugenicists, Sanger framed her birth control agenda explicitly in terms of civic lineage—or the

[331] See McCann, *Birth Control Politics*, 50-2.
[332] Ibid., 50-2.

reproduction of the nation through influencing the birth of the "right" type of citizens. Her political and legal activism chipped away at the Comstock laws, and an important reason for her victories was the fact that the eugenicists were successful in transforming reproductive issues into a public concern of the state, thereby replacing the moral purity ideal of the family and good citizenship. But unlike the eugenicists, neither her rationale nor her political agenda of birth control for all women was accepted by the public or codified in law during the Progressive Era. A talented organizer and leader, Sanger won victories though her confrontational tactics and built the foundation for more sweeping changes in the future. But before the Second World War, the dominant civic lineage alliance was the eugenics ideal of the fitter families, and Sanger's birth control movement won victories only to the extent that she appealed to cross-cutting goals with eugenicists and experts in the medical profession. This meant that her focus on public health eclipsed her emphasis on women's liberation, and national betterment overshadowed the role of birth control in women's equality as a politically salient issue. Deplorable as her attempts to unite with eugenicists is from our modern viewpoint—indeed her comments about eugenics have become the focus of contemporary scholarship on Sanger—the victories she won happened in large part because she worked through mainstream channels of the medical establishment and framed contraception as a matter of eugenic values such as public health and its impact on national identity.

Conclusion

This has been a transitional chapter. I began by discussing the Anthony Comstock's anti-contraceptive laws, and the ideal of civic reproduction he championed at the dawn of

the twentieth century. The Comstockian "moral purity" ideal, as I have argued, focused on molding proper citizens out of children by promoting Victorian norms of sexuality and striving to keep the economic market of "obscene materials" from corrupting the private sphere of the family. Not only did Margaret Sanger, as the most prominent leader in the early birth control movement, set out to uproot Comstock's anti-contraception laws, but the eugenics movement also clashed with Comstock's notion that everything sexual was obscene when discussed in public. Before the development of a fundamental right to privacy protecting the use of contraceptives by married couples in *Griswold v. Connecticut* (1965), addressed in the next chapter, the eugenics and birth control movements existed side by side (sometimes in conflict and at other times in cooperation) in American politics. Together, these movements shaped the Progressive Era's civic lineage regime, with the eugenics movement having more influence than the birth control movement on the set of policies that comprised the dominant civic lineage regime during this political period. This raises an important question: how did we get from the dominant eugenics fitter families ideal, which framed reproductive matters in terms of public health, to *Griswold* and the development of a right to reproductive privacy? Sanger never framed her argument for birth control in terms of a right to privacy. When she wasn't citing public health and citizenship, she spoke of women's liberation and equality. She made it clear that birth control was a "public issue," stating, "I believe that these things which enslave women [in the private sphere as mothers without reproductive control or choice] must be fought openly, fearlessly, consciously."[333]

[333] Margaret Sanger, "Why The Woman Rebel?" *The Woman Rebel* 1, no. 1 (March 1914): 8.

This is part of what makes the *Griswold* ruling so interesting. Conventional wisdom holds that the *Griswold* case is the culmination of Sanger's work, insofar as the case was organized and spearheaded by Planned Parenthood in the name of overturning the Comstock law. But this does not mean that Sanger's vision of the American family and citizenship prevailed in *Griswold.* Although the legalization of birth control goes against the fitter families positive eugenics ideal and supports some version of "family planning," as we shall see, the Court in *Griswold* speaks little of public health, citizenship, national identity, women's liberation, or gender equality. Instead, Justice Douglas's majority opinion waxes nostalgic about the sanctity of marriage and grounds this right in privacy. Sanger spent her career repudiating Comstock's Victorian conception of family privacy and his moral purity ideal of citizenship by trying to make birth control a legitimate "public issue" and by establishing public clinics as key institutions of voluntary motherhood. Indeed, although the eugenic fitter families ideal replaced the moral purity ideal, it was the birth control movement, as opposed to the eugenics movement, that fought to tear down the anti-contraceptive laws instituted by the Comstockian civic lineage regime. As I have argued, Sanger's campaign won using the mainstream civic lineage discourse of the Progressive Era: Public health. Her own ideal (voluntary motherhood) never gained significant popular support in the shade of the much more popular eugenics agenda. So what are we to make of the fact that the Court finally ruled to strike down all Comstockian anti-contraceptive laws as unconstitutional based on a constitutional right in the privacy of marriage? Where did this right to privacy come from if not from Sanger herself? And when the Supreme Court selected "a right to privacy" (over other options) as the rationale for protecting access to contraception and

later abortion, how did this jurisprudential choice shape the path of civic lineage policy throughout the last few decades of the twentieth century? It is to these questions that we now turn.

CHAPTER 4

From *Griswold* to *Roe*: The Development of a Right to Reproductive Privacy

Introduction

In November 1961, two police officers arrived at the new Planned Parenthood clinic in New Haven, Connecticut to conduct a search for evidence of any violation of the state's anti-contraceptive statute, which had been in effect since the 1870s. The director of the clinic, Estelle Griswold, a distinguished woman in her sixties, met the detectives at the entrance and announced that she was violating the law.[334] Next, she took Detectives John Blazi and Harold Berg on a tour of the Planned Parenthood birth control clinic she opened just ten days earlier. The head doctor was the chief gynecologist at Yale Medical School, Dr. Charles Lee Buxton. This clinic, Estelle Griswold explained, only served married women and focused purely on contraception, but this was a "criminal" establishment in the state of Connecticut. Taking the time to carefully point out the contraceptives they dispensed to patients and explaining how the devices worked during her tour, Griswold told the detectives that she hoped that they would arrest her, so she could challenge the constitutionality of the outdated anti-contraceptive law before the Supreme Court. Many years later, Detective Berg recalled that, "It was one of the easiest

[334] Garrow, *Liberty & Sexuality*, 202-4.

types of investigations you could get involved in. It wasn't one of those investigations where you had to dig out the information…It was sort of 'Here it is; here we are; take us in."[335] Both the clinic's executive director, Estelle Griswold, and medical director, Dr. Charles Buxton were arrested and charged by the New Haven police department for violating Connecticut's 1879 anti-contraceptive law the same month, and the two defendants began preparing to challenge the law in court.[336]

By the 1960s, ten states in the nation—Connecticut, Arizona, Idaho, Kansas, Mississippi, Missouri, Montana, Nebraska, Pennsylvania, and Washington—still had laws on their books that forbid doctors from prescribing contraceptives even when medically necessary to protect the health of their patients.[337] The law in Connecticut was the most stringent of these, because it banned disseminating *information* about birth control to anyone (married or single), in addition to outlawing both the *distribution* and the *use* of contraceptives even in cases in which pregnancy posed a threat to a married woman's health or life. Ironically, although birth control was officially illegal in Connecticut, it was nonetheless widely available.[338] Not only did many private doctors ignore the law and prescribe it to their patients anyway, but also most drugstores sold condoms under the counter for "the prevention of disease" (not birth control). As a result, the people hurt the most by the law were poor women, who did not have access to private physicians willing to prescribe other methods of contraception such as the diaphragm or

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[335] Fred W. Friendly and Martha J. H. Elliot, *The Constitution: That Delicate* Balance (New York: Random House, 1984), 196.
[336] Garrow, *Liberty & Sexuality,* 210.
[337] Wawrose, *Griswold v. Connecticut*, 14.
[338] Emerson, "Brief for Appellants," *Griswold v. Connecticut*, U.S.S.C., O.T. 1964, #496, February, 11 1965.

birth control pill, the latter of which was approved by the FDA in 1960.[339] Poor women also had the most difficulty traveling to nearby states such as New York and Rhode Island, which by the 1960s had already legalized family planning services and birth control clinics.[340] Yet these were the very citizens who most needed public clinics like the New Haven Planned Parenthood clinic, which had a sliding scale (income-based) payment plan for services to accommodate clients who normally could not afford such healthcare from private physicians.

This chapter traces the development of a right to privacy in reproduction and its impact on the political development of America's civic lineage regime during the twentieth century. Broadly, this chapter consists of five parts. In Part 1, I begin with a case study of the birth control movement in Connecticut during the 1930s, which as we shall see championed Margaret Sanger's "clinic plan," discussed in the last chapter, but later failed in Connecticut due to political backlash from the Catholic Church. Indeed, as the last chapter addressed, during its early stages the birth control movement won court victories by opening public clinics and challenging the Comstock laws in the name of public health and "doctors rights." In Part 2, I turn to the landmark case of *Griswold v. Connecticut*, in which the Supreme Court in 1965 finally overturned Connecticut's Comstock law by ruling that a right to privacy protects the use of contraception for married people.[341] As Part 3 discusses, one of the factors that makes this case so important is that the Court decided to strike down the Comstock law by developing a new

[339] Elaine Tyler May, *America Plus the Pill: A History of Promise, Peril, and Liberation* (New York: Basic Books, 2010).
[340] Harriet Pilpel, *The New York Times*, September 19, 1987.
[341] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

line of constitutional jurisprudence—in the form of finding a fundamental right to marital privacy that protects the use of contraception by marriage couples—and grounded its decision in the "sacred" institution of "traditional marriage" in American society. However, rather than ruling in favor of equal protection for women, or based upon socioeconomic status and the role that class plays in structuring unequal access to birth control for low-income women, the Court chose instead to champion a rather conservative ideal of marriage in *Griswold*.

I argue in Part 4 that the concept of marriage celebrated by the majority of the Court in *Griswold* is the postwar ideal of the homemaker mother and breadwinner father in the 1940s and 1950s. Somewhat ironically, this civic lineage regime was already under assault on multiple fronts in the 1960s, including from the civil rights movement, the emerging women's movement, and the counterculture "sexual revolution" on college campuses. I call this the "white picket fence" ideal of the family and good civic reproduction. Like the fitter families eugenic photographs prior to the Second World War, the ideal promoted by the postwar civic lineage regime is preserved on film: in popular 1950s television shows in postwar America, including "Father Knows Best" and "Leave it to Beaver." Although it replaced the inegalitarian eugenic fitter families eugenic ideal as the dominant civic lineage order during postwar America, this regime also—like its predecessor—supported a highly gendered, racialized, and classist model of the reproduction of citizenship. In this regard, as I shall argue, the original *Griswold* ruling was, at first glance, a conservative celebration of an increasingly outdated ideal of

"traditional marriage," not a radical declaration of a right to reproductive or sexual liberty.

With the rise of the "sexual revolution" during the 1960s and 70s, Part 5 explores how the Court extended the right to privacy in reproduction, first established in *Griswold*, to cover birth control for unmarried individuals in *Eisenstadt v. Baird* (1971) and a woman's choice to have an abortion in *Roe v. Wade* (1973).[342] Given the fact that the Court began expanding its new reproductive privacy doctrine over such a short period of time to cover the right of individuals to use birth control and obtain an abortion, I suggest that the Court's celebration of traditional marriage in *Griswold* is a fascinating example of the judiciary relying on a form of "camouflage conservatism" to expand reproductive rights in the name of traditional "family values." Moreover, expanding the right to privacy in *Griswold* in a path dependent fashion, which ignored other constitutional possibilities for deciding these cases, the Court engaged in a process of doctrinal extension which I term "patchwork constitutionalism." These cases have not only increased women's reproductive options and choices in America, but they have had lasting repercussions on civic lineage alliances in American politics and continue to shape our civic lineage regime today. I conclude by emphasizing that the rise of the right to privacy in late twentieth century in no way signals a weakening of the state's involvement of the regulation of reproduction. Rather, it indicates a transition from one dominant civic lineage regime to another. As we shall see, the fact that the Court grounded these civic lineage decisions in privacy and not equal protection has helped to

[342] *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade,* 410 U.S. 113 (1973).

foster the rise of a new civic lineage order. In the next chapter, I will further examine this contemporary neoliberal civic lineage regime. For now, let us take a closer look at the development and trajectory of the right to privacy in reproduction, focusing on *Griswold v. Connecticut.*

1. Connecticut Case Study

To understand the context leading up to the case of *Griswold v. Connecticut* (1965), it is useful to begin with a case study of the early birth control movement in Connecticut. Not only does a more detailed examination of the legal challenges to the Comstock law in Connecticut during the 1930s and 1940s shed important light on the background factors leading up to *Griswold*, but more specifically it does so by revealing two major transitions in the politics of birth control in the United States during the twentieth century. Margaret Sanger, and the early birth control movement more generally, succeeded in reframing birth control as a matter of public health matter as opposed to an issue of moral purity, but the movement nonetheless hit a political wall (in the form of opposition from the Catholic Church) in some states like Connecticut. Framed primarily as a "public health" issue before the Second World War, birth control advocates recast access to contraception as an issue of civil rights by the 1960s. In 1965 in *Griswold*, a majority of the Supreme Court would embrace this argument and endorse a right to privacy for married persons in reproduction. Let us examine this transition, starting with the emphasis on "public health" before the 1950s, which won important victories for

reproductive rights in many areas of the nation, by shifting the law away from Comstock's emphasis on moral purity to "doctors rights." As we shall see in the sections that follow, the transition from being labeled as a "public health" to a "civil liberties" issue serves as critical juncture in the development of civic lineage politics in the United States.

The first birth control clinic in Connecticut opened in Hartford, the capital of the state, in 1935, to provide birth control services on a sliding pay scale to married women, who were not already getting similar services from their own private physician.[343] By opening this clinic in the 1930s, the Connecticut Birth Control League (CBCL)—the precursor of Planned Parenthood—decided to follow Margaret Sanger's "clinic strategy" and break the law. If the state prosecuted them under Connecticut's own Comstock-based anti-contraception law, the CBCL would simply turn to the courts to try to win a judicial exception for "doctors rights." (Margaret Sanger was already operating successful clinics through the doctor's loophole established in the *One Package* decision, so the plan was to do the same thing in Connecticut.[344]) The clinic was a success. They remained in operation for several years without negative action from law enforcement, and the CBCL opened additional clinics across Connecticut. The President of the Connecticut Birth Control League (CBCL), Sallie Pease, began to wonder if the law was a "dead duck" because the state was turning a blind eye to the clinics.[345] But when a local newspaper in Waterbury, a predominately working-class Catholic town, printed a

[343] Johnson, *Griswold v. Connecticut: Birth Control*, 20.
[344] *United States v. One Package of Japanese Pessaries*, 86 F .2d 737 (2nd Cir. 1936).
[345] Sarah Pease, "President's Report," *PPLC-F,* June 2, 1938, cited in Garrow, *Liberty & Sexuality*, 2.

front-page headline announcing, "Birth Control Clinic Is Operating in City," the clergy of the local Catholic Church drafted a resolution against the clinic, which was read from the pulpit of every Catholic Church in Waterbury.[346] The State's Attorney in Waterbury, William Fitzgerald, heard the resolution from the pews on Sunday in Church.[347] Recognizing that it was his duty to enforce the laws, Fitzgerald promptly applied for a search warrant for any "books, records, registers, instruments, apparatus and appliances" used and kept for the purpose of violating the criminal law" at the clinic.[348] When detectives seized a large stock of contraceptives, the city's Police Department decided to enforce the old 1879 anti-contraception statute by arresting the clinic's directors in 1939.[349]

This brings us to the case of the *State of Connecticut v. Nelson* (1940).[350] After the staff physicians, Roger Nelson and William Goodrich, and the founder and director of the clinic, Clara Lee McTernan, a certified nurse, were charged under the 1879 law, the Connecticut Birth Control League (CBCL) retained the legal council and services of Warren Upson. A Yale Law School graduate and junior partner in one of Waterbury's top law firms, Upson's mission was to use Sanger's victory in *One Package* as a model

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[346] "Birth Control Clinic Is Operating in the City," *Waterbury Democrat*, June 9, 1939.
[347] The resolution: "Whereas, it is the teaching of the Catholic church that birth control is contrary to the natural law and therefore immoral, and Whereas it is forbidden by statute law to disseminate birth control information for any reason whatsoever or in any circumstance, and Whereas it has been brought to our attention that a so-called birth control clinic, sometimes called a maternal health center, is existing in Waterbury as admitted by the superintendent of Chase Dispensary, according to the papers, therefore, be it Resolved, that this association go on record as being unalterably opposed to the existence of such as clinic in our city and we hereby urge our Catholic people to avoid contact with it and we hereby publicly call the attention of the public prosecutors to its existence and demand that they investigate and if necessary prosecute to the full extent of the law" *Catholic Transcript*, June 15, 1939, 1.
[348] A copy of Fitzgerald's warrant is in the Connecticut Supreme Court Record and Briefs, *State of Connecticut v. Certain Contraceptive Materials*, #1780, January 1940, A-144, p. 173.
[349] Johnson, *Griswold v. Connecticut: Birth Control*, 23.
[350] *State v. Nelson,* 126 Conn. 11 A. 2d 856 (1940).

for establishing a doctor's exception to the Connecticut law. He filed a demurer on behalf of his clients, and put together an impressive brief.[351] (A demurer is a legal claim in which a defendant admits to the facts of the case being used against them, but argues that there are legal reasons why they are not guilty even if those facts are true.) In his brief, which was over fifty pages long, Upson argued that that the main reason his clients were not guilty was because the Comstock statute violated the liberty of the defendants guaranteed by the Fourteenth Amendment of the U.S. Constitution in addition to analogous provisions in Connecticut's own state Constitution.[352] For the law to be constitutional, Upson emphasized, it needed to grant an exception for licensed medical professionals to give their best professional advice regarding the health of the women visiting the Waterbury clinic. Upson also argued that Comstock's primary concern was banning obscene literature and photographs, and that the dissemination of information about contraceptives to adult married women by medical professionals should not qualify as obscene and was simply a public health matter.[353]

Persuaded by the public health argument but not willing to strike down the entire law, Judge Wayne in the initial trial followed the *One Package* precedent to rule in favor of the clinic staff.[354] However, on appeal to the highest court of the state, the Connecticut Supreme Court voted 3-2 to overturn the lower court ruling in *State v. Nelson*.[355] The court emphasized that this was not a dead law left by the legislature to languish in outdated books since 1879, rather the legislature had actively addressed and rejected

[351] Upson, "Brief on Demurrer," *State of Connecticut v. Roger B. Nelson*, July 25, 1939.
[352] Ibid.
[353] Ibid.
[354] Garrow, *Liberty & Sexuality*, 69-70.
[355] *State v. Nelson*, 126 Conn. 11 A. 2d 856 (1940).

proposals by birth control advocates for a health exception to be added to the law on several occasions in the 1920s and 1930s. If the democratic lawmakers had intended for such an exception to exist, reasoned the judges, then the Connecticut representatives would not have voted against it. The state's highest court upheld the Waterbury convictions, and the CBCL felt that its only option was to close down all of the clinics operating in Connecticut to avoid further prosecution.[356]

1.2 The Significance of *Nelson*: The Public Health Frame

The *State v. Nelson* ruling was a major blow to the birth control movement in Connecticut. When the CBCL appealed the *Nelson* ruling to the U.S. Supreme Court, the Court declined to hear the case just as it had in the similar Massachusetts case of *Commonwealth v. Gardner* (1938).[357] In the aftermath of *Nelson*, the Connecticut Birth Control League changed its name to Planned Parenthood League of Connecticut following the national name change in the early1940s. The change was an attempt to seem less radical in order to win political support for "family planning" nationwide. In the meantime, The Connecticut Planned Parenthood continued to prioritize getting a doctor's exemption to the law. The issue of public health remained the primary concern throughout the 1940s. Hence, in 1941, the Connecticut Planned Parenthood League

[356] Fitzgerald, "State's brief on Respondent's motion to dismiss," *State of Connecticut v, Certain Contraceptive Materials,* July 29, 1939, and *State v. Nelson*, 126 Conn. 11 A. 2d 856 (1940).
[357] *Gardner v. Massachusetts*, 305 U.S. 559: "appeal dismissed for want of substantial federal question." Original case: *Commonwealth of Massachusetts v. Carolyn T. Gardner*, 300 Mass 372, 15 N.E.2d. See also: *New York Herald Tribune*, October 11, 1938, and Harriet F. Pilpel, "Memorandum Regarding the United States Supreme Court's Dismissal of the Massachusetts Birth Control Case," October 18, 1938, cited in Garrow, *Liberty & Sexuality,* as part of Upson Papers.

decided to return to court to apply for a "declaratory judgment" as to whether the 1879 state law prohibited Dr. Wilder Tileston from prescribing contraceptives to married women in cases in which pregnancy would endanger their health and pose a risk to their lives. The case was fatally flawed on a procedural level and the Supreme Court ruled in 1943 that Dr. Tileston lacked standing because his patients, not he, were claiming injury from the law.[358] With back-to-back judicial losses in *Nelson* and *Tileston*, the birth control movement in Connecticut was at a standstill for almost twenty years. Clinics remained closed throughout the state, and local activists focused unsuccessfully on continuing to repeal the law at each session of the Connecticut assembly from 1941 to 1963.[359]

Upon analysis, what is striking about the early Connecticut birth control movement is how closely it conformed with Sanger's "clinic plan," and focused on the goal of getting a medical exemption—or winning "doctor's rights." There is no mention of privacy in any of these early cases, and nor is there an emphasis on women's liberation or equality (i.e. the more feminist prongs of Sanger's arguments). Nonetheless, while largely ignored by the courts, it is important to note that Upson's brief in *Nelson* included a powerful section invoking civic lineage issues by theorizing about the relationship between citizenship and reproductive rights. He argued that the right to use contraceptives was a natural right, protected by the U.S. Constitution as prior to the sociopolitical order and hence, he argued, a right of citizens protected by the American political system. As Upson puts it, "The power to commence a pregnancy is one of the

[358] *Tileston v. Ullman,* 318 U.S. 44, 46; Garrow, *Liberty & Sexuality*, 94-105.
[359] Johnson, *Griswold v. Connecticut: Birth Control*, 34-35.

inalienable rights of the citizens of Connecticut."[360] Upson was willing to grant that the state retained the power to "control abortions," but he emphasized that "in the attempt to control conception, the State interferes with a natural right which inheres in its citizens…the decision as to whether or not a married couple shall have children is a decision peculiarly their own…"[361] Upson (ahead of his time) forcefully proclaimed that, "If the people of Connecticut have any natural rights whatsoever, one of them certainly is the right to decide whether or not they shall have children…"[362] This part of the constitutional argument presented in *State v. Nelson* typically gets lost in discussions about the development of reproductive privacy rights. And when Upson filed his brief the argument fell on deaf ears, but he nonetheless sketched out a foundation for future civic lineage arguments that the right to use contraceptive devices is a right of citizenship, which he argued was fundamental both to the marriage relationship and to an individual's bodily integrity.[363]

The fact that Upson's "natural rights" argument went largely unnoticed by both judges and activists alike is telling, particularly with respect to how birth control was conceptualized during this time. At this point, birth control was considered a doctor's right—perhaps a matter of public health and national welfare—but not ranked as a broader civil liberties concern even by groups like the American Civil Liberties Union (ACLU). Aware of the limitations of "doctor's exceptions," Margaret Sanger, in a series of speeches and articles in the early 1940s titled, "Birth Control and Civil Liberties,"

[360] Upson Brief.
[361] Ibid.
[362] Ibid.
[363] Garrow, *Liberty & Sexuality,* 70.

sought to establish a firmer connection between the birth control movement and civil liberties. Aimed to create alliances with groups like the American Civil Liberties Union (ACLU) she urged civil liberties advocates to recognize that birth control was fundamental to American freedom, which, Sanger emphasized, must include "the right of free men and free women to control, as best they may, their own destiny on earth, their right to undertake the deep and satisfying act of parenthood, not by chance or in ignorance, but in full knowledge of their responsibility—to the child, to themselves and to their nation."[364] Drawing a connection between childbirth and national strength, Sanger threw her support behind an alternative conception of civic lineage that endorsed parental choice and family planning as a vital component of American freedom. Although Sanger's speeches did not change either ACLU or government policy at the time, she helped to spark a cross-pollination of ideas between lawyers working on both birth control and civil liberties.[365] Almost two decades later in the 1960s, the ACLU would work with Planned Parenthood on defending contraception as a civil liberty and developing "a right to privacy."[366]

During the early 1940s, however, the idea that birth control might be a civil liberty—or not just a public health issue but also a right or even duty of citizenship—garnered little support from either activist groups or the government. Upson faced the hurdle that birth control was still considered a public health matter by the government and not an issue of civil liberties. The eugenics movement dominated ideas about the

[364] Margaret Sanger, "Birth Control and Civil Liberties," October 13, 1941, MSP-MF, reel S72.
[365] Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (New York: Oxford University Press, 2013), 96-119.
[366] Ibid., 102-3, describing Melvin Wulf's ACLU *amicus curie* brief in the *Poe* case.

relationship between the State and the reproduction of citizens, prior to the United States joining the Second World War. As we have seen in previous chapters, the eugenics movement held that the procreation of citizens ought to be influenced and controlled by the state in the broader interests of national identity and welfare. This way of framing the reproduction of citizenship—and its corresponding civic lineage discourse and public policies—rejected any notion that procreation and marriage was somehow a natural right possessed by people prior to the State or that it was essential to the freedom and equality of citizens within the state. Under the eugenic fitter families regime of citizenship, the future of national identity was dependent upon proper reproductive politics and laws targeting human breeding. Upson's natural rights argument didn't speak in terms of the dominant civic lineage discourse of the times, and was ignored by the courts. Conversely, his public health argument and support for "doctor's rights" did have a chance, but lost by one vote in a state supreme court controlled by former legislatures who had voted for the very law he was challenging while they were serving in the State Assembly.[367] Although birth control had already made the transition from a moral to a medical issue (under the federal law), in order for birth control to qualify as a right of citizenship, it had to next transform from being labeled as a predominately medical issue to a civil rights issue in America.

[367] See Garrow, *Liberty & Sexuality*, 76. To quote Garrow, "the composition of the Connecticut Supreme Court offered few reasons for optimism…four were Congregationalists and the fifth a Baptist, but it was not an aggressive or creative court…all five were Republican, all five had previously served as Superior Court trial judges, in line with a long-established Connecticut tradition. *Three of the five had themselves served as members of the legislature* …" [italics mine].

2. Griswold & Privacy

Let us now return to Estelle Griswold and her New Haven birth control clinic. When Griswold became executive director of the Planned Parenthood League of Connecticut (PPLC) in the 1950s, her mission was to revive the nearly dead birth control movement in the state and challenge its Comstock law.[368] First, she attempted to get the Court to issue a declaratory judgment overturning the Connecticut law. She recruited Yale law Professor Fowler Harper and civil liberties attorney Catherine Roraback to represent Dr. Charles Buxton and several of his married patients—in particular, women whose health and lives might be imperiled by pregnancy—in *Poe v. Ullman* (1961).[369] But in a 5-4 vote, the majority of the Supreme Court ruled to dismiss the case on the grounds that it was not ripe, because the plaintiffs had not been charged by the state for violating the law. The majority opinion, written by Justice Felix Frankfurter, sent the clear message to the PPLC that it needed to prove that the Connecticut law was still actively enforced by the state and more than merely a "harmless empty shadow."[370]

In his concurring opinion, Justice William Brennan sympathetically informed the plaintiffs that they would have a properly pressing controversy if they opened a public clinic and the state acted against the clinic as it had twenty years earlier in *Nelson*.[371] So, Estelle Griswold immediately began organizing to open a clinic "and get arrested" to challenge the law before the Court. After Estelle Griswold successfully started a public clinic in New Haven and was arrested along with Dr. Buxton, there was already an

[368] Johnson, *Griswold v. Connecticut: Birth Control*, 36-43.
[369] *Poe v. Ullman*, 367 U.S. 497 (1961).
[370] Ibid., at 508.
[371] Ibid., at 509.

organized network of lawyers and interest groups, which had united in *Poe v. Ullman* (1961) to support them. Despite the loss in *Poe*, Estelle Griswold's Planned Parenthood state branch—with the national Planned Parenthood and ACLU united behind them—were buoyed by the fact that both Justices Harlan and Douglas wrote passionate dissents in support of a right to privacy (mentioned in the *Poe* brief along with public health).[372] They now had a live case to bring before the Court, and several Justices appeared receptive to idea that a right to privacy justified overturning the old Comstock law.

2.1 The Decision

In *Griswold v. Connecticut*, decided in June 1965, the Supreme Court ruled 7-2 that Connecticut's ban on contraception was unconstitutional.[373] After over twenty years of failed challenges to Connecticut's Comstock law, the majority overturned the Connecticut law on the grounds that it violated a "right to privacy." The fact that the Constitution does not explicitly mention privacy makes this reasoning particularly interesting. This marks several key changes from the *Nelson* years. First, it is noteworthy that every justice—even the dissenters—expressed their opinion that the Connecticut Comstock law was absurd irrespective of their opinion of its constitutionality. Second, seven of the justices readily framed married couples using contraceptives as a civil right. Finally, out of all the ways they could have justified this as a civil right, the majority gravitated towards theorizing a new right to privacy in

[372] Ibid., Douglas dissent at 510, and Harlan dissent at 523.
[373] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

marriage to support this rights claim. No longer focusing on issues of public health or social welfare, the Court turned its jurisprudential gaze to privacy. So, how did this happen? Let us examine these opinions in more detail, before proceeding to the civic lineage questions it raises: namely, how did reproduction transition from being a purely public health issue to a civil right? And what does viewing it as protected by privacy rights mean for civic lineage politics then and now?

2.2 The Opinions

Just over six pages in length, Justice Douglas' majority opinion is remarkably short for a landmark decision. According to Douglas, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give" the right to privacy "life and substance."[374] Douglass argued that the right to privacy is implicit in a number of Amendments, including the First Amendment's freedom of speech, religion, and association, the Third Amendment's prohibition against the quartering of soldiers protecting the privacy of the home, the Fourth Amendment's right of the people to be secure in their persons and home, the Fifth Amendment's right against self-incrimination, and the Ninth Amendment's proclamation that the people retain unenumerated rights. Echoing Upson's "natural rights" argument, Douglas writes:

> We deal with a right of privacy older than the Bill of Rights—older than political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not

[374] Ibid., at 484.

> political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[375]

To give the right to privacy the veneer of historical basis and legitimacy in the American constitutional tradition, Douglas relied on past Supreme Court precedent, emphasizing cases concerning reproduction such as his own majority opinion in *Skinner v. Oklahoma* (1942), and cases focusing on raising children with a particular emphasis on *Meyer v. Nebraska* (1923) and *Pierce v. Society Sisters* (1925).[376] These latter two cases, Douglas argued, show that the Court had already ruled that the Constitution protects privacy in the home and family, including the right to "marry, establish a home and bring up children."[377] He concludes his opinion with the specter of the state intruding upon married couples on a most intimate level: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship."[378]

The first concurrence, which was twice as long as Douglas's majority opinion, was issued by Arthur J. Goldberg and joined by Chief Justice Warren and Justice William Brennan. (It is worth noting that Goldberg's clerk, Stephen Breyer, researched and wrote the first draft, and in 1994 Stephen Breyer became the 108th Justice on the Supreme Court, appointed by President Bill Clinton.[379]) Justice Goldberg's concurrence focused

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[375] Ibid., at 486.
[376] Ibid., at 482.
[377] *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society Sisters*, 286 U.S. 510 (1925), quote from *Meyer*.
[378] Griswold v. Connecticut, at 486.
[379] See e.g., Laura Krugman Ray, "The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg*," Penn State Law Review* 115, no. 1 (2010-2011): 116-29. Copy available online at: http://www.pennstatelawreview.org/115/1/115%20Penn%20St.%20L.%20Rev.%2083.pdf

on the Ninth Amendment concerning rights retained by the People not specifically enumerated in the text of the Constitution. He asserted that the "concept of liberty" protects some fundamental rights, including a right to privacy in marriage, that are not specifically enumerated in the text of the Bill of Rights."[380] Justice Douglas referred to the Ninth Amendment, but did not focus on it. In contrast, Goldberg made this the heart of his defense of a right to marital privacy. He emphasized that the Ninth Amendment demonstrated that the framers of the Bill of Rights believed that the rights of the people went beyond those enumerated in the Constitution and encompassed a right to privacy. As he put it,

> Although the Constitution does not speak in so many words of the right to privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family –a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgement by the Government though not specifically mentioned in the Constitution.[381]

By speaking about marital privacy as a right because it was "a relation as old and as fundamental as our entire civilization," Goldberg, arguably even more so than Douglas, relies on a natural rights argument (akin to Upson's) to suggest that this was exactly the type of right the Framers meant to protect when drafting the Ninth Amendment.[382]

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[380] *Griswold v. Connecticut*, at 486-487.
[381] Ibid., at 495.
[382] *Griswold v. Connecticut*, at 496.

Justice John Marshall Harlan wrote the second concurring opinion. The grandson of the famous dissenting Justice against racial segregation in *Plessy v. Ferguson* (1896), the younger Harlan authored the most important dissenting opinion in *Poe v. Ullman* in support of the right to privacy for married couples.[383] (*Poe*, as mentioned earlier, was the most recent failed Connecticut Planned Parenthood case against the Comstock law and paved the way for the *Griswold* case a few years later.) Harlan's dissent in *Poe* was much longer, and he referred to it in his concurrence in *Griswold*. In fact, Harlan's dissent in *Poe* made him, along with Douglas, one of the founding voices of reproductive privacy. Longer than all the other opinions combined in *Poe,* Harlan's dissent vehemently supported the existence of a constitutional right to privacy, grounding it in the due process clause of the Fourteenth Amendment and defining it as a "rational continuum" that encompasses "freedom from all substantial arbitrary impositions and purposeless restraints."[384] Citing scores of cases to defend this broad conception of privacy, he went far beyond any of the briefs in discussing this new right as a matter of jurisprudential continuity. Harlan placed emphasis on Douglas's majority opinion in *Skinner v. Oklahoma* (1942), discussed earlier in Chapter 2, as establishing a right to bodily privacy and reproductive integrity from intrusion by the state. To Harlan, the state of Connecticut violated the privacy of the sacrosanct institution of marriage, and this was unacceptable. He maintained that, "the sweep of the Court's decisions, under both the Fourth and Fourteenth Amendments amply shows that the Constitution protects the

[383] *Plessy v. Ferguson*, 163 U.S. 537 (1896): See Harlan dissent in which the elder Harlan famously argued that racial segregation violated the Fourteenth Amendment's equal protection clause. His dissent was influential in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) by the Warren Court not long before *Griswold* (1965).
[384] *Poe v. Ullman*, 367 U.S. 497 (1961), at 550-2.

privacy of the home against all unreasonable intrusion whatever character."[385] Noting that laws targeting procreation determine "when the sexual powers may be used and the legal and societal context in which children are born and brought up," Harlan emphasized that these civic lineage policies form "a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis."[386]

In his concurrence in *Griswold*, Harlan cited his *Poe* dissent and briefly repeated his due process support for a right to marital privacy. Unlike Douglas, Harlan did not feel the need to examine the Bill of Rights for any "penumbras," but rather he believed that the Due Process Clause of the Fourteenth Amendment endorsed a broad enough concept of liberty to protect a right to privacy in marriage. Given that Harlan had the reputation for being an advocate of judicial restraint and was widely viewed as the principled conservative on the Warren Court, his passionate support for a right to privacy is interesting given the conservative backlash against the right to privacy today. As Harlan put it, "The Due Process Clause of the Fourteenth Amendment, stands, in my opinion, on its own bottom."[387]

Justice Byron White wrote the third and final concurrence. He attacked the law on more narrow grounds, emphasizing that the state's purpose for enacting the law—which the attorney for Connecticut named was to discourage illicit sexual relations—was not rationally sufficient to justify the scope of the state to cover married couples. Focusing on due process, he argued that the statute arbitrarily denied married people a

[385] Ibid., at 550.
[386] Ibid., at 546.
[387] *Griswold v. Connecticut,* Harlan dissent, at 500.

key liberty without due process of law.[388] His argument is not explicitly grounded in a right to privacy, but it is rooted in a related concept of marital liberty that shares much in common with the idea of marital privacy.

Finally, the two dissenting Justices, Hugo Black and Potter Stewart, admitted that they did not agree with the law and found it downright absurd, but they could not find anything in the text of the Constitution that forbid state's from passing "stupid laws."[389] Speaking of the majority's emphasis on a right to privacy, Justice Black wrote:

> The Court talks about a constitutional "right to privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge "privacy" of individuals. But there is not…I get nowhere in this case by talk about a constitutional "right to privacy" as an emanation from one or more constitutional provision. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.[390]

Accusing Douglas of sloppy jurisprudence, Black raised the dreaded ghost of *Lochner v. New York* (1905) and the specter of judges making rather than simply interpreting the law: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians…"[391] Likewise, in his separate dissent, Potter Stewart wrote that the Connecticut statute was, in his view, an "uncommonly silly law," but there was nothing in the Constitution to use to strike it down.[392] Endorsing privacy as a political ideal and not a judicial prerogative, he wrote that "I believe the use of contraceptives in the

[388]Ibid., at 502-4.
[389] Ibid., at 507.
[390] Ibid., Back dissent, at 508-9.
[391] Ibid., at 526.
[392] Ibid., Stewart dissent, at 528.

relationship of marriage should be left to personal and private choice," and he emphasized that he supported the idea that "professional counsel about methods of birth control should be available to all."[393] But since the right to privacy was not protected by the Constitution in the realm of birth control, he argued that the people of Connecticut were charged with repealing the law through the normal democratic process in their Assembly.

2.3 Analysis:

What are we to make of these six separate opinions in this landmark case on birth control? Although the Court in *Griswold* fractured into numerous opinions, it is interesting to note that several factors stand out as striking points of consensus. For instance, it appears that each of the nine justices—yes, every single one—makes it clear that he *politically* disagrees with Connecticut's anti-Contraception law and supports the legalization of birth control for married couples. When compared to the Court that refused to hear *Nelson* and *Gardner* twenty years earlier, this represents a remarkable point of political consensus, despite their doctrinal points of disagreement over constitutional interpretation. Likewise, it is interesting to note that the public health argument, which dominated the birth control debate throughout the 1920s to the 1950s, is eclipsed by a completely different debate about a fundamental right to marital privacy in *Griswold*. Indeed, out of all the ways the Court could have justified striking down the law, the justices in the majority gravitated towards theorizing a new right to privacy in

[393] Ibid., at 527.

marriage to support this right. What at first appears to be an unusually fractured Court in *Griswold* is actually a Court that found a surprising degree of agreement before splintering over where in the Constitution to locate a right to marital privacy. This political consensus over the desirability of legalized birth control for married couples—despite disagreement among the justices about whether or not it is protected by the Constitution (or where it is protected in the Constitution)—indicates, as I shall argue below a significant shift in the civic lineage order associated with the rise of a right to privacy in reproduction.

3. Why Privacy?

This section focuses on the significance of the Court's decision to articulate a right to marital privacy in *Griswold*. The Court's emphasis on a fundamental right to marital privacy in *Griswold*, protecting birth control use by married couples, represents a fascinating civic lineage development. No longer focusing on issues of public health or social welfare, the idea that reproductive matters qualify as a civil liberty is a pivotal moment in the development of civic lineage politics in America. This raises a set of important questions: Why did the Court endorse a right to marital privacy when there were other options for constitutionally overturning the Connecticut law? And what does the advent of a right to marital privacy in *Griswold* indicate about the trajectory of civic lineage politics during this time? Finally, in particular, does *Griswold* represent a loosening of the civic lineage regime, with the state stepping back in the name of

preserving the privacy of citizens from state interference? Or does it represent support for a new dominant civic lineage regime? As I argue below, it does indicate support for a new dominant postwar civic lineage regime.

In a law review article, titled "Nine Justices In Search of a Doctrine," which Thomas Emerson, also a professor of at Yale Law, published shortly after arguing and winning the *Griswold* case, he noted that there were at least five ways the Court could have chosen to strike down the Connecticut law.[394] Acknowledging that "privacy" was by no means the only or inevitable outcome of the case, he wrote, "The case of *Griswold v. Connecticut*, like few others in recent times, presented the United States Supreme Court with a hopelessly unsupportable piece of state legislation and an unusual variety of possible doctrinal solutions."[395] According to Emerson, the five options the Court could have followed to strike down the law were as follows: (1) the Court could have relied on the equal protection clause, (2) the First Amendment, (3) substantive due process, (4) the right to privacy, or (5) the Ninth Amendment. But while the "Connecticut law as a matter of social policy, had little or nothing to be said for it…and remained as a relic of a Comstockian philosophy which had long since ceased to be widely held," Emerson emphasizes the "problem with the case was that the issue did not readily fit into any existing legal pigeonhole."[396] To put it another way, the difficulty that the Court faced in *Griswold* was that there was no clear Supreme Court precedent addressing the matter of

[394] Thomas Emerson originally published the article in 1965 in a special issue of Michigan Law Review, with a group of commentaries by prominent scholars on *Griswold* and the right to privacy (Original Ref: 64 (1965): 219-234). A copy of the article is now available online through Yale University's Faculty Series: Thomas I. Emerson, "Nine Justices in Search of a Doctrine, *Faculty Scholarship Series,* Paper 2803, 1965. http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3762&context=fss_papers
[395] Emerson, "Nine Justices," 219.
[396] Ibid., 219-20.

birth control as a civil right, nor does the Constitution ever explicitly mention issues of sexuality, reproduction, or contraception in its text. This meant that "whatever course the court took," the path would not be simple, because it would "be forced to enter uncharted waters [and] its action was bound to be pregnant with possibilities crucial to the development of the law in a vital area of American life."[397] In sum, Emerson suggests that each of the five options the Court could apply to this case would spur an alternate path in constitutional development, which would in turn shape the future trajectory of reproductive law.

So, what does it mean for the civic lineage regime that the Court chose privacy to overturn Connecticut's anti-contraception law over alternative routes? Of all five options mentioned by Emerson, the fact that the Court chose privacy over equal protection serves as a noteworthy critical juncture in the development of civic lineage policy. This decision would have important ramifications in the future. In *Griswold*, rather than striking down the Connecticut law in the name of equality—whether it be the right of a woman to determine the timing and number of her pregnancies or even the class distinction of the state only going after public clinics that served low-income women—the Court based its decision on the grounds of a married couples right to privacy. Unlike a right to privacy, which is not mentioned in the text of the Constitution, equal protection has the benefit of being an enumerated right under the Fourteenth Amendment. But although the Warren Court had begun extending equal protection to racial discrimination during the black civil rights movement, the idea of extending equal protection on the

[397] Ibid.

basis of sex or class in this case would have paved new ground in 1965. The Court had the opportunity to consider using equal protection doctrine in *Griswold* as an alternative to privacy, but consciously chose to reject this path. Let us briefly examine why the Court chose privacy over equal protection, before turning to the civic lineage implications of this important decision.

During the *Griswold* case, John Hart Ely, one of Chief Justice Earl Warren's clerks and later a law professor at Yale, wrote a memo to the Chief Justice on precisely this topic.[398] Ely first took aim at the idea of a right to privacy in his memo, stating that he disagreed with the arguments made by Emerson, Planned Parenthood, and the ACLU that a right to privacy can be considered a fundamental right enumerated in the Constitution.[399] But in my view, the most interesting aspect of this memo is that Ely recommended that the Court use equal protection doctrine to strike down the Connecticut law. Noting that the law has only been enforced against public clinics serving poorer members of the community and not against private physicians or individual women, Ely encouraged the Chief Justice to focus on the inequitable enforcement of the law against low-income women. "Although this argument takes up little in the appellants' brief," which focuses on privacy, wrote Ely, the equal protection argument "is one which to me seems very important."[400] Addressing the amicus curie briefs in his memo, Ely also

[398] John Hart Ely, Clerk to Justice Earl Warren, *Memo on Griswold v. Connecticut*, February 26, 1965.
[399] Against privacy, Ely wrote: Just as I think the Court should vigorously enforce every clause in the Constitution, I do not think the Court should enforce clauses, which are not there. No matter how strong a dislike for a piece of legislation may be, it is dangerous precedent to read into the Constitution guarantees that are not there. Despite Justice Brandeis's lifelong crusade for a right to privacy, and despite the desirability of having such a right as a basis of a tort action, the Constitution says nothing about such a right (Summarized in Johnson, *Griswold v. Connecticut: Birth Control*, 136-7).
[400] Ely, *Memo on Griswold* (1965).

discussed the brief by the American Civil Liberties Union (ACLU), noting that its shorter discussion of equal protection under the Fourteenth Amendment seemed stronger than its longer privacy argument. Concluding that the anti-contraceptive law was being selectively enforced in an invidious manner, he drew a parallel between the Connecticut law and an Asian discrimination case in California from 1885 called *Yick Wo v. Hopkins*.[401] The Court in *Yick Wo* found an equal protection problem with a California law, which used building codes to discriminate against Chinese laundry businesses. In the words of the *Yick Wo* Court, the law might "be fair on its face and impartial in appearance," but it was nonetheless applied "with an evil eye and an unequal hand." Ely recommended to the Chief Justice that the Connecticut law be overturned "on the ground that the law is administered so as to hurt only the ill-informed or poor."[402]

Although Ely flagged this equal protection argument, this line of justification was an uphill battle in the *Griswold* case for two reasons. First, the issue of sex discrimination was off the table. Although the Court would later recognize in *Planned Parenthood v. Casey* in 1992 that, to quote Justice Sandra Day O'Connor, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," the Supreme Court did not extend the equal protection clause of the Fourteenth Amendment to women until the 1970s.[403] Despite the fact that pregnancy uniquely impacts women compared to men, Emerson never raised the issue of sex discrimination in his entire *Griswold* argument,

[401] *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).
[402] Ely, *Memo on Griswold*, (1965).
[403] *Panned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, pp. 855-6.

reflecting the general lack of support during this time for equal protection for women.[404] He never mentioned the Nineteenth Amendment's guarantee of voting rights to women to ground equality, or tried to extend the Fourteenth Amendment's Equal Protection Clause to sex in this case. Unlike his privacy argument, the idea of equal protection for women was simply not ripe for the time. In fact, the first time the Court struck down a law as unconstitutional for discriminating against women, using the equal protection clause, was not until *Reed v. Reed* in 1971.[405] This happened over half a decade after the women's movement gained momentum following *Griswold*. Conversely, Emerson, Ely, and the ACLU all discussed concerns about equal protection based on socioeconomic status, but as Emerson acknowledged in his law review essay afterwards, an equal protection ruling based upon class would have been a much more radical decision than one based on marital privacy. In his words, "It will not be easy to reconcile such equal protection theories with the economic and social laissez-faire assumptions and practices upon which our society has operated over many years and to which it still largely adheres."[406] Whereas equal protection for women was beyond the reasonable ideational scope of constitutional argument at the time, equal protection based on socioeconomic disadvantage threatened to destabilize the economic foundation of American society. Marriage, in contrast, was a widely held traditional value in society. As Emerson

[404] Emerson, "Brief for Appellants," *Griswold v. Connecticut*, U.S.S.C., O.T. 1964, #496.
[405] *Reed v. Reed*, 404 U.S. 71 (1971).
[406] Emerson, "Nine Justices," 221.

portrays the situation, privacy was a much more narrow and less radical position for the Court.[407]

By rejecting equal protection, the Court closed one path and opened another. *Griswold v. Connecticut* is ranked among the most important landmark decisions in the twentieth century. The first time that the Court articulated that a right to privacy protecting reproduction within marriage, what makes the *Griswold* decision particularly significant is that it marks the beginning of a line of politically controversial constitutional jurisprudence on the right to privacy regarding a range of procreative and sexual matters. The right to privacy would later be used by the Court to justify the abortion decisions of *Roe v. Wade* (1973) and *Doe v. Bolton* (1973), which have eclipsed in many respects the original establishment of the right with its focus on marriage in *Griswold*.[408] But despite the ongoing assault on constitutional privacy doctrine from the political right today, I want to emphasize that the original *Griswold* ruling was rather conservative in its scope and political implications. The majority's emphasis on *marital* privacy was the heart of the opinion. "We deal with a right to privacy older than the Bill of Rights," wrote Justice Douglas, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[409] By celebrating what it viewed as "traditional marriage," the Court made no gestures towards altering marriage

[407] Praising the Court for its choice, Emerson writes: "One the whole, the Court's choice of the privacy doctrine as the basis of its decision seems sound. Unprecedented as it was, and as broad and ill-defined as it remains, the doctrine still represents the *narrowest and most precise formula available*, and the one most relevant to the issues presented. This creation of a new constitutional protection meets a critical need of society, and the new doctrine seems to have a viable and significant future" (233-4).

[408] *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).
[409] *Griswold v. Connecticut*, at 486.

or women's place in it. Rather than ruling in a manner that might restructure traditional domesticity or give women birth control in the name of women's liberation—for indeed birth control could liberate women to pursue their ambitions, thereby reordering the meaning and structure of marriage—the Court ruled in favor of marital privacy in a way that celebrated marriage in its patriarchal sense without challenging either the socioeconomic or gendered landscape of the American family or society.[410] Given the political controversies associated with topics relating to non-marital sex, focusing on the sanctity of marriage was a successful strategy on Douglas's part for deflecting political opposition to *Griswold*.

Douglas has received a great deal of criticism for his vague use of the term "penumbra" to establish a fundamental right. However, in the months following the *Griswold* decision, virtually every legal commentator who analyzed the case agreed that the Court made the correct decision by striking down the Connecticut law.[411] While many criticized the "nebulous language" and "muddy reasoning" in the majority opinion by Douglas, the anti-contraceptive statutes seemed to most Americans as inappropriate and unacceptable invasions of their personal liberty in an intimate dimension of their lives by the state.[412] They were happy to see the Court step in and strike it down. By

[410] This is noteworthy: the conservative ideal of marriage supports a seemingly not-so conservative right involving sex. In a brief filed in *Poe*, the state of Connecticut had recently spelled out its state interest in preserving marriage in such a way that it retained its patriarchal structure, focusing on the connection between birth control and women's place within the institution of the family: "The State and society expects that the parties will, as a result of voluntarily entering the marital status, carry out the duties and obligations required of such a relationship" (Murray paper 327). Due to the threat that birth control posed to the order of society—presumably by having the potential to alter women's place in the family and in society—the state argued that the Court should uphold the Connecticut law.
[411] David J. Garrow, "Privacy and the American Constitution," *Social Research* 68, no. 1 (Spring 2001): 61.
[412] Ibid., 61-2.

1965, national public opinion polls revealed that more than 80 percent of women supported the use of birth control by married women and most married woman had used birth control at one point or another (Johnson 20).[413] Moreover, on May 9, 1960, the United States Food and Drug Administration (FDA) officially approved an oral contraceptive pill marketed by G.D. Searle and Company under the brand name, Enovid.[414] Soon known simply as "the Pill"—probably stemming from women requesting it from their doctors in vague and discrete terms—almost 6.5 million women in America were taking oral contraceptives by the time *Griswold v. Connecticut* was argued before the Supreme Court in 1965.

Just as importantly, World War II marks the end of "popular eugenics" in America, and the beginning of a global endorsement of human rights after the atrocities committed by Nazi Germany in the name of state-controlled eugenics. In the televised Nuremberg trials, presided over by Supreme Court Justice Robert Jackson, the nation witnessed war criminals being tried for the eugenic atrocities of the Third Reich. Fitter Families eugenic contests ended at state and country fairs. As 'eugenics' became a bad word in America, a new discourse of "human rights" began to inspire ideas about civil

[413] See e.g., http://ropercenter.cornell.edu/public-attitudes-birth-control/ (last checked July 2, 2016).
[414] In the early 1950s, Margaret Sanger approached biologist Gregory Pincus, who was a well-known fertility researcher at the time, with a request that he look into the use of hormones to prevent conception by preventing human ovulation. Sanger then encouraged philanthropist Katherine McCormick, a wealthy widow and supporter of birth control, to provide funding for Pincus's project. In 1956, the United States Food and Drug Administration (FDA) approved the use of hormones for health problems like menstrual disorders and even PMS, and the late 1950s suddenly witnessed "an epidemic of menstrual irregularity among women across the nation." Then, on May 9, 1960, the FDA officially approved an oral contraceptive pill based on Pincus's research (May, *America Plus the Pill*).

rights and equal citizenship both at home and abroad.[415] By the 1950s, fears of "race suicide" gave way to different anxieties about global overpopulation. The latter, like the former, was a highly racialized discourse about the wrong people (poor people of color) having too many children, but it lacked the positive eugenic push for the "right" citizens to have more children. In 1952, John D. Rockefeller III founded the Population Council, and within the next decade, the United States government began sponsoring policies to educate and advocate "family planning" both globally and domestically.[416] By 1965, President Lyndon Johnson endorsed the use of birth control in family planning policy in both his domestic State of the Union address and in a speech before the United Nations. During the Court's debate about the merits of the *Griswold* case during the same year, the Justices were aware that Johnson's War on Poverty incorporated family planning and birth control services into its plan, and American foreign aid programs started offering funding for education about contraceptive devices to combat world poverty.[417]

Federal policy played a major role in normalizing the use of birth control. Given the trajectory of "federal contraceptive policy" during the twentieth century, briefly

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[415] The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly on December 10, 1948 in Paris. The Committee was headed by First Lady Eleanor Roosevelt.

[416] The Council's roots involve the late eugenics movement: The first president of the Council, appointed by Rockefeller, was Frederick Osborn, who authored the *Preface to Eugenics* (New York, 1940), prior to the United States entering the Second World War. In 1968, revealing both the unpopularity of eugenics after the war and his continued personal commitment to it, Osborn wrote that, "Eugenic goals are most likely to be achieved under another name than eugenics." This suggests that concerns about "family planning" and "population control" after World War II were not divorced from eugenics, rather eugenic remnants continued in efforts to control reproduction and shape the population both domestically and globally. In other words, these policies were not complete breaks with the past, but rather a reformulation and repackaging of older concerns. See e.g., Betsy Hartmann, "Everyday Eugenics," *Zmag*, September 22, 2006. *Available online at: https://zcomm.org/znetarticle/everyday-eugenics-by-betsy-hartmann/*

[417] John D' Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (Chicago: University of Chicago Press, 1997), 250.

outlined above, it is no wonder that all of the justices thought the Connecticut Comstock law was "uncommonly silly."[418] With its conservative praise of traditional marriage, *Griswold* sparked criticism about its constitutional analysis but little opposition from the public or even the legal world regarding the outcome of the case. In fact, one of the right of privacy's staunchest opponents, Robert H. Bork wrote in a 1968 law review article that *Griswold* was an excellent example of how "the idea of deriving new rights from old is valid and valuable," because "the first eight amendments…may properly be taken as specific examples of the general set of *natural rights* contemplated" by the framers of the Constitution.[419] He would later change his stance on *Griswold* in the 1970s, becoming one of its most trenchant and famous critics. Bork's change of heart coincided with a movement among lawyers to push for more sweeping privacy rights such as abortion, and he ominously wrote that the opinion provided "no idea of the sweep of the right to privacy and hence no notion of the cases to which it may or may not be applied in the future."[420]

In the case declaring the Comstock laws as unconstitutional, the Court ironically relied on a rhapsody on the sanctity of traditional marriage to justify the marketization of contraceptives in pharmacies and public clinics, thereby coming close to turning Comstockian values on their head. Moreover, rather than speaking about citizenship explicitly, *Griswold* established a relational right to privacy dependent upon the marital relationship and not possessed by the individual outside this relationship. Indeed,

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[418] *Griswold v. Connecticut* (1965), Stewart dissent, at 528.
[419] Robert H. Bork, "The Supreme Court Needs a New Philosophy," *Fortune* 78 (December 1968): 138-41, 170-77, 170.
[420] Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (Fall 1971): 1-35.

whereas *Griswold* legalized birth control for married couples as a relational right, insofar as it is dependent upon marriage rather than automatically possessed by the individual, after the case, millions of unmarried women in 26 states were still denied access to birth control.[421] By framing access to birth control in this manner, it went to great lengths to appear to be judicially endorsing a particular vision of the reproduction of citizenship within a "traditional family." Douglas's opinion in *Griswold* is, in the words of David Garrow, "an enthusiastic paean to the importance of marriage in American life."[422] His reasoning touches on a host of amendments, but his focus is on praising the "sacred" institution of marriage and justifying its protection from undue state interference in marital privacy. The Court framed the right to privacy as a conservative avenue of judicial reasoning rooted in the traditional family, but the right would very shortly expand to the later more controversial privacy cases of *Eisenstadt v. Baird* (1972) and *Roe v. Wade* (1973). For this reason, I argue that *Griswold* ought to be recognized as an example of "camouflage conservativism" in judicial doctrinal development during the twentieth century.

The Court's discussion of marriage is idealized, myopic, nostalgic, and wrapped in fiction. But in this fiction, we locate something important. The initial development of a right to privacy was not indicative of a withering of the civic lineage regime—with the state stepping back to let individual citizens make their own choices about matters of procreation and birth—rather *Griswold* is a decision in which the Court actively endorsed a specific civic lineage order. This order is rooted in a particular inegalitarian conception

[421] See e.g., http://www.ourbodiesourselves.org/health-info/a-brief-history-of-birth-control/
[422] Garrow, "Privacy and the American Constitution," 1.

of marriage, and it was actually a lot more recent than Douglas suggests. The idea of privacy in marriage is associated with the Victorian Era of separate spheres, which is not older than the state or the constitution, and was reworked, in postwar America into a new family ideal.[423] With the fitter family ideal of eugenic citizenship weakening with the rise of the Great Depression and meeting its final demise during the Second World War, a new postwar ideal of the family and good citizenship emerged to fill the gap. (Good citizenship was about conforming to these traditional norms as parents, and about raising your children as good citizens, and it was premised upon a particular idea of the postwar nuclear family.) Let us briefly examine what this ideal looked like in the following section, before turning to the later more controversial privacy cases of *Eisenstadt v. Baird* (1972) and *Roe v. Wade* (1973), which together signify the end of the postwar civic lineage order.[424]

4. The "White Picket Fence" Ideal: 1950s Postwar Family and Citizenship

What Justice Douglas labeled as traditional marriage, which he called older than the Constitution itself, actually had its origins in the aftermath of World War II and was a concept of marriage backed by federal policy. The war opened unprecedented opportunities for women, particularly after the Great Depression in which work was scarce and good jobs nearly nonexistent. During World War II while men were serving

[423] For an interesting discussion of the "strange" role of family in the Court's reproductive privacy jurisprudence, see, Martha Minnow, "We, the Family: Constitutional Rights and American Families," *Journal of American History* 74, no. 3 (December 1987): 959-83.
[424] *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade,* 410 U.S. 113 (1973).

in the military overseas, the government launched campaigns for women, married or single, to take on well-paying jobs that would have previously been considered "men's work" in the name of national patriotism and the war effort. Courted by the government via glamorized posters of the patriotic female worker in industrial jobs on the home front—most famously, the feminine yet muscular "Rosie the Riveter"—women became mechanics, welders, carpenters, lathe operators, truck drivers, factory workers, and indeed riveters, increasing the female labor force by almost 60 percent.[425] But after the war ended, more than 3 million women lost their wartime jobs and were replaced by returning veterans.[426] In response, the media and government together assured the women that they would actually be happier not working—all they had to do was find an eligible man to marry. A 1944 article in *Ladies Home Journal* told women workers that: "If the American woman can find a man she wants to marry, who will support her, a job fades into insignificance beside the vital business of staying at home and raising a family."[427] The marriage rate had been low during the Great Depression, and the birthrate plummeted across the nation. Now, the joys of courtship and marriage offered a ready solution to finding a new purpose and place in life for returning soldiers and displaced female workers after the war. The ideal of "traditional marriage" became a mantra in postwar America. In the words of Sociologist Willard Waller during this time, it is vital for the nation that "women must bear and rear children; husbands must support

[425] Stephanie Coontz, *A Strange Stirring: The Feminine Mystique and American Women at the Dawn of the 1960s* (New York: Basic Books, 2011), 47.
[426] Ibid., 50.
[427] Quoted in Marilyn Yalom, *History of the Wife* (New York: Harper Perennial, 2002), 351.

them."[428] Echoing similar sentiments, J. Edgar Hoover, director of the FBI, stated that a woman's civic duty to the nation was marriage and motherhood: "Her patriotic duty is not the factory front. It is on the home front!"[429]

This was the backbone of civic lineage policy during the postwar period. Focusing on integrating returning veterans into civilian life and paving a path to a middle class lifestyle, domestic policy during this time created a welfare state ripe with opportunities for young veterans to build a better life for themselves and their family—including the G.I. Bill, with educational and housing opportunities and a national employment policy that supported the idea of a breadwinning head of household.[430] The GI Bill was incredibly successful at paving a path to the middle class for returning veterans. Paying all the tuition of veterans that enrolled in college and a living stipend that increased if a man had a family, by the end of the 1940s veterans made up nearly half the student bodies at most colleges and universities.[431] However, from a proportional standpoint, the GI Bill primarily benefited white men.[432] African American veterans faced widespread discrimination in housing, ranging from overt violence to more subtle forms of racism such as redlining, which often pushed them out of middle-class suburban neighborhoods. Likewise, racial segregation in education often stymied their abilities to take full advantage of these federal benefits. This was also a highly gendered set of

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[428] Quoted in Coontz, *A Strange Stirring*, 49.
[429] Ibid., 47.
[430] See Suzanne Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (Oxford: Oxford University Press, 2005). See also, Robert O. Self, *All In The Family: The Realignment of American Democracy since the 1960s* (New York: Hill and Wang, 2012), 17-46.
[431] Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (New York: Penguin Books, 2005), 223.
[432] See Ira Katznelson, *When Affirmative Actions Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W.W. Norton & Company, 2006).

government benefits: only 2 percent of returning veterans were women, and they received less than their male counterparts with penalties for having a spouse to "support them" that were not applicable to men in school with working wives.[433] Across the board, federal policy actively sought to encourage a subset of privileged American citizens to conform to a new civic lineage ideal, comprised of a married couple with a breadwinner husband and a homemaker wife, and indeed in 1948 the U.S. federal income tax was changed to favor married couples that had only one primary earner.[434] (While both the previous moral purity and fitter families civic lineage regimes were based upon gendered ordering within the household and racial segregation in society, but what is different during this postwar period is the *national effort* to use strong economic incentives through public policy to restore this order after the War.) Through federal policy, whites and blacks were given different opportunities, and the government encouraged women—especially white middle-class women—to stay home and bear and raise children for their breadwinner husbands. This was a highly effective and far-reaching civic lineage policy, which successfully promoted the rise of a new postwar civic lineage regime, which focused on restoring the traditional family.

Marriage rates rose sharply and reached all time highs in this postwar period. After the Second World War, Americans began to marry at a younger age, and family size increased dramatically with the advent of the postwar "baby boom."[435] In fact, between 1940 and 1960, the number of families with three children doubled, and the

[433] Coontz, *Marriage, a History,* 223.
[434] Patricia Strach, *All in the Family: The Private Roots of American Public Policy* (Stanford: Stanford University Press, 2007), 92-100.
[435] "Population and Household Economic Topics," *United States Census Bureau*, located at Census.gov. [Last Checked September, 2016.]

number with four quadrupled with a peak in 1957 of 3.77 children born to the average American woman.[436] I would venture to suggest that the "baby boom" itself, which lasted far longer than demographers would normally predict such an increase in birthrate after a war, was in part the product of government civic lineage policies, including those like the GI Bill bolstering economic security and pushing women out of the workplace and into the role of full time wives and mothers.

Like the fitter families of the eugenics era, we a have pictures of what this ideal of the family and good citizenship looked like in the 1950s. In fact, this ideal continues to evoke nostalgia in segments of American culture today. When American families gathered in their living rooms to watch the most popular shows on television, they witnessed elegant homemakers such as June Cleaver, Donna Reed, and Harriet Nelson, married to breadwinner husbands, with houses in the suburbs, automobiles and two car garages, two to four children, and their home perfectly enclosed by a white picket fence. Ironically, when the birthrate was lower and "race suicide" was a widespread national concern, the (large) fitter families was the ideal promoted to the public as an example of good citizenship on two levels: Good citizens had many children, and their eugenically "fit" children would later grow up to become good citizens. With the baby boom, however, the ideal was much smaller. The ideal family conformed to an unspoken white Anglo-Saxon norm, with diversity almost completely absent from these popular television shows. Moreover, as "Father Knows Best" reminded us, men were the heads of the household, with its extremely gendered ordering.

[436] Ibid.

The postwar 1950s family ideal, like the eugenic fitter families ideal discriminated on the basis of race, gender, class, sexuality, disabilities, and the list goes on. But the family ideal was now a nuclear one: Good citizens got married and had 2-4 children, which they raised with great care to become good American citizens in the future. Perhaps most interestingly, for my purposes here, is the symbolic significance of "the home" enclosed and protected behind an iconic "white picket fence." During this time, the idealized home became shrouded in an aura of "privacy" in a manner that it had not before. "A good wife," according to the Saturday Evening Post in December 1962, "makes every effort to keep their home…a restful haven" for her husband.[437] Even Dr. Benjamin Spock, the parenting advice author, maintained in the 1960s that: "women were made to be concerned first and foremost with childcare, husband care, and home care."[438] From looking at these nostalgic pictures of the "White Picket Fence" family ideal of what good citizenship entailed in the realm of civic reproduction within the family, we learn a great deal about the civic lineage regime of the postwar era, both by what the ideals included and what was, by omission, absent from the screen.

Importantly from a civic lineage standpoint, this new postwar white picket fence ideal of the family treated the act of sex between husband and wife as natural and necessary for a healthy marriage. Having children was the patriotic thing for a couple to do, but the duty was fulfilled at smaller number of children than before and family planning was now widely considered healthier than abstinence for a happy and lasting marriage. The normalization of sex—and media discussions of Freud—made the idea of

[437] Coontz, *A Strange Stirring*, 16.
[438] Ibid.

birth control within the institution marriage an important part of the new ideal of the reproduction of citizenship. Indeed, as mentioned in an earlier chapter, many eugenicists like Paul Popenoe abandoned the sinking ship of eugenics advocacy and instead became—of all things—marriage counselors. In particular, Popenoe authored numerous books on marriage advice and was nationally famous for a particularly popular column, "Can This Marriage Be Saved?" which he wrote for the *Ladies Home Journal* (i.e. one of the most widely circulated women's magazines of the day). His marriage column was based on case histories from his Institute of Family Relations, where he met with couples having difficulty in their marriage.[439] In each article, he would describe how he saved rocky marriages by teaching young couples to appreciate each other in their roles as husband and wife. In this vein, he often counseled women to control their bossiness, become less "frigid" in bed, and make their husbands feel more "manly" as the head of the family. Significantly, he also wrote about counseling husbands on the importance of pleasuring their wives in bed and spoke openly about women's sexual needs within the marital relationship. He often ended his column with the joy of pregnancy (or the birth of a child), which signified that the marriage had been saved.[440]

Before concluding this section, it is worth noting that this is the very "feminine mystique" that Betty Friedan took aim at in her bestselling book in 1963.[441] In her book, Friedan described the housewife who dropped out of college to marry and raise four children, but felt trapped in the home by "the problem that has no name"—namely, "as

[439] Molly Ladd-Taylor, "Eugenics, Sterilization and Modern Marriage: The Strange Career of Paul Popenoe," *Gender & History* 13 (August 2001): 298-327.
[440] Ibid.
[441] Betty Friedan, *The Feminine Mystique* (1963: repr., New York: W.W. Norton & Company, 2013).

she made beds, shopped for groceries…she was afraid to ask even of herself the silent question—'Is this all?"[442] Criticizing Freud's theories about women and sexuality in her discussion of their role in the family and society, she suggested that the solution to the housewife's malaise and lack of purpose in life was to pursue a career. While *The Feminine Mystique* resonated powerfully among upper middle-class homemakers, by focusing on this ideal as if it was the norm, Friedan overlooked the interests of marginalized groups, such as women of color, who often found racism more constraining and experienced different forms of sexism than her description of the discontented upper middle-class housewife, and poor women, who were not socioeconomically well off enough not to work while raising their children. Nonetheless, with the black civil rights movement in full force in 1965 and Friedan's *The Feminine Mystique* on the best sellers list of books, it is peculiar to note that the very ideal that the Supreme Court embraced in its *Griswold* opinion was under assault from multiple fronts. Not only did the 1964 Civil Rights Act finally include sex as a protected category against invidious discrimination (i.e. along with race, color, religion, and national origin), but in 1966 Friedan co-founded the National Organization for Women (NOW), which aimed to bring women "into the mainstream of American society now [in] fully equal partnership with men."[443]

The postwar ideal was in transition at the very time that Douglas drafted his *Griswold* opinion for the majority. Somewhat ironically, at the same time the postwar "White Picket Fence" civic lineage regime began to buckle under the weight of attacks

[442] Ibid., 1.
[443] Civil Rights Act of 1964 (Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964); The National Organization for Women's 1966 Statement of Purpose, which was adopted at NOW's first National Conference in Washington D.C. on October 29, 1966, and is available online at: http://now.org/about/history/statement-of-purpose/

from multiple fronts—including the women's movement, black civil rights movement, and youth counterculture on college campuses—the Court articulated an unenumerated right to marital privacy. By the late 1960s, a common theme in the media was that traditional marriage was eroding with the rise of the "sexual revolution." Young people were increasingly having sex before marriage. Birthrates in America began to fall. The divorce rate increased to a record high. (In fact, Douglas himself had already gone through multiple divorces and remarriages during his long service on the Court by the time he praised the sanctity of marriage in *Griswold*.[444]) The eugenic anxiety of "race suicide" was no longer a popular public concern, but the worldwide population explosion was on the front pages of newspapers. The Johnson Administration was launching its War on Poverty.[445] In sum, the ideal family and the norms of civic reproduction that accompanied this ideal seemed to be in flux during the 1960s and 1970s, which brings us to the cases of *Eisenstadt v. Baird* (1972) and *Roe v. Wade* (1973).

5. Privacy for Individuals

Albeit decided at the heart of the "sexual revolution" of the 1960s, the Court in *Griswold* officially grounded (and camouflaged) its protection of the use of birth control in a facially conservative right to marital privacy.[446] Given that it was grounded in marriage,

[444] David J. Garrow, "The Tragedy of William O. Douglas," *The Nation*, April 14, 2013.
[445] President Lyndon B. Johnson, "State of the Union Address to Congress," January 8, 1964: This is the unofficial name for the legislation to combat poverty in America first introduced by President Johnson in his 1964 State of the Union Address to Congress.
[446] On the Sexual Revolution of the Sixties see: David Allyn, *Make Love Not War: The Sexual Revolution, An Unfettered History* (New York: Taylor and Francis, 2001); M.J. Heale, *The Sixties in America: History, Politics, and Protest* (Edinburgh: Edinburgh University Press, 2001), 13-14; Tom W. Smith, "A Report:

could the idea of privacy protect individual decision-making regarding procreative issues? This section focuses on the development of an individual right to birth control in *Eisenstadt v. Baird* and to abortion in *Roe v. Wade*, which would together dramatically change the landscape of the reproduction of citizenship. As we shall see, this is a classic story of path dependency and policy feedback. In his analysis of *Griswold* after the case, Emerson presciently suggested that it "is conceivable that sometime in the future, as mores change and knowledge of the problem grows, all sexual activities of two consenting adults in private will be brought within the right to privacy," and even briefly mentioned the possibility of it extending to cover abortion.[447] And in the aftermath of *Griswold*, there was a network of civil rights lawyers ready to test how far the Court would extend the concept of privacy with respect to birth control and abortion.[448] Not only did *Griswold* play a vital role in mobilizing activists to challenge laws relating to procreation and sexuality, thereby creating a new political civic lineage agenda through policy feedback, but rather than focusing on prioritizing other constitutional arguments (such as equal protection), lawyers now gravitated towards testing the scope of the new right to privacy in cases involving issues of sexuality in a path dependent fashion. The question was: Would the Court accept the challenge to extend the right to privacy beyond the institution of marriage?

The Sexual Revolution?" *The Public Opinion Quarterly* 54, no. 3 (Autumn 1990); John DeLamater, "The Social Control of Sexuality," *Annual Review of Sociology* 7 (1981); Beth Bailey, "Prescribing the Pill: Politics, Culture, and the Sexual Revolution in America's Heartland," *Journal of Social History* 30, no. 4 (1997).

[447] Emerson, "Nine Justices," 232.

[448] Garrow, "Privacy and the American Constitution," 55.

5.1 *Eisenstadt v. Baird*

Let us begin chronologically with *Eisenstadt v. Baird* (1972).[449] William Baird, a former medical student turned birth control activist, was charged with a felony after distributing condoms and contraceptive foam at a lecture on birth control at Boston College. Baird intentionally set out to challenge the Massachusetts state law, which the legislature amended after *Griswold* to allow only registered doctors and pharmacists to distribute birth control to married people. After personally handing a package of Emko contraceptive foam to a 19-year-old women at his lecture before 2,000 students, Baird announced to police officers stationed in the lecture hall that he just broke the law and dared them to arrest him so he could take his case to court.[450] He was arrested and convicted to three months prison for disseminating contraceptives to an unmarried person. After Baird challenged his conviction at both the state and federal levels, the Supreme Court agreed to hear the case. The question of whether the Court would extend the right to privacy to individuals was answered in this case. In a 6-1 decision (Justices Rehnquist and Powell were not sworn in on time to participate in the case) in *Eisenstadt v. Baird*, the Supreme Court ruled that Baird had the right to distribute contraceptives to unmarried adults, thereby extending the right to privacy to unmarried individuals.[451]

Writing for the majority, Justice William Brennan spent most of his opinion discussing the lack of rational basis for the Massachusetts state law.[452] He pointed out that Baird was arrested for committing a felony by simply distributing something

[449] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[450] Johnson, *Griswold v. Connecticut: Birth Control,* 198-201.
[451] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[452] Ibid., at 442.

available at most drugstores and pharmacies. The state also could not justify the law in the name of public health, because the same health concerns would logically apply to both unmarried and married persons. Yet the law allowed married people to use birth control. Moreover, in response to *Griswold* and changing social norms, the federal Comstock laws were redrafted in 1970 to remove birth control material from its obscene materials classification. Near the end of his opinion in *Eisenstadt*, Brennan linked the Court's ruling to the right to privacy. Without theorizing the origin of the right to privacy anew on a different basis, Brennan simply used the equal protection clause to extend the right to unmarried people by sleight of hand and sweep of pen. "It is true," wrote Brennan, "that in Griswold the right of privacy in question inhered in the marital relationship."[453] He then proceeded to remove the relational aspect of the right's foundation from the equation in *Eisenstadt,* noting, "the marital couple is not an independent entity with a mind and heart of its own, but an association of *two individuals* each with a separate intellectual and emotional makeup" [italics mine]. Since married individuals had been extended the constitutional right to use contraceptives in *Griswold*, Brennan found that the denial of the same right—already established in *Griswold* as fundamental—to unmarried individuals violated the equal protection clause of the Fourteenth Amendment. In his now famous words, "If the right to privacy means anything, it is the right of the *individual,* married or single to be free from unwanted

[453] Ibid., at 453.

governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" [italics in original].[454]

This is a striking example of what I term 'patchwork constitutionalism.' Recall that, in *Griswold*, the right to privacy was established as explicitly protecting "the sacred precincts of marital bedrooms."[455] The *Eisenstadt* decision never challenged this doctrinal foundation of reproductive privacy in the institution of marriage or rearticulated a right to privacy that did not depend upon marriage from a doctrinal standpoint. Rather than justify privacy rights for individuals independently, Justice Brennan built a patchwork extension onto the preexisting right (akin to an architect designing an addition to a house), thereby extending the right beyond its original foundation in marriage but nonetheless relying on this foundation as a (counterintuitive) steppingstone to achieve this new construction. While Brennan acknowledged that *Griswold* established that "the right to privacy in question inhered in the marital relationship," he overcame that limitation by proclaiming that what applied to married persons must also apply to individuals under the equal protection clause of the Constitution: "whatever the right of the individual to access to contraceptive may be, the rights must be the same for the unmarried and the married alike."[456] *Eisenstadt* accepted the right as already established earlier (in *Griswold*), and once the Court recognized privacy as a fundamental right applying to married individuals, then Brennan argued that this secondary patchwork logic in turn extended the same right to unmarried individuals. What had been a relational

[454] Ibid.
[455] *Griswold v. Connecticut*, at 486.
[456] *Eisenstadt v. Baird*, at 453.

right was now recast as an individual right. In her analysis of *Eisenstadt,* Mary Ann Glendon criticized Brennan for "abruptly severed the privacy right from its attachment to marriage and the family."[457] But what is interesting is that Brennan never fully detached the right to privacy from its foundation in family and marriage in the first instance. Leaving the *logical foundations* of privacy in marriage in tact in the case, Brennan divorced the right from privacy from its *application* only to marriage in a manner that supports Glendon's interpretation in the end. This is an interesting moment in constitutional development, and as we shall see it would have important civic lineage implications.

5.2 *Roe v. Wade:*

Decided by the Court just ten months later, *Roe v. Wade* (1973) has proven to be the much more provocative and politically contentious opinion.[458] Few Americans—the justices on the Supreme Court included—anticipated the depth and intensity of the reactions to *Roe*. At the time of the ruling abortion had not been a mainstream political (legislative) issue in national politics. By ruling on the case, the Court unwittingly raised the issue of abortion to the national political agenda and spurred a larger political struggle over the topic of abortion within the country, which continues to this day. This is a classic example of policy feedback, or how certain policies create new forms of

[457] Mary Ann Glendon, *Rights Talk* (New York: Free Press, 1991), 57.
[458] *Roe v. Wade,* 410 U.S. 113 (1973).

politics.[459] The Court's ruling in *Roe* created new political alliances, interest groups, and agendas—such that the identifications of "pro-choice" and "pro-life" now possess strong political meaning—and abortion has proven extremely divisive within American politics. In the words of Jack Balkin: "Roe energized new social movements that eventually divided the two major political parties over abortion rights and reshaped their respective coalition. Securing and expanding the right to abortion became a central concern of the women's movement, while opposition to *Roe v. Wade* awakened the sleeping giant of religious conservatives, who in turn helped shape the contemporary Republican Party. In the process, *Roe v. Wade* became a central issue in federal judicial nominations, symbolizing not only the issue of reproduction freedom but also the larger question of the proper role of courts in a democratic society."[460] The emotional and religious attachments to this case are beyond the scope of my analysis here, for my focus is on the effects of government policy targeting procreation and birth and its connection to citizenship. As we shall see in the next chapter, this ruling and the politics that followed it, dramatically altered the configuration of our civic lineage policies and landscape in America. For now, let us briefly examine the *Roe. v. Wade* ruling by the Court in 1973.

Roe v. Wade struck down a Texas law prohibiting abortion, dating from 1854. *Roe* was argued together with a companion case, *Doe v. Bolton*, which challenged Georgia's less stringent abortion reform statute from 1968, based on the American Law

[459] See, for instance, Paul Pierson, "When Effect Becomes Cause: Policy Feedback and Political Change," *World Politics* 45, no. 4 (July 1993): 595-628.
[460] Jack M. Balkan, ed., *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (New York: New York University Press, 2005), 3.

institute's Model Penal Code.[461] Since *Roe v. Wade* became the more important of the two cases because it dealt with the broader questions about abortion under the Constitution, I focus on *Roe* in this section. In *Roe*, attorney Sarah Weddington, representing a twenty-two-year-old woman, Norma McCorvey (under the pseudonym Jane Roe), challenged the state of Texas's anti-abortion statute on the grounds that it violated McCorvey's rights to privacy and equal protection under the Fourteenth Amendment. McCorvey unsuccessfully sought an abortion in Texas after already giving birth to two children (one raised by her mother and the other adopted), but she did not know how to obtain an abortion "performed by a competent, licensed physician, under safe, clinical conditions" in Texas.[462] Nor could she afford to travel out of state for the procedure, because she lacked a stable income. The lawyer, who arranged her adoption, introduced her to Sarah Weddington and Linda Coffee, two lawyers, who were looking for a test case to use to challenge Texas's strict anti-abortion law.[463] McCorvey became "Jane Roe" and the district attorney for Dallas County, Henry Wade, defended the law for the state of Texas.

In *Roe v. Wade* (1973), the Court ruled 7-2 that the right to privacy extended to a woman's decision to have an abortion, but that this right must be balanced against the state's two legitimate interests in regulating abortions: protecting women's health and protecting potential human life.[464] Harry Blackman's majority opinion in *Roe* was 51 pages long, more than 7 times longer than Douglas's opinion in *Griswold*. Blackmun

[461] *Doe v. Bolton*, 410 U.S. 179 (1973) was the companion case to *Roe* and released on the same day, but instead concerned a somewhat less restrictive Georgia state law.
[462] *Roe v. Wade,* Case Summary.
[463] Wawrose, *Griswold v. Connecticut*, 117.
[464] *Roe v. Wade.*

spent the bulk of the opinion summarizing the history of abortion laws in the United States, discussing the fact that the medical profession now supported abortion in the name of public health and family planning, and emphasizing that public opinion polls revealed that a majority of Americans now supported the legalization of abortion. But when he finally turned to the constitutional issues involved in the case, he spent just a fraction of the opinion on doctrinal issues. The foundation for the decision was the right to privacy established in *Griswold,* and modified in *Eisenstadt*. In the words of Blackmun, "The Court has recognized that a right of personal privacy or guarantee of certain zones of privacy does exist under the constitution."[465] In a moment of noteworthy equivocation, however, Blackmun groups all the concurring opinions in *Griswold* together to suggest that the right to privacy could be found in a number of places without influencing the Court's *Roe* decision. As he puts it, "The right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[466] Interestingly, a close reading of this sentence reveals that the majority of the Court in *Roe* is endorsing Justice Harlan's recommendation for locating privacy in the due process clause of the Fourteenth Amendment, rather than Douglas's "emanations and penumbras" opinion, but hedging their due process support by saying that the location of the right is less important than the fact that a majority of the Court agrees the right exists (wherever it may be). To support the majority opinion,

[465] Ibid.
[466] *Roe v. Wade*, at 153.

Blackmun emphasizes that after *Griswold* an extensive number of abortion cases citing the right to privacy made their way to lower courts between 1970 and 1973, and "most of these courts have agreed that the right to privacy, however based, is broad enough to cover the abortion decision."[467]

But this right is not an absolute right. Although "the right of personal privacy includes the abortion decision," Blackmun added that, "this right is not unqualified and must be considered against important state interests in regulation…and is subject to some limitations; and at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant…"[468] Balancing a woman's right to have an abortion against the state's interest in public health, Blackmun introduces "the trimester system" in *Roe*. (This no longer guides the Court's approach to abortion today.) Blackmun originally circulated an opinion among the justices that would have extended constitutional protection to abortion only up to the end of the first trimester of the pregnancy and left the other trimesters to the states to determine whether (and how) to regulate abortion, but several of his fellow justices and their clerks lobbied him to extend the right up to fetal viability measured at approximately the end of the second trimester.[469] Justices Brennan and Thurgood Marshall, in particular, argued that limiting abortion to the first trimester didn't give a woman reasonable time to discover she was pregnant, locate a doctor to provide an abortion, and take other key steps to arrange to have the procedure—from gathering necessary funds to getting time off work. Marshall

[467] The companion case to *Roe*, *Doe v. Bolton*, garnered the same 7-2 majority and added nothing with respect to privacy but to repeat that it applied to Georgia's anti-abortion law as well as the Texas law in question in *Roe*.
[468] *Roe v. Wade*, at 154, 159.
[469] See David J. Garrow, "Revelations on the Road to Roe," *The American Lawyer* 22, May 2000: 80-83.

was concerned that such a narrow timeline would disproportionately burden low-income and minority women, who already faced structural disadvantages in healthcare. This convinced Blackmun to extend the timeframe.[470] Dividing pregnancy into three trimesters, Blackmun devised a formula for determining when the state could regulate or ban abortion entirely.[471] In the first trimester, a woman can make her own choice with the advice of her doctor whether or not to have an abortion. In the second trimester, the state can pass regulations aimed at protecting the woman's heath. And in the final trimester, states can prohibit abortion in the interest of potential fetal life unless the woman's health or life is at stake. In this manner, the Court attempted to respond to the state's interest in protecting public health, in addition to mitigating socioeconomic disadvantages some women might experience—through structural forms of inequality—as serious hurdles to having an abortion.

5.3 Would a Right to Privacy Protect Carrie Buck?

The Court's discussion of public health in *Roe* raises an interesting question about the scope of reproductive rights for vulnerable citizens like Carrie Buck, the young woman in Virginia who was involuntarily sterilized by her doctor following the Court's ruling in *Buck v. Bell*.[472] Although the Court has never officially overruled *Buck v. Bell*, most who are familiar with this case assume that it is simply a remnant of a different era, and has not been overruled because a similar case has not made it to the high court during the

[470] Garrow, *Liberty & Sexuality*, 582-84.
[471] *Roe v. Wade,* at 164-5 (on the Trimester System).
[472] *Buck v. Bell*, 274 U.S. 200 (1927).

second half of the twentieth century. Surely a right to privacy would have protected Carrie Buck from involuntary eugenic sterilization? It seems intuitive to assume that privacy in reproduction, protecting the decision "whether to bear or beget a child," marks a complete and final rejection of eugenic principles by the Supreme Court. If a fundamental constitutional right of individuals to reproductive choice had been recognized during Carrie's day, this would have trumped the state of Virginia's professed interest in protecting public health and social welfare—right?

Surprisingly, the answer to this question is not entirely clear. In a moment rarely discussed in *Roe,* Justice Blackmun not only asserts that the right to abortion is not absolute (and must be balanced against state interest in public health), but he also writes that, "it is not clear to us that the claim…that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions." Then, explicitly citing *Buck v. Bell* (1927) as an example of a case in which the right to privacy did not protect bodily integrity, Blackmun bluntly states, "The Court has refused to recognize an unlimited right of this kind in the past."[473] In short, the *Roe* Court references *Buck v. Bell* as a case in which a right to privacy would probably not protect reproductive choice over public health. A surprising place to find support for eugenic sterilization, the *Roe* opinion casts doubt on the scope of this right to protect a young woman like Carrie Buck from being involuntarily sterilized in the name of the state's interest in protecting public health and social welfare. Of course we can surmise that the Court would probably rule differently in a case like *Buck*

[473] *Roe v. Wade,* at 154.

today, given the shocking facts we now know about the case, addressed in chapter 2, but this guess is based on the presumption that civil liberties groups would rally to Carrie's side and ensure that she received proper representation in Court. As we shall see in the next chapter on Medicaid and family planning, the right to privacy does not always protect poor and marginalized women from state coercion in practice or ensure that they can realistically exercise their reproductive rights.

5.4 Privacy and Civic Lineage Politics

This brings me to the role of "equal citizenship" for women. The women's movement gained increasing power in the 1970s and made control over women's reproductive capacities a central part of its agenda. For instance, the National Organization for Women (NOW) included abortion access on its "Bill of Rights for Women," labeling reproductive choice as necessary for the full and equal citizenship of women.[474] However, in *Roe,* the Supreme Court opted to extend its new reproductive privacy doctrine to cover abortion, rather than pave new ground in the arena of constitutional equal protection for women. Justice Ruth Bader Ginsburg, appointed by Bill Clinton to the Supreme Court in 1993 and a staunch supporter of abortion rights, has argued that the Court should have decided the case based on equal protection for women because the right to privacy weakens the force of the decision by diluting the true weight of the rights at stake. In 1984, at the time on the U.S Court of Appeals in the District of Columbia,

[474] "National Organization for Women Bill of Rights" (1966), reprinted in Linda Greenhouse and Reva Siegel, eds., *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court Ruling* (New York: Kaplan Publishing, 2010), 36-38.

Ginsburg expressed disappointment that the court "had treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women," because control of her reproductive capacities is vital for a woman's "ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."[475] Likewise, Reva Siegel argues that abortion is a constitutional right necessary to achieve women's equal citizenship to men, and that focusing on the state's value of "unborn life" as Texas did in *Roe* is a way of using "criminal law to coerce and intimidate women into performing the work of motherhood" and treating women as "mothers—citizens who exist for the purpose of rearing children, citizens who are expected to perform the work of parenting as dependents and nonparticipants in the citizenship activities in which men are engaged."[476] In a society in which women continue to bear the most significant share of responsibility for the birth of children and their rearing, anti-abortion laws have the effect of compelling pregnant women into life-altering obligations, which restrict their present and future liberty and citizenship status in a profound way, perpetuating "second-class citizenship for women."[477]

What is striking about the use of equal protection arguments in the context of reproduction, is their tendency to evoke the language of "citizenship" and the role that the regulation of reproduction has on shaping women's access to (or lack there of) full citizenship. The above quote by Justice Ginsberg is an excellent example. She

[475] Ruth Bader Ginsburg, "Essay: Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 375 (1985): 383.
[476] Reva Siegel, in Jack M. Balkin, ed., *What Roe v. Wade Should Have Said*, 63.
[477] Ibid., 63.

emphasizes the role of reproductive choice in shaping the status of a woman as "an independent, self-sustaining, equal citizen." Language like this leaves no question that these laws target civic lineage and are fundamentally about citizenship, but arguments based upon privacy, as we see in Blackmun's opinion in *Roe*, tend to speak more broadly about the rights of "persons" and "individuals," rather than about how access to such choices shape citizenship and civic status. Indeed, directly taking aim at the right to privacy, feminist Catherine MacKinnon in 1983 stated that "A right to privacy looks like an injury got up as a gift," noting that "the privacy doctrine reaffirms and reinforces what feminist critique of sexuality criticizes: the public/private split."[478] Although privacy was doing important work in terms of opening reproductive choices for women, it nonetheless evoked traditional notions women's place within the family and implied on one level that women's sexuality and control over their procreative capacities was NOT a properly public matter. Rather than inviting state protection in the name of equality, it built a wall against state intrusion. But although the legal "privacy frame" puts the state at a metaphorical distance, ironically it does so through state action: That is, the U.S. Supreme Court issued the *Roe* ruling and it did so in dialogue with the other levels of state and federal government, which in turn responded by decriminalizing the procedure and then seeking to test how far legislatures could go when it came to making it more difficult for women to obtain an abortion. While the language used by the Court seems to imply that the right to privacy exists prior to citizenship or is akin to a natural right (wherever it may be found in the Constitution), the story is rife with state action. Both

[478] Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987), 100.

Eisenstadt and *Roe* use the concept of privacy to do a great deal of civic lineage work, but this time the right to privacy seems to support different civic lineage goals than the idea of marital privacy in *Griswold*.

The most important point that I want to emphasize here is that these laws, based on reproductive privacy doctrine, are central components of the broader civic lineage regime today. Irrespective of how one feels about the right to privacy and its political consequences, the fact that these are civic lineage laws is, in my view, fairly straightforward. For instance, those who oppose abortion would be quick to point out that the National Right to Life Committee estimates that 58 million abortions have been performed in the 43 years between the *Roe* ruling and the beginning of 2016.[479] This suggests that a lot fewer citizens were born as a consequence of legalized abortion in America. Yet one can make similar claims about the role of birth control in preventing pregnancy in the first place, changing sexual norms and family expectations, and even the impact of women's changing role in society and entrance into the workforce in large numbers since the 1970s. Hence. I would argue that, rather than counting the numbers of abortions performed in the United States, the more significant question from the perspective of civic reproduction in this country concerns how access to reproductive choice—and subjection to coercion—is distributed across various groups within American society? Do different groups experience diverging degrees or forms of choice/coercion in the realm of reproductive choice? If so, then do they in turn give birth

[479] See e.g., http://www.lifenews.com/2016/01/14/58586256-abortions-in-america-since-roe-v-wade-in-1973/

to children who are differently situated and have diverging experiences of civic status and political agency in America?

The answer is "yes." As we shall see in the next two chapters on abortion defunding under Medicaid and welfare reform, these laws treat potential and actual mothers of various groups differently in ways that structure the civic status of these women and the birth and standing of their children unequally in the United States. As Justice Thurgood Marshall pointed out in the (behind the scenes debates) in *Roe*, laws regulating reproduction have a tendency to create inequalities of civic status, birthrates, and childrearing opportunities between women of different demographic groups.[480] When civic lineage laws impact women unequally, on the basis of race or class for instance, these policies invariably shape both the birth of citizens (children) and the experience of citizenship (the status of these women and their children) in a manner that perpetuates and reinforces group-based inequalities through reproductive laws.

Conclusion:

In this chapter, I have focused on the Supreme Court's development of a fundamental right to reproductive privacy in *Griswold v. Connecticut* in 1965, and expansions in the privacy doctrine that followed this landmark case. With the demise of the eugenic fitter family ideal during the Second World War, this chapter has discussed the advent of a new postwar white picket fence ideal of civic reproduction during the 1940s and 1950s.

[480] See Garrow, "Revelations," 80-83.

Supported by government policies—ranging from the GI bill to tax reform offering benefits to married men—this ideal of the nuclear family with a breadwinning father and homemaker mother dominated the media and public policy for approximately two decades. While different from the large multigenerational eugenic family ideal, the new smaller nuclear ideal nonetheless promoted a highly gendered, racially "whitewashed," heteronormative, consumerist, and classist idealization of the proper American family. By extension, it provides us with a picture of the standards of civic lineage during this time—or, more specifically, the ways in which patriotic American citizens were expected to bring up the next generation of good American citizens and what this norm of citizenship both included and excluded in its romanticized form.

Although birthrates actually increased during this time with the "baby boom," the new ideal of the family was smaller. Postwar American culture emphasized a gendered division of labor within the family, accepted non-procreative sex between husband and wife as healthy for marriage, and placed a special value on the concept of privacy within the home. *Griswold*, as I have argued, gives us a fascinating glimpse into one of the strongest state endorsements of this postwar ideal of marriage. Yet ironically, when the Court decided *Griswold* in 1965, this ideal was already cracking under the pressure of the civil rights movement, early women's movement, and the sexual revolution of the sixties. For this reason, I have argued that the case of *Griswold* serves as an instance of "camouflage conservatism" by the Court, for this new privacy doctrine was pregnant with possibilities far beyond its rhapsody on the sanctity "traditional" marriage. In less than a decade, the Court soon expanded the right to reproductive privacy to cover the right of

unmarried individuals to obtain birth control and choose whether or not to have an abortion.

The Court's decision to detach privacy from its original grounding in marriage in *Eisenstadt v. Baird* (1971) and *Roe v. Wade* (1973) was an important sign that the postwar civic lineage order was in the mist of a radical transition. No longer the dominant order, newspapers bemoaned the crisis in the American family and culture with the demise of the postwar ideal. In the aftermath of the Court's birth control and abortion decisions and in the center of rapidly changing sexual norms, the next decade would be marked by contestation over competing civic lineage orders. This contestation would involve issues of the place of women in society, welfare racism, heterosexism, deep anxieties about the changing mores of sexuality, and the place of the family in American society (among other things). Moreover, the fact that the Court placed individual sexual and reproductive rights solidly in the domain of privacy jurisprudence during the 1970s, rather than equal protection, would make reproductive rights vulnerable to a set of challenges at the state and federal levels. While the Court fully acknowledged that class was a major consideration in the opinions, analyzed above—for instance, poor people in *Griswold* needed public clinics to obtain birth control, and poor women in *Roe* were burdened by laws that compelled them to travel to another state to obtain an abortion—the Court said nothing in either decision about whether or not the state had a duty to help ensure that poor people had access to birth control and abortion through the support and funding of public clinics for low-income people. This raises an important set of questions about the meaning and scope of reproductive rights in American constitutional

law: What did a right to privacy require of the government for those who could not afford medical services like birth control or abortion and who were receiving Medicaid to cover basic medical care? Does this right require positive aid to help low-income women receiving Medicaid exercise their right in a meaningful manner, or is it merely a negative right to be let alone by the state to make one's decision? Given the role that socioeconomic concerns played in both *Griswold* and *Roe*, these questions were not merely theoretical, yet how would the state and federal government respond?

I turn to this issue in the next chapter by looking at the advent of Medicaid health insurance and the funding (and defunding) of abortion for poor women by the government during the 1970s. In the aftermath of these reproductive privacy cases, we witness a new civic lineage order emerging in the United States, which remains dominant to this day. As I shall argue, this "neoliberal" civic lineage regime uses the right to privacy as a cover for effectively "privatizing" reproduction by pushing it out of the public sector into the economic marketplace, thereby placing certain groups of woman at severe disadvantages when it comes to exercising their reproductive rights. The right to privacy, and the sexual and reproductive freedoms it now protects, has become a prominent battleground for diverging civic lineage alliances in the aftermath of *Roe v. Wade*. These laws are unequivocally a part of America's civic lineage regime. But as we shall see in the next chapter, the reproductive victories, addressed in this chapter, did not result in a simple story of progress. Their impact on the reproduction of citizenship is a story of the expansion of access to new reproductive choices for some, and comparatively more restrictive opportunities for others in a manner that creates and reinforces both old

and new forms of inequality in citizenship. Let us now examine the roots of our contemporary neoliberal civic lineage regime.

CHAPTER 5

Privatizing Abortion: The Birth of Neoliberal Citizenship

Introduction

The Supreme Court, as the previous chapter examines, developed and expanded a fundamental constitutional right to privacy in reproduction over a relatively short period of time, from birth control for married couples in *Griswold v. Connecticut* in 1965 to the right of individuals to obtain birth control and abortion by 1973 in *Roe v. Wade*. Importantly, like all major legal developments, these Court rulings occurred within a larger political arena, and would invariably interact with a host of different government policies, including the new program of Medicaid. During the same year that the Court issued its reproductive privacy ruling in *Griswold* in 1965, Congress passed President Lyndon Johnson's proposed "War on Poverty" healthcare Amendments to the Social Security Act (i.e. Medicaid and Medicare), and Medicaid subsequently became the first public health insurance program in the United States for poor families.[481] President Richard Nixon went further in 1970 with the passage of the Title X Family Planning Program, dedicated solely to providing individuals with family planning services in part through the establishment and funding of public clinics for the poor.[482] Given that these

[481] See e.g., Bruce S. Jansson, *The Reluctant Welfare State: American Social Welfare Policies-Past, Present, and Future*, 4th ed. (Belmont, CA: Wadsworth, 2001), 250-251.
[482] See e.g., Clare Coleman and Kirtly Parker Jones, "Title X: A Proud Past, An Uncertain Future," *Contraception* 84 (2011): 209-11.

policies were enacted separately yet roughly during the same period of time, how would Medicaid and the Court's new reproductive privacy doctrine fit together? Would Medicaid support birth control and abortion as part of the government's new family planning focus? Or would the two come into conflict?

This chapter focuses on abortion defunding under Medicaid in the aftermath of *Roe v. Wade* and the beginnings of a neoliberal civic lineage regime during the mid to late 1970s. The question of how far the new constitutional "right to privacy in reproduction" extended remained unanswered by the Court in *Roe*. Hence, a number of political paths were open at this juncture, including the possibility of the Court linking abortion to equal protection and bolstering federal funding for family planning in the process. But with the rise of the anti-abortion movement, a string of cases made their way to the Supreme Court between 1977 and 1991, which I broadly refer to here as the 'abortion defunding cases.' As we shall see, the Court used the initial framing of abortion rights in terms of privacy (not equal protection) to effectively privatize abortion by allowing states and the federal government to withdraw public funding for abortion services for poor women under Medicaid. Rather than framing abortion as a right necessary for women to achieve standing as equal citizens in America, the Court cast it instead as a private decision that requires no public (positive) support on behalf of the government, including states that fund childbirth through Medicaid. Ultimately, as I shall argue, the abortion defunding cases offer a glimpse into the early development of our contemporary neoliberal civic lineage regime, which treats devices and procedures aimed

at expanding women's control over their fertility as market commodities, thereby perpetuating a host of entrenched civic inequalities in the reproduction of citizenship.

This chapter is divided into eight parts. Part 1 examines a series of expansive civic lineage developments from 1965 to 1973, including the advent of the Medicaid program and government funding of family planning.[483] With the rise of the women's and civil rights movements, I argue in Part 2 that a more egalitarian version of the ideal of voluntary motherhood appeared to be a genuine possibility. However, it fell short once again from becoming the dominant ideal. Part 3 turns to the rise of a different civic lineage ideal: Neoliberalism. Here I focus on the advent of our American neoliberal civic lineage regime—incorporating and fostering a series of "homegrown" systemic inequalities pertaining to class, gender, sexuality, and race. Pointing to evidence that this regime gained traction as a backlash against the victories of the women's and civil rights movements (with abortion and poverty issues front and center), I begin to trace our contemporary neoliberal ideal of citizenship. In Part 5, I turn to the Hyde Amendment, which was a rider introduced to the 1976 appropriations bill to ban federal funding for abortion under Medicaid. Congress passed the Hyde Amendment by forming a new alliance between members of the religious right, anti-big government politicians, and those who opposed welfare and anti-poverty programs like Medicaid. This coalition brought about the rise of our contemporary neoliberal civic lineage regime by redefining reproductive rights as consumer privileges to access "goods and services" like

[483] See e.g., Martha Bailey, "Fifty Years of Family Planning: New Evidence on the Long-Run Effects of Increasing Access to Contraception," *Brookings Papers on Economic Activity* 44, no. 1 (Spring 2013): 341-409.

contraception and abortion on the market. Next, I examine almost twenty years of Supreme Court abortion defunding cases, from the 1970s to the 1990s. These cases narrowed the scope of *Roe* and recast the purportedly fundamental right to reproductive privacy as purely a negative right against the state. As I shall argue, the neoliberal ideal espoused by the Court in these cases is that of a self-sufficient citizen, who is wealthy enough to function as an independent and responsible market actor by paying for her own prudent reproductive choices on the economic market. Finally, I end by examining the early dissents in these abortion-defunding cases and the objections of the dissenting justices to what they viewed as a disingenuous use of the market to foster civic inequalities, indeed hierarchy, in America. We see the accuracy of their predictions today.

1. The Development of Medicaid:

With the rise of the women's movement and civil right's movement, the postwar white picket fence ideal of citizenship was under assault from multiple fronts. What civic lineage order would replace it? The rapid expansion of the welfare state to include "reproductive choice" for poor and minority women is a political moment in which Margaret Sanger's ideal of voluntary motherhood seems in hindsight as if it was on the verge of becoming the dominant civic lineage order in America. But with the advent of the anti-abortion movement, this alternative of 'voluntary motherhood' became an incompletely realized possibility yet again. So, before examining the abortion defunding

cases under Medicaid, which took aim at these new reproductive policies and re-characterized reproductive choice as a mere market opportunity (accessible only to those who can afford it), it would be useful to first examine the development of Medicaid and the federal government's endorsement of family planning.

Let's begin with the development of Medicaid, and some of the factors that contributed to the establishment of the program. Prior to the Court's decision in *Roe v. Wade*—declaring abortion a constitutionally protected right covered by privacy throughout the nation in 1973—Congress followed the Johnson Administration's recommendation to amend the Social Security Act to pass Medicaid, thereby offering public insurance to poor people; particularly women and children on welfare.[484] By 1970, Medicaid covered family planning services, and the Nixon Administration expanded family planning for low-income women.[485] Against this backdrop, the fact that the Court in *Roe* said nothing about whether or not the state had a duty to help ensure that low income women had access to abortion through public funding and clinics became a serious cause of contention within the Medicaid program. Since the Medicaid program, discussed in this section, empowered states to establish their own public insurance plans with a great deal of state autonomy and discretion, the design of the policy left the door open to a variety of state responses—including the outright refusal to fund abortion while covering childbirth. This would in turn require judicial clarification from the Court on the scope and meaning of the right to privacy: What precisely did a right to privacy

[484] Medicaid was passed in 1965 as Title XIX of the Social Security. Online history provided by Medicaid.gov at: https://www.medicaid.gov/about-us/program-history/index.html
[485] Bailey, "Fifty Years," 341-409.

require of the government for those who could not afford medical services like birth control or abortion and who were receiving Medicaid? Did privacy require positive public aid and funding from the government to help poor women, receiving Medicaid, exercise their right to choose abortion over childbirth in a meaningful manner? Or was it simply a negative right against government intrusion? The answers to these questions would shape the reproduction of citizenship in ways that created and reinforced both old and new forms of civic hierarchy—particularly regarding class inequality and its intersection with race and gender in American politics.

During the 1950s and 1960s, Americans had the "highest mass standard of living in world history," with the gross national product of the United States increasing by a factor of five from 1940 to 1960.[486] This economic growth was due in part to the success of American corporate products both domestically and abroad (as much of the globe recovered from the Second World War), and the growth of the "military industrial complex" during the Cold War.[487] In 1958, John Kenneth Galbraith, an economist, published "The Affluent Society," in which he described the growing reach and strength of American corporations, their ability to create consumer demand through new targeted mass advertising, and the growth of a new professional class which now enjoyed more than "the rich rejoiced in a century before."[488] But shortly thereafter, in 1962, Michael Harrington, a socialist critic, countered with evidence about the "Other America" defined

[486] Michael Harrington, *The Other America* (Baltimore, MD: Penguin Books, 1971), 1.
[487] Jerry D. Marx, "American Social Policy in the 1960s and 1970s," *The Social Welfre History Project*. Online at: http://socialwelfare.library.vcu.edu/war-on-poverty/american-social-policy-in-the-60s-and-70s/
[488] John Kenneth Galbraith, *The Affluent Society*, 4th ed. (Boston: Houghton Mifflin, 1984), 2.

by a "culture of poverty."[489] In addition to being a land of prosperity, Harrington argued that America was also a land of great numbers of people living in poverty yet largely invisible to the rest of American society (i.e. between 40,000,000 and 50,000,000), representing unskilled workers, migrant-laborers on farms, part-time jobs in the service sector, and people who existed in the shadows of the nation.[490] These were the other American citizens, many of whom were minorities and woman, and Harrington argued that it was indecent that such an affluent society turned a blind eye to their poverty.[491]

In response to this debate about poverty in America, President Lyndon Johnson launched an "unconditional war on poverty."[492] In his State of the Union Address in 1964, the President offered proposals to significantly expand federal support for social welfare on multiple fronts, including healthcare. In his War on Poverty speeches, it is also worth noting that President Johnson specifically used the language of citizenship to rally national support for his program. In his words,

> We are citizens of the richest and most fortunate nation in the history of the world…[We] have never lost sight of our goal: an America in which every man has a chance to advance his welfare to the limit of his capacities…There are millions of Americans—one fifth of our people—who have not shared in the abundance which has been granted to most of us, and on whom the gates of opportunity have been closed…[The War on poverty] Is an effort to allow them to develop and use their capacities as we have been allowed to develop and use ours, so that they can share as others share, in the promise of the nation.[493]

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[489] Harrington, *The Other America*, 1-2, 17.
[490] Ibid.
[491] Ibid., 1-2.
[492] Lyndon B. Johnson, "Annual Message to Congress on the State of the Union," January 8, 1964. Online at: http://www.presidency.ucsb.edu/ws/?pid=26787
[493] Lyndon B. Johnson, "War on Poverty" Speech, 1964, from *Public Papers of the Presidents of the United States, Lyndon B. Johnson, 1965* (Washington D.C.: Government Printing Office, 1966).

President Johnson emphasized that one of the centerpieces of the War on Poverty was public health insurance for the poor and the elderly, which he presented as "an opportunity and obligation—to prove the success of our [American] system."[494] These programs were intended and designed to help every American poor enough to qualify, and as part of his civil rights agenda, Johnson explicitly promised to extend his anti-poverty programs to historically marginalized minority groups, including African Americans. The creation of Medicaid, in turn, spurred legislation that offered new reproductive opportunities and options for the poorest citizens in America. Medicaid, discussed below, is the most important of these programs when it comes to shaping women's access to medical care relating to birth control and pregnancy—particularly poor women and children on welfare.

In 1965 Congress enacted Title XIX of the Social Security Act, which is commonly referred to as Medicaid. The Medicaid program is a federal-state cost sharing program designed to fund the medical care for most welfare recipients and other low-income individuals. Although participation in the jointly funded governmental program was completely optional for states, Title XIX authorized the federal government to reimburse states for expenditures covering a broad range of medical services for the needy at a guarantee of $1 of federal funds for every $1 spent by the state (and often more). States could establish their own Medicaid plans, and would in turn have broad discretion over determining the extent and duration of the services it provided. However, if they agreed to participate in the program, each state merely had to satisfy certain basic

[494] Lyndon B. Johnson, "Annual Message to the Congress on the State of the Union," January 8, 1964.

statutory guidelines and regulations that met with federal approval. In particular, as Laura Crocker summarized the requirements in 1981, Title XIX "requires that states (1) establish reasonable standards for determining the extent of the coverage; (2) fund similar services in equal amounts; (3) provide qualified recipients with equal duration and scope of services; and (4) act consistently with the stated objectives of Title XIX which is to provide medical assistance for those whose "income and resources are insufficient to meet the costs of necessary medical services.""[495] Aside from these stipulations, the grants were generous and open-ended. Filtered through federalism into fifty different state programs—thereby empowering states to pursue different plans and offer different opportunities to their poorest (Medicaid eligible) citizens—Medicaid became the primary mechanism of healthcare for women and children on welfare.

The advent of Medicaid was coupled with another major civic lineage development. During the same period of time, the United States government also began to actively support family planning, both domestically and internationally. In a Special Message to the Congress in 1966 on Domestic Health and Education, President Lyndon Johnson championed federal support for family planning and expanded healthcare associated with childbirth and childrearing as a means to strengthen the nation. As he put it, "A nation's greatness is measured by its concern for the health and welfare of its people."[496] Johnson called for increased funding for "maternal and infant care," adding, "it is essential that all families have access to information and services that will allow

[495] Laura Crocker, "Harris v. McRae: Whatever Happened to the Roe v. Wade Abortion Right?" *Pepperdine Law Review* 8:3 (1981): 862-3.
[496] Lyndon B. Johnson, "Special Message to the Congress on Domestic Health and Education," March 1, 1966. Online at: http://www.presidency.ucsb.edu/ws/?pid=28111

freedom to choose the number and spacing of their children within the dictates of individual conscience."[497] During this period, family planning was an issue of bipartisan consensus. After Johnson, a Democrat, bowed out of the presidential race in 1968 in the midst of the increasingly controversial Vietnam War, the next President, Richard M. Nixon, a Republican, continued this dimension of the domestic War on Poverty in 1970 by successfully supporting the Title X Family Planning Program, as part of the Public Health Service Act.[498] Nixon was careful and strategic about maintaining many of the social policies of the Great Society while trying to use the new programs and funding to encourage more conservative goals like population control and family planning, announcing "we are all Keynesians now."[499] (In a nutshell, the Keynesian state is premised on the idea of an economy that manages business cycles using fiscal and monetary tools and limits impact of downturns and inequalities with a basic social safety net.)

Nixon's Title X Family Planning Program—which is not part of Medicaid and serves a broader group of low-income people—is the only federal grant program dedicated purely to providing individuals with comprehensive family planning and related preventative health services.[500] Rather than matching state funds under the Medicaid scheme, this program—with explicit civic lineage aims for the government to increase the access poor women have to information about birth control and to contraceptive devices—instead focuses on supporting and funding *public clinics* to

[497] Ibid.
[498] Family Planning Services and Population Research Act of 1970 (Title X Family Planning Program), Public Law 91-572 (1970).
[499] David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 2-3.
[500] Coleman and Jones "Title X," 2011: 209-211.

provide services to low-income individuals who might not otherwise have access to them. Speaking of the program in 1969, President Nixon stated: " It is my view that no American woman should be denied access to family planning assistance because of her economic condition…This we have the capacity to do."[501] Additionally, using language consistent with Margaret Sanger's public health framing of family planning associated with her "clinic plan," the primary sponsor of the Title X statute in Congress, then-Representative George H. W. Bush, expressed his strong support for the Act as both voluntary for women and a matter of public health:

> We need to make population and family planning household words. We need to take sensationalism out of this topic so that it can no longer be used by militants who have no real knowledge of the voluntary nature of the program but, rather are using it as a political stepping stone. If family planning is anything, it is a public health matter.[502]

During the Nixon Administration in 1972, Congress also Amended the Medicaid Program to establish family planning for Medicaid beneficiaries nationwide by requiring participating states to include "family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the state plan and who desire such services and supplies."[503] In this bill, passed by Congress just one year before the Court's ruling in *Roe v. Wade*, the federal government offered an additional

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[501] Richard M. Nixon. Message to Congress, July 18, 1969.
[502] Quote located in: Clare Coleman and Kirtly Parker Jones, "Title X: A Proud Past, An Uncertain Future," Contraception Editorial, *Association of Reproductive Health Professionals* (September 2011). Online at: http://www.arhp.org/publications-and-resources/contraception-journal/september-2011 [last checked October 24, 2017]
[503] Social Security Act (SSA), 42 U.S.C § 1905 (1972).

incentive to states for complying with its family planning program by increasing the matching rate in all states to 90% federal funds for family planning services and supplies.[504] Through policies like this, the government appeared to be acknowledging the importance of the reproduction of American citizenship across generations, and actively designing laws aimed at reducing inequality in reproductive choice.

In sum, during a short period of time—from 1965 to 1973—different branches of the federal government enacted a number of programs and public policies relating to pregnancy and childbirth. Addressing intersecting issues concerning fertility and reproduction, these separate civic lineage developments would inevitably interact with each other in the political arena. First, Medicaid used public provisions to fund medically necessary treatment for the poorest members of society, including covering family planning, prenatal care, and childbirth. Second, Title X established public clinics to provide information and healthcare for poor women. And, finally, in *Roe v. Wade* and *Eisenstadt v. Baird*, the Supreme Court declared that individuals possessed a fundamental constitutional right to reproductive privacy, which encompassed a woman's decision in correspondence with their doctor whether or not to seek out birth control or have an abortion during the first two trimesters of pregnancy. With so many parallel civic lineage developments happening in tandem during the 1960s through the mid-1970s, would the different policies work together in a complementary manner? Or would they produce new forms of political friction and conflict? Given that this appears to be a transitional period in civic lineage politics in America, how would the development of Medicaid and

[504] Ibid.

the Supreme Court's ruling in *Roe v. Wade* fit together? And, finally, how would the interaction between these policies impact civic lineage politics in the United States?

The Court in *Roe* didn't mention Medicaid, and the Medicaid program likewise made no reference to abortion. This is normal for public policies of that scope, but the broad language nonetheless opened the space for contestation over how the two would fit together. Since there was no inevitable contradiction between these policy developments, the practical matter of whether or not they worked together smoothly would depend upon the actions of legislatures and courts. The federal government initially assumed that Medicaid would cover abortion procedures for poor women receiving Medicaid. Shortly after the *Roe* decision, during the Nixon Administration, the Department of Health, Education, and Welfare (HEW) began to reimburse states for abortion expenditures provided to indigent women under Medicaid.[505] This federal decision reflects the administration's initial recognition that abortion, after the Court's decision in *Roe*, constituted a legitimate medical treatment in the context of the Medicaid program. In addition to providing other family planning devices and services like birth control, from 1973 until 1977, state and federal Medicaid plans funded between 250,000 and 300,000 abortions for indigent women each year.[506] Although Medicaid did not mention abortion specifically even in its family planning Amendments in 1972 (established prior to *Roe*), the procedure was widely assumed, after the Court's *Roe* ruling, to qualify as part of

[505] Bailey, "Fifty Years."
[506] Marlene Gerber Fried, "Hyde Amendment: The Opening Wedge to Abolish Abortion," *New Politics* 11, no. 2 (2007). Online at: http://nova.wpunj.edu/newpolitics/issue42/Fried42.htm

Medicaid and a matter of family planning. As a result, Medicaid paid for almost one-third of all abortions annually, during this time, in the United States.[507]

2. The Triumph of the Voluntary Motherhood Ideal?

In this political climate of rapid change, it is valuable to take stock of the political moment.[508] During this extraordinary time in American politics, the idea that the government had a responsibility to actively combat poverty and inequality through anti-poverty legislation was becoming institutionalized in public policy in ways that extended to reproductive rights. With President Lyndon Johnson's "Great Society," and in particular his War on Poverty programs, the Keynesian economic ideals of a managed economy—which partly inspired Franklin D. Roosevelt's Social Security Act of 1935 (in response to the Great Depression)—not only remained the dominant economic paradigm but received renewed political support. This was not a mere blip on the political radar, rather it was a prolonged transitional period of nearly a decade in which the future of civic lineage policy remained uncertain but appeared increasingly hopeful—from an

[507] Marlene Gerber Fried, "The Hyde Amendment: 30 Years of Violating Women's Rights," Center for American Progress, October 6, 2006. Online at: https://www.americanprogress.org/issues/women/news/2006/10/06/2243/the-hyde-amendment-30-years-of-violating-womens-rights/ [last checked October 24, 2017]

[508] The Johnson Administration pushed the Civil Rights Act of 1964 through Congress, making it illegal at the federal level to discriminate on the basis of race, color, religion, national origin, and even sex. Two years later, Betty Friedan co-founded the National Organization for Women (NOW), which issued its own Bill of Rights agenda for achieving equal citizenship for women in 1968, and included "the right of women to control their own reproductive lives." As the women's movement became more organized and found allies during the early 1970s, the Equal Rights Amendment passed both the U.S. Senate and the House of Representatives as the proposed 27th Amendment to the United States Constitution, and was sent to the states to be ratified by a necessary 38 states in a period of 7 years. Like the 19th Amendment (women's voting rights), the ERA took off out of Congress getting a whopping 22 of the necessary states in the first year.

egalitarian feminist standpoint. Given that the U.S. government rapidly began to embrace reproductive freedom (and even took the initiative of funding public clinics for the poor), this raises the question of whether this was a sign that Margaret Sanger's ideal of voluntary motherhood finally triumphed?

Although this new version of voluntary motherhood was not identical to the one espoused by Sanger in the 1920s, it appears to share many of the same premises in its revised 1970s version. Sanger's ideal of voluntary motherhood, as discussed previously, involved a woman having the freedom to "control her own body," for "No women can call herself free until she can choose consciously whether she will or will not be a mother."[509] As this quote illustrates, Sanger viewed voluntary motherhood as first-and-foremost about women's freedom and equality as citizens in the United States. Admittedly Sanger did not align with the political cause of abortion when she spearheaded the early birth control movement against the Comstock Laws in the early twentieth century. When any form of contraception was illegal during the 1920s and 1930s, she spoke of access to birth control as sufficiently revolutionary. Later, Sanger's ideal of voluntary motherhood was extended by the same organization she founded, Planned Parenthood, to include abortion along with birth control as key for empowering women to choose whether and when they wished to become mothers.[510] So, during this time, we encounter the real and tangible possibility that something resembling Margaret Sanger's ideal of voluntary motherhood might finally be on the horizon (and in broader

[509] Margaret Sanger, "A Parent's Problem or Woman's?" *Birth Control Review* (March 1919): 6-7. Online at: https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=226268.xml
[510] See e.g., "Griswold v. Connecticut," Planned Parenthood Action Fund, https://www.plannedparenthoodaction.org/issues/birth-control/griswold-v-connecticut

and more egalitarian terms than she herself first articulated it half a century earlier). Consider Sanger's emphasis on the importance of establishing public clinics for the poor in her "clinic plan." Reframing this plan on as egalitarian terms as possible, Planned Parenthood and other civil liberties organizations followed her agenda for years without much assistance (and often strong opposition) from the government. Finally, in Title X in 1970, Congress passed Richard Nixon's proposed legislation that focused specifically on the issue of establishing public (government-funded) reproductive health clinics to serve poor women across the nation and provided large amounts of federal funding to Planned Parenthood clinics for providing expanded services to the poor. In the face of these rapid and sweeping changes in public civic lineage policy, it is worth asking ourselves whether this signals a new or impending dominance of a voluntary motherhood ideal of the reproduction of citizenship?

The short answer is no. Once again, this is a story of missed opportunities and unrealized possibilities from the standpoint of the voluntary motherhood ideal. While there was a time in which an alliance supporting a revised voluntary motherhood ideal seemed to be on the verge of victory, as we shall see, the Keynesian economic values and political ideas that supported these increasingly egalitarian civic lineage policies were shortly thereafter eclipsed by a new increasingly powerful economic ideology in American politics: Neoliberalism.

3. Neoliberalism & Civic Lineage:

Before proceeding to a discussion of the abortion defunding cases and tracing the rise of our contemporary neoliberal civic lineage regime, it would be useful to first clarify what I mean by 'neoliberalism.' The rise of neoliberalism is rarely discussed in terms of reproductive policy, which has allowed an important transition in contemporary citizenship to remain largely overlooked. The restrictions on federal funds for abortion under Medicaid in the 1970s, examined in this chapter, not only went hand-in-hand with a neoliberal attack on the welfare state, but they also played an arguably pivotal role in the rise of early neoliberalism in America. In this section, I specify how I am using this term in the context of reproductive policy. I maintain that neoliberalism shaped civic lineage policy, ushering in a new dominant civic lineage regime in contemporary America. This neoliberal discourse and policy package appears to have gained political traction in part as a conservative backlash against the aforementioned victories of the civil rights and women's movements, along with adverse economic conditions in the 1970s that many blamed on Great Society policies. As the Court outlawed the formal legal subordination of women and minorities for being unconstitutional in America, the "pro-traditional family" religious right, fiscal conservatives, and racial conservatives (now supporting colorblind racial policies) united to create an alliance supporting a new mechanism of creating and maintaining civic inequalities through the regulation of reproduction and birth: The private market.[511]

[511] It is worth noting that this political (neoliberal) coalition included "national security conservatives" as well as the groups focused on here. Although the national security (hawkish) conservatives dis not play an influential role in vocally shaping domestic reproductive policy during this time, they were a part of this

What is neoliberalism? A notoriously difficult concept to pin down, 'neoliberalism' has become a signifier for a variety of global and domestic political trends involving economic deregulation, the privatization of traditionally public services, expanding market relations and mass marketization, subsidizing private companies, and the increasing commercialization of virtually all aspects of human life.[512] As Loïc Wacquant puts it, "Neoliberalism is an elusive and contested notion, a hybrid term awkwardly suspended between the lay idiom of political debate and the technical terminology of social science."[513] For many, the idea of "neoliberal citizenship" may at first glance appear to be a contradiction in terms. In international politics, for instance, the ideology and practice of "neoliberalism" is often portrayed as undermining the significance of the modern nation-state in an increasingly globalized world.[514] This, by extension, lessens the import of national citizenship in the face of a global economy and transnational corporations. Yet, as I shall argue, the American brand of neoliberalism supports a "strong state," on a domestic level, at the same time it reorganizes statecraft according to market ideals and privatization.

The most widely accepted account of the origins of neoliberalism, elaborated in David Harvey's *Brief History of Neoliberalism* and Manfred Steger and Ravi Roy's

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coalition; relying increasingly on a mercenary army and private firms like Blackwater Protection, in neoliberal fashion.

[512] Harvey, *A Brief History,* 2-3.

[513] Loïc Wacquant, *Punishing the Poor* (Durham: Duke University Press, 2009), 306.

[514] Since the 1980s, neoliberalism has dominated discussions of globalization and free trade. This is particularly evident with respect to the "Washington Consensus," which used international organizations like the World Bank and the International Monetary Fund (IMF) to force poor countries in the third world to deregulate their economies and open them up to transnational corporations associated with wealthy countries but not bound to their national laws. See Manfred B. Steger and Ravi K. Roy, *Neoliberalism: A Very Short History* (Oxford: Oxford University Press, 2010).

Neoliberalism: A Very Short Introduction, locates the roots of this ideology in Cold War critics of the social welfare state, such as Frederick Hayek and Milton Friedman. Aimed at dismantling the Keynesian welfare state and promoting free market ideology, these ideas subsequently developed into a post-Keynesian economic orthodoxy, as they penetrated a growing network of sympathetic right-wing think-tanks, such as the American Enterprise Institute.[515] In conservative think-tanks, the intellectual ideas were transformed into practical political agendas and policy packages, which we have come to associate with the celebration of free markets, low taxes, the deregulation of trade, the privatization of public assets and traditionally public services, an attack on labor unions, and the retrenchment of the welfare state.[516] The elections of Margaret Thatcher in Great Britain in 1979 and Ronald Reagan in the United States in 1980 are widely viewed as ushering in the formal period of neoliberal dominance in political and economic policy in Britain and the United States, with both leaders deriding Keynesianism and setting out to weaken their nation's respective labor movements and social safety nets.[517] As the examples of Reagan and Thatcher illustrate, there is both a global and a domestic politics of neoliberalism.[518] Thus, while neoliberalism is often associated with the globalization of economic markets, it also functions as an ideological program of domestic governance and the reorganization of statecraft according to laissez-faire free market ideals. Importantly, as I shall argue, a neoliberal state requires "neoliberal citizens."

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[515] Richard Robinson, ed., *The Neoliberal Revolution: Forging the Market State* (New York: Palgrave, 2006), 183.
[516] David M. Kotz, *The Rise and Fall of Neoliberal Capitalism* (Cambridge: Harvard University Press, 2015), 74; Arthur T. Denzau and Ravi Roy, *Fiscal Policy Convergence from Reagan to Blair: The Left Veers Right* (London: Routledge, 2004), 35.
[517] Steger and Roy, *Neoliberalism*, 21-49.
[518] Wendy Brown, "Neoliberalism and the End of Liberal Democracy," *Theory and Event* 7, no. 1 (Fall 2003): http://muse.jhu.edu/journals/theory_&_event/

Here I focus on a uniquely American neoliberal regime.[519] In practice, no ideology comes in a "one size fits all" package, and hence neoliberalism, as a system of statecraft in U.S. domestic policy, incorporated and reworked preexisting civic hierarchies of race, gender, and sexuality in the United States. Whereas conventional wisdom typically credits the demise of official Keynesianism and rise of neoliberalism to the OPEC oil crisis and economic recession of 1973-1974, this is an incomplete and partial explanation for the domestic ascent of neoliberalism and the specifically "American" configurations it followed.[520] Missing from this explanation is the fact that the doctrine gained much of its political strength in America during the mid-1970s as a reactionary backlash against the successes of the progressive left social movements of the 1960s and 70s. In the aftermath of the civil rights victories of the Great Society and its War on Poverty, a burgeoning neoliberal conservative opposition to the welfare state found important allies in the newly mobilized religious right, which sought to return to the "traditional" family—or what Robert O. Self calls the male "breadwinner" family. Nostalgia for this "white picket fence" ideal (i.e. under siege by feminism, civil rights, and the early gay rights movement) provided a point of "coming together" for new allies in the political arena.[521] As Thomas Palley notes, "Throughout the period of Keynesian dominance, there remained deep conservative opposition within the United States that

[519] As Harvey has emphasized, neoliberalism depends upon nationalism to survive by increasing global competition. "[T]he neoliberal state needs nationalism of a certain sort to survive. Forced to operate as a competitive agent in the world market and seeking to establish the best possible business climate, it mobilizes nationalism in its effort to succeed. Competition produces ephemeral winners and losers in the global struggle for position, and this in itself can be a source of national pride and soul-searching." As a project relying on nationalism, it is therefore not surprising that Thatcherism in Britain appealed to different national concerns and discourses than did Reaganism in the United States, because they framed free market ideals in discourses that resonated in each nation. Harvey, *A Brief History*, 85.
[520] On Neoliberalism and the OPEC oil crisis, see, Harvey, *A Brief History*, 12, 27.
[521] Self, *All in the Family.*

provided a base from which to launch a neoliberal revival."[522] The "family values" religious right advocates, racial conservatives, and fiscal conservatives formed a tight political alliance based upon their mutual interest in dismantling the welfare state. Far from being strange bedfellows, as is often assumed, the "pro-family" politicians and fiscal (spending-cutback) conservatives during the 1970s and 1980s, these groups each eschewed the welfare state and celebrated the (mythological) idea of the self-sufficient "head of household" citizen who exercised freedom on the market without dependency on the state. This, as I shall argue, is evident in the discourse surrounding abortion defunding under Medicaid—which condemned welfare dependency as part of its attack on the Medicaid program and blamed poor women for making irresponsible reproductive choices.

The abortion defunding cases, examined throughout this chapter, endorsed the market privatization of the right to reproductive privacy. When the Court in the early reproductive rights cases of *Griswold, Eisenstadt*, and *Roe* elaborated a fundamental right to reproductive choice in a "right to privacy" under the Constitution, there is good reason to believe that many of the Justices in the majority viewed the right as fundamental and robust: Justice Blackmun, the author of the majority opinion in *Roe,* would later emphasize this point.[523] However, the Court in *Roe* did not specify what affirmative duties the right might require from the states under programs like Medicaid, or the scope of privacy in this context. With privatization and marketization assuming a more central

[522] Thomas I. Palley, "From Keynesianism to Neoliberalism: Shifting Paradigms in Economics," in *Neoliberalism: A Critical Reader,* eds. Alfredo Saad-Filho and Deborah Johnston (London: Pluto Press, 2005), 21.
[523] See e.g., Justice Blackmun's dissents in *Beal v. Doe*, 431 U.S. 438 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980).

role in governance in America during the mid-1970s, the Court's earlier decision to ground reproductive rights in "a right to privacy" opened up a fairly easy path of attack for its opponents seeking to limit reproductive choice. While a right to privacy could be conceived broadly as providing protection for reproductive autonomy, decision-making, and bodily integrity (all ideas consistent with voluntary motherhood), it could also refer to the classical idea of liberty as a narrow negative right against state interference and nothing more (neoliberal retrenchment). Under the second of these alternative formulations of privacy rights, the state has no affirmative obligation to ensure that women have access to meaningful reproductive choice when they lacked the economic capabilities to exercise their reproductive choices on the private market. Focusing on the market gave this a thin veneer of equality. Since the women's movement and civil rights movements were largely successful in their goals to eliminate formal legal discrimination under the law by the end of the 1970s, the subordination of women and minorities was no longer explicitly built into the law yet remained a prominent part of the American landscape and private decision-making on the economic market. Under this neoliberal model, women and people of color could function as primary breadwinners, opening new doors for some hitherto excluded individuals to access reproductive opportunities on the market. However, when overt legal discrimination disappears, the next most effective way to enforce historically salient civic hierarchies is by privatizing discrimination through making it subject to the whims of the private market, a market in which preferences and resources are shaped by previously state-constructed systems of inequality.

For instance, Susan Braedley and Meg Luxton describe neoliberalism as a "gendered regime" writing that, "neoliberalism's core theoretical premise and its practice in conjunction with the prevailing sex/gender divisions of labor" has actually fostered a "decline in women's positions and material well-being" on a broader level.[524] Even with laws forbidding overt workplace discrimination, women are typically paid lower salaries than their male counterparts in similar positions in the private market.[525] They are also responsible for more of the unpaid work of raising children and sustaining families that gets done in private households.[526] By transforming reproductive choice into a market choice more than a civil right, the privatization of a right to privacy from the outset targeted non-affluent single mothers, disproportionately minorities, who were the least able members of society to express their civic freedom as consumers on the private market. In this respect, neoliberalism was fueled by the legal successes of the civil rights and women's movements, but this alliance used the end of formal subordination to foster a backlash against policies aimed to rectify the past ills of discrimination. This twist to the story of the "right to privacy" played a pivotal role in the development of our contemporary civic lineage regime, which uses the commercialization, commodification, and marketization of reproductive technologies and services on the private market to perpetuate and sometimes deepen a landscape of civic inequality in America today.

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[524] Susan Braedley and Meg Luxton eds., *Neoliberalism and Everyday Life* (Montreal & Kingston: McGill-Queen's University Press, 2010), 13.

[525] See e.g., "78 Cents on the Dollar: The Facts About the Gender Wage Gap," Sara Ashley O'Brien, *CNN Money*, aired April 14, 2005, on CNN. Quote: "7% wage gap between male and female college grads a year after graduation even controlling for college major, occupation, age, geographical region and hours worked."

[526] See e.g., Gaelle Ferrant, Lucia Maria Pesando, and Keiko Nowacka, "Unpaid Carework: The Missing Link in the analysis of gender gaps in labour outcomes," *OECD Development Center,* December 2014. Online at: https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf

When the government actively privatizes public services by pushing them onto the market, the state's decision to privatize remains a consequence of state action and public policy, and state action then enforces market choices. This in turn alters the reproductive opportunities available to different citizens based upon the ways in which past civic hierarchies map onto class inequality in the United States today, intertwining with race and gender inequalities.

Wendy Brown has recently pointed out the ways in which neoliberalism penetrates all aspects of political life, including transforming private relations into commoditized encounters and undermining democratic citizenship.[527] However, the idea that neoliberalism offers its own "ideal of citizenship" remains largely overlooked and under-developed in political science. This makes sense because neoliberalism appears to undermine the many of the most cherished values associated with democratic citizenship, replacing an emphasis on engaged political participation and civil rights with a culture and practice of mass consumerism. Nonetheless, while neoliberalism depoliticizes civic membership in important ways—by transforming traditional civil rights into consumer protections, commercializing collective concerns, and privatizing public services—I nonetheless seek to document ways in which neoliberalism also ironically restructures citizenship by fostering a distinctively neoliberal ideal of citizenship that offers a picture of the type of body politic (or people) necessary for the state to function smoothly according to a politicized market. Here I argue that there is a neoliberal ideal of citizenship, and a neoliberal civic lineage regime aimed at structuring the reproduction of

[527] Brown, *Undoing the Demos.*

citizens across generations. Indeed, a neoliberal nation requires a population of properly neoliberal citizens to make the system work—that is, a populace which accepts the norms of neoliberalism, including its emphasis on personal responsibility and its theory of the individual as finding true freedom through consumerism and market choices. (I will discuss the precise configurations of this neoliberal regime—and what this ideal of good citizenship and civic reproduction looks like—throughout the rest of this chapter and the next.) For now, the important task at hand is to trace the mechanisms by which this civic lineage regime skyrocketed to prominence in the mid to late 1970s, and did so in part via targeting reproductive policy.

The fact that the Supreme Court grounded birth control and abortion in a right to privacy was the ideal opportunity for an alliance between the religious right, racial conservatives, and the new neoliberal market fundamentalists. This provided an opening for reframing reproductive rights for the poor under Medicaid as a consumer protection rather than a civil right. Ultimately, the fact that *Roe* was founded on a fundamental right to privacy provided an opening for a burgeoning neoliberal alliance to form tighter ties and redefine terms like "privacy" and "choice," according to their market ideology and the rhetoric of consumerism under Medicaid. Let us turn now to the origins of these early "abortion defunding" efforts, which, as we shall see, offer a unique glimpse into the development and construction of a neoliberal citizenship and civic reproduction in the United States.

4. Federalism: Abortion Defunding in the States

In the aftermath of the Court's decision in *Roe*, we immediately encounter friction at the state level over whether or not the voluntary motherhood ideal ought to apply in the context of Medicaid. With the federal courts compelling states to fund abortion under Medicaid and the federal government matching their funds under the program, the possibility of voluntary motherhood appeared to be on the horizon. However, in a matter of a few years, we encounter a national shift away from voluntary motherhood towards a neoliberal approach to civic reproduction.

The initial response of the Nixon Administration to the Court's ruling in *Roe v. Wade* was simply to incorporate abortion, as a medical procedure concerning pregnancy, into the existing program of Medicaid. The Department of Health, Education, and Welfare did this swiftly and effectively (at the federal level), treating the legalization of abortion as consistent with the goals of Medicaid. But the design of the Medicaid program soon complicated the relationship between abortion and Title XIX of the Social Security Act. Medicaid, as mentioned above, was designed to empower the state governments to determine the meaning of what procedures qualified as medically necessary.[528] As long as they abided by a few basic federal guidelines, each state could tailor its own program with significant latitude. The program itself encouraged a system of state control that meant that what California covered would, for instance, almost certainly be different from Arkansas, Texas, or New York. The federal government in

[528] "Medicaid: A Timeline of Key Developments, 1965-2009," *Kaiser Family Foundation*. Online at: https://kaiserfamilyfoundation.files.wordpress.com/2008/04/5-02-13-medicaid-timeline.pdf

turn would provide matching funds based on what the states decided to fund. By filtering Medicaid through American federalism, Title XIX of the Social Security Act offered a political opening for opponents of abortion to attempt to defund it at the state level by excluding it from their own Medicaid plans.[529] And if the states didn't pay for a procedure like abortion, then the program provided no matching funds from the federal government. This in turn led to a series of federal court cases, which would later be appealed to and heard by the Supreme Court in 1977 as the "abortion defunding cases" under Medicaid.

In the aftermath of *Roe*, the anti-abortion movement—empowered by strong support from the Catholic Church— mobilized and began to lobby both state and federal legislatures to oppose spending tax money on financing abortion through Medicaid.[530] Over a dozen states passed legislation denying state funding under Medicaid for abortion. Of particular note, Pennsylvania and Connecticut outlawed public funding for what they framed as elective (or optional) abortions, but permitted funding for abortions deemed "medically necessary." In addition to a host of similar laws regulating Medicaid at the state level, the Mayor of St. Louis, Missouri issued a directive banning municipal hospitals from performing abortions, except when doing so is necessary to either save the

[529] Michael Lalli, "The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions Only for the Rich?" *Fordham Urban Law Journal* 6, no. 3 (1977): 689-90.
[530] Fried, "Hyde Amendment," 2007, 1. As Fried describes it, the Catholic Church was instrumental along with Evangelical Protestants: "[A]fter the 1973 decision…the Catholic Church took the lead through the National Conference of Catholic Bishops, which set up an independent lobbying group with the goal of overturning Roe. Other key players included the National Right to Life Committee, which united state anti-abortion groups, and the Christian Evangelicals, who had formerly resisted political engagement. While security a constitutional amendment banning abortion was abortion opponents' ultimate goal, they realized they did not have sufficient support. They turned instead to tirelessly pursuing a strategy of advocating for restrictions on the state level. In 1973 abortion opponents introduced close to 200 bills in state legislatures; 62 of those 200 measures limiting access to abortion passed."

life of the pregnant woman or protect her from grave physical injury. (The Missouri directive was not attached to a state Medicaid program, and would apply to all women seeking an abortion by prohibiting public hospitals from providing abortion services—hence it too was an instance of public regulation at the state level.) These states defended their decision to cut funding for abortion by emphasizing that the Medicaid Statute limited payments to "medically necessary" services and gave states a great deal of discretion to determine which services qualified as "medically necessary." Faced with states withdrawing funding for abortion, the federal Department of Health, Education, and Welfare announced that the national government would continue to contribute its share of matching funds to states covering abortion, but did not require states to pay for abortions that were not classified by those states as "medically necessary."[531] Ultimately, by failing to set national guidelines on the issue and allowing states to determine the meaning and scope of what qualified as a "medical necessity," the Department of Health, Education, and Welfare punted the issue to the courts.

The attempts by the states to cut funding for abortion under Medicaid failed in the lower federal courts, so both the states and federal government continued to pay for the procedure under the program. Before the topic came before the Supreme Court, the lower federal courts heard a string of Medicaid defunding cases from 1973 to 1977, including challenges to the laws of Pennsylvania and Connecticut. In a vast majority of these cases, the federal court in question concluded that Medicaid required states to fund all abortions after *Roe*. Since pregnancy required some form of medical intervention—

[531] Lalli, "The Effect of Recent Medicaid Decisions," 689-90.

either childbirth or abortion—a consensus seemed to be forming among the judiciary that abortion (when stripped of its moral controversy and viewed as simply a legal question) was one of two possible "medically necessary" responses to pregnancy. In the wake of *Roe*, these lower federal courts almost all concluded that states needed to fund both abortion and childbirth. For instance, in *Doe v. Rampton* in 1973, the Utah district Court concluded that a "[s]tate may not so use its Medicaid program to limit abortions" because it would curtail the ability of poor women to exercise the right to an abortion in all trimesters "for reasons having no apparent connection to [the] health of the mother or child."[532] In its interpretation of *Roe*, the Utah court concluded that a limitation on public funding for abortion under Medicaid was no different than limiting the right of the poorest Americans to choose abortion over pregnancy. Using similar reasoning, the Second Circuit Court in *Maher* overturned Connecticut's law as unconstitutional. The Circuit Court noted that requiring burdensome proof of "medical necessity" made a mockery of the fundamental right affirmed in *Roe v. Wade*. It also sided with the argument that abortion restrictions violated equal protection. Since states have no affirmative obligation to fund childbirth (but can opt to do so through Medicaid), then the state cannot make certain services contingent upon a woman forfeiting her constitutional right to choose abortion because she is poor. In another example, the federal court of appeals in *Beal,* struck down Pennsylvania's law for violating the spirit of the federal act in a statutory sense.[533] By funding childbirth but not abortion it forced "pregnant women to use the least *voluntary* method of treatment, while not imposing similar requirement on

[532] *Doe v. Rampton,* 366 F. Supp. 189 (D. Utah 1973).
[533] *Doe v. Beal*, 523 F .2nd 611 (3rd Cir. 1975).

other persons who qualify for aid" for medical conditions besides pregnancy [italics mine].[534]

The lower federal court rulings, as illustrated in the quotes above, almost all overturned the state legislation aimed at limiting abortion funding for violating the Court's ruling that a woman had a right to choose abortion in *Roe v. Wade* and often also emphasized the egalitarian spirit of the Medicaid program. Indeed, the federal court of appeals in *Beal,* overruled the Pennsylvania law for violating voluntarism and choice within the Medicaid program—echoing what sounds a lot like the ideal of voluntary motherhood.[535] The key question was: would the Supreme Court concur with this interpretation?

5. The Hyde Amendment:

This brings us to the Hyde Amendment. Before the Supreme Court reviewed these lower court cases, Congress acted to defund abortion under the Hyde Amendment. These legislative debates revolved around arguments about what can reasonably be termed "voluntary motherhood" versus "neoliberalism," as two contradictory civic lineage ideals, but neither of which was yet a dominant civic lineage regime. When this later sparked the Supreme Court to weigh in on the topic of abortion defunding and the Hyde Amendment, as we shall see, the Justices also split along similar ideological lines, with a bare majority pushing narrow (market-based) access to abortion and an outspoken

[534] Ibid., at 619.
[535] Ibid., at 611.

minority arguing for a more robust notion of reproductive rights. By 1976, the contemporary neoliberal reproductive alliance was coalescing around the goal of denying government funding for women to choose abortion under Medicaid. In fact, the debate over the Hyde Amendment was dominated by discussions of the irresponsible choices that poor women purportedly make when it comes to childbearing, and discussions of pregnant women as market actors who can purchase their own abortions if they don't wish to carry their pregnancy to term. This legislation portrayed pregnant women as consumers (or consumer-citizens) as opposed to rights-bearing citizens. Let us examine this debate and shift in rhetoric away from voluntary motherhood to an emerging neoliberal civic lineage ideal in the context of the first debate over the Hyde Amendment in Congress.

In fall 1976, a freshman Congressman from Illinois, Henry Hyde, spearheaded an effort in the House of Representatives to abolish federal funding for all abortion.[536] Although the anti-abortion movement's larger goal of a Constitutional Human Life Amendment to protect unborn fetuses failed to gain sufficient political traction, Hyde found increasing support for defunding abortion for poor women by targeting Medicaid. Circumventing the normal legislative process to amend the Medicaid statute, Hyde attached a provision in the form of a "rider" to the Department of Labor, Health, Education, and Welfare Appropriations Bill for 1977. Now known as the "Hyde Amendment," the purpose of the rider was to end federal Medicaid funding for abortion by using the appropriations process as a "backdoor" mechanism for accomplishing

[536] See e.g., Barbara H. Craig and David M. O'Brien, *Abortion and American Politics* (Chatham, N.J.: Chatham House Publishers, Inc., 1993), 110-117.

controversial legislation, which was unlikely to pass through the traditional legislative process. During the congressional debates over the Hyde Amendment, as we shall see in quotes below, members of Congress spoke openly and directly about their goals of transforming abortion from an issue of "rights" and "public health," to a private choice available to those who could afford to purchase the procedure from a private doctor. Praising personal responsibility and self-sufficiency as the mark of good citizenship, in the Hyde debates, we witness an alliance forming in Congress in support of this new civic lineage policy, aimed at regulating the reproductive opportunities of poor women—or more broadly what I call "a neoliberal ideal of citizenship."

The most vocal supporters of the Hyde Amendment relied almost exclusively on religious rhetoric, making frequent references to the slaughter of "defenseless" fetuses and "innocent" souls. But Henry Hyde's appropriations rider to restrict federal support for poor women's abortions under Medicaid was successful because it was able to garner support—building key alliances—outside the religious right. By 1976, the religious right and anti-abortion movement had emerged as an increasingly powerful force in politics, and successfully helped get pro-life candidates elected to Congress.[537] These representatives proved to be the most stalwart supporters of the Hyde Amendment, which is a classic example of policy feedback involving a political backlash against the *Roe* decision. However, the anti-abortion proponents could not push the Hyde Amendment through Congress without building a broader crosscutting coalition. They recruited fiscal conservatives on the promise to stymie misuse of public funding by irresponsible citizens

[537] Fried, "Hyde Amendment" 2007, 1.

and curtail the welfare state.[538] This is why the Hyde Amendment denied protections to poor women and only poor women. Hyde targeted this group purely because it was vulnerable, and because he could form a coalition around the cause. Explaining his true motives, Representative Hyde said during the debate on the floor of the House, "I would certainly like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW Medicaid bill."[539] The commodification of abortion was strategic for the religious right. The attack on Medicaid funding for abortion drew support from representatives who opposed big-government and sought to constrict federal funding for social programs and federal bureaucracy. It also attracted the votes of those who opposed welfare as government handouts for "underserving" Americans, and viewed government spending on programs to help poor families—such as welfare and Medicaid—as supporting lazy and promiscuous women who made "irresponsible" reproductive decisions. (The topic of welfare reform is discussed in detail in the next and last "case study" chapter.) Ultimately, as we shall see, this alliance between fiscal conservatives and the pro-traditional family religious right, joined by racial conservatives from the south, would prove an enduring civic lineage coalition. This political alliance would, among other things, play a central role in the development of our contemporary neoliberal civic lineage regime.

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[538] See e.g., Heather Boonstra and Adam Sonfield, "Rights without Access: Revisiting Public Funding of Abortion for Poor Women," *Guttmacher Policy Review 3,* no. 2 (2000); Heather Boonstra, "The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States." *Guttmacher Policy Review* 10 March 5, 2007; Fried, "The Hyde Amendment: 30 Years," 2006.
[539] Congressional Record 20, 410 (1976).

The proponents of the rider sought to reframe abortion as just another service that a consumer-citizen could purchase on the market. Representative Charles Grassley Iowa explicitly made the case for framing abortion as more like "goods and services," than as a necessary medical procedure or a civil right. In his words, while "some argue that the Hyde Amendment [unfairly] deprives poor women of something that more affluent women can pay for," there is nothing wrong with that since the same rule applies to all other market services.[540] At the same time that Grassley sought to frame abortion as just another customer service that is naturally subject to the rules of supply and demand of the economic market, Senator Orrin Hatch of Utah equated the poor woman seeking an abortion as akin to a traditional consumer, who could carefully save small amounts of money over time (i.e. putting aside "five" to "ten" dollars every couple days) like she would save for any other private good. As Hatch put it, "There us nothing to prevent [any women, including poor women]…from exercising increased self-restraint, or from sacrificing on some item or other for a month or two to afford [her] own abortion."[541]

This coalition declared that abortion was no different than other goods and services. The pregnant woman was merely another type of consumer. They turned a blind eye to the reality that abortion was a time sensitive medical procedure, which distinguished it from a traditional good or service. The women who sought abortion under Medicaid did not, by definition of qualifying for Medicaid insurance in the first place, have the resources to function as self-reliant citizen-consumers when it came to

[540] Congressional Record, Vol. 123, 25 (September 29, 1977).
[541] Rickie Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States* (New York: Hill and Wang, 2001), 17.

shopping around on the private market. Unlike typical consumers seeking goods and services, a pregnant woman had finite time and money to pay for an abortion. The longer she waited, the more expensive and dangerous the procedure became for her. As public health officials put it, "the risk of death [from abortion], though small, increases by almost 30 percent with each week of gestation over eight weeks, and the risk of other major complications increases by about 20 percent with each additional week past the eighth."[542] When we add poverty to the equation, the combination of time and resources might prove to be an insurmountable obstacle for a pregnant woman seeking to obtain an abortion.[543] When the Hyde Amendment became law, the cost of an abortion in the United States was forty-four dollars more than the average monthly AFDC welfare check for an entire family.[544] Thus, a poor woman on welfare could only pay for her own abortion by sacrificing basic necessities such as "food and shelter for themselves and their children."[545]

During the Hyde Amendment debates in the1970s, it is worth noting that there remained strong and vocal support at this time for the voluntary motherhood ideal in Congress. These members of Congress argued that the new right's attack on the reproductive opportunities of poor women was a backhanded means to the end of circumscribing abortion for the most vulnerable members of society. For instance,

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[542] Stanley K. Henshaw and Lynn Wallisch, "The Medicaid Cutoff and Abortion Services for the Poor," *Family Planning Perspectives* 16 (July-August 1984): 171.
[543] Boonstra, "Heart of the Matter."
[544] Fried, "Hyde Amendment," 5. In Fried's words, "The average cost of an abortion at the time was $285, forty-four dollars more than the average total monthly welfare payment for a family of four."
[545] Rhonda Copelon and Sylvia A. Law, "'Nearly Allied to Her Right to Be'—Medicaid Funding for Abortion: The Story of Harris v. McRae," in *Women and the Law Stories,* eds. Elizabeth S. Schneider and Stephanie M. Wildman (New York: Foundation Press, 2011).

Senator Edward Brooke of Massachusetts, a Republican senator and vigorous champion of abortion rights in the 1970s, spoke on the Senate floor in 1975 about his concerns regarding the trend in the states to limit Medicaid funding for the poor. Brooke, the nation's first African American Senator since Reconstruction, warned that funding restrictions within the Medicaid program could "put an economic test on the question of abortion," which would discriminate against vulnerable (poor) women who sought to exercise their right even during the first trimester.[546] Likewise, Senator Jacob Javits argued that denying federal funds for poor women to have abortions "eliminates all decision-making and exercise of choice on the part of women who are poor, thereby infringing upon their civil rights and personal freedom."[547] Expressing his concerns about an the impending class dichotomy in abortion, New York Republican Senator Jacob Javits emphasized his fear that: "The poor [will] use coat hangers and the wealthy go to clinics."[548] But these more expansive arguments in favor of reproductive freedom and equality lost the vote over the Hyde Amendment.

By seeking to transform abortion from an (accessible) fundamental constitutional right into merely a permissible though undesirable consumer choice, the members of this newly forming neoliberal civic lineage order reclassified a right to reproductive privacy and choice as merely a consumer protection. This right was now available only to those with the economic resources to purchase abortion services on the (reproductive) marketplace. Turning Comstock's "moral purity" crusade against the commodification

[546] Congressional Record, Senate, vol. 124, pt. 14 (September 27, 1978).
[547] Ibid.
[548] Ibid.

of reproductive technologies on its head while at the same time taking aim at the ideal of voluntary motherhood, this was not a simple return to the old ideals of the "moral purity" regime that dominated American politics one hundred years before. Unlike the "traditional family" advocates of the past, the neoliberal "pro-traditional family" religious right formed a tight link with a market-based agenda, which contradicted Comstock's former concerns about the commodification of birth control and abortion corrupting the youth (or the next generation of citizens). But this was not a total break from the past either, for the ideal citizen advocated through these policies (in practice) continued to be the white middle to upper-middle class citizen—the same "picture" of the ideal citizen encouraged via civic lineage policies throughout the twentieth century.

The Hyde Amendment's success was deeply intertwined with the growing backlash against welfare during the 1970s. As the next (and last) "case study" chapter on welfare reform discusses, after the inclusion of people of color in AFDC following the end of formal segregation and the Civil Rights Act of 1964, these policies not only targeted the poor but also disproportionately affected minority women. Filtered through a neoliberal prism, this resurgent discourse against welfare relied upon (intersecting) negative stereotypes about gender, race, class, and sexuality in the United States. For instance, during the same year that the Hyde Amendment first came before Congress, Ronald Reagan, in his 1976 unsuccessful bid for the Republican Party's nomination for President, popularized the now-familiar stereotype of the "welfare queen." As we shall see in the next chapter, this narrative elicited white racial resentment aimed at inner-city blacks, and helped fuel a nationwide animus against welfare focusing on the purportedly

"pathological" (irresponsible) reproductive and motherhood behaviors of poor women of color. The Hyde Amendment cannot be disconnected from this concomitant conservative condemnation of welfare (and Medicaid), which in turn incorporated and deployed specious racial stereotypes such as the welfare queen to call into question the ability of poor women to make proper reproductive choices and function as morally upright citizens.

Indeed, according to this neoliberal conception of civic reproduction, a proper citizen ought to be self-sufficient, properly self-disciplined and frugal, not dependent on state financial support, and in turn make reproductive choices that matched her economic means—having only so many children as her family could afford to raise without government assistance.) The idea that the state would use public funding to bankroll the (private) reproductive choices of potentially irresponsible and untrustworthy members of society—women, people of color, and the poor—was absurd according the supporters of the Hyde Amendment. And, as Rickie Sollinger emphasizes, "a critical mass of Americans did not approve of associating the sexual behavior of poor women, particularly minorities" with a "freedom of choice" when their (bad) choices would be funded by (responsible) taxpayer dollars.[549] Just as good citizens made responsible choices, even if it required sacrifice, the implication was that "bad" citizens didn't deserve government assistance due to their irresponsible choices and lack of self-discipline. The argument that tax dollars should not go towards "cleaning up the mistakes of careless, oversexed women" of color resonated with large numbers of the

[549] Solinger, *Beggars and Choosers,*14.

American public, who believed that these women should take financial responsibility for their own choices and self-created problems.[550]

Not anticipated by the Court in *Roe*, this strategy of privatization and market choice became a powerful avenue of attack against abortion. Here we see the alliance forming in favor of neoliberal citizenship and a neoliberal civic lineage order. The attack on abortion began as an attack on the trustworthiness of the poor to make responsible reproductive decisions, and it reframed the potential mother as first-and-foremost a consumer. The good citizen made her own reproductive decisions from a position of "independence" and economic self-sufficiency rather than dependence upon the state. The proper consumer citizen could afford to make her own choices about fertility and birth, but the woman too poor to have such an engaged relationship to the market was not a legitimate "choice maker," and thus not proper neoliberal citizen. The former (good citizen) was stereotyped as white and middle-class under the neoliberal regime, and the latter (bad citizen) was conversely portrayed as a poor woman of color on welfare. In the next chapter, I will examine and interrogate these stereotypes of good and bad neoliberal citizenship in more detail, but for now let us turn to the Supreme Court "abortion defunding" cases after *Roe.*

[550] Ibid., 14.

6. The Abortion Defunding Supreme Court Cases:

Let us turn now to the abortion defunding cases. Before the Hyde Amendment was scheduled to go into effect on September 30, 1976, a federal Judge in the Eastern District of New York, Judge Dooling, issued an injunction with nationwide effect requiring Medicaid payment to continue from the federal government "for all abortions provided to Medicaid-eligible women by certified Medicaid providers…"[551] The same Judge later declared the Hyde Amendment unconstitutional and in violation of *Roe v. Wade*.[552] Although Representative Hyde and other members of Congress appealed this injunction to the Supreme Court, the Court chose to take no action on the case at the time and focused instead on deciding the three earlier state rather than federal "abortion defunding cases" before it in 1977. In the aftermath of the Court's *Roe* ruling, the federal courts almost all took the position that the states were subsequently required to include abortion (along with childbirth) in their Medicaid programs. Would the Court agree in these cases and continue to expand its privacy doctrine through a sweeping ruling as it had in the past? Or would it constrict it for the first time since *Griswold*? More specifically, would the discourse of these opinions support the voluntary motherhood ideal or the neoliberal ideal of civic reproduction? As we shall see, a neoliberal majority began to emerge on the Court in favor of supporting decisions by both states and the federal government to

[551] *McRae v. Califano*, 491 F. Supp. 630. 742 (E.D.N.Y) (1980): Judge Dooling. For an excellent discussion of this case, see: Copelon and Law, "Nearly Allied to Her Right to Be."

[552] The day before the Hyde Amendment was scheduled to go into effect on September 30, 1976, a coalition of advocate groups filed suit in federal Court in the Eastern District of New York, challenging the constitutionality of the Hyde restriction on abortion. The case was filed as a class action lawsuit in the name of Medicaid eligible pregnant women wishing to have an abortion, and abortion clinic providers, including Planned Parenthood.

defund abortion under Medicaid and transform the right to reproductive privacy into a market commodity.

The Supreme Court finally weighed in on the topic in the cases *Beal v. Doe*, *Maher v. Roe*, and *Poelker v. Doe*, three "abortion defunding decisions" decided together in 1977. Here we see the Court moving in a distinctly neoliberal direction. In these three cases in 1977 on the public funding of abortion, the Supreme Court reversed the decision of the federal court's ruling below it. In the first case, *Beal v. Doe*, the Court held that states participating in the Medicaid program had the discretion under Title XIX of the Social Security Act to decide whether or not to fund abortions that were not medically necessary.[553] The Court focused on the statutory question in this case and overturned the Pennsylvania federal court's ruling that Medicaid required state's to fund abortion. In *Poelker v. Doe,* the Court held that states and cities had no obligation to provide public employees or facilities—including access to municipal hospitals—to perform abortions that were not "medically necessary" to save the life or protect the health of the pregnant woman.[554] But *Maher* is by far the most significant of these three abortion (state-funding) cases of 1977, because it went beyond the statutory issue in *Beal,* by directly addressing the constitutionality of defunding abortion under Medicaid.[555] The *Maher* Court dismissed the plaintiffs' due process and equal protection claims, stating that indigence was not a suspect classification. So, before turning to the Hyde Amendment

[553] *Beal v. Doe,* 432 U.S. 438 (1977).
[554] *Poelker v. Doe,* 432 U.S. 519 (1977).
[555] *Maher v. Roe*, 432 U.S. 464 (1977).

challenge in *McRae,* let us briefly examine the Court's majority opinion in *Maher*, because it has served as controlling precedent in subsequent abortion defunding cases.

In *Maher*, the Court ruled that it was constitutionally permissible for states participating in the Medicaid program to refuse to fund elective abortions while at the same time funding childbirth. According to the *Maher* Court, privacy was a purely negative right against state interference. It required no positive support from the state. In fact, Connecticut could favor childbirth over abortion—and place obstacles in the path of a woman achieving an abortion—as long as it did not "unduly burden" her choice. Writing for the majority of the Court in a 6-3 decision in *Maher*, Justice Powell maintained that the District Court "misconceived of the nature and scope of the fundamental right recognized in *Roe*."[556] Emphasizing the difference between the freedom to purchase abortion services on the *private* market versus having the state *publicly* pay for it under Medicaid, Powell states:

> *Roe* didn't declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of the State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of *public funds*…An indigent woman who desires an abortion suffers no disadvantages as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on *private sources* for the service she desires [italics mine].[557]

Powell's use of the terms "private sources" contrasted with "public funds" in the paragraph above starkly highlights the *Maher* Court's narrow interpretation of the right to

[556] Ibid., at 471.
[557] Ibid., at 473-474.

privacy. This market-based public/private dichotomy echoes the same language of privatization cited previously in the debate over the Hyde Amendment in Congress. Connecticut's policy, according to Powell, "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. Although the "State may have made childbirth a more attractive alternative, thereby influencing the woman's decision," Powell countered that this does not constitute an unconstitutional limitation on her right, for "it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."[558] Since any women who can afford an abortion can purchase one under the law, the assumption of the Court appears to be that her market freedom as a consumer remains in tact.

To help explain the reasoning in *Maher*, it is interesting to consider Justice Lewis Powell's early connection to neoliberal policy. In addition to authoring all three of these 1977 majority opinions regarding abortion defunding, Justice Powell was also one of the first members of government—shortly before he became a member of the Supreme Court—to advocate a neoliberal "takeover" of statecraft in America. In fact, David Harvey, in his analysis of the origins of neoliberalism in American public policy, lists Powell as one of the earliest proponents of neoliberal policy in U.S. government. The neoliberal turn in the United States, Harvey suggests, can be most clearly traced to "a confidential memo sent by Lewis Powell to the US Chamber of Commerce in August

[558] *Maher v. Roe* (1977), at 473-74.

1971."[559] Harvey's description of Powell's memo draws a revealing link between Justice Powell's endorsement of the privatization of abortion under Medicaid and his role as an early advocate of domestic neoliberal economic policy.

In this memo, Powell argues that the government ought to step back and to allow "the U.S. free market" and "the wisdom, ingenuity, and resources of American business to be marshalled" against forces that would replace it with public services.[560] As Harvey puts it, in defense of private market solutions rather than public government intervention in social institutions, "[t]he National Chamber of Commerce," argued Powell, "should lead an assault upon the major institutions—universities, schools, the media, publishing, the courts—in order to change how individuals think 'about the corporation, the law, the culture, the individual.'"[561] An early advocate of neoliberal ideas, Powell's memo is more than simply a pro-business statement, it also sounds a lot like he was sketching a strategy for changing both the relationship between government and business and how this, in turn, shapes the meaning of citizenship. (Powell, quite literally, sought to change the way people think about the "connections between law, individuals, and society.") Sketching a long-term economic plan, the growth of American businesses meant privatizing traditionally public governmental services to Powell in the memo. This is precisely what the Court upheld in his opinion for the majority in *Maher*. Here Justice Powell emphasized that any woman could exercise her right to have an abortion during the first two trimesters of her pregnancy, but she could do so only in her private capacity as a

[559] Harvey, *A Brief History,* 43.
[560] Ibid.
[561] Ibid.

consumer of "goods and services" on the market not by relying on government assistance to exercise her right.[562] In theory, this applies to all women. In practice, this creates and reinforces a strict dichotomy between the poor and the middle-class. After *Maher,* abortion became a service that a woman could purchase on a burgeoning "reproductive marketplace."

We thus witness the rise of an ideal of neoliberal citizenship when it comes to civic lineage policy. This negative interpretation of privacy, advanced by the Court, effectively drained abortion of any robust connection to gender equality—or concerns about class and racial disparity under Medicaid—and instead reframed the procedure as first-and-foremost a market good. As the Court quite literally put it, while poor people may not be able to afford abortions under the state's funding restriction, there remains "nonindigents who are able to pay for the desired goods or services." Rejecting the lower court's equal protection argument in *Maher*, Justice Powell describes the constraints of poverty regarding reproductive choice as if it has little to do with the state or the ways in which government policies structure and create political landscapes of civic inequality in society. The Court's opinion in *Maher* gives us an inside glimpse of the rhetoric and reasoning driving an increasingly dominant neoliberal civic lineage regime in American law and public policy. With the Hyde Amendment still on hold in the federal courts at the

[562] Not opposed to abortion in principle or a member of the religious right, it is interesting to note that Powell supported *Roe* against restrictions that what he viewed as undermining the individual private market freedom of pregnant women. For instance, in the Court's tight ruling in *Thornburgh v. American College of Obstetricians & Gynecologists* (1986), Powell was the deciding "pro-choice" vote in this 5-4 decision to strike down a Pennsylvania law that required (among other things) for all women seeking an abortion at any clinic to hear a state-scripted speech designed to convince them to carry their pregnancy to term.

time of the decision, *Maher* was a key turning point in civic lineage politics in the last quarter of the twentieth century.

Following the Court's new *Maher* and *Beal* precedents in 1977, the federal district Court—which had initially ruled against the Hyde Amendment—was compelled to lift its nationwide injunction on the federal funding ban.[563] The Supreme Court took the case in the same year.[564] Since it involved the *federal* Hyde Amendment, the resulting case of *Harris v. McRae* (1980) is typically ranked as more significant than *Maher* when it comes to reproductive policy in the United States. However, the Supreme Court's majority opinion treated *McRae* in exactly the same manner as *Maher*.[565] In *Harris*, Justice Stewart writing for a 5-4 majority—joined by Chief Justice Burger, Rehnquist, Powell, and White—stated that "The principle recognized in *Wade* and later cases—protecting a woman's freedom of choice—did not translate into a constitutional obligation" to subsidize abortions (i.e. even medically necessary ones under the public health program of Medicaid).[566] Despite their similarities, this is an important point, which *Harris* clarified and expanded upon from *Maher*.

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[563] In *McRae v. Matthews*, Judge Dooling ruled that the Hyde Amendment was unconstitutional based on both equal protection and privacy grounds.

[564] The case against the Hyde Amendment was tried again in the same District Court under a much narrower frame in *McRae v Califano* (1980), focusing simply on the lack of an exemption for medically necessary abortions in the federal law. (Since exemptions for "medically necessary" cases were included in both the Connecticut and Pennsylvania laws upheld by the Court in *Maher* and *Beal,* this was a narrow health-based challenge many assumed would prevail on narrow grounds.) With over a year's worth of research and medical testimony, Judge Dooling pronounced again that the Hyde Amendment was unconstitutional because a) Medicaid focused on protecting health abortion and b) abortion was protected by *Roe* as vital part of women's healthcare. He issued the longest opinion of his career in 1980—presenting 328 pages defending his ruling that the Hyde Amendment violated the Constitution.

[565] Since exemptions for "medically necessary" abortions were included in both the Connecticut and Pennsylvania laws upheld by the Court in *Maher* and *Beal,* it was widely assumed that the health-based challenge would prevail on narrow grounds.

[566] *Harris,* 448 U.S. at 315.

Like Powell in *Maher,* Justice Stewart in *Harris* painted the pregnant woman's right to privacy as a negative right against state interference. She could purchase reproductive services on the market in the same way that parents can choose whether or not to "send their children to private schools," but a poor women is not entitled to public assistance by the state even if it pays for all other medically necessary procedures under Medicaid.[567] Holding that the Hyde Amendment affects but does not intend to harm any suspect class and raises no equal protection concerns under the Constitution, Justice Stewart referenced *Maher* at length as controlling precedent in the case. In his words:

> The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher,* 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…regardless 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. The reason why was explained in *Maher*: 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. *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 the 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 [italics mine].[568]

The judicial retreat from support of "voluntary motherhood" as a possible civic lineage ideal began with *Maher* and *Beal*. Then, just seven years after the Court's landmark

[567] Ibid., at 318.
[568] Ibid., 315-18.

ruling in *Roe v. Wade*, the Court in *McRae* took its earlier ruling in *Maher* and extended it further to uphold the Hyde Amendment. As I shall discuss in the next section of this chapter, the dissenting justices in the aforementioned "abortion defunding cases" openly expressed concern that these market-based rulings would foster past civic hierarchies and make reproductive rights unattainable for many poor women, but before turning to these prescient dissents, let me wrap up this section by tracing the neoliberal direction that abortion cases took in the aftermath of these decisions. Indeed, the cases above paved the way for additional defunding cases in the last two decades of the twentieth century.

For instance, in *Webster v. Reproductive Health Services* in 1989, the Court upheld a ban in the state of Missouri on the use of all public employees and facilities for performing abortion.[569] Despite the fact that this ruling placed a woman's ability to obtain an abortion in a precarious position in many of the poorest and most rural areas of Missouri—in which healthcare was provided primarily at public hospitals by public employees—in a 5-4 ruling, the Court ruled that the Missouri law was consistent with its past rulings in *Maher* and *McRae*. In *Webster,* the Missouri law took the idea of defunding to the extreme by banning ALL public employees and government-funded facilities from participating in performing abortion. This applied to public hospitals in areas without private abortion clinics, and it even extended to any public employees who

[569] The change of tide was swift. In his majority opinion in *Thornburgh v. American College of Obstetricians & Gynecologists* in 1986, Blackmun wrote that: "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in Row—whether to end her pregnancy. A women's right to make that choice freely is fundamental." Blackmun comes out clearly on the voluntary motherhood side in *Thornburgh*, but by *Webster* in 1989 he was in the minority and speaking about ominous change.

volunteered time or worked second jobs at private women's health clinics. The Court upheld an extreme divide between the market and the state, despite the fact that both were deeply intertwined in practice in the healthcare of citizens. With Justice Antonin Scalia recommending overturning *Roe* and three other Justices suggesting reconsidering the decision, Justice Blackmun ended his dissent in *Webster* on an ominous tone: "I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since Roe was decided…a chill wind blows."[570]

By *Rust v. Sullivan* in 1991, the backlash against public funding for abortion reached its pinnacle. This case involved the constitutionality of regulations sponsored by the Reagan Administration from the Department of Health and Human Services, which cut all Title X Family Planning funds from going to any organization that counsels women seeking advice on family planning about abortion. Under the new Executive Department's rules, recipients of Title X Family Planning funds were prohibited from discussing the option with women at their clinics—including counseling or advising clients in a neutral manner. Going against the very idea of informed family planning and (according to dissenting Justices) curtailing freedom of speech, these regulations—known as "the gag rule"—were challenged in Court. In a 5-4 decision, the Supreme Court ruled that the intent of Congress in enacting Title X was ambiguous with regard to abortion counseling and that it was therefore constitutional and statutorily permissible for the administrative agency to regulate it.[571] Just because the Government subsidizes family planning, argued the majority, does not mean that it must subsidize a controversial aspect

[570] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), 539.
[571] *Rust v. Sullivan*, 500 U.S. 173 (1991).

of family planning, such as providing information about abortion. Relying on the *McRae* precedent, the Court held that the Executive Branch of the federal government could prevent Title X funds from doing anything to "encourage, promote, or advocate abortion as a method of Family Planning."[572] While the right to have an abortion would remain available for women who could seek out a private provider and afford to take advantage of her buying power on the reproductive market, poor women who received family planning services from the government could not even legally request information at public family planning clinics about the full range of legal options available to them in order to make an informed reproductive decision.

Above all, I would argue that this ban on the distribution of information at family planning clinics marks the end of voluntary motherhood as a robust ideal in American politics and the weakening of left voices in support of more egalitarian notions of civic reproduction. The dissenters viewed this not only as a violation of a right to privacy under *Roe,* but also as a violation of the freedom of speech and of the economic professional rights of family planning counselors, who were prohibited under the law from discussing the topic of abortion with women seeking family planning advice at publicly-funded clinics—even if the woman brought the topic up first and asked for names of private doctors. Importantly, this shows how the "homegrown" neoliberal alliance in the United States lacked what one might term "neoliberal ideological purity," if such a thing exists, for fiscal conservatives were willing to reject certain patently libertarian claims about professional rights—even economically libertarian claims—to

[572] Ibid.

satisfy the religious right, which remained critical to the broader neoliberal alliance upholding this new civic lineage regime. In other words, the neoliberal coalition in America depended on coalition politics that mixed economic goals with other national and moral values in a manner that was distinctly American. (I will describe our distinctly American neoliberal civic lineage regime in greater detail in the next chapter.)

These "abortion defunding" cases supported the reframing of the abortion debate in state legislatures and Congress as a matter of market principles. This approach transformed pregnant women into market actors, which was increasingly becoming the new neoliberal avenue for practicing "American citizenship" through responsible forms of market consumption—as opposed to exercising civil or political rights. By holding 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"—and arguing that it was permissible for abortion to be the only medically necessary procedure for the national government to refuse to fund because it preferred childbirth even in cases that would harm the health of a poor woman on Medicaid—the Court in *McRae* sided firmly with the neoliberal arguments of members of Congress supporting the Hyde Amendment.[573] This became a stepping-stone for the complete defunding of abortion, including the advent of the "gag rule" in *Rust v. Sullivan*. According to this formulation of civic lineage, a pregnant woman exercised her citizenship rights as a consumer, through her relationship to the (reproductive) marketplace. If she had access to the

[573] *Harris v. McRae*, 448 U.S. 297 (1980).

resources necessary to buy an abortion from a private doctor, then her right as a consumer was protected under the Constitution. But if she lacked the resources to purchase an abortion on her own, then the state offered no recourse or way for her to access this right. In the words of the Court in *McRae*, "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 the governmental restrictions on access to abortions, but rather of her indigency."[574] Poverty was an individual problem—probably an individual failure—rather than a collective political concern of the state.

7. The Dissents: Concerns About Civic Hierarchy

What does this neoliberal regime mean for U.S. citizenship? Although the majority opinions avoided the language of citizenship and instead sought to frame abortion as a market commodity rather than a state-provided (public) service, the dissenting Justices in contrast focused more directly on concerns about civic hierarchy. The dissenters pointed to the inegalitarian underbelly of this "financial" shift in privacy jurisprudence. In the 5-4 case of *Harris v. McRae* (1980), the four dissenting justices rejected the Court's market-based interpretation of privacy by pointing to the civic hierarchies it would reinforce in the realm of reproduction. Calling the majority's claims of neutrality and egalitarianism disingenuous, the dissenters emphasized that the market ideals of self-sufficiency and independence itself produces and reproduces civic inequalities—particularly among those who are economically dependent and poor. It does so particularly because poverty intersects with the already uneven, and substantially state-

[574] Ibid., at 316.

constructed, socioeconomic landscape of race, gender, and ethnicity in the United States. At a time in which the struggle between two conceptions of civic lineage policy (voluntary motherhood versus neoliberalism) were in open dispute, the dissenting justices in the early abortion defunding cases were clear about the connection between the rise of this neoliberal civic lineage regime and the hierarchies in citizenship that this order would likely foster in the future.

For instance, in the main dissent in *McRae*, Justice Brennan—joined by Justices Blackman and Marshall—flatly condemned the Hyde Amendment as a backhanded attack on *Roe*, which targeted the most vulnerable women in society. As he put it, the Hyde Amendment "serves to *coerce indigent pregnant women to bear children* that they otherwise elect not to have…[it] is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly" [italics mine].[575] Pregnancy, Brennan points out, is a condition that requires medical services, and in most cases the two options are either childbirth or abortion. While acknowledging that *Roe* did not automatically require the state to assure financial access to abortion, Brennan argues that the key distinction is that the state decided to adopt the Medicaid program in the first place. If the state funds childbirth under Medicaid, then it is also required to fund abortion and remain neutral regarding a woman's decision to become a mother during the first two trimesters of pregnancy. To do otherwise, surmounts to a form of state coercion. He emphasizes that, for a poor women, funding one procedure and not the other is a very real form of coercion. Spelling

[575] Ibid., at 331.

out this "theory" versus "practice" (or abstract/outcome) distinction as clearly and forcefully as possible, he writes: "the reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse."[576] Worst of all, according to Brennan, this policy harms the most politically powerless members of society: "the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality."[577] Focusing on class issues and their role in shaping opportunity and fairness in "our Nation," Brennan presents a trenchant critique of the false neutrality behind the abortion defunding laws, arguing that they target and limit the opportunities of poorest women in America.

Whereas Brennan focused almost exclusively on concerns about poverty and equal citizenship, Justice Thurgood Marshall addressed the ways in which poverty intersects with gender and race to shape the status and opportunities of Americans. He offers the most eloquent argument for equal protection in *McRae* and the earlier cases such as *Beal* and *Maher*. In his 1977 *Beal* dissent, Justice Thurgood Marshall spoke bluntly about the discriminatory impact of the state defunding legislation. Highlighting the connections between gender, class, and race in the case—and emphasizing the fact

[576] Ibid., at 333-34.
[577] Ibid.

that the children of poor and minority women have fewer opportunities and lower civic status in America in the first place—Marshall pressed his concerns about civic hierarchy and labeled the policies as a form of unconstitutional discrimination against a particularly vulnerable class of Americans:

> The impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions. The enactments challenged here *brutally coerce poor women to bear children whom society will scorn for every day of their lives*. Many thousands of *unwanted minority and mixed race children now spend blighted lives* in foster homes, orphanages, and "reform" schools. Many children of the poor, sadly, will *attend second-rate segregated schools*. And opposition remains strong against increasing Aid to Families with Dependent Children benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. I am appalled by the ethical bankruptcy of those who preach "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children…The Court's insensitivity to the human dimension of these decisions is particularly obvious in its cursory discussion of appellees equal protection" [italics mine].[578]

Noting that the Hyde Amendment targets the most vulnerable citizens in America, Marshall calls for a heightened scrutiny because "The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races." Marshall concludes, "I do not believe that a Constitution committed to the equal protection of the laws can tolerate this result."[579] Even if the strongly disparate

[578] *Beal v. Doe*, 432 U.S. 438, at 455-457.
[579] Ibid., at 348. It is interesting and important to note that, while there is a lot of "equal protection" language here, it is not explicitly about citizenship. While equal protection tends to focus on the broader theoretical concept of human rights as opposed to national citizenship as an abstract juridical principle, this in no way means that the link is not there as a practical matter. In fact, Justice Ruth Bader Ginsburg makes this link—often explicitly—then as a litigator, now as a Associate Justice on the Supreme Court.

racial impact does not alone violate the Equal Protection Clause…"at some point, a showing that state action has a devastating impact on the lives of minority racial groups must be relevant."[580] Likewise in *McRae*, Marshall writes: "The legislation before us…is a form of discrimination repugnant to the equal protection of the laws guaranteed by the Constitution."[581]

Justice Blackmun, the original author of *Roe v. Wade* in 1973, also issued a series of passionate dissents in the early abortion defunding cases, in which he argues these policies create and reinforce invidious forms of civic hierarchy not consistent with the Court's ruling in *Roe v. Wade*. Taking aim at Justice Powell's neoliberal analysis of reproductive rights—or what he termed, Powell's "financial argument"—Blackmun emphasized that a poor woman is not a traditional consumer.[582] In *Beal,* he labeled Justice Powell's financial approach as both disingenuous and cruel to those without the means to exercise their reproductive rights on the private market.

> The Court concedes the existence of a constitutional right, but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent and financially helpless, as the Court's opinions in the three cases concede her to be, the result is punitive and tragic. Implicit in the Court's holding is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of "Let them eat cake…There is

[580] The full quote: "the Court forgoes all judicial protection against discriminatory legislation bearing upon "a right vital to the flourishing of a free society" and a class "unfairly burdened by invidious discrimination unrelated to the individual worth of its members….it is no less disturbing that the effect of the challenged regulations will fall with great disparity upon women of minority races. Nonwhite women now obtain abortions at nearly twice the rates as whites and it appears that almost 40% of minority women—more than five times the proportion of whites—are dependent upon Medicaid for their healthcare. Even if the strongly disparate racial impact does not alone violate the Equal Protection Clause…" at some point, a showing that state action has a devastating impact on the lives of minority racial groups must be relevant" *Beal v. Doe*, 432 U.S. 438 (1977), at 458-60.
[581] *Harris v. McRae*, 448 U.S. 297 (1980), 338.
[582] *Beal v. Doe*, 432 U.S. 438 (1977), at 462-63.

> another world "out there," the existence of which the Court, I suspect, either chooses to ignore of fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.[583]

Blackmun's initial position seemed to be that equal protection was unnecessary, because he conceived the right to privacy in reproduction, developed in *Roe*, as broad enough to compel the state to cover abortion and childbirth evenhandedly under Medicaid. Yet his language was very much about the importance of the equal and impartial protection of the law. By *McRae* in 1980, Blackmun simply issued a short one-paragraph dissent, piecing together a series of quotes from his much longer dissents in the 1977 state defunding cases. Blackmun's uncharacteristically perfunctory dissent in *McRae* appears to serve as an acknowledgement that the neoliberal regime had won the prolonged debate over abortion defunding by this point, and that writing a new dissent on the topic was futile in the same context.

So what does this mean for citizenship? In Brennan's critique of the majority's position in the case, he writes: "Implicit in the Court's reasoning is the notion that, as long as the Government is not obligated to provide its *citizens* with certain benefits and privileges, it may condition the grant of such benefits on the recipient's relinquishment of his constitutional rights."[584] As mentioned in the last chapter, whereas pure privacy rulings tend to emphasize individual and personal choice above citizenship (even when doing a great deal of "civic lineage work" in practice), equal protection jurisprudence

[583] Ibid., at 462-63.
[584] Ibid., at 344. (Italics added.)

tends to focus on human rights and equality in a much more explicit way (also doing civic lineage work). The explicit references to protecting the public health of citizens no longer guides the Court's decisions, as it did during the fitter families regime of the Progressive Era. But, as the concerns expressed by the dissenters in these cases reveal, these cases are just as much about the reproduction of citizenship as those of the previous regimes. Whereas Marshall and Blackmun emphasized issues of state coercion and its impact on civic equality, Justice Stevens in his dissent in *McRae* also refers to national membership and concerns about equality. As he put it, "in my judgment, these Amendments constitute an unjustifiable, and indeed blatant, violation of the sovereign's duty to govern impartially." In sum, although the majority framed their decisions as having little to do with citizenship—using the language of free-market individualism and private choice—the dissenting justices conversely pointed to the civic inequalities that the majority position was likely foster. While it is important to emphasize that equal protection is about the rights of persons not formal citizens in constitutional law, these dissents are noteworthy because they tease out its civic lineage implications and offer a trenchant critique of the marketization of reproductive choice and its damaging impact on vulnerable citizens in America. Indeed, although the brute concept of 'citizenship' admittedly does not play a central role in their "equal protection" reasoning, the dissenting justices nonetheless highlight the practical impact this move will have on the reproductive choices of vulnerable Americans, thereby supporting my civic lineage interpretation of this case.

The *Maher* and *McRae* decisions reveal the weaknesses of the original privacy framework. The very thing that originally helped *Griswold* to succeed without much immediate backlash—that privacy seemed like a fairly conservative negative liberty to protect the sanctity of the marital bedroom against state interference—is precisely what made the Court's path dependent choice of this doctrine to ground birth control and abortion rights in later cases susceptible to attack on the grounds that privacy was, according to the new majority on the Court, a purely negative right. Given the fact that both Brennan and Blackmun (the original authors of *Eisenstadt* and *Roe*) so vehemently objected to the narrow interpretation of the right, it is clear that this was not an inevitable consequence of the privacy doctrine. However, the fact remains that the very reason the Court picked privacy in *Griswold* (it's camouflaged conservatism to appeal to less radical and more traditional values) ended up providing an opening for dramatically limiting the scope of reproductive rights and voluntary motherhood in later cases. In each of these major reproductive privacy cases, the topic of equal protection was present, but it remained a path not taken. Instead, the privacy doctrine became an avenue for pushing state-provided services into the private sector, and transforming many of the most important reproductive freedoms and choices into mere consumer protections on the market. Ironically, this defies both Comstock's crusade against the commercialization of reproductive technologies and Sanger's goal of voluntary motherhood through access to public clinics for the poorest citizens.

The neoliberal advocates cloaked state coercion in the deceptively neutral language of the market. Meanwhile, their opponents pointed to the real-world outcomes

the privatization and commodification of reproductive choice would have on the civic landscape in America. In the era of the new woman, the career woman, we see the rise of a new regime allowing women who can afford reproductive technologies and devices to gain access to greater choices on the economic market. In contrast, low-income women encountered increasingly coercive and invasive reproductive policies from the state, which interfered with their choices regarding motherhood by using state funding to attempt to encourage childbirth and even inhibit knowledge about abortion options, while at the same time cutting back funding for childrearing. (This paradox, as I shall argue in the next chapter on welfare reform, lies at the heart of neoliberal ideal of civic reproduction.) By the time the Supreme Court upheld the Hyde Amendment in 1980 in *McRae,* public funding of any kind was almost completely disconnected from abortion under the Constitution. This located most funding issues at the state level, resulting in fifty different regimes of Medicaid with diverging policies in each state about whether (and under what circumstances) abortion would be covered by the state with no help from the federal government. No longer pertinent to welfare or Medicaid, we witness the advent of reproduction as a market choice that was increasingly more difficult for poor women to obtain and easier for wealthier women to access.

8. The Reproductive Marketplace:

This trend in civic lineage continued throughout the rest of the twentieth century. In fact, by the time the Court heard *Planned Parenthood of Southeastern Pennsylvania v. Casey*

in 1992, many believed that *Roe v. Wade* would be overturned. It was then a surprise to Supreme Court prognosticators, when on June 29, 1992, Justices Sandra Day O'Connor, Anthony M. Kennedy, and David Souter read their coauthored opinion—which they claimed upheld the basic tenets of *Roe*—from the bench.[585] Although *Casey* did not concern the Medicaid/public funding issue, which had been laid to rest in the cases preceding it, the compromise *in Casey* was fundamentally neoliberal in both theory and outcome. With Justice Sandra Day O'Connor's plurality opinion invoking sweeping rhetoric about the importance of reproductive freedom to gender equality and personal liberty, *Casey* acknowledges the importance of abortion for women's equal citizenship. However, it also limits the accessibility of this choice to the poorest and most vulnerable Americans by replacing *Roe's* trimester system with an "undue burden" framework, first articulated by Justice Powell in *Maher*, designed to permit more invasive restrictions at the state and federal levels.[586] Hence, *Casey* ironically transfers reproductive rights—which it recognizes as vital for women's equal citizenship—to the states to restrict in more stringent ways and pushes onto the economic market, rather than protecting reproductive rights under state law in the name of equal citizenship.[587] By doing so, it gives middle-class and wealthy women a chance at civic equality, and effectively denies equal opportunity to those who are economically disadvantaged.

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[585] Wawrose*, Griswold v. Connecticut,* 126.
[586] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[587] Indeed, applying the new (much weaker) "undue burden" test to the Pennsylvania statute, the plurality upheld all of the limits except for the spousal notification requirement. It is interesting to note that the spousal notification requirement is also the one requirement that goes against the concept of a self-sufficient and independent adult market actor making an informed decision on her own about what she wishes to do with her body. In other words, the one provision that the plurality struck down in the Pennsylvania law was the provision least consistent with the neoliberal ideal of a woman functioning as an individual market actor on the reproductive marketplace.

This raises the question of how the feminist movement and women's rights groups responded to the erosion of abortion rights. The short answer is that they were taken by surprise. Between 1976 and 1980, it appears that mainstream women's groups were taken off-guard by the success of the Hyde Amendment so soon after its victory in *Roe*. For instance, NOW and NARAL circulated memos suggesting that they did not know how to respond to these "reactionary forces," which were thwarting the nation's pro-choice majority confirmed in the polls.[588] Not fully understanding how to combat the strategies of the National Pro-Life Political Action Committee (NPLPAC) and the Life Amendment Political Action Committee (LAPAC), NOW and NARAL nonetheless spearheaded their own grassroots and lobbying campaigns in support of "choice." While they succeeded in halting the proposed human life amendment to the U.S. Constitution introduced to Congress in 1981 by Republican Senator Orren Hatch of Utah, they were too late in to change the tide on the funding issue.[589]

By *Webster* (1989) and *Casey* (1992), these organizations were above-all just fighting to keep abortion legal (in its already attenuated form).[590] In response to unexpected early losses, the mainstream feminist organizations largely abandoned the active fight for reproductive rights for poor women, having already lost that battle in the courts. They focused defensively on preventing further erosion of abortion rights, which largely meant retaining the consumer freedom to purchase an abortion on the private

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[588] "Call to Action for Reproductive Rights," NOW Memo, September 14, 1979; "Reproductive Rights Alerts," NOW Memo, cited in Self, *All In the Family*, 375.
[589] Introduced by Orren Hatch (R-Utah) on September 21, 1981 unde S.J. Res. 110. See also "April 'Must Do' Activities to Stop HLA/HLB," March 20, 1981 on the urgency of stopping the human life amendment.
[590] See e.g., National Abortion Rights Action League Amicus Brief for Webster v. Reproductive Health Services. Online at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1008&context=yjll

market.[591] Given their defensive memos and early losses, they appear to have done this primarily as a practical and strategic matter in defense of what was left of *Roe*.[592] For this reason, rather than emphasizing its role in "saving abortion" by refusing to declare it unconstitutional, I instead suggest that *Casey* marks the culmination of the neoliberal civic lineage regime in the realm of abortion. To preserve abortion as an option on the private market, many mainstream feminists, however reluctantly, appealed to this discourse to save what was left of *Roe* so that career women and those in the middle-class could still take advantage of this consumer right.

Casey allowed states to pass increasingly restrictive laws regulating abortion, which has had a major impact on the availability of abortion across the United States. By opening abortion regulation to massive decentralization, through federalism, the Court has helped make reproductive rights far from universal in America, and thrust the costs of unwanted pregnancy to the private pocketbooks of individual women. This in turn reinforces the dichotomy between those with and without the means to exercise their right. Many impoverished women are now stuck in a similar position as Jane Roe (Norma McCorvey) in Texas, the original plaintiff in *Roe v. Wade* (1973), who could not afford to travel to another state to safely and legally terminate her unwanted pregnancy. In the words of Robert O. Self, "By the first decade of the twenty-first century, across the

[591] On the defensive, states increasingly placed limits on abortion rights, and the Supreme Court had settled the issue for poor women in the "Medicaid defunding cases." After Webster, NARAL" circulated a memo, "Where do we go from here?" in July 1983, arguing that supporters should not become complacent with the victory in *Webster* and "*continue to take the power of the opposition seriously*" [italics in original]. The irony here is that, from the standpoint of poor women, the opposition had already won significant victories.
[592] Importantly, Planned Parenthood, with its clinics and sliding-scale (income based) payments does not conform to this. Unlike the others, it depends on government funding through Title X and Medicaid and has always placed an emphasis on serving everyone seeking family planning advice and medical assistance, especially low-income women.

United States, one-third fewer counties had an abortion provider than in the late 1970s."[593] In 2005, a whopping 87 percent of counties in the United States have no place to go to obtain a legal abortion, which meant that 35 percent of women in America had to travel to other areas if they sought to terminate an unwanted pregnancy.[594] If a woman can afford a train or plane ticket to get an abortion in a different region than she lives, then she has access to reproductive choice. She can buy the right to exercise her liberty. But if a woman is already strapped for money, then this is another difficult hurdle in her path towards exercising a right that the Court in *Casey* acknowledged as a precondition for women's equal citizenship. Speaking of women's unequal access to privacy rights based upon their socioeconomic status, Justice Ruth Bader Ginsburg stated in an interview in the *New York Times* in 2009, "There will never be a woman of means without choice anymore. That just seems to me so obvious. The state that changed their abortion laws before *Roe* are not going to change back. So, we have a policy that only effects poor women."[595]

This has tremendously inegalitarian consequences. Today, more than two-thirds (69%) of women who have abortions are economically disadvantaged, with nearly half living below the poverty line.[596] Since poor women have less reliable access to contraceptive services than middle-class women, the rate of unintended pregnancies among poor women, according to a Guttmacher study, is more than five times higher than

[593] Self, *All in the Family*, 423.

[594] Ibid., 423.
[595] Interview with Ruth Bader Ginsburg: Bazelon, "The Place of Women on the Court."
[596] Amanda Marcotte, "The Demographics of Abortion: It's Not What You Think," *The American Prospect*, January 22, 2013. Online at: http://prospect.org/article/demographics-abortion-its-not-what-you-think

their middle-class counterparts.[597] They are also more likely to have difficulty procuring an abortion due to financial hardship, because they cannot pay for an abortion out of pocket. In fact, one in four Medicaid-eligible women, who seek an abortion, must carry the child to term, because she is unable to raise the money for the procedure.[598] In interviews with patients, the Guttmacher Institute documents that indigent women who live paycheck to paycheck are often compelled to make serious sacrifices to raise the money to have an abortion. These women report delaying paying essential bills like electricity or rent, taking payday loans, pawning valued possessions, borrowing from multiple friends and relatives, and cutting back on food and necessities for themselves and their children.[599]

Due to how challenging it can be to raise the funds, poor women tend to get their abortions two to three weeks later than their more affluent counterparts. Two-thirds of them say that they wanted to get the procedure earlier, but name the financial costs as the primary reason for delay.[600] Since the price of abortion increase steadily over time, the later a woman gets into her pregnancy, the greater financial burden it poses for those who can least afford it. Moreover, in the process of delaying to gather funds, some of these

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[597] "Unintended Pregnancy in the United States," *Guttmacher Institute*, September 2016. Online at: https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states

[598] See e.g., the University of California, San Francisco's ongoing "Turnaway Study," examining how being denied access to abortion impacts women's choices and lives throughout her pregnancy and beyond: Online at: https://www.ansirh.org/research/turnaway-study; Linda Goler Blount, "Poor Women Suffer Most From Restrictive Abortion Policies," *Rewire*, May 14, 2015. Online at: https://rewire.news/article/2015/05/14/poor-women-suffer-restrictive-abortion-policies/

[599] Heather D. Boonstra, "Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters," *Guttmacher Policy Review* 19, July 14, 2016. Online at: https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters

[600] Maya Dusenbery, "Poor Women in the United States Don't Have Abortion Rights," *Pacific Standard*, July 28, 2015. Online at: https://psmag.com/social-justice/poor-women-dont-have-abortion-rights

[600] Ibid.

women arrive at the clinic past her gestational limit and are turned away. The cost of raising a child until the age of 18 is now over 240,000 dollars, according to a recent report from the department of Agriculture.[601] When a low-income woman is able to plan her pregnancies, she is much more likely to establish a good career and provide for her children. But when she cannot get an abortion after deciding that is her best option, she is three times more likely to become or remain in poverty in the future. With cuts in funding for childrearing (discussed in the next chapter), this has severe consequences for both the actual birth of children in the United States and for the status of these citizens. The disparity created by this policy clearly shapes the civic status of these women and the standing and opportunities of their children in ways that reinforce economic inequality in the United States. Furthermore, given the fact that poverty intersects with gender and race so significantly in America, we end up with a civic lineage order that reinforces a host of different civic inequalities through the indirect mechanism of turning public services over to the private market. In hindsight, this evidence confirms that the dire predictions of the dissenting Justices in *Maher and McRae.* In their dissents, Justices Brennan, Marshall, Blackmun, and Stevens argued presciently that the marketization and economic privatization of abortion would end up reinforcing civic hierarchy in the United States.

[601] See http://www.ansirh.org/research/turnaway-study and http://www.thewire.com/politics/2014/02/abortion-outcomes-tktk/358122/

Conclusion:

In this chapter, I have focused on the early rise of the neoliberal civic lineage regime in the United States. During an extraordinarily political moment, we encounter rapid changes in the role of women and people of color in society (coupled with the War on Poverty). As I have argued, this trend *could* have inspired the rise of a new more egalitarian civic lineage regime, akin to a contemporary version of the voluntary motherhood ideal. However, the white picket fence regime was instead replaced by another inegalitarian civic lineage regime, which I have termed the 'neoliberal civic lineage regime.' This civic lineage regime transfers many dimensions of reproduction and childbirth to the whims of the economic free-market.

This chapter highlights the role of abortion and reproductive rights as a battleground in the formation of the early neoliberal coalition. The rise of neoliberalism on a domestic level is typically associated with the OPEC oil crisis in the West in the 1970s, and the subsequent backlash against Keynesian economics due to its failure to swiftly remedy the situation. While there is a great deal of truth in this explanation, here I have documented another important yet frequently overlooked dimension of the early story of the advent of this ideology and policy package in U.S. politics. In addition to this more straightforward global economic explanation, I suggest that a backlash against the successes and gains of the Women's and the Civil Rights Movements also played a key role in shaping the rise of America's uniquely homegrown neoliberal free-market dogma. In opposition to the gains of the War on Poverty and changes in the "traditional" white picket-fence ideal of the family, the politics of civic lineage—and specifically its

application to gender, sexuality, race, class, and the family—appear to have inspired and shaped the rise of the new neoliberal domestic agenda in America. In the words of Robert O. Self,

> Observers have far less often recognized that the politics of gender, sexuality, and the family shaped the rise of neoliberal free-market orthodoxy. In a nation that imagines that individuals rise solely by their own merits and the market follows its "natural" course, there is little room for an expanded social contract in which new gender and sexual rights—or increasingly, even hard-won race-based rights—are guaranteed by the state…Rather [family] policies have been one of the central grounds on which this public life itself has been constituted.[602]

To this, I would add that the issues of fertility and birth have served as a prominent arena for the development of these neoliberal laws and public policies, precisely because they shape the transmission of American citizenship from one generation to the next. When it comes to the state's regulation of reproduction and birth, both in practice and outcome, the key civic lineage questions inspiring these laws appear to be: Who ought to become part of the future generation of American citizens? What citizens should the government encourage and discourage from reproducing and contributing to the future generation of Americans? Under what terms and by what mechanisms should the government intervene to encourage or discourage childbirth? And, finally, what status should different groups of citizens and their children occupy in the United States?

The civic lineage ideal—embraced by the Court's majority in the "abortion defunding" cases discussed above—is that of the woman as a citizen consumer. This

[602] Self, *All in the Family*, 424.

new "ideal" portrays a person who makes responsible choices, is an "independent" market actor, and enjoys her rights of citizenship based on her relationship to the (reproductive) market. The new woman might be a career woman, or a housewife; but she was not dependent on the state for welfare. She was middle to upper middle-class, tended to be white, and displayed an ethic of self-reliance and personal responsibility. She was responsible for taking control over her reproductive capacities in the same manner that she shopped for her favorite brand of shampoo or blue jeans. Her reproductive options and her choice to become a mother were increasingly market choices, but they were tied to a new approach to reproductive "choice" as a practice of consumerism. This would become even more pronounced with the expansion of new reproductive technologies, but the defunding of abortion offers one of the first and most striking examples of the growth of the newly dominant neoliberal civic lineage regime. The "good" citizen was self-sufficient enough to function as an independent market actor and have only as many children as she and her spouse could afford to raise according to middle-class norms. Conversely, the "bad" citizen was the woman who was irresponsible enough to get pregnant when she could not afford to pay for an abortion or raise her child without becoming dependent on state funding and assistance.

This neoliberal civic lineage regime therefore supports a neoliberal ideal of citizenship, which links proper citizenship with appropriate reproductive behaviors and choices and maps civic practice onto market consumerism in the realm of reproduction and birth. While it is important to note that the neoliberal emphasis on "the consumer" and the "private market" militates against the language of citizenship, as we have

witnessed in the post-*Roe* Supreme Court majority opinions examined in this chapter, this is no less a civic lineage regime than those that preceded it. In fact, through the avenues of governmental law and public policy, this neoliberal civic lineage regime (somewhat counterintuitively) relies on statecraft to cultivate consumer citizens by compelling women to turn to the private market to exercise their constitutional reproductive rights. Although the face of the new ideal of citizenship looks a lot like the one reinforced throughout the twentieth century, with class, race, and gender intersecting to produce a similar landscape of civic inequality, the main difference is that the neoliberal state empowers the private market to do a large part of this civic lineage work on behalf of the government and nation.

CHAPTER 6:

The End of Welfare:
The Triumph of Neoliberal Citizenship

Introduction

In this final case study, I turn to the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), commonly referred to as "the end of welfare."[603] Passed by a Republican-controlled Congress and signed into law by President Bill Clinton, this bipartisan bill abolished the sixty-year old federal "welfare" assistance program for impoverished children first established by the Social Security Act in 1935.[604] Part of Franklin D. Roosevelt's New Deal response to widespread poverty during the Great Depression, the original Aid to Dependent Children (ADC) welfare program was renamed Aid to Families with Dependent Children (AFDC) in 1962.[605] During the civil rights movement and the Great Society, the Supreme Court labeled AFDC as a "statutory entitlement" for all who met the qualifications for government assistance for impoverished children under AFDC, but this Supreme Court (statutory) doctrine became

[603] This bill was enacted as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law Number 104-193, 110 Stat. 2105 (1996). The Act was codified in scattered sections of 42 U.S.C.

[604] Title IV of the 1935 Social Security Act (SSA) established Aid to Dependent Children, which provided matching grants to states to provide support for impoverished dependent children, so they could stay with their mothers in their own home. Social Security Act of 1935, Title IV, § 401.

[605] Social Security Act Amendments of 1962 (Congress amended Title IV of the SSA in 1962, changing the name to: Aid to Dependent Families and Children, 42 U.S.C. § 602 (1962).

moot with the end of the law. A triumph for the neoliberal civic lineage alliance, PRWORA combined stringent requirements for work participation with the "family values" agenda of the religious right, replacing AFDC with a much more restrictive block grant program titled Temporary Assistance for Needy Families (TANF). The welfare reform law also broke from AFDC by instituting a strict civic lineage distinction between citizens and noncitizens, barring most *legal* immigrants from access to public assistance for their first five years residing in the United States. As I shall argue, the replacement of AFDC with PRWORA in the nineties reveals a great deal about the texture of our neoliberal civic lineage regime at the end of the twentieth century. Not only has the government continued to target both citizens and non-citizens deemed deviant for harsher treatment in the realms of fertility and childrearing, thereby reinforcing a landscape of civic inequality linked to birth, but—as my examination of the Temporary Assistance for Needy Families (TANF) program highlights—it now does so in ways that institutionalize a distinctively American neoliberal ideal of citizenship.

This chapter consists of eight parts. Part 1 begins by introducing the key elements of the TANF program. Whereas AFDC applied to all legal residents, whether citizens or not, PRWORA excludes most immigrants, including legal permanent residents, from receiving welfare benefits for their first five years of residence in the United States. Drawing a sharp distinction between citizens and noncitizens in a civic lineage policy, TANF enforces national boundaries of citizenship in government policy pertaining to the reproduction of citizenship. Moreover, by explicitly mandating work and promoting marriage to counteract the dependency of needy mothers on government assistance,

TANF institutionalizes a neoliberal vision of what counts as proper childbearing and family formation in the United States. After introducing TANF as a prominent neoliberal civic lineage policy, I turn in Part 2 to important background information: addressing some of the key welfare laws and policies that preceded PRWORA, including Mother's Pensions and AFDC.[606] As these prior programs reveal, throughout the twentieth century "welfare" in America functioned as a means through which the government coercively intervened through public policy in the birth and rearing of the nation's future generation of citizens, making it an influential part of each civic lineage regime.

After examining a series of Supreme Court cases expanding welfare access to AFDC during the civil rights movement and the Great Society's War on Poverty in Part 3, I turn in Part 4 to the political backlash against welfare and the stigmatization of welfare recipients. Of particular note, the negative stereotype of the "welfare queen" invoked racialized fears reminiscent of the "unfit" citizen of the early twentieth century, and played an integral symbolic role in the political drive to "end welfare" at the end of the century, as we shall see in the discourse surrounding this bipartisan agreement in 1996, examined in Part 5. However, just as we have an image of irresponsible civic reproduction, we also have a neoliberal ideal of "responsible" citizenship. During 1996, the same year as the passage of TANF, we witness the rise of the "Soccer Mom" as the ideal middle-class mother and key swing consumer and voter in the 1996 Presidential election. In part 6, comparing the most prominent female stereotypes of the 1996

[606] Note: In American parlance, the term "welfare" continues to be used to describe public assistance programs, including both AFDC and TANF. Hence, in this chapter, I use the term to refer to public assistance, past and present.

election—the "welfare queen" versus the "soccer mom"—uncovers the exclusionary underbelly of neoliberal citizenship. With the ideal neoliberal citizen in mind, Part 7 returns to the connections between neoliberalism and welfare reform under PRWORA by examining features of TANF directly targeting fertility and family formation, including marriage promotion, child caps, mandatory paternity tests, abstinence education, prenatal drug testing, and family planning services that endorse semi-permanent forms of birth control like Norplant and Depo Provera.

Finally, Part 8 turns to the concept of neoliberal citizenship. I end by examining the complex and sometimes contradictory texture of the neoliberal civic lineage regime at the end of the twentieth century. My aim in this last part is to offer the beginnings of a domestic theory of neoliberal citizenship that is responsive to the particular national values, principles, and institutional configurations of the United States. Through statecraft and public policy, as I shall argue, our civic lineage regime fosters two tracts of neoliberal citizens, "responsible" and "deviant," which continues to reinforce inequality among the most vulnerable groups in society. This, in turn, raises serious concerns about the complicity of the American government in actively using public policy to maintain hierarchies in the reproduction of citizenship.

Before proceeding to an introduction of the main policies and purposes of the TANF program in Part 1, it is important to first acknowledge at the outset that there is a weighty paradox resting at the center our contemporary neoliberal regime's approach to childbirth and childrearing. Justice Thurgood Marshall, in his dissent in the *Beal* case, discussed in the last chapter, drew attention to this tension by asking how a nation could

rationally opt to encourage childbirth among its poorest and most disadvantaged citizens by funding only childbirth and not abortion under Medicaid, while simultaneously cutting back on welfare funding for impoverished mothers to raise their children.[607] If the government is so invested in poor women having babies, then it seems to logically follow that a nation as wealthy as the United States would also seek to ensure that their children have access to the basic resources and opportunities to grow up to become upstanding and productive members of society. This tension appears to rest at the heart of our contemporary civic lineage regime. How have these seemingly contradictory policies managed to coexist in our civic lineage regime for so long? I emphasize two factors.

First, this puzzle draws attention to the fact that the broad set of policies and laws that comprise this regime are at root the inconsistent product of three agendas within the neoliberal alliance: The small-state fiscal conservatives, racial conservatives, and the religious right. As discussed in the preceding chapter, a new civic lineage coalition gained early political traction in the 1970s, illustrated by the Hyde Amendment in the last chapter, through a powerful political alliance between fiscal conservatives, opposed to government spending on welfare and anti-poverty initiatives, and the newly mobilized religious right, which championed "family values" in the political arena, including opposition to abortion and support of the "traditional" ideal of the nuclear family.

[607] *Beal v. Doe*, 432 U.S. 438 (1977), Thurgood Marshall dissenting (The majority in *Beal* ruled that states participating in the Medicaid program were not required by Title XIX of the Social Security Act or under *Roe v. Wade* to fund elective abortion, Marshall dissented on the grounds that "Medicaid recipients are, almost by definition, "completely unable to pay for" abortions, and are thereby completely denied "a meaningful opportunity" to obtain them." If unable to obtain an abortion under Medicaid, then "Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All chance to control the direction of her own life will have been lost."

Additionally, in the aftermath of the civil rights movement, racial conservatives mobilized on behalf of "color-blind" racial policies to avoid aiding minorities through new "color-conscious" efforts fostering affirmative action for the members of historically disadvantaged groups. (This backlash against civil rights efforts was particularly prevalent among southern Democrats, many of whom switched to the Republican Party in the 1970s.) The alliance between these groups reshaped civic lineage policy in the United States by linking "family values," race-neutral "colorblind" approaches, and free market ideals (whenever possible), particularly in policies and laws governing the lives of poor women, often women of color, reliant on government assistance for basic necessities. Although these three groups sometimes support differing civic lineage goals—such as, for example, promoting childbirth (i.e. a family values goal) and opposing government-funded child support for the poor (i.e. a commitment of fiscal conservatives)— TANF reveals the triumph of this sometimes inconsistent but distinctly American neoliberal civic lineage regime. Notably, on the issue of restricting welfare funds for poor women, disproportionately women of color, all three groups could find common ground in the PROWRA "welfare reform" legislation.

Second, the neoliberal state is a powerfully coercive and interventionist state when it comes to regulating citizens deemed deviant, marshaling both public state coercion and private market forces to intercede in the lives of "dependent" citizens. Specifically, I suggest that the neoliberal American state is a muscularly interventionist, often punitive, state in its interactions with citizens who fall short of conforming to the neoliberal idea of proper civic (and economic) responsibility. This, as I argue below,

makes political room for a "family values" agenda targeting deviant citizens through direct governmental coercion, rather than merely relying on the market. As opposed to functioning as a so-called "small state"—which the champions of economic neoliberalism often emphasize—the neoliberal state is what I term a "strong state." This interventionist and disciplinary aspect of American neoliberal statecraft is demonstrated through the growing surveillance and coercion associated with the exploding criminal justice system in the United States, as scholars have recently argued, but it also extends to reproductive behavior and welfare. Our strong state uses interventionist policies to sponsor a disciplinary regime of citizenship, which seeks to mold productive neoliberal citizens out of members of the "underclass," or citizens deemed deviant, by assigning market roles and various degrees of civic status too them. The neoliberal disciplinary regime uses both public state coercion and private market forces, such as the transition of welfare to mandated "workfare," to create and reinforce a host of civic inequalities in the realms of class, race, sexual behavior, and gender. In fact, as I shall argue at the end of this chapter, the inconsistencies and contradictions within programs like TANF—including the central place of "family values" in our contemporary neoliberal civic lineage regime—makes the regime all the more coercive and stratifying in its control of the procreative lives of poor women and the civic status of their children. Let us turn now to the 1996 Personal Responsibility and Work Opportunity Act, as a pivotal neoliberal civic lineage policy at the close of the twentieth century.

1. Introducing PRWORA

The purpose of this section is to introduce and outline the main provisions of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which the Clinton Administration maintained would transition parents off government assistance and into jobs by "mak[ing] work pay."[608] Through combining an emphasis on mandatory market work with provisions promoting "family values" like marriage, I argue that PRWORA was a bipartisan effort to enshrine a uniquely American vision of what constitutes proper neoliberal citizenship within the civic lineage policies of "welfare reform."[609] Indeed, the drafters and supporters of PRWORA in Congress argued that the reform aimed to incentivize changes in the reproductive and market behavior of poor mothers, which would in turn strengthen families by promoting personal responsibility and independence through work instead of a pathological dependence on the government.[610] As Parvin Huda emphasizes, "the text repeatedly extols work, family, personal responsibility and self-sufficiency."[611] These, of course, are central tenets of the neoliberal theory of the individual, or the responsible market actor, who practices (negative) freedom and attains self-sufficiency and success through hard work on the private market. Ultimately, as I argue below, we encounter a national vision—mixed

[608] Personal Responsibility and Work Opportunity Act, Public Law No. 104-193, 110 Stat. 2105 (1996). The Act was codified as amended at 42 U.S.C. §§ 601-617 (1996).
[609] See H.R. Rep No. 104-651, at 4. ("The [former AFDC] system contradicts fundamental American values that ought to be encouraged and rewarded: work, family, personal responsibility, and self-sufficiency.)
[610] Ibid., at 4.
[611] Parvin Huda, "Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse," *William & Mary Journal of Women and Law* 7 (2000-2001): 344.

with American values of civic reproduction—of what constitutes the ideal neoliberal citizen in PRWORA at the close of the twentieth century.

In the last chapter, I introduced neoliberalism as an economic policy that rose to prominence in the 1970s, becoming "the Washington Consensus" and gaining dominance under President Ronald Reagan in the 1980s.[612] Neoliberalism is best known as an economic approach that involves an emphasis on "free trade" in a globalized world, but it also focuses on a nation's domestic economy by deregulating businesses and financial markets, cutting back on social support and public benefit programs, and transferring public programs onto private markets.[613] In the words of Frances Fox Piven, "In the name of individualism and unfettered markets, the [neoliberal] campaign called for deregulation of corporations, and particularly financial institutions; the rollback of public services and benefit programs; curbing labor unions; "free trade" policies that would pry open foreign markets; and wherever possible the replacement of public programs with private markets."[614] This radical reorganization of the state from a Keynesian to a neoliberal economy, as Wendy Brown has suggested, aims to infiltrate and shape all aspects of contemporary American society according to its market logic, along with the political system itself.[615] As a result, I have argued that a neoliberal state depends upon the political cultivation of what might be called 'neoliberal citizenship'—or a body politic that accepts these market norms and in which members function as productive

[612] Harvey, *A Brief History*.
[613] Mimi Abramovitz, "Theorising the Neoliberal Welfare State for Social Work," in *The SAGE Handbook of Social Work,* eds. Mel Gray, James Midgley, and Stephen A. Webb (Thousand Oaks: Sage Publications, 2012), 33-46.
[614] Frances Fox Piven, "The Neoliberal Challenge," *Contexts* 6, no. 3 (Summer 2017): 13.
[615] Brown, "Neoliberalism," 1.

participants in neoliberal society. As the previous chapter addresses, the idea of a neoliberal civic ideal—or civic lineage regime—may, at first glance, appear to be a contradiction in terms, because the ideology and practice of neoliberalism tends to undermine the economic significance of the modern nation-state by valorizing the free market in an increasingly globalized world. But that is only a partial snapshot of the politics of neoliberalism, for it fails to address the way these neoliberal values—of negative freedom, self-reliance, personal responsibility, privatization, market participation, and consumerism—shape domestic laws regulating the reproduction of citizenship in a homegrown" manner in all nations, including the United States. A neoliberal state requires a domestic population of properly neoliberal citizens to make the system work smoothly, which in turn means that it has a political investment in harnessing public policy to cultivate neoliberal citizenship. Given the intimate connection of social welfare policy with both the labor market and the actual reproduction of citizens, it is no wonder that "welfare reform" became a unifying part of the domestic agenda of the dominant U.S. civic lineage alliance at the end of the twentieth century.

What did this neoliberal policy look like? From a civic lineage standpoint, the first place to begin is its hostility towards immigrants. Under AFDC, legal noncitizens such as legal permanent residents were able to qualify for a wide range of government assistance benefits. In fact, AFDC forbid states from restricting or denying access to *federal* welfare based upon the status of citizenship. In the words of Michael Fix and Ron Haskins, "This access was based on the principle that non-citizens come to

America," and become legal residents, in order "to participate in the full range of American social, economic, and political life and that, with modest exceptions, they should be treated like other Americans."[616] Since the vast majority of the children of non-citizens are citizens themselves, as a consequence of U.S. birthright citizenship law, the inclusion of most legal noncitizens in the program allowed thousands of needy citizen-children to receive government assistance.[617] Breaking with the recent AFDC past, PRWORA explicitly reversed this policy.[618] After the 1996 enactment of welfare reform, most citizens were not eligible to receive means-tested anti-poverty benefits from the government during their first five years in the United States, including TANF, Medicaid, and food stamps.[619] Hence, while welfare reform slashed benefits for citizens, it was even more restrictive and exclusionary in its treatment of non-citizens, including those with citizen children. Although the United States did not restrict the legal admission of immigrants during this time, which was unusually high during the 1990s, PRWORA "cut back sharply on the public benefits that immigrants could receive, even as it reduced the social rights of its citizens somewhat less severely."[620] Interestingly, these dramatic cuts in aid to immigrants nonetheless managed to serve the "work first" goal of TANF. As Rogers Smith points out, these dramatic reductions in benefits to immigrants "made it more likely that aliens would take any jobs on any terms offered; and if they failed to find

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[616] Michael Fix and Ron Haskins, "Welfare Benefits for Non-citizens," *Brookings Report* (February 2, 2002).
[617] Ibid.
[618] Audrey Singer, "Welfare Reform and Immigrants: A Policy Review," in *Immigrants, Welfare Reform, and the Poverty of Policy*, eds. Philip Kretsedemas and Ana Aparicio (Westport CT: Pragaer Publishers, 2004), 21-34.
[619] Ibid., 21.
[620] Rogers M. Smith, "Alien Rights, Citizen Rights, and the Politics of Restriction," in Swain, *Debating Immigration,* rev. ed.

employment, the laws made it easier to deport them."[621] Drawing sharp lines between citizens and legal non-citizens, there are distinctively nationalistic concerns resting at the heart of TANF, which is also a neoliberal policy, focusing on promoting work, markets, privatization, and self-sufficiency.

Let us turn now to the central place of mandatory work in welfare reform. Whereas AFDC was a joint federal and state program, in which the national government agreed to match state expenditures to everyone who qualified for assistance (subject to federal oversight), TANF allocates funds through block grants to states to develop their own assistance programs, thereby shifting oversight to the states.[622] These block grants give increased flexibility to states to design their state welfare programs based on their own policy priorities. But to qualify for the block grants, the state programs must meet the basic requirements of PRWORA.[623] These priorities, as we might expect, emphasize the importance of moving recipients off government assistance and into the workforce as soon as possible. Unlike AFDC, which offered benefits based on need with no cut-off as long as a family still met the qualifications, TANF recipients face a lifetime limit of five years total of government assistance. With welfare no longer a statutory entitlement based upon need, after one member of a household reaches this limit, typically the mother, the entire family becomes ineligible for aid as long as the expired member lives in the household. (The lifetime limit applies even if the family remains in poverty, and irrespective of the level of need.) In addition to the five-year (or 60 month) lifetime limit,

[621] Ibid., 6.
[622] 42 U.S.C.A. § 617 (1996). Excluding areas where Congress expressly reserved power, PRWORA granted "Power and Flexibility" to the states.
[623] Ibid.

TANF requires recipients to engage in a work activity within two years of receiving their first assistance check, and stipulates a minimum number of hours that recipients must work.[624] During its first year in 1996, TANF set the minimum hours a recipient must engage in an approved work activity outside her household at twenty hours a week. Later, after states presumably had sufficient time to develop their work programs in accordance with TANF, the hourly work requirement for such recipients would steadily increase to twenty-five hours in 1999 and thirty hours a week in 2000.[625]

Based on the description of the work provisions in TANF above, one might (at first glance) conclude that the birth and rearing of children seems secondary to the government's efforts to push impoverished parents into low-wage jobs. Yet this is only half the story. In addition to its focus on work, "equally embedded in the law is a vision of socially desirable family formation, expressed in terms of individual sexual, reproductive and childrearing goals."[626] Indeed, in its four purposes of TANF, Congress lists a series of civic lineage goals. To combat a "crisis in our Nation"—explicitly attributed by Congress to teenage pregnancy, unwed motherhood, and birth out-of-wedlock in its "findings" section of in the Act's introduction—the purpose of TANF is to provide block grants to states to design their own welfare program that meets the following goals,

[624] 42 U.S.C. § 608 (1996). Note: While mandating "no assistance for more than [five] years," Congress nonetheless left precisely what constitutes 'work activity' open to the states to define.
[625] 42 U.S.C. § 607.
[626] Wendy Chavkin, et al., "Sex, Reproduction, and Welfare Reform," *Georgetown Journal on Poverty Law & Policy* 7, no. 2 (Summer 2000): 380.

1. Provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
2. End the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
3. Prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
4. Encourage the formation and maintenance of two-parent families.[627]

As Congress clearly outlines in the purposes of TANF, listed verbatim above, the legislation aims to combine both work and family values to "end the dependence of needy parents on government."[628] This, in turn, sheds light on the texture of our American neoliberal civic lineage regime. As mentioned earlier, no ideology comes in a one-size-fits-all policy package when a nation uses it to shape its civic lineage laws. In TANF, we encounter the economization of a complex set of "American values" pertaining to fertility, sexual behavior, family formation, and parenthood.[629] In fact, PRWORA denied benefits to non-citizens far more substantially than it did to citizens, and it did so in a manner that sharply reinforced distinctions in national status and membership in a way that is neoliberal in its emphasis on markets and also attentive to the domestic concerns and moral values of the United States.

Before ending this introduction to PRWORA, it is useful to touch on the role of "new federalism" in the bill. At the center of PRWORA is an emphasis on "state devolution," or the transfer of power over welfare programs from the national government to the states. In fact, perhaps the most significant way in which PRWORA

[627] Ibid § 601 (Supp. III 1997).
[628] Ibid.
[629] See Judith E. Koons, "Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy," *Wisconsin Women's Law Journal* 19, no. 1 (2004): 1-45.

altered the structure of welfare under AFDC was through the advent of its block (lump sum) grants to the states to organize their own welfare programs.[630] In the Supreme Court's first important welfare rights ruling in *King v. Smith* in 1968, the Court described AFDC as an example of "cooperative federalism" to refer to the fact that it was a joint federal and state program in which the states could voluntarily opt-in to the federal program and receive matching funds in return for abiding by the federal rules. In contrast, PRWORA is an example of "new federalism," in which Congress grants greater degrees of autonomy and flexibility to the states with less federal oversight. This in effect creates fifty different welfare programs only loosely united around certain common federal goals outlined in TANF, some more generous or more punitive than others.[631] In fact, since few conditions are placed on their block grants, states can choose to be less generous in their programs.[632] While they cannot extend the generosity of their state assistance beyond the federal requirements, TANF explicitly permits them to create harsher policies and sanctions, including shorter lifetime limits and more stringent work requirements. This intentional shift in the locus of authority over government assistance to the poor, in turn fostered a plethora of different state policies aimed at regulating fertility and family formation. Through economic incentives and disincentives, each of these programs relies upon coercive mechanisms—"the carrot or the stick"—to shape reproductive and market labor among their poorest residents. Depending upon the state, these coercive civic lineage policies include: A variety of ways to promote marriage, caps

[630] 42 U.S.C. §§ 607
[631] See Peter T. Kilborn, "With Welfare Overhaul Now Law, States Grapple with Consequences," *The New York Times,* Aug. 22, 1996.
[632] Ibid.

on assistance to additional children born while receiving assistance, mandatory paternity tests, family planning classes, advocacy of semi-permanent forms of birth control, abstinence-only education, drug tests with the risk of losing child custody, and efforts to decrease out-of-wedlock births and teenage motherhood.[633] I will examine some of the most noteworthy of these state policies later in this chapter, but the main point is that the law mandated the devolution of authority to the states, resulting in fifty different regimes connected through the broader TANF requirements.

There are features both old and new about the role of federalism in the design of TANF. On the one hand, the increase in state flexibility has noteworthy commonalities with what we saw during the Progressive Era, at a time in which states designed their own eugenics and mother's pension programs with a nod from the federal government. Yet this was not a return to the past. Not only did the law's central features, such as mandatory work requirements for women with dependent children point to a different role of women and the family in American political culture, but also the structure of TANF encouraged privatization within state programs in a distinctively neoliberal way.[634] Since the overall amount of federal funding for needy families went down under the fixed (lump sum) block grants and this switch happened suddenly, many states turned to private companies to professionally design and oversee their welfare programs as efficiently as possible based upon the new TANF regulations. In this regard, the end of the AFDC program and swift devolution of oversight to the states created incentives for

[633] See Anna Marie Smith, "The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview," *Michigan Journal of Gender & Law* 8 (2002).
[634] Christine N. Cimini, "The New Contract: Welfare Reform, Devolution, and Due Process," *Maryland Law Review* 61 (2002): 250-51.

state and local governments to engage in privatization of these new state-based (public) welfare programs. A hallmark of neoliberal statecraft, I will examine this trend towards privatization of public services and social programs—including its impact on citizenship—in more detail at the end of the chapter.

This, then, is a brief outline of the neoliberal landscape of anti-poverty social policy that we encounter at the end of the twentieth century. Throughout this chapter, I will examine these specific neoliberal civic lineage policies in more detail—and subject these policies to critical assessment for their role in perpetuating civic inequality among vulnerable groups in America based upon birth—but next I turn first to the political background leading to this juncture in the government's decision to slash benefits to the poor. Indeed, to fully grasp this neoliberal civic lineage regime, it is useful to address the question of how we got here? Why did the national government compromise across party lines to end the sixty-year old AFDC policy and replace it with TANF? And what was the role of the courts in this process?

2. Background: The Development of Welfare in America

Although the neoliberal ideal of citizenship is a contemporary phenomenon, the government's use of state-coercion through welfare policy to mold citizens and enforce prevailing civic ideals is not new. From its earliest days, social programs for poor mothers in America have functioned as a means through which the state coercively intervenes via public policy in the birth and rearing of the nation's future generation of

citizens. The government does this by specifically targeting mothers and children for aid, and in turn attaching various requirements for families to receive government aid for their children. We see this at the beginning of the twentieth century, in the Progressive Era's Mother's Pensions movement. We also see this in the rise and expansion of the Aid to Dependent Children program under the 1935 Social Security Act prior to its replacement by TANF. This section touches upon the ways in which "welfare" has always functioned as a civic lineage policy endorsing the dominant ideals of the reproduction of citizenship of its day. The next section traces the development of AFDC as a "statutory entitlement" to all qualifying individuals, with a focus on the welfare rights rulings by the Court during the civil rights movement.

The first widespread effort to create modern welfare system, prior to the Social Security Act of 1935, was the Mother's Pensions movement during the Progressive era.[635] These civic lineage policies fit squarely within the Fitter Families ideal of the day. A part of the broader Progressive Era reform agenda, the concept of Mother's Pensions began with support from private charities but later expanded into a wider call for the government to provide public relief to impoverished mothers and their young children. Between 1911 and 1920, a total of forty states enacted mother's pension programs, thereby establishing the first expansive public aid programs for single mothers.[636] These

[635] See Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (Cambridge: Harvard University Press, 1994): Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Belknap Press, 1994); Carolyn M. Moehling, "The American Welfare System and Family Structure: A Historical Perspective," *Journal of Human Resources* 42, no. 1 (2007): 117-155; Joanne Goodwin, *Gender and the Politics of Welfare Reform: Mothers' Pensions in Chicago, 1911-1929* (Chicago: The University of Chicago Press, 1997).
[636] Mark H. Leff, "Consensus for Reform: The Mothers' Pension Movement in the Progressive Era," *Social Service Review* 37 (1973): 400-1.

programs targeted certain mothers as morally upright and deserving of aid, offering a sharp contrast between mothers deemed eugenically deviant and those ranked as deserving of state support. In particular, Mother's Pension programs focused on white widows as their beneficiaries. African American women and immigrants from unpopular groups, as Molly Ladd-Taylor argues, were widely excluded from Mother's Pensions.[637] In the early 1900s, reformers emphasized that a mother and her children, through no deficiency or fault of their own, could be thrust into poverty following the loss of their breadwinning husbands/fathers.[638] The victims of bad luck as opposed to personal failure, rather than treat their children in the same manner as the unfit, the focus of public policy ought to be raising the next generation of citizens in the "suitable homes" of their own mothers to develop proper civic character. For instance, in a White House Conference on the Care of Dependent Children in 1909, conference participants issued the following resolution about the importance of ensuring that parents of "worthy character" could care for their children:

> Home life is the highest and finest product of civilization. It is the great molding force of mind and character. Children should not be deprived of it except for compelling and urgent reasons. Children of parents of worthy character [i.e. not the children of individuals like Carrie Buck], suffering from temporary misfortune and children of reasonable efficient and deserving mothers who are without the support of the normal breadwinner, should as a rule, be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of children.[639]

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[637] Molly Ladd-Taylor, *Mother-Work: Women, Child Welfare, and the State, 1890-1930* (Urbana: University of Illinois Press, 1994), 149.
[638] Moehling, "The American Welfare System," 117-55.
[639] The 1909 White House Conference on the Care of Dependent Children, quoted in Leff, "Consensus for Reform," 400.

Passed as state laws during the same time as the "eugenics craze," Mother's Pensions were aimed at advancing the Fitter-Families civic lineage (positive eugenics) ideal of the Progressive Era.

Likewise, driven by the same forces that mobilized in support of mother's pensions, the Sheppard-Towner bill of 1921—frequently called the Maternity Act—provided significant federal funding "to reduce maternal and infant mortality."[640] The Sheppard-Towner bill passed both Houses of Congress easily, and was signed into law by President Warren G. Harding.[641] Part of a Progressive Era (eugenic) movement called "scientific mothering"—or applying the principles of science to improve the health of infants and children and to educate poor mothers—the bill was designed to provide federal funds to encourage states to develop their own programs to provide better medical care to mothers and young children: childbirth remained the leading cause of death for women, and around one-third of all children died within their first five years, which was higher than in other industrialized countries.[642] Administered by the Children's Bureau, the program provided dollar for dollar matching funds, based on population, for states to decide how to use the money to serve the goals of the program (if they opted in).[643] As

[640] J. Stanley Lemons, "The Sheppard-Towner Act: Progressivism in the 1920s," *The Journal of American History* 55, no. 4 (March 1969): 776-78. Available online at: https://archive.org/stream/pdfy-scg8I4xdsqHbT2CH/shep-towner-act-article_djvu.txt (last accessed July 5, 2017).
[641] Ibid.
[642] https://embryo.asu.edu/pages/sheppard-towner-maternity-and-infancy-protection-act-1921
[643] Interestingly, the Sheppard-Towner Act was challenged to the Supreme Court in 1923 in *Frothingham v. Mellon* and *Massachusetts v. Mellon,* which were consolidated in *Massachusetts v. Mellon*, 262 U.S. 447 (1923). The Court unanimously dismissed both cases on the grounds that the plaintiffs lacked standing. The Court ruled that the program did not violate federalism, because no state was required to accept the matching federal funds—and indeed Massachusetts, Connecticut, and Illinois opted not to join. Moreover,

Alexandra Stern emphasizes, the Sheppard-Towner Act allowed for the convergence of state (Mother's Pensions) and federal "infant and maternal hygiene programs," and many states used the federal funds to tailor "Americanization campaigns of cleanliness and citizenship."[644] Whereas deviant mothers, such as Carrie Buck could not approximate this ideal and were considered "lost causes" warranting sterilization, these Progressive Era programs sought to school worthy recipients in the moral values and mainstream behaviors of middle-class American society.[645] They were part of the political agenda of positive eugenics and central features of the fitter-family civic lineage regime of the day.[646]

This brings us to the New Deal. By 1929, the state funding for Mother's Pensions dried up and Congress ceased funding the Sheppard-Towner Act in large part due to the financial emergency caused by the Great Depression.[647] In the face of economic crisis and widespread poverty, Franklin D. Roosevelt, as part of his New Deal program, championed the Social Security Act (SSA). The foundation for the modern welfare state in America, the Social Security Act of 1935 included provisions for the elderly, the

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the plaintiffs lacked standing because they could not demonstrate any injury by showing that their tax dollars went to the program.

[644] Alexandra Minna Stern and Howard Markel, eds. *Formative Years*: *Children's Health in the United States, 1880-2000* (Ann Arbor: University of Michigan Press, 2004), 123.

[645] It is worth noting that, support for the Act, in Congress, was bolstered by nativist concerns about increasing the number of children born to Anglo-American women of "native stock." For instance, one Congressman urged his colleagues to support the bill as "the only prospect of maintaining a leavening of the 'native-born,' since rural women were likely to benefit most from it. As quoted by Alisa Klaus, "Depopulation and Race Suicide: Maternalism and Pronatalist Ideologies in France and the United States, in *Mothers of a New World: Maternalist Politics and the Origins of Welfare States,* eds. Seth Kovan and Sonja Mitchell (New York: Routledge, 1993), 204.

[646] Evidence suggests that the Act was successful in bringing medical care to rural communities and decreasing infant and maternal mortality. During the eight years it was in effect, the Act spurred the creation of 3,000 child and maternal healthcare facilities, and reduced the rate of infant mortality from 76.2 deaths to 67.6 deaths per 1000 live births, and was particularly effective in rural areas. Lemons, "The Sheppard-Towner Act," 785.

[647] Ibid., 776-78.

unemployed, and impoverished children "to provid[e] a modicum of income security to working-class families and a minimal safety net for the urban and rural poor."[648] The 1935 Social Security Act (SSA) created the first U.S. national welfare program, Aid to Dependent Children (ADC), which was expanded over time, becoming Aid to Families with Dependent Children (AFDC) in the 1962.[649] Although the stipends to mothers were often small and difficult for a family to survive on, the purpose of the funding was to keep respectable women out of workhouses and poorhouses and allow them to raise their children with dignity in their own home.[650]

The original Aid to Dependent Children program in the 1935 SSA garnered early respectability due to its association with the "deserving" (white) widows of working men.[651] This soon disappeared. Shortly before the United States entered World War II, Congress amended the Social Security Act in 1939 so that widows would no longer be stuck within a means-tested (state-run) program and would instead receive direct survivors benefits for their children. In the words of Stephen Sugarman, "From that date forward their assistance was to be generous and unstigmatizing. Under the amended regime, these new benefits could be characterized, in effect, as life insurance annuities

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[648] Charles Noble, *Welfare As We Knew It: A Political History of the American Welfare State* (Oxford: Oxford University Press, 1997), 67.

[649] The original Social Security Act was Public Law 74-271 (49 Stat. 620) Title IV, and was approved on August 14, 1935. In 1962, the SSA was amended by Congress in Public Law 87-543, transforming ADC to AFDC, signed by President John F. Kennedy.

[650] Gordon, *Pitied But Not Entitled*, 298. According to Linda Gordon, poor women often had to work to support their families, but they had to enter the labor force covertly: If they were caught working by social workers while receiving government support, they were often classified as unfit mothers and purged from welfare rolls.

[651] Stephen D. Sugarman, "Welfare Reform and the Cooperative Federalism of America's Public Income Transfer," *Yale Law & Policy Review* 14, no. 2 (1996): 123-47.

paid for by the deceased father through his social security contributions."[652] While this improved the lot of the widows of workingmen, both in terms of financial security and status, this amendment was damaging for the public image of welfare. By removing the most sympathetic and respectable recipients (widows and their children) and transitioning them into a completely different and more generous annuity program based upon the work contributions of their deceased spouse, "Congress effectively left behind those single mothers who are generally viewed by society as less deserving" in AFDC.[653] This created a separation between the most stereotypically deserving recipients and mothers at the margins, increasingly labeled as "undeserving."[654] In postwar American society, the AFDC program gained the reputation for funding the irresponsible and deviant behaviors of single mothers.[655]

During this time, caseworkers in many states and localities began to more strictly enforce "suitable home" and "substitute parent" rules. They often applied these rules in a relatively arbitrary manner to exclude women of color from the welfare rolls.[656] Likewise, despite a 1961 proclamation issued by the secretary of Health, Education, and Welfare against it, welfare caseworkers persisted in conducting surprise visits to homes (called "midnight raids") to police "man in the house" rules. These rules stipulated that unmarried women with men in their beds should not receive assistance. (According to

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[652] Ibid., 137.
[653] Ibid.
[654] Ibid.
[655] See Gordon, *Pitied But Not Entitled*, 1994; Mimi Abramovitz, *Regulating the Lives of Women: Social Welfare Policy from Colonial Times to the Present* (Boston: South End Press, 1988); Gwendolyn Mink, "The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State," in *Women, the State, and Welfare*, ed. Linda Gordon (Madison: University of Wisconsin Press, 1990), 92-122.
[656] Winnifred Bell, *Aid to Dependent Children* (New York: Columbia University Press, 1965), 75.

this logic, if the relationship was legitimate and serious then the man ought to provide for the family, but if the relationship was not serious, then the woman was morally unfit and the household did not meet the "suitable home" requirements for aid.) In the words of Kaaryn Gustafson, "The unstated but underlying goals of the rules were to police and punish the sexuality of single mothers, to close off the indirect access to government support of able-bodied men, to winnow the welfare rolls, and to reinforce the idea that families receiving aid were entitled to no more than near desperate living standards."[657] In the 1960s—at the same time the Supreme Court was praising the white picket fence (postwar) ideal of the family in *Griswold*—welfare caseworkers policed the sexual behavior and childrearing of poor women, not conforming to the postwar ideal, through the AFDC program.[658]

This brings us to the War on Poverty. The same year that President Lyndon B. Johnson signed the 1964 Civil Rights Act, he also launched a War on Poverty, calling for Congress to pass legislation expanding of the safety net for poor Americans. In the words of President Johnson in his first State of the Union Address to Congress in 1964:

> Let this session of Congress be known as the session which did more for civil rights than the last hundred sessions combined…as the session which declared an all-out-war on human poverty and unemployment in the United States…Unfortunately, many Americans live on the out outskirts of hope—some because of their poverty, and some because of their color, and all too many because of both. Our task is to help replace their despair with opportunity…This administration today, here and now, declares unconditional war on poverty in America. I urge this Congress and all Americans to join me in that effort. It will not be a short or easy struggle, no single weapon will suffice, but we shall not rest until that war is won. The richest Nation on earth can afford to win it. We cannot

[657] Kaaryn S. Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York: New York University Press, 2011), 21.
[658] *Griswold v. Connecticut,* 381 U.S. 479 (1965).

> afford to lose it…Poverty is a national problem, requiring improved national organization and support. But this attack, to be effective, must also be organized at the State and local level…It must be won in every private home, in every public office, from the courthouse to the White House.[659]

From today's vantage point, the idea of the government spearheading an effort to end poverty in America altogether seems remarkable—perhaps even quixotic—for a President's State of the Union Address. However, following this speech, Congress responded by passing the Economic Opportunity Act of 1964, which created a series of educational, employment, and anti-discrimination programs, including Jobs Corps, Head Start, Legal Services, and the Community Action Program.[660] Congress also expanded nutrition programs in the Food Stamps Act of 1964, which later became the Supplemental Nutrition Assistance Program (SNAP), and passed the Elementary and Secondary Education Act of 1965 increasing educational opportunities and aiming to lessen achievement gaps in schools.[661] Furthermore, as part of its War on Poverty legislation, Congress added the health insurance programs of Medicare for the elderly and Medicaid for the poor as amendments to the Social Security Act (SSA) in 1965.[662]

This impressive list of accomplishments begs the question: What did the War on Poverty mean for AFDC? Despite supporting a host of anti-poverty initiatives, it might seem surprising that Congress chose not to expand federal funding of AFDC as part of

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[659] Lyndon B. Johnson, *1964 State of the Union Address*, Joint Session of Congress (January 8, 1964).
[660] See Gareth Davies, *From Opportunity to Entitlement: The Transformation and Decline of Great Society Liberalism* (Lawrence, KS: University of Kansas Press, 1996); Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016).
[661] United States Department of Agriculture, "A Short History of SNAP: Supplemental Nutrition Assistance Program." Available online at: https://www.fns.usda.gov/snap/short-history-snap [last visited July 5, 2017].
[662] James T. Patterson, *America's Struggle against Poverty in the Twentieth Century* (Cambridge: Harvard University Press, 2000), 153-65.

the War on Poverty. In fact, when the Johnson Administration proposed welfare reforms that would have merely required states to raise their cash assistance benefits under AFDC to keep pace with changes over time in the cost of living (i.e. meet the calculated baseline of standard of need in the state), Congress rejected this basic increase in funding and instead added additional work-related requirements in the 1967 Amendments to the SSA.[663] The incorporation of work-based initiatives was not new. In response to concerns that welfare discouraged marriage and encouraged unwed motherhood, the original Aid to Dependent Children (ADC) was renamed Aid to Families with Dependent Children (AFDC) in 1962 and incentives for poor husbands to work became part of the program.[664] In 1964, Congress rejected any increase in generosity in favor of a work-focused direction, with increased job training opportunities, primarily for men, in the Work Experience and Training Program, citing the rising costs associated with the spike in caseloads. In her revisionist account of the "workfare state," Eva Bertram presents detailed and convincing evidence that conservative southern Democrats spearheaded work requirements during the 1960s and throughout the War on Poverty, making the move to work requirements a bipartisan project long before Bill Clinton and a Republican Congress passed TANF.[665] Nonetheless, since the focus of these early AFDC work programs aimed to encourage the formation of nuclear families, over single motherhood, and offered incentives for fathers to provide for their families as traditional male

[663] Davies, *From Opportunity to Entitlement*.
[664] 42 U.S.C. § 606 (1962): transforming ADC to AFDC under the SSA.
[665] Eva Bertram, *The Workfare State: Public Assistance Politics from the New Deal to the New Democrats* (Philadelphia: University of Pennsylvania Press, 2015).

breadwinners, these early work requirements appear largely in keeping with the postwar white picket fence ideal of citizenship and civic reproduction.

Although the War on Poverty did little to expand AFDC legislatively, it contributed to the growth of the welfare program in other ways—particularly judicially. Most importantly, the Johnson Administration helped make AFDC more accessible for qualifying families, including hitherto excluded African Americans.[666] With the end of formal legal racial discrimination, African Americans—who had suffered higher rates of poverty than whites throughout the program but were regularly excluded from receiving AFDC at the state and local level—were no longer systematically excluded from AFDC. Furthermore, in her analysis of the welfare rights movement during the 1960s, Kaaryn Gustafson notes that the Johnson Administration played a key role in "funneling money into legal services for the poor," including giving federal government money to the Legal Aid Society in "handling both minor individual cases and broader actions challenging government policies" that were arbitrary or racially discriminatory.[667] These efforts to use the courts to improve the welfare system sought to end racial discrimination in AFDC and grant due process access to all those who qualified under the statute, resulting in court cases addressed below.

To summarize: The early ADC policy, like the state-run Mother's Pensions programs before it, was built around the Progressive Era Fitter Families ideal of citizenship. The AFDC program later sought to encourage nuclear families in a manner

[666] Brendon O'Connor, *A Political History of the American Welfare System: When Ideas Have Consequences* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2004), 49-69.
[667] Gustafson, *Cheating Welfare*, 25.

consistent with the White Picket Fence ideal of citizenship of postwar America. However, as we shall see below, AFDC took a distinctively neoliberal turn beginning in the 1970s. Importantly, the Supreme Court played a key role in first expanding the policy to be more inclusive, and later providing policymakers with the legal leeway to reshape the program in a manner consistent with the advent of a neoliberal civic lineage regime.

3. Expansion and Retrenchment: The Supreme Court's AFDC Cases

This brings us to the role of the Supreme Court in expanding welfare rights during the 1960s and early 1970s. Fueled by the activism associated with the civil rights and feminist movements and funding from the Johnson Administration, as part of the War on Poverty, lawyers increasingly identified arbitrary practices from caseworkers and brought "welfare rights" cases to court.[668] This section begins by examining three Supreme Court cases that expanded and streamlined procedural access to welfare, even suggesting (briefly) that the Court might be headed in the direction of determining that welfare was a right, but the Court soon retreated from these feminist egalitarian implications and took a distinctively neoliberal turn in its jurisprudence. The tensions in these AFDC cases, timed close together, are fascinating and indicative of a larger political struggle over civic lineage and welfare policy in the nation. Like we saw in the last chapter, at a time of transition between civic lineage regimes, it appears that the Court was in the process of "trying to figure out" how the jurisprudence on the topic ought to pan out. In the end, as

[668] Ibid., 24-32.

we shall see, the Court first expanded procedural access to welfare, but soon fell in a neoliberal civic lineage direction when it came to the benefits given by the government to recipients within the program.

Let us begin with the role of the Supreme Court in expanding access to welfare. In a triad of cases, between 1968 and 1970, the Supreme Court expanded welfare rights. The first of these "welfare rights" cases was *King v. Smith* (1968) in which the Court overturned the state of Alabama's man-in-the-house rule, which had thrown an African American widow and mother of four off the welfare rolls for not having a "suitable home" because she had a sexual relationship with a married man.[669] In a unanimous opinion, written by Chief Justice Warren, the Court held that the Alabama rule violated the federal Social Security Act on the grounds that "the category [of dependent] singled out for welfare assistance by AFDC is the "dependent child," defined as "an age-qualified needy child," not the mother.[670] The SSA protected dependent children, and was not intended to punish children for the sins of their mothers. [671] Hence, "Under the "scheme of cooperative federalism," Alabama is required to follow the statutory requirements of the SSA and "provide economic security for children" not mothers.[672] Second, in *Shapiro v. Thompson* (1969), the Court issued a 5-4 ruling that a state could not deny the application of a qualified women for Aid to Families with Dependent Children (AFDC),

[669] *King v. Smith*, 392 U.S. 309 (1968).
[670] Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement*, *1960-1973* (New Haven: Yale University Press, 1993), 62-67. (The primary brief for the case, submitted by the lawyers representing Mrs. Smith, identified a series of constitutionally problematic aspects of man-in-the-house rules—ranging from equal protection to a sweeping assertion that these laws deprived poor people of the "right to live.")
[671] *King v. Smith* (1968): at 313-314.
[672] Ibid., at 329-331.

because she recently changed her residence and relocated from another state.[673] Although the Constitution does not specifically mention a right to travel, the majority opinion by Justice Brennan struck down a Connecticut state law requiring that a mother live in the state for one year before applying for assistance under AFDC, because this waiting period for government aid violated the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment by depriving newcomers of "the ability . . . to obtain the very means to subsist-food, shelter, and [the] other necessities of life."[674]

Then, in *Goldberg v. Kelly* (1970)—arguably the most important of the AFDC welfare rights cases—the Supreme Court ruled 5-3 (with the vacancy of Abe Fortas) that "Welfare benefits are a matter of statutory entitlement for persons qualified to receive them."[675] As a result, the Due Process Clause of the Fourteenth Amendment requires that the government offer procedural due process through a fair evidentiary hearing before depriving a recipient of benefits.[676] Whereas states such as New York previously would remove recipients from welfare rolls suddenly and in a relatively arbitrary fashion, leaving recipients not only without necessary funds to survive but also without recourse to challenge this decision, the *Goldberg* Court determined that recipients were entitled to notice of the decision before their benefits were reduced or ended and that they could challenge negative actions before a neutral arbitrator. This case set the guidelines for how procedural due process applies when dealing with the termination of a government

[673] *Shapiro v. Thompson,* 394 U.S. 618 (1969).
[674] Ibid., at 627.
[675] *Goldberg v. Kelly*, (1970): at 262.
[676] Ibid.

benefit or entitlement. Even more interestingly, Justice Brennan writing for the majority, cited a law review article by Charles Reich, "The New Property," to argue that the expansion of the welfare state and government subsidies—including subsidies to corporations, farms and small agriculture, government pensions, professional licenses, and social welfare to impoverished citizens—constituted something akin to "new property" in the changing economic system.[677] This, as scholars like Gwendolyn Mink have emphasized, suggested at the time that welfare might be closer to a right than a privilege, and as Brennan argued, the Fourteenth Amendment's Due Process Clause is triggered when a person is deprived of property without the due process of law.[678] A person has a property interest in government payments she depends upon to survive and raise her family, which makes AFDC a statutory entitlement to those who qualify for the program.

In a similar manner to the Medicaid cases on abortion defunding, addressed in the last chapter, the *Goldberg* case reveals a brief moment in time in which a voluntary motherhood civic lineage regime was one possible direction that the Supreme Court and the other branches of government might follow. In *Goldberg,* Justice Brennan suggests through dicta that bearing and raising a child with rudimentary support from the government for sustenance might be a social right of citizenship protected by the Constitution.[679] As a result of the short-lived welfare rights movement and its court victories during the War on Poverty, AFDC became a much bigger civic lineage program

[677] Charles A. Reich, "The New Property, " *Yale Law Journal* 73, no. 5 (1964): 733-87.
[678] Gwendolyn Mink, *Welfare's End* (Ithaca: Cornell University Press, 1998), 57.
[679] *Goldberg v. Kelly*, 397 U.S. 254 (1970): at 262, 265.

affecting more and more American children. the welfare rolls more than doubled in the short time between 1964 and 1970, swelling from 4.2 to 9.7 million.[680] With AFDC more widely accessible to qualifying families during the Johnson Administration's War on Poverty, Gustafson concludes, "More and more of the poor realized they were eligible for assistance and applied for welfare…The sheer volume of applications was overwhelming…"[681] The number of recipients enrolled in the program continued to expand into the 1970s, with help from the Court's favorable rulings.

The courts played an important role in opening the doors of AFDC for hitherto excluded groups and streamlining procedural access to benefits, which made the program much less arbitrary and more administrative. But although AFDC remained a "statutory entitlement" after *Goldberg*, the more sweepingly egalitarian aspects of Justice Brennan's "new property" argument did not stick. The Supreme Court increasingly favored neoliberal theories of individual choice and reproduction in its AFDC jurisprudence during the 1970s after *Goldberg*. However, while the courts expanded access, the states and federal government constricted benefits and reshaped the program in a more work-focused direction. Let us examine the Supreme Court's neoliberal turn in welfare jurisprudence.

After briefly flirting with making welfare a social right, the Court in the mid-1970s determined that states could impose significant limitations—such as maximum payments or child caps and limitations that fell short of the calculated standard of need of

[680] Davies, *From Opportunity to Entitlement*, 158, 215.
[681] Gufstafson, *Cheating Welfare*, 29.

recipients—irrespective of whether children and their family failed to receive the funds required for basic subsistence. For instance, in *Dandridge v. Williams* (1970), the Court ruled that states could cap the maximum grants offered to welfare recipients based upon family size, cutting off benefits when "additional" children are born.[682] Likewise, in a strong repudiation of the notion that welfare payments are "new property," the Court held in *Wyman v. James* (1971) that an individual's Fourth Amendment protections against unwarranted searches do not apply to the homes of people receiving welfare support.[683] While the majority acknowledged that a person is normally free from unwarranted government intrusion in her home under the Fourth Amendment, they waved this protection for caseworker visits for welfare recipients. Labeling welfare as a privilege not a right in the majority opinion in *Wyman*, Justice Blackmun held that home visits from government officials was a reasonable tradeoff for the privilege of receiving AFDC benefits.[684] If a person didn't want a caseworker to visit her home, then she could simply decide not to receive assistance from the government. By participating in the need-based AFDC program, she effectively relinquished her Fourth Amendment right to be free from government officials visiting (read: searching) her home in exchange for the program's benefits. To put it another way, she sold this right to the government when she signed up for welfare.

This is a classic neoliberal ruling during the 1970s. Specifically, *Wyman* transforms government assistance for poor women to support dependent children into a

[682] *Dandridge v. Williams*, 397 U.S. 471 (1970).
[683] *Wyman v. James,* 400 U.S. 309 (1971).
[684] Ibid., at 319.

matter of free choice, thereby sidelining the ways in which their options are limited by poverty. A mother relying on welfare to support her children cannot refuse a caseworker access to her home without sacrificing basic necessities. By exercising her Fourth Amendment right, she might even place her home at risk by not meeting rent. In fact, this is precisely what Justice Douglas implies in his *Wyman* dissent.[685] He went directly for the jugular of the majority's cramped notion of choice and its double-standard for poor mothers compared to businessmen. As Douglas put it, "Whatever the semantics, the central question is whether the government by force of its largesse had the power to "buy up" rights guaranteed by the Constitution."[686] By offering benefits with traditionally unconstitutional stipulations attached to the funding, which an impoverished person simply cannot afford to refuse (and therefore has no genuine choice), Douglas accuses the Court's Majority of allowing the government to essentially purchase by eminent domain a poor person's normal Fourth Amendment protection.

Importantly, the *Wyman* decision in 1970 is premised upon the neoliberal theory of the individual. If a woman is financially independent enough to reject government assistance, then she can exercise her constitutional right to privacy. The government program is a privilege. So, irrespective of poverty the need of her children, her reliance on government assistance is a free choice. This Fourth Amendment privacy case sounds a lot like the Court's approach to reproductive privacy rights under Medicaid. In both, the solution for the woman who wants to access her fundamental constitutional right in question is to become a self-sufficient market actor, who does not rely on the government

[685] *Wyman v. James* (1971), Justice Douglas dissenting, at 326-336.
[686] Ibid., at 328.

for basic necessities. Ironically—yet in line with neoliberal market ideology—the Court treats government subsidies to businesses and corporations completely differently when it comes to the effect of assistance on fundamental rights. As Douglas points out in his *Wyman* dissent, while government assistance given to an impoverished mother can buy up her fundamental rights, the government does not attach such requirements to the "new property" given to businesses through subsidies. In his words, "There is not the slightest hint [in the Court's majority opinion]…that the Government could condition a business license on the "consent" of the licensee to the administrative searches we held violated the Fourth Amendment." He continues, "it is a strange jurisprudence indeed which safeguards the businessman at his place of work from warrantless searches but will not do the same for the mother in her home…It is the precincts of the home that the Fourth Amendment protects; and their privacy is as important to the lowly as to the mighty."[687]

Written in response to a general shift in jurisprudence on the Court, this is an important dissent because it points to the fact that in just a few years the Court went from viewing welfare as potentially a "new property" right to falling in a different (neoliberal) direction—which favored businesses over poor mothers and undermines redistributive social policy. With a neoliberal theory of the individual and the idea that welfare is a privilege not a right, we encounter a patchwork jurisprudence that ensured qualified individuals could enter the program, while at the same time the Court permitted states to offer less generous benefits. In practice, states could cut funding in a variety of ways for program beneficiaries, especially in the interest of saving money or encouraging work.

[687] Ibid., at 331, 333.

For instance, the Court refused to apply equal protection to harmful distinctions between categories of poor within assistance programs in *Jefferson v. Hackney* (1972).[688] Ruling that it was constitutionally permissible for the state of Texas to provide higher benefits to disability and old-age programs comprised primarily of white and elderly beneficiaries while meeting a fraction of the needs of AFDC recipients, who were overwhelmingly people of color and young, the majority of the Court in *Jefferson* permitted Texas to slash welfare benefits in a manner that disproportionately harmed needy blacks and Latinos with children in the state. Writing for the majority, Justice Rehnquist concluded that the Texas system was both statutorily and constitutionally acceptable because it treated everyone within the AFDC program alike, and instead made distinctions between different SSA aid programs. Labeling the racial disparity between the programs as merely statistical with no evidence of invidious discrimination, Rehnquist argued that Texas had rational reasons to want to offer meager benefits to people on welfare because the young have the ability "of improving their situation," presumably through work.[689] Responding to the narrow reasoning of the majority, Justice Marshall, echoing his dissents in the last chapter on Medicaid, accused the Court of adopting a misguided approach to the nexus of reproduction, poverty, and citizenship. In his words, "All of us with children know that it costs as much if not more to rear children in health, decency, and self-respect than to maintain an adult. It is surely no less

[688] *Jefferson v. Hackney*, 406 U.S. 535 (1972).
[689] Ibid., at 547-548.

important to make this investment in our future citizens than it is to provide decently for those who have retired."[690]

Despite the fact that the Court cultivated a more ambivalent "welfare rights" jurisprudence after 1970, the fact remains that AFDC was a "statutory entitlement" under federal law for all who qualified under *Goldberg*. It remained so until "the end of welfare," and replacement of AFDC with TANF, in 1996. This meant that recipients had access to benefits with due process protections, but it also meant that states could apply a variety of different limitations on funding within the program. Perhaps most importantly, when the question before the Court involved a class of dependent children, the Court almost always ruled in favor of dependent children as the intended beneficiaries of the statute. (The Court consistently prohibited the total exclusion of categories of dependent children using equal protection, including illegitimate children and military orphans.[691]) However, this was a thin approach to equal protection, which granted access but not any semblance of substantive equality, and made room for policing of mothers within the program. Indeed, when the question in a case centered around the mother, as it was framed in *Dandridge* and *Wyman*—note: this is primarily a matter of *framing* because the child is, by definition, dependent—then the Court was apt to rule against the mother to the detriment of the child. While the dissenters maintained that this obviously harmed the child, the majority focused more narrowly on the mother or entire family, not the individual dependent child. This distinction between the dependent child and parent is a

[690] *Jefferson v. Hackney* (1972), Marshall dissenting at 582. Here Marshall quotes Senator Benton from the Congressional Record (96 Cong Rec. 8813-8814).
[691] See *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971): *King v. Smith* (1968).

noteworthy pattern in these AFDC cases, and the Court appeared increasingly willing to punish the mother, which in turn harmed the child.

In sum, the political backlash against welfare shares much in common with the retrenchment of funding for abortion and reproductive choice under Medicaid for poor women in the 1970s, examined in the last chapter. On the heels of the civil rights and women's movements, we see evidence of the beginnings of a neoliberal civic lineage regime emerging in another policy arena: Namely, welfare. The tensions in these AFDC cases, timed close together, is fascinating and indicative of a larger political struggle over civic lineage and welfare policy in the nation. As we saw in the last chapter, at a time of transition between civic lineage regimes, it appears that the Court was in the process of "trying to figure out" how the jurisprudence on the topic ought to pan out. What we get is a narrow view of equal protection focusing on thin procedural access to the program as opposed to a thicker notion of social equality. In the end, the Court—as Justice Douglas intimates above—fell in a neoliberal civic lineage direction. Moreover, as Justice Thurgood Marshall emphasizes, these decisions were likely to foster inequality among future generations of citizens.

4. Deviant Citizenship & the Welfare Queen Stereotype

Ironically, this was "soft" neoliberalism compared to what would follow twenty years later in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Not only did "welfare reform" entirely abolish cash assistance as a

"statutory entitlement" to all impoverished dependent children who qualified, but it also redesigned welfare via TANF to operate as fixed federal block grants to states, banned most legal non-citizens from receiving public assistance for five years, required mandatory work from caregiving recipients after two years, strict lifetime limits of benefits irrespective of need, and a series of "family values" provisions coercively regulating family formation and promoting marriage.[692] How, then, did we get from this "soft" to "hard" neoliberalism in welfare policy?

The explanation is neither simple nor direct. In her recent analysis of the development of the "workfare state," Eva Bertram persuasively challenges the traditional narrative that credits the Republican Party with the retrenchment of New Deal and Great Society welfare programs, the latter of which were sponsored by the liberal wing of the Democratic Party.[693] Against the classic story that suggests that welfare expanded under the War on Poverty until the Republican war against the poor under the Reagan Administration in the 1980s, Bertram documents the legislative battles waged by conservative southern Democrats, largely within their own party without public attention, to introduce work programs for AFDC welfare recipients in the 1960s and 1970s. When the courts struck down overt racial discrimination within social programs and made welfare more accessible, this in turn increased the welfare rolls and gave the false impression that the government was more generous within AFDC. In contrast, according to Bertram, southern Democrats responded at both the state and national level by seeking to reshape the New Deal "welfare" program into a less generous "workfare" system.

[692] Public Law Number 104-193, 110 Stat. 2105 (1996): codified in sections of 42 U.S.C. (1996).
[693] Bertram, *The Workfare State*.

Bertram's evidence strongly suggests that southern Democrats spearheaded these policy innovations supporting low-income work rather than government cash handouts to preserve the (hierarchical) economic status quo of the South.[694] Using race-neutral language to highlight work to thwart economic mobility among people of color and poor whites and keep them in the low-end labor market, these leaders were able to quietly sponsor a shift in the shape of the welfare state that helped to preserve southern racial and socioeconomic inequalities in the face of the legal victories of the civil rights and women's movement.

Bertram's account of the role of workfare in reinforcing civic inequality, first as a southern response to civil rights within the Democratic Party and later as a bipartisan project, points to the non-accidental timing of this backlash against welfare in the wake of the civil rights movement. This, in turn, highlights the unequal underbelly of neoliberal citizenship at an early policy-making stage. That said, an important part of the neoliberal backlash against welfare involves the American public's ideological acceptance of a neoliberal ideal of citizenship. In this regard, Ronald Reagan played a key discursive role in the shift towards neoliberal civic lineage policy in the 1970s and 1980s. Widely credited with the economic triumph of neoliberalism in the United States (just as Margaret Thatcher was in Britain), Ronald Reagan's rhetorical approach to "market fundamentalism" often utilized discourse on civic lineage to garner public support for dismantling social programs.[695] Indeed, a key piece of the puzzle from a civic lineage standpoint is captured in Ronald Reagan's demonization of the "welfare queen"

[694] Ibid.
[695] Harvey, *A Brief History,* 1.

as a trope for engaging in irresponsible reproduction and bad motherhood to take advantage of the welfare system.[696] Combining invidious historical stereotypes about the reckless fertility and irresponsible reproduction of both blacks and poor women, Reagan mixed existing prejudices with a contemporary neoliberal picture of a deviant citizen. Akin to the political backlash against the eugenically unfit citizen of the Progressive Era—who was also cast as overly fertile and dangerous for the nation's future generation of citizens—the "welfare queen" would become the face of welfare during Ronald Reagan's campaign for the presidency.[697] From an ideological standpoint, Ronald Reagan articulated—and in hindsight convincingly sold—a distinctively American (neoliberal) picture of the unfit citizen to the wider American public in his efforts to attack and dismantle government aid programs in favor of an increasingly unrestrained "trickle down" market economy.

During his (unsuccessful) 1976 campaign for the Republican presidential nomination, Reagan launched a full-blown assault on the social programs of the New Deal and the Great Society. In particular, accusing anti-poverty programs like AFDC and Food Stamps as rife with fraud—stealing hard earned money from taxpayers to fund unworthy civic reproduction and pathological parenthood—Reagan introduced the "Welfare Queen" to the American public, crowning her as the face of welfare. As he put it in a campaign speech, "There's a woman in Chicago. She has 80 names, 30 addresses, 15 telephone numbers to collect food stamps, Social Security veterans' benefits for four

[696] See John Blake, "Return of the Welfare Queen," *CNN*, January 22, 2012; Rachel Black and Aleta Sprague, "The Rise and Reign of the Welfare Queen," *New America Weekly*, September 22, 2016.
[697] Rachel Black and Aleta Sprague, "The Welfare Queen Is a Lie: Programs that Should be Crafted Around People's Needs Are Instead Designed to Deal with a Problem that Doesn't Exist," *The Atlantic*, September 28, 2016.

nonexistent deceased veteran husbands, as well as welfare [which she collects under each of these names]. Her tax-free cash income alone has been running $150,000 a year."[698]

This was a powerful story. It also had some basis in reality. In 1974, Congress amended the Social Security Act to require AFDC beneficiaries to report their Social Security numbers with their annual paperwork for their application, and "computers began being used routinely to monitor for fraud."[699] As we might expect, a few AFDC cheaters were uncovered during this time, but they pilfered much less money than those engaged in white-collar tax or corporate fraud.[700] The first case of welfare fraud to make national headlines was a Chicago mother in her forties, named Linda Taylor, who was engaged in a host of egregious criminal activities, including welfare fraud, and whom the *Chicago Tribune* and *Jet Magazine* both dubbed "the Welfare Queen."[701] This is the first time the term appears in the press, and Reagan coopted it. The fact that Taylor was convicted for stealing much less from the government ($8,000) was not important. Rather than treating the fraud she committed as an anomaly and applying a more appropriate criminal narrative to Taylor's case, Reagan instead combined her story with other accounts of AFDC scam artists to create a legendary political myth of poor mothers (in mass) abusing the system in outrageous ways.[702] Through lurid tales of "welfare queens," Reagan transformed Taylor (who remained nameless in his accounts) into a symbol of the entire AFDC program. Reagan described the Welfare Queen as decked out

[698] As quoted in Black and Sprague, "The Welfare Queen Is a Lie," 1.
[699] Gustafson, *Cheating Welfare*, 33 (quoting Greenberg and Wolf).
[700] Ibid.
[701] *New York Times*, December 15, 1974. For an excellent journalistic account of the "real story" of the crimes of Linda Taylor, not focused on welfare, see: Josh Levin, "The Welfare Queen," *Slate*, December 19, 2013.
[702] "'Welfare Queen' Becomes Issue in Reagan Campaign," *New York Times*, February 15, 1976.

in jewelry and furs, infamously driving her pink Cadillac to pick up booze and cigarettes with food stamps, and cashing her welfare check while at the Liquor Store.[703]

In his 1980 presidential campaign, Reagan continued to condemn welfare by focusing on the "welfare queen" as a normative description of mothers receiving AFDC government assistance. After becoming President, he sought to translate his "market fundamentalism" into public policy by slashing programs for the poor and favoring the market. While distinctions between "worthy" and "unworthy" recipients have always been a part of welfare policies, as noted earlier, what makes this stereotype so powerful is its attempt to merge historical prejudices against the reproductive behaviors of African Americans, women, and the lower classes with a vitriolic neoliberal discourse about what it means to be a responsible market actor.[704] Using racially coded language to conjure up a picture of urban decay and black female criminality in the wake of the civil rights movement, the welfare queen stereotype refers to a woman, invariably African American and from the inner-city, who intentionally profits off the system through her reckless, calculated, and fraudulent reproductive behaviors and motherhood.[705] Describing the historical basis of this stereotype, Dorothy Roberts defines the "welfare queen" as a stereotype of "the lazy mother on public assistance who deliberates breeds children at the expense of taxpayers to fatten her monthly check."[706] Roberts further notes that this "picture of reckless black fertility is made all the more frightening by a more devious

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[703] Black and Sprague, "The Welfare Queen Is a Lie."
[704] See Ange-Marie Hancock, *The Politics of Disgust: The Public Identity of the Welfare Queen* (New York: New York University Press, 2004).
[705] Eileen Boris, "When Work Is Slavery," in *Whose Welfare*, ed. Gwendolyn Mink (Ithaca: Cornell University Press, 1999), 39.
[706] Roberts, *Killing the Black Body,* 17.

notion of Black women's childbearing. Poor Black mothers do not simply procreate irresponsibly; they purposefully have more and more children to manipulate taxpayers into giving them more money."[707] As Roberts notes, this line of attack on welfare policy merges presumptions about irresponsible fertility and childbearing with irresponsible market behavior and dependency on the government.[708] This stereotype appears to have struck a chord with the American public, and the face of welfare in America has, ever since this time, been both black and female.[709]

To grasp why the welfare queen stereotype was so salient, it is useful to briefly address the role of the Moynihan Report during the War on Poverty. After the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Daniel Patrick Moynihan, Johnson's Assistant Secretary of Labor, released a confidential report White House officials in March 1965 (*The Negro Family: The Case for National Action*), commonly known as simply the "Moynihan Report," arguing that racial equality required more than civil rights legislation.[710] A promoter of the War on Poverty, Moynihan contended that poverty in the black urban community wasn't merely the consequence of a lack of jobs, but rather stemmed from the "matriarchal structure" of the family in poor black communities, which "is so out of line with the rest of American society" that it constituted a "tangle of pathology."[711] Relying heavily on statistics concerning poverty among African Americans living in the inner-city, Moynihan explicitly cited welfare as a

[707] Ibid., 17.
[708] Ibid., 17-19.
[709] See Hancock, *The Politics of Disgust*.
[710] Daniel Patrick Moynihan, *The Negro Family: The Case for National Action* (Washington D.C.: Office of Policy Planning and Research, U.S. Department of Labor, 1965).
[711] Ibid., document in *Welfare: A Documentary History of U.S. Policy and Politics*, ed. Gwendolyn Mink and Rickie Solinger (New York: New York University Press, 2003), 226-29.

measure of this problem: "The steady expansion of welfare programs can be taken as a measure of the steady disintegration of the Negro family structure over the past generation."[712] Moynihan defined the "tangle of pathology" as a problem that was "capable of perpetuating itself without assistance from the white world."[713] Since so many "Negro Families are Headed by Females," he concluded that this "weakness of the family structure…now serves to perpetuate the cycle of poverty and deprivation" from mother to child, across generations. Speaking of the intergenerational manner of this pathological (matriarchal) family structure, he wrote: "Many of those who escape do so for one generation only: as things now are, their children may have to run the gauntlet all over again…The matriarchal pattern of so many Negro families reinforces itself over the generations."[714]

Moynihan's analysis was a scathing patriarchal condemnation of unwed and single motherhood, as feminists have noted, particularly within the inner-city black community.[715] Even worse, the Moynihan Report communicates a message—cloaked in the legitimacy of the government and using the statistical tools of social science—that low-income unwed African American mothers pose a threat to the nation, because the data suggests that they disproportionately give birth to and raise children who do not escape the ghetto underclass marked by welfare dependency among women and criminality among men. While Moynihan intended his analysis to help "the Negro

[712] Moynihan, *The Negro Family.*
[713] Ibid., n.p.
[714] Ibid., 228.
[715] See Daniel Geary, *Beyond Civil Rights: The Moynihan Report and Its Legacy* (Philadelphia: University of Pennsylvania Press, 2015); Susan D. Greenbaum, *Blaming the Poor: The Long Shadow of the Moynihan Report on Cruel Images About Poverty* (New Brunswick: Rutgers University Press, 2015).

American to full and equal sharing in the responsibilities of citizenship" during the War on Poverty, his Report has provided racialized ammunition to those who oppose welfare.[716]

In subsequent years, conservative scholars used Moynihan's Report to support a neoliberal attack on the cultural and reproductive behaviors of welfare recipients, often framing them as "pathological." For instance, using Moynihan's analysis of "the culture of poverty" as a starting point, Charles Murray in 1984 focused on the idea of "welfare dependency" in his popular book, *Losing Ground*.[717] Murray labeled welfare as a personal choice, arguing that the government was providing the wrong incentives to poor people by allowing them to choose not to work. Since the most respectable poor citizens preferred work, according to Murray, he accused the social programs of the New Deal and Great Society of rewarding the least capable and most deviant members of society, which redistributed economic resources from "the most law-abiding to the least law-abiding, and from the most responsible to the least responsible."[718] Arguing that all government aid to the poor made low-wage work less attractive and less dignified—particularly since he admitted that one cannot always survive on the income of an unskilled worker in a low-wage economy—Murray blamed welfare for the culture of poverty and intergenerational dependency.

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[716] Moynihan's argument was picked up by both fiscal conservatives and the new right "family values" supporters, and it was also supported by many Democrats who advocated job training programs and creating more jobs in the inner-cities, such as scholar William Julius Wilson. See William Julius Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987).
[717] Charles Murray, *Losing Ground: American Social Policy, 1950-1980* (New York: Basic Books, 1984), 38.
[718] Ibid., 201.

Murray's attack on welfare didn't stop there: He argued that programs like AFDC also provided a safety net for the wrong citizens to reproduce, weakening the gene pool in the United States. In their popular book, *The Bell Curve*, Richard Herrnstein and Charles Murray in 1994 took aim at the ways in which civic lineage policy at the time encouraged the least fit members of society to bear children.[719] In their words, "The United States already has policies that inadvertently social engineer who has babies, and it is encouraging the wrong women…The technically precise description of America's fertility policy is that it subsidizes births among poor women, who are disproportionately at the low end of the intelligence distribution."[720] Far more commonly, opponents of AFDC, such as Lawrence Mead, argued that welfare promoted a "culture of dependency," rather than suggesting there was a genetic twist to the story.[721] But it is noteworthy that many attacks on welfare recipients during this time echoed earlier eugenic concerns about unfit civic reproduction in the Progressive Era (whether framed as genetic or cultural in its transmission across generations), yet mixed those resurgent concerns with distinctively neoliberal policy recommendations; for instance, Murray advocated scaling back all government anti-poverty programs in order to let the "invisible hand" of the free market reward the most qualified and capable citizens, thereby effectively "sorting the wheat from the chaff."

Martin Gilens has documented that public opinion viewed welfare as racially coded from the late 1960s through the 1990s, and this he argues is part of the reason that

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[719] Richard Herrnstein and Charles Murray, *The Bell Curve* (New York: Free Press, 1994).
[720] Ibid, quote from book reprinted in Mink and Solinger, *Welfare: A Documentary History,* 595.
[721] Lawrence Mead, *Beyond Entitlement: The Social Obligations of Citizenship* (New York: The Free Press, 1986), 19, 20, 40-44.

"Americans Hate Welfare."[722] The significance of the welfare queen stereotype is that it negatively colored public perceptions and discourse about welfare. It did so by combining and merging a host of racial, gender, class, urban, and cultural tropes, and by distilling welfare discussions to the neoliberal dichotomies between "dependent" and "independent," "hard working" and "lazy," "irresponsible" and "responsible." The irony is that the stereotype was not descriptively accurate, and indeed few AFDC recipients actually conformed much at all to the "welfare queen" stereotype. As Stephen Page and Mary Larner put it, "The profile of the typical family receiving AFDC differs in many respects from the popular image of a welfare family."[723] Most recipients are not African Americans from the inner-city. A majority of recipients were white, including large numbers of rural whites. Specifically, Page and Larner document that in "1992, some 39% of the parents who received AFDC were white, 37% were black, and 18% were Hispanic."[724] Additionally, they found that most mothers on welfare actually have fewer children than the average in the country; 43% of families on welfare consisted of merely a single child.[725] Most impoverished parents only signed up for AFDC as a last resort out of financial desperation. Since the program was simultaneously meager and socially stigmatizing, it was hardly an attractive alternative to most paid work.

The welfare queen, defined by her "pathological" fertility, is an important part of the ideology of neoliberal citizenship. Deeply embedded in American folklore about

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[722] Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (Chicago: The University of Chicago Press, 1999).
[723] Stephen B. Page and Mary B. Larner, "Introduction to the AFDC Program," *The Future of Children* 7, no. 1 (Spring 1997): 22.
[724] Ibid., 22-23.
[725] Ibid., 22.

welfare, the stereotype would continue to be a catchphrase as part of the discourse on welfare reform during the Clinton Administration. This stereotype took on a life of its own in much the same way as the eugenically unfit citizen during the Progressive Era, who threatened to "sap the nation of its strength" by weakening the gene pool. Reagan compared her to a parasite on the system, leaching the hard-earned money of taxpayers and intentionally giving birth to large numbers of children who would follow in the pathological footsteps of their mother. Like Henry Goddard's notorious Kallikak family of the Eugenic Craze, with a photograph altered so that even the children appeared "feeble-minded" (in an unending cycle of intergenerational mental retardation, disability, and criminality), the "welfare queen" and the "culture of poverty" became a powerful civic lineage myth about presumed intergenerational pathology, which in turn drove public policy and was used to fuel a political assault on AFDC.[726] In the welfare queen, we get a picture of the unfit citizen, whose reproduction is not only irresponsible, but whose fraudulent behavior—defined by uncontrolled fertility and a penchant for criminality—is passed to her children. In the words of Patricia Hill Collins, the welfare queen "is portrayed as being content to sit around and collect welfare, shunning work and passing her bad values to her offspring. The welfare mother represents a woman of low morals and uncontrolled sexuality."[727]

This, of course, is the worst kind of citizen for a neoliberal free market economy, because she undermines its entire logic of work and consumption, supply and demand.

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[726] Goddard, *The Kallikak Family*.
[727] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 2000), 84.

The woman on welfare, according to this popular account, exploits the neoliberal market system by violating almost every social and economic tenet it is based upon: She is neither married nor works, takes advantage of those taxpayers who play by the rules, consumes extravagantly using other people's money, opts for dependency on the state over the independence of work, prefers promiscuity to a nuclear family, reproduces uncontrollably without having the means to support her children on her own, and transmits her beliefs and behaviors to her children to continue the same profligate abuse of the system across generations. Part of the reason this trope is so powerful is that it envisions large numbers of deviant members of society who together pose a threat to the very logic of market fundamentalism. Indeed, why should a person work hard, laboring at a grueling and often low-paying job, when some people appear to thrive by not working and breaking the rules? For the free market to function properly in a neoliberal nation guided by market norms, the nation's citizens *must* accept this market logic and play by its market rules. While the ideal neoliberal citizen is independent, hardworking, responsible, and self-sufficient, the welfare queen threatens the foundation of neoliberal statecraft through her deviant fertility and lavish exploitation of the system.

5. The End of Welfare

Our discussion above is key to understanding the rise of TANF in the late 1990s. Draconian by design, "welfare reform" is premised upon the stereotype of the irresponsible and reckless fertility of the welfare queen and her dependency on

government, which the TANF legislation aims to abolish by uniting the workfare and family values agendas. During the presidential race of 1992, Democratic candidate Bill Clinton included a promise to make welfare benefits temporary and "end welfare as we know it."[728] As I demonstrate in this section, "welfare reform" in 1996 was a bipartisan compromise that centered around classic neoliberal rhetoric about the dignity of work and on the religious right promoting "family values" as part of this distinctively American neoliberal civic lineage coalition. Let us turn to role of neoliberalism in the debates leading up to TANF.

In his State if the Union address in 1993, President Clinton told Congress and the nation that a major goal of his administration was to "end welfare as a way of life, and make it a path to independence and dignity."[729] Listening to Bill Clinton speak about his plan for welfare reform, it appears that he viewed the role of welfare as a temporary pathway to market self-sufficiency. Since the good citizen shouldn't need to rely on the government for assistance in raising his or her children, it followed that family providers should work for wages on the market. Two years before, as Governor of Arkansas, Clinton extolled the federal Family Support Act of 1988 for making room for additional state flexibility to include work provisions in their AFDC systems. His remarks speak directly about connections he perceived between work, family, and the reproduction of citizenship:

> One of the most valuable things about this program [in Arkansas] is that it will change the values underlying the system and the way the American government

[728] See Peter Edelman, "The Worst Thing Bill Clinton Has Done," *The Atlantic,* March 1997.
[729] William J. Clinton, State of the Union Address, to a Joint Session of Congress, 1993.

> relates to the people who are on welfare. The program says to everybody, "We don't want to maintain you. We don't think you have a right to anything other than assistance in return for your best efforts and we believe in you enough to believe that you can become independent…and when your child sees you at night [after you return from education, job training or working], your child will know that you're out there trying to amount something, trying to be a productive citizen and make life better for him.[730]

Clinton's plank to do away with welfare functioned as a popular consensus-building part of his campaign. Unlike Reagan, Clinton did not focus on spearheading an ideological attack on welfare by creating a myth of the "welfare queen." That had already been done. As Martin Gilens and Franklin Gilliam have both emphasized in separate studies on the relationship between public opinion and welfare perceptions among Americans, the trope of the "welfare queen" was deeply embedded in the public's negative perceptions of AFDC.[731] Clinton merely repeated what had become a mantra about welfare causing a cycle of dependency and interfering with the dignity of work. For instance, in an interview during the campaign, Clinton stated bluntly: "What I am in favor of doing is breaking the chain of dependency through putting more people to work."[732]

In 1994, Donna Shalala, the Secretary of Health and Human Services for the Clinton Administration, presented the President's welfare reform proposal to the Ways

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[730] Bill Clinton, Hearings on the Family Support Act of 1988, From the House Committee on Ways and Means, subcommittee on Human Resources, *Hearings on the Implementation of the Family Support Act of 1988,* 101st Cong, 2nd Session, April 30, 1999: 111.
[731] Gilens, *Why Americans Hate Welfare*; Franklin D. Gilliam, "The 'Welfare Queen' Experiment: How Viewers React to Images of African-American Mothers on Welfare," *Nieman Reports*, Summer 1999.
[732] Robert Sheer, "Question and Answer: Clinton Sketches Scenarios for Easing Urban Problems," *Los Angeles Times*, May 31, 1992.

and Means Committee of the House of Representatives.[733] Importantly, the three main planks of the proposal included 1) Work, 2) Responsibility, and 3) Reaching the Next Generation. President Clinton explicitly framed welfare as a civic lineage concern about raising responsible future generations of Americans, who valued work above-all as a duty—in fact one might even call it a *civic duty*—to their family, society, and the nation. The Clinton Administration argued that welfare ought to become "a transitional system leading to work," and connected this duty to work to "parents [responsibility] for their children."[734] Although the Clinton Administration's 1994 version of welfare reform died in Congress—in part due to its "generous" government spending proposals for mandatory education and job training to prepare people for better jobs to "make work pay"—it nonetheless offered a neoliberal articulation by the Clinton Administration of the link between work, family, poverty, and civic reproduction across generations. The proposed Act presented by Secretary Shalala demonstrates that the Clinton Administration linked market participation to good citizenship and explicitly sought to use welfare as an avenue for training the next generation of citizens in these market expectations. Expressing concern about the next generation of Americans, the proposal stated, "It is absolutely critical that our reforms send a strong message to the next generation. All young people must understand the importance of staying in school, living at home, preparing to work, and building a real future."[735]

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[733] Donna Shalala, House Committee on Ways and Means, *Hearings on the Work and Responsibility Act,* 103rd Congress, 2nd Session, July 14, 1994. Reprinted from Federal Documents Clearinghouse Inc.
[734] Ibid. (Shalala: "The second pillar of our plan is responsibility: the responsibility of parents for their children; the responsibility of the system to deliver performance, not process; and the responsibility of the government to provide accountability to taxpayers").
[735] Ibid.

Nonetheless, rejecting the bill, a new generation of conservative Republicans in Congress sought to take "market fundamentalism" up a notch by slashing government funding for dependent children more dramatically than Clinton's proposal. During the 1994 midterm campaign, Republicans in the House of Representatives released their own plank on welfare reform in *The Contract with America*.[736] Among their main provisions in this neoliberal treatise on the future of American government, Republican Members of the House promised the American voters that they would put an end to "big government," restore fiscal responsibility in Congress, crack down on crime, build more prisons, cut welfare benefits in a Personal Responsibility Act, mandate work, and protect family values.[737] After the GOP trounced Democrats in the 1994 midterm elections, gaining control of Congress, Speaker of the House, Newt Gingrich led an attack on Aid to Families with Dependent Children (AFDC). The resulting welfare reform combined the popular backlash against government spending on social programs with an emphasis on the dignity of a strong work ethic and family values.

The TANF legislation was not simply a "workfare" bill. In debates about the bill in Congress, the topic of making people work for a living went hand-in-hand with a preoccupation among members of Congress with what has become known broadly as "family values," with an emphasis on the issues of reproductive behavior and family formation. In this vein, the specter of an intergenerational cycle of dependency loomed large in the "welfare reform" policy debates. For example, Congressman James Talent

[736] *Republican Contract with America*, 1994. Located online at: http://media.mcclatchydc.com/static/pdf/1994-contract-with-america.pdf [last visited July 5, 2017]
[737] Ibid.

(R-Missouri), author of the plank on welfare reform in *The Contract with America*, stated on television that the only solution to the cycle of welfare dependency was for the state to "remove the incentives in the existing system which reward irresponsibility by young men, which lure and trap young women and their children into lives of dependency, where it is impossible for them ever to leave poverty."[738] Representative Talent accused AFDC of rewarding the irresponsibility of these men and women for having children out of wedlock by saying to the young mother: "Ok. Go ahead. If you have a child without being married, without a work skill, the system will set you up in your own apartment, your own place, and life can be hunky dory for you."[739] This, he emphasized, not only wasted taxpayer money on undeserving recipients, but "the present system is" also akin to "quicksand [into a cycle of dependency] to them...in a way that lures them into making decisions which are destructive for themselves and their children…," setting them on the path to "lives of dependency and dislocation and crime and drugs where families break down and neighborhoods break down."[740] Indeed, the stereotype of the welfare queen lurks behind the policy-making process insofar as she is *the* danger to prevent. The resulting policy was lauded by supporters as having the power to instill self-sufficiency by shaping neoliberal citizens out of this hitherto dependent underclass.

After President Clinton vetoed the first two versions of the "welfare reform" bill that passed Congress, the GOP condemned him as a hypocrite who still had not delivered

[738] *Crossfire*, CNN transcript 1223, November 15 1994, reprinted in Mink and Solinger, *Welfare: A Documentary History,* 597.
[739] Ibid.
[740] Ibid., 597-99.

on his last 1992 campaign promise to end welfare.[741] In his reelection year of 1996, pitted against Senate Majority Leader, Bob Dole, Clinton reached a bipartisan compromise to end AFDC. Just as he had campaigned to do in 1992, the President signed a bill ending welfare and could say he delivered on this promise in his 1996 campaign. Speaking on the floor of Congress and later voting against the bill, Senator Edward Kennedy (D-Massachusetts) condemned the act as "legislative child abuse"[742]

6. Neoliberal Ideal: The Soccer Mom

In addition to a picture of the "irresponsible" and "unfit" citizen in the "welfare queen" stereotype, we also witness the rise of an image of the ideal neoliberal citizen. The same year that AFDC was abolished and replaced by TANF, the key swing voter in the 1996 Presidential election was termed the "Soccer Mom."[743] This middle-class, white, suburban wife and mother, who was a "mom first" but usually also worked at least part time, became the key target group for market advertising and was also crowned the most important electoral demographic in the nation in 1996. With surprisingly little coverage of the impact of welfare reform on poor mothers or attention to their political concerns about the new TANF legislation, the media in 1996 became fixated on the so-called

[741] These first two bills were not merely welfare bills, and Edelman claims that Congress intended for the President to veto them to place him on shaky ground before the election, before realizing they could win the game by getting him to cave on a bill that left out Medicaid and focused only on welfare. In his words, they "contained horrible provisions concerning food stamps, disabled children, and foster care." Edelman, "The Worst Thing."
[742] Ibid., 7.
[743] Ann E. Burnette, "Courting Women Voters: Candidate Message Strategies and the Gender Gap," in *Communicating Politics: Engaging the Public in Democratic Life*, eds. Mitchel S. McKinney, et al. (New York: Peter Lang Publishing, 2005), 283-85.

Soccer Mom as "the key swing consumer in the marketplace, and the key swing voter who will decide the election."[744] Who was this mother, portrayed by the media in 1996 as both the both the most important *consumer* and *voter* in America?

The stereotype of the Soccer Mom, like that of the Welfare Queen, is multilayered and difficult to fully pin down even as a fiction. A *New York Times* story labeled soccer moms as "the most sought-after voters of this campaign season."[745] Alex Castellanos, media advisor to the Dole campaign, described the soccer mom as the key swing voter Bob Dole needed to win over, and Bill Clinton spoke directly to the soccer mom's concerns about school uniforms, teen curfews, curbing crime, longer hospital stays for childbirth, and emphasized his role in passing the Family and Medical Leave Act (all policies aimed at the middle-classes).[746] A *Washington Post* column on July 21, 1996 described the soccer mom as "the overburdened middle income working mother who farriers her kids from soccer practice to scouts to school."[747] In another article in the *New York Times* on October 20, 1996, shortly before the election, Neil MacFarquhar writes, "The hands that steered the mini-van" are "also deciding whether to turn left or right in the Presidential election."[748] Noting that the term in reality "embodies the concerns of a huge swath of suburban female voters," this article acknowledges that

[744] Tim Cornwell, "Bring on the Soccer Moms," *Independent*, November 1, 1996 (quoting an article in the *Wall Street Journal*).
[745] Jacob Weisberg, "Soccer Mom Nonsense: The Making of this Year's Election Myth," *Politics and Policy*, October 12, 1996, quoting a *New York Times* lead article on the same day of the first presidential debate.
[746] Burnette, "Courting Women Voters," 283.
[747] E.J. Dione Jr., "Clinton Swipes the GOP's Lyrics: The Democrat as a Liberal Republican," *The Washington Post*, July 21, 1996.
[748] Neil MacFarquhar, "What's a Soccer Mom Anyway?" *The New York Times,* October 20, 1996.

"pollsters and demographers find the term useful as a catch-all for suburban women, most married and working at least part-time outside the home, with children under 18..."[749]

In her 1999 article, "The Disempowerment of the Gender Gap," analyzing press coverage of the Soccer Mom in the 1996 election, Susan Carroll notes that common definitions included "married women with children" and "Married, white, suburban woman."[750] More specifically, in her words, "the soccer mom's most frequently mentioned attribute was that she was a mother or a woman who had children."[751] Next, the most "frequently mentioned characteristics, in order, were: lives in the suburbs (41.2% of the articles); is a swing voter (30.8%); is busy, harried, stressed out, or overburdened (28.4%); works outside the home (24.6%); drives a minivan, (usually Volvo) station wagon, or sports-utility vehicle (20.9%); is middle class (17.1%); is married (13.7%); and is white (13.3%)."[752] There appears to be a set of fairly specific demographic commonalities behind this "media frame," which points to a married, white, suburban, middle-class, working, overburdened but responsible mother. However, perhaps the most important one was that the Soccer Mom was defined totally by her children. As Carroll puts it, in the press "there was a near-consensus about the concerns of soccer moms...The Soccer Mom, as portrayed in media reports, fit the stereotype of the self-sacrificing "mom," who is always placing the needs and interests of her children and family above any personal needs or individual interests she might have."[753] Her life

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[749] Ibid.
[750] Susan J. Carroll, "The Disempowerment of the Gender Gap: Soccer Moms and the 1996 Elections," *PS: Political Science and Politics* 32, no. 2 (March 1999): 9.
[751] Ibid., 9.
[752] Ibid.
[753] Ibid., 9-10.

revolved around raising her kids, balancing the demands of work and family with panache. According to a Republican Polling company in 1996, "Soccer moms of the 1990s were the 'supermoms' of the 1980s…Many of them have kicked off their high heels and replaced them with Keds to watch their kids. If you are a soccer mom, the world according to you is seen through the needs of your children."[754]

We already have a stereotype for the bad neoliberal citizen (the welfare queen), which I have suggested was the mythological specter driving the public policy behind welfare reform. In contrast, I want to emphasize that in 1996 we have a corresponding stereotype of good civic reproduction to contrast with this powerful non-ideal. In this stereotype, we encounter a mother who is economically and reproductively responsible, and places her children first. This is a suburban mother, with school-age children, portrayed as white, who is at least middle-class but could also be wealthy, who probably works at least part-time, but might be a professional or a stay at home mother, who is a conscientious but avid consumer, married (or if she is divorced, then she is financially stable), and whose life revolves around properly raising her children. The soccer mom is defined by her relationship to the market and to her children, and this earns her the status of the most important swing consumer and voter of 1996. The welfare mom is also defined by her relationship to the market and to her children, but this earned her stigmatized and marginalized status in 1996. I will examine these two tropes of responsible and irresponsible motherhood in more detail at the end of this chapter to give my analysis of neoliberal citizenship a firm contextual foundation. When Bill Clinton

[754] MacFarquhar, "What's a Soccer Mom Anyway?" 4.

won reelection against Dole in 1996 with a gender gap of 11 percentage points, the media resoundingly concluded that 1996 was the year of soccer mom.

7. TANF: A Neoliberal Civic Lineage Policy

Let us return to welfare reform. If the soccer mom offers an ideal of neoliberal citizenship, then TANF is designed to target the welfare mother who falls short of this ideal. While sharply restricting access to legal immigrants, PRWORA combines both workfare and family values in a single bill, telling qualified recipients what counts as "responsible" economic behavior in the realms of both work and fertility. On the one hand, in the realm of work, the bill promotes the goals of economic responsibility and self-sufficiency through mandatory workfare imposed upon welfare recipients.[755] On the other hand, regarding fertility and birth, it attacks a "culture of dependency" among poor mothers, by condemning birth out of wedlock, teenage pregnancy, and women having children that they cannot afford to support without assistance from the government. Most scholarly critiques of TANF tend to focus mainly on one or the other—either the role of workfare in the Act or its emphasis on family values—for in many ways these two ideological goals fit awkwardly together in the legislation. Indeed, why use government policy to promote work among poor mothers if the aim is to promote marriage, and vice versa? Here I highlight that both aspects of TANF are integral to the neoliberal civic lineage regime in America. The hallmark of neoliberalism, as Wendy Brown notes, is to promote the principles of market rationality in all aspects of social and political life, and

[755] See Chavkin, et al., "Sex, Reproduction, and Welfare Reform."

TANF supports this presupposition.[756] In addition to reorganizing the welfare state to promote market principles in the form of mandatory work, TANF illustrates that the discourse of market "responsibility" extends directly to sexuality, birth, and childrearing within welfare policy.

It is useful to begin with the altered role of the judiciary in TANF, which gets to the heart of the relationship between state and citizen under government assistance. When Congress and the President repealed AFDC, replacing the previous statute with a new one, this rendered decades of court rulings on the previous welfare statute moot.[757] Since this study focuses on the twentieth century, this means that we face a dearth of relevant Supreme Court cases on TANF. The policy itself takes center-stage in our examination of this shift to a dominant neoliberal civic lineage regime. In fact, to ensure that courts do not interfere with its stringent time limits and work requirements, booting recipients off irrespective of their financial need in five years, TANF directly told the courts how to interpret the law. Among the purposes listed in TANF by Congress is not only "to increase the flexibility of states" in creating their own welfare programs, but also (in bold letters) "NO INDIVIDUAL ENTITLEMENT."[758] The bill states clearly, with the courts in mind, that TANF "shall not be interpreted [by the courts] to entitle any individual or family to assistance under any State program under this part."[759] Rather than an entitlement program, TANF is a block grant program, which Peter Edelman emphasizes means two things: "First, that there will be no federal definition of who is

[756] Brown, "Neoliberalism."
[757] When AFDC was repealed, all Supreme Court rulings interpreting that part of the SSA statute effectively died too, because they were statutory not constitutional rulings.
[758] 42 U.S.C § 1305 (1996).
[759] Ibid.

eligible and therefore no guarantee of assistance to anyone; each state can decide whom to exclude in any way it wants, as long as it doesn't violate the Constitution (not much of a limitation when one reads the Supreme Court decisions on the subject). And second, that each state will get a fixed sum of federal money each year, even if a recession or a local calamity causes a state to run out of federal funds before the end of the year."[760]

With few conditions placed on these block grants—aside from the exclusion of most immigrants arriving after the law's enactment for five years, work mandates, and promoting family values—TANF shifts the locus of authority over assistance to the poor to the states in a highly decentralized fashion. This is what I referred to earlier in Part 1 of this chapter as the place of "new federalism" in the bill. By requiring that states develop their own programs, this devolution of authority to the states largely does away with federal oversight beyond requiring that each state follow the basic federal benchmarks regarding work and creates its own mechanisms for meeting the goals to promote of family values. In practice, the landscape of welfare went from a state-federal joint entitlement program to, in the words of Christine Cimini, a "devolved contractual model."[761]

In order to qualify for the federal block grants, the state programs must meet the basic requirements of PRWORA. The work requirements are the most stringent. As mentioned at the outset of this chapter, after one member of a household reaches five years (60 months) of government assistance under TANF, the entire household is no

[760] Edelman, "The Worst Thing," 5.
[761] Cimini, *The New Contract*, 246, 250.

longer eligible for assistance "even if a family has done everything that it was asked of it and even if it is still needy."[762] Additionally, a TANF recipient must engage in an approved work activity within two years of receiving their first assistance check, and ideally sooner than this, with the minimum hours of work outside the household set to reach thirty-hours a week by the year 2000. To ensure that states follow these strict work provisions, the federal TANF legislation specifies work-related benchmarks that the states must meet to continue to meet to receive their full block grants. TANF requires that state programs ensure that twenty-five percent of all single-parent families engage in a work activity during 1997, at the start of the new program, and raises the requirement to fifty-percent by 2002 for a single parent and ninety-percent for a two-parent household at the risk of sanctions.[763]

These strict work requirements push mothers of young children out of the home when their children are two or younger, offering various forms of subsidies (often only partial) for daycare.[764] Rather than caring for their own dependent children, mothers are compelled to work outside the home if they wish to continue receiving their meager TANF benefits to support their family. This is a bargain for the private businesses and corporations who often receive government subsidies to employ TANF recipients in low-wage jobs. Given its central focus on pushing the parents of dependent children out of the home and into work, often with government subsidies for employers, the advent of workfare is a triumph for neoliberal market-based approaches to social policy. Now,

[762] Edelman, "The Worst Thing," 5.
[763] Huda, "Singled Out," 343-4.
[764] Mink, *Welfare's End*.

parents who cannot afford to support their families and seek government assistance, have no alternative but to work. Moreover, as noted earlier, a hallmark of neoliberalism is a trend towards the privatization of traditionally public services. Under PRWORA, this move towards the privatization of welfare happened in two ways. In addition to 1) recipients facing strict work requirements in order to continue to receive government assistance, we also 2) encounter a shift towards the privatization of state welfare programs, with states "contracting out" the creation and implementation of their TANF programs to private corporations on the market. In the words of Judith Koons, "The devolution of welfare to the states also came with discretion to allow "second order" devolution to local governments, as well as to permit states to "privatize" welfare."[765]

With less federal oversight and more state and local flexibility, the design of TANF creates incentives for states to push their own government-funded programs onto the private market. Many states turned to private companies to oversee this transition as efficiently as possible according to the new TANF requirements. As M. Bryna Sanger puts it, "The current environment reflects an increasing interest in market solutions that have encouraged outsourcing and competition, even in…new federal welfare reform legislation."[766] Under a business model, the goal of moving people as quickly as possible to market work and off government assistance takes priority over aid to dependent children. Poverty—previously deemed a market failure under Keynesian logic—becomes recast in a neoliberal state as at best a personal misfortune and more likely an individual

[765] Koons, "Motherhood, Marriage, and Morality," 10.
[766] M. Bryna Sanger, *The Welfare Marketplace: Privatization and Welfare Reform* (Washington D.C.: Brookings Institution Press, 2003), 1. Sanger emphasizes that, with a handful of "large organizations with experience in human services," states often sought their expertise rather than fail to place enough clients in work, which "would risk losing federal funding" (2).

failing. This alternative approach to poverty as the responsibility of private individuals, not the community as a whole, in turn grants a green light for the government to create and foster an "economization" of the intimate lives and sexual behavior of poor women.

Indeed, the second dimension of PRWORA is its emphasis on family values. Congress explicitly listed the four main purposes of PRWORA in a manner that aggressively promotes marriage and two-parent households. Recall that these four purposes are: 1) to provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; 2) to end dependence of needy parents on government benefits by promoting job preparation, work, and marriage; 3) to prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and 4) to encourage the formation of two-parent families.[767] In addition to implementing workfare programs, the law requires states to design programs that promote these goals of encouraging marriage and two-parent families, discouraging teen pregnancy, reducing unwed birth, and abolishing state dependency.

Since each state came up with its own program under TANF—replete with varying policies to foster marriage and family values within their own welfare programs—a detailed analysis of the complex landscape of TANF across all fifty states is beyond the scope of this project. But let us consider a couple of examples of the ways in which TANF targets fertility and reproductive behavior. For instance, PRWORA requires recipients in all states to comply with paternity testing and identification,

[767] 42 U.S.C. § 601 (Supp. III 1997).

generally performed at the moment of birth in the hospital, to enforce child-support among "deadbeat dads" and defer the costs of the government. If a woman refuses to participate in such a test—perhaps due to concerns about domestic abuse or worries about battles over custody—she faces sanctions, which cut government funding to uncooperative recipients in various degrees.[768] Additionally, TANF allows states to impose "family caps," on recipients, which exclude additional funding to children conceived or born to families already receiving assistance.[769] Based on the presumption that women on welfare intentionally have babies to get more money from the state, the "family cap" imposes an economic penalty on childbirth to encourage "responsible" reproductive behavior. In fact, within a week of TANF becoming law, the Third Circuit in *C.K. v. New Jersey Department of Health and Human Services* (1996) upheld a New Jersey "family cap" policy (i.e. at the time resulting from a waiver issued by the federal government under AFDC), against both statutory and constitutional challenges to entirely excluding benefits to dependent children conceived or born to mothers already receiving benefits.[770] Citing the Supreme Court in *Dandridge v. Williams* (1970), the Third Circuit emphasized that a state has a rational interest in "promoting individual responsibility" within the "family unit."[771] Since the Supreme Court has made it clear that receiving government assistance is a privilege not a right, the Third Circuit emphasized, "it would be remarkable to conclude that a state's failure to subsidize a reproductive choice burdens

[768] 42 U.S.C. §§ 602 (a) (2) (must show that child support enforcement is part of state program).
[769] See Smith, "Sexual Regulation," 168.
[770] C.K. v. New Jersey Department of Health and Human Services, 92 F.3d 171 (1996).
[771] Ibid., 194.

that choice."[772] When a woman makes the irresponsible "procreative choice" to have an additional child while she is poor, then she remains no worse off with a child exclusion policy than she would be without support from the program at all.[773] While not required by PRWORA, these "child caps" are incentivized by the advent of fixed block grants to the states with no entitlement of access to those who meet the qualification requirements under TANF. With a nod from the federal courts, 24 states implemented some form of family cap in their programs immediately under TANF.[774]

Additionally, to encourage states to reduce out-of-wedlock pregnancy and illegitimate births, the federal government offered an "illegitimacy bonus" of $20 million to each the five states that show the highest decreases in out-of-wedlock births without corresponding increases in abortion, a ratio they were required to submit to the federal government.[775] This ratio, with a negative hit for abortions, made promoting birth control attractive to most states, particularly semi-permanent forms of birth control. In her analysis of birth control policies in the 1990s, Dorothy Roberts found that all states subsidized Norplant under Medicaid for welfare recipients after its approval from the

[772] Ibid., 195.
[773] In in *C.K. v. New Jersey* (1996), the appellants argued that the exclusion policy violated their equal protection and due process rights under the Constitution, because "the cap is irrational and illegitimate" and "it penalizes children for the behavior of their parents." Citing the Supreme Court's ruling in *Dandridge*, examined above, the Third Circuit sided with the district court that the family cap is permissible and a rational way to seek to limit birth to welfare recipients: New Jersey's welfare cap is rationally related to a legitimate government purpose, in that the state's interest in giving [welfare] recipients the same structure of incentives as working people, promoting individual responsibility, and strengthening and stabilizing the family unit are clearly legitimate…[and] does not infringe on appellants' procreative rights" (92F.3d at 194-195).
[774] Koons, "Mother, Marriage, and Morality," 13.
[775] Phoebe G. Silag, "To Have, To Hold, To Receive Public Assistance: TANF and Marriage Promotion Policies, *Journal of Gender, Race & Justice* 7 (2003): 426.

Food and Drug Administration (FDC).[776] Norplant is an expensive and invasive minor surgical procedure in which tubes with the hormone, progesterone, are implanted under the skin of a woman's upper arm, thereby inhibiting fertility for up to five years. In addition to offering long-term birth control as a general option (upon request), however, many states like Tennessee and California actively sought to advertise and promote Norplant and Depo-Provera to TANF recipients of child-bearing age, and sometimes mandated that they receive counseling or information about semi-permanent forms of birth control. Some recipients have described the promotion of Norplant by TANF caseworkers as deceptive and aggressive, particularly framed by the threat of penalties for childbirth and no funding for abortion.[777] To quote a provision in Tennessee, "The department of human services shall provide written information through the Medicaid program of the Norplant contraceptive implant, and other functionally equivalent contraceptives that provide similar long-lasting pregnancy prevention, to all temporary assistance for needy families (TANF) recipients when such persons apply for benefits or are recertified."[778] As these examples illustrate, women receiving TANF assistance face particularly coercive and punitive policies regulating their sexual behavior and decisions about family structure.

What should we conclude about these measures? Through increased mechanisms of surveillance and sanctions within anti-poverty programs, the government is able to uniquely target the reproductive decision-making of the nation's most vulnerable citizens,

[776] Roberts, *Killing the Black Body*, 104-12.
[777] Ibid., 127-138.
[778] This is an example of a contemporary policy: Programs and Services for Poor Persons, Tennessee Code Title 71, ch.5 Pt. 1§71-5-131 (2016). Located online at: http://law.justia.com/codes/tennessee/2016/title-71/chapter-5/part-1/section-71-5-133 [last visited July 5, 2017].

because they are too poor not to refuse government support. This is an important distinction, arising from Supreme Court rulings examined earlier in the last two chapters. (Recall that after the Supreme Court held that participating in a need-based assistance qualifies as a free choice in the 1970s, it further ruled that the government may regulate the lives of women receiving assistance in a manner not constitutionally permissible under normal conditions.) This makes poor women vulnerable to forms of reproductive regulation by the government, which middle-class and more affluent women avoid completely. For instance, the threat of a mandatory paternity test or "family cap" does not apply to those who are *not* dependent on TANF assistance, and the government could not under normal circumstances constitutionally compel individuals to comply with such a mandate without violating privacy law. The ability to control one's reproductive fate is all too often merely matter of money. As a thin privacy right, the "consumer protection" does not protect those who are dependent upon the government for basic necessities.

Moreover, as we have seen, neoliberal logic couches dependence on the government in an odd and slippery discourse of "market responsibility," but its primary concern is not actual independence or self-sufficiency. Rather, the discourse on "responsible" neoliberal citizenship draws a distinction between proper and improper forms of dependency, and applies it to the family as a unit.[779] For example, it is entirely acceptable for a wife and soccer-playing child to be dependent upon a breadwinning husband who in turn earns the bulk of the income for the household, or for a successful professional to be dependent upon her paycheck from her employer because she works

[779] See Nancy Fraser and Linda Gordon, "A Geneology of Dependency: Tracing a Keyword of the U.S. Welfare State*," Signs* 19, no. 2 (1994): 309-336.

for her income. The problem is not dependence, but the kind of dependence. Indeed, it would be unthinkable for the government to tax a soccer mom for having an extra child. Instead, the government grants taxpaying families an annual Child Tax Credit (CTC), which increases for each additional dependent child under the age of 17 (no cap or exclusions). Neither the CTC nor the Earned Income Tax Credit (EITC), which calculates tax refunds based upon number of children and income, apply to welfare recipients because they are too poor to have a taxable income. Whereas the poorest mothers on welfare are actively penalized for bearing children through "child cap" provisions, the opposite is the case for working and wealthy families. [780] The former receives meager assistance, coupled with surveillance and various forms of coercion, and is effectively punished for exercising her right to bear children. In contrast, the latter receives generous subsidies from the government in proportion to the actual number of dependent children in their family.

In this regard, the concept of 'labor' takes on a double-meaning under TANF—with its emphasis on both work and marriage. In the face of this emphasis on personal responsibility, women are encouraged to practice reproductive self-discipline—or abstain from having children—unless they are married or economically self-sufficient themselves. Dependence on a man is respectable, but not dependence on the government.[781] While the fiscal design of the policy places strong emphasis on compulsory work (often termed "workfare), the text of the legislation focuses on *both*

[780] Susan Mettler has argued is a kind of trickle-up social welfare for better-off citizens.
[781] Martha A. Fineman, *The Neutered Mother: The Sexual Family and Other Twentieth-Century Tragedies* (New York: Routledge, 1995).

marriage and work as two laudable routes for single-mothers to pursue to escape dependence on the government. The message to single mothers is clear: Either find yourself a breadwinner husband, or work and support your own family. Through either marriage to a wage-earning spouse or through participation in the market herself, or both, the theory seems to be that an impoverished mother can move out of dependence on government benefits and into a sufficiently "responsible" position in the market economy. This treats wage labor outside the household—either by breadwinning husbands or single mothers—as the only recognizable form of genuine work in neoliberal society, discounting the carework that mothers perform within their households for their children.[782]

Importantly, the government is not attempting to push *all* mothers into the workforce, rather PRWORA is promoting two avenues off dependency on TANF for the poorest Americans with dependent children, either wage labor or marriage. A family must attain a degree of market self-sufficiency as a unit, but not every mother must work outside the home. By placing one's relationship to the market economy at the forefront of civic status, the subjective category of "responsible citizenship" becomes a precondition for access to reproductive choice, ranging from abortion to childbirth.

[782] Joan J. Tronto, "Who Cares? Public and Private Caring and Rethinking Citizenship," in *Women & Welfare: Theory and Practice in the United States*, eds. Nancy Hirschmann and Ulrike Liebert (New Brunswick: Rutgers University Press, 2001), 65-83; Eva Feder Kittay, "From Welfare to a Public Ethic of Care, in Hirschmann and Liebert, *Women & Welfare,* 38-64.

8.0 Towards a Theory of Neoliberal Citizenship

This brings us to our final section on neoliberal citizenship.[783] As I have argued, a neoliberal state requires neoliberal citizens to function smoothly according to its logic of market norms. To begin to develop a theory of neoliberal citizenship in the United States, this last section is divided into several subsections. I start by discussing the neoliberal state as a strong and interventionist state in its interactions with citizens deemed deviant, before turning to what the strong state means for our neoliberal civic lineage regime. To illustrate a political disparity between two classes of neoliberal citizens (commonly labeled, responsible and irresponsible), I compare and contrast the stereotypical soccer mom with the TANF mother. While the former experiences a relatively small and unobtrusive state, the latter experiences a complex network of policies regulating the most intimate aspects of her life. In practice, the policies shaping neoliberal citizenship perpetuate inequalities affecting historically disadvantaged groups, and they do so through political discourses and practices emphasizing economic freedom for those who can afford it. Somewhat ironically, following the victories of the civil rights and women's movement, we encounter the advent of a muscularly interventionist state relying on market logic to reproduce a host of inequalities in the realms of fertility, birth, and civic status.

[783] There has been an impressive body of literature developing in recent years addressing the ways in which neoliberalism alters domestic politics and statecraft in the United States, but I take this a step further and argue a neoliberal state in turn requires neoliberal citizens.

8.1 Citizenship in the Neoliberal Strong State

Let us turn to a vital point: The neoliberal state is not a "small government" state, as its proponents often paint it to be in their classic libertarian posturing against "big government." Granted, the neoliberal state appears relatively small (or far less intrusive) to those at the top, who conform to its market norms of citizenship and succeed according to these politicalized economic norms. But as TANF illustrates, the contemporary state is a muscularly strong state when it comes to those who fall short of these ideals of market responsibility. While "responsible" neoliberal citizens, such as soccer moms, experience the government from the standpoint of respectable consumers and taxpayers, the opposite is the case for women on welfare. Identified instead as irresponsible and dependent upon the state, mothers in TANF experience an intrusive network of state policies regulating everything from the place in which they work, the number of hours they must spend at work, and their most intimate choices about their sexual and familial lives. If a mother receiving government assistance fails to meet these stringent work requirements, then she loses the meager benefits she qualified for under TANF to support her children. Moreover, unlike the array of choices available to economically secure citizens, the family values policies that *do* apply directly to TANF recipients, such as mandatory paternity tests and "child caps," tend to be coercive and invasive. Since noncompliance results in sanctions, policies targeting fertility and family formation do more than merely send a message about marriage as a civic lineage ideal. They punish women who fall short of the ideal. The government can do this precisely because these women are poor enough to become dependent upon government assistance. In the words of Loïc

Wacquant, the neoliberal state "embraces laissez-faire at the top…[and] anything but laissez-faire at the bottom."[784]

Neoliberalism, as a distinctive approach to domestic governance (differentiated from its more common association with economic globalization), is not a retreat in the growth of government or in the power of the state. Instead, as Wendy Brown has argued, neoliberalism involves the reorganization of the state according to new norms of market rationality.[785] This domestic variant of "market fundamentalism" differs from the classic laissez-faire approach, which emphasizes cutting back on the size and scope of government. Unlike classical liberal economic theory, neoliberal statecraft does not leave markets alone to naturally develop through patterns of spontaneous human interaction shaping supply and demand in a manner peripheral to the political system. Instead, the state actively seeks to create, cultivate, and nurture markets through the use of public policy and law. As Joe Soss, Richard Fording, and Sanford Schram put it,

> Markets must be actively constructed; market behaviors must be learned; and once learned, they must be deliberately extended to new arenas. Neoliberalism treats market rationality as a normative ideal to be pursued through applications of public authority and uses it as a preeminent standard for evaluating institutional designs and individual behaviors throughout society…Thus, rather than limiting the state, neoliberalism envisions the state as a site for the application of market principles. Through contracting, decentralization, and competitive performance systems, neoliberal reformers work to "reinvent government" in ways that mimic market forms…Through privatization and collaboration, they make the state more reliant on market actors to achieve public purposes….reconstructing institutions to encourage both the governing and the governed to think of themselves and behave as market actors.[786]

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[784] Wacquant, *Punishing the Poor,* 308.
[785] Brown, *Undoing the Demos*.
[786] Joe Soss, Richard C. Fording, and Sanford F. Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (Chicago: University of Chicago Press, 2011): 21-22.

In neoliberalism, the invisible hand morphs into the strong arm of the state when it comes to regulating those deemed deviant in society. Seeking to reorganize not abolish the welfare state, according to Soss, Fording, and Schram, TANF places the market at the center of the government's funding and distribution of social services so that it operates according to a business model.[787] Moreover, as I have argued above, welfare reform under TANF is an effort to use statecraft to promote particular expectations of individual responsibility with dire consequences for poor women. These market values not only identify individuals as proper and deviant citizens, but the state interacts with those deemed deviant in a manner that goes beyond market mechanisms in its use of surveillance, discipline, and sanctions for TANF recipients.[788] With the rise of neoliberal modes of governing, we encounter the growth of an increasingly interventionist neoliberal state, flexing its muscles to direct and control those deemed deviant, often according to market models but also through traditional "law and order" mechanisms,

[787] Ibid., 10, 179, 298-99.

[788] See Wacquant, *Punishing the Poor*, 42-3, 58, 312. Nowhere is this directly punitive aspect of the neoliberal state clearer than in the booming prison system. In his discussion of how neoliberalism goes about "punishing the poor," Wacquant argues that "workfare" and "prisonfare" represent "two integral components of the neoliberal Leviathan" state, reorganizing "social services into an instrument of surveillance and control" (58). Although government appears to be "shrinking" to those at the top, Wacquant maintains that this "centaur state" is liberal only at the top and paternalistic at the bottom," with workfare policing the poor through "surveillance and control" in the first instance and the growing carceral system making up for dysfunctions in social welfare by locking deviant members away from full membership society altogether (312). Attributing the strategy to a backlash against the successes of the civil rights movement in the 1960s, Wacquant calls this a "twofold strategy for using the U.S. bureaucratic field to manage poor populations" (42-3).

including sanctions under TANF and fostering the massive growth of the U.S. prison system.[789]

What does this 'strong state' mean for theorizing neoliberal citizenship? With the reorganization of the state under this new "economy of politics," we also get new norms of citizenship. In his important analysis of neoliberalism and punitive policies directed at "punishing the poor," Wacquant vaguely refers to neoliberal citizenship, but he describes it as *transnational*: "Neoliberalism is a transnational political project aiming to remake the nexus of market, state, and citizenship from above."[790] In contrast, I want to emphasize that neoliberal citizenship is a fundamentally *national* phenomenon. Consider the distinction, discussed earlier, that TANF draws between citizens and non-citizens residing within the United States. By denying public benefits to non-citizens—including their citizen children—this neoliberal civic lineage policy is profoundly nationalistic in its approach to citizenship. It allows legal immigrants to stay and contribute to the economy via low-income work, but draws lines in the sand demarcating the benefits that accompany the formal status of citizenship versus mere legal residence. Speaking of the role of citizenship in PRWORA, Audrey Singer writes "Prior to its enactment, legal immigrants residing in the United States by and large had access equal to citizens with regard to public assistance benefits. The new citizenship criterion elevates the

[789] See Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton: Princeton University Press, 2015).
[790] Wacquant, *Punishing the Poor*, 306.

importance of formal citizenship in a way that is inconsistent with both previous U.S. policy [under AFDC] and international standards."[791]

Rather than conforming to international norms, these concerns about policing the boundaries of U.S. citizenship are distinctly national, not transnational. Although neoliberalism seems to work against national distinctions in the context of globalization, on a domestic front these ideas *must* harness the specific values and modes of governance within a nation, or they would fail to resonate and stick. No ideology comes in a one-size fits all package, and this includes neoliberalism. Hence, Reaganism and Thatherism are different variations on domestic neoliberal policy, each responding in a homegrown manner to the distinct culture, traditions, governing institutions, demographic landscape—and the political incentives associated with these factors—of the United States and Britain. What makes a political ideology significant on a domestic level is its ability to advance the agendas of political elites within the nation, operating within indigenous institutions, incorporating the broader systemic norms, and speaking to existing values within the domestic political culture as it reshapes them in the process. In this regard, there is no such thing as a neoliberal state without a corresponding notion of neoliberal citizenship conditioned by the moral and social values that have historically influenced a nation.

This is precisely what we find in the United States at the end of the twentieth century. The broader pattern of the "the reproduction of citizenship" continues in America today, but the specific contours of our civic lineage regime has shifted over

[791] Singer, "Welfare Reform and Immigrants," 22.

time. Neoliberal civic lineage policy in the United States deploys many traditional "American values" in the name of shaping procreation and family formation in a manner that is simultaneously both old and new. Not a complete break with the past, this new neoliberal civic lineage regime continues to shape citizenship according to a set of ideals about what constitutes proper American citizenship. As we have seen throughout our examination of civic lineage policy in the twentieth century, the ideals of citizenship dominating particular periods of U.S. politics use institutional discourses to promulgate a host of biases and inequalities pertaining to race, gender, class, disability, culture, and sexuality.

Neoliberal citizenship is no different in this regard, but the inequalities it supports have shifted to allow for new reproductive and professional opportunities for some while all but closing the door of opportunity on others. This uniquely American neoliberal civic lineage regime continues to promote a picture of the ideal citizen that is strikingly similar to those we have encountered throughout the twentieth century. While there appears to be greater flexibility based on market status, the neoliberal civic lineage regime still idealizes many features from past civic lineage regimes, including whiteness, middle-class or even more affluent socioeconomic standing, inequality between the sexes, being able-bodied (particularly the ability to work), and traditional "family values" associated with Christianity.[792]

[792] On the topic of Christianity, it is useful to view TANF as part of a trio of 1996 laws against immigrants and particularly worries about the threat of terrorism from Muslim immigrants. As Rogers Smith has astutely pointed out to me, PRWORA was one of a three laws in 1996 motivated in part by concerns about Muslim terrorism after the 1994 World Trade Center garage bombing. The other two laws were, first, the Antiterrorism and Effective Death Penalty Act of 1996, which created a special removal court for the

8.2 Neoliberal Citizenship in Context: Comparing Soccer Mom to Welfare Queen

To illustrate this civic lineage policy as clearly as possible, let us consider and compare our stereotype of the ideal female neoliberal citizen and her non-ideal counterpart in 1996: The soccer mom versus the welfare queen. Comparing these two political tropes helps us to better grasp the stark difference in incentives to reproduce and barriers each face in their daily lives. While more affluent citizens, who can afford it, have expanding access to new reproductive opportunities on the burgeoning fertility market, the fertility and reproduction of women on welfare is explicitly discouraged and restricted through government policy. Of course, it is important not to forget that the soccer mom and the welfare queen are just stereotypes. Nonetheless, these stereotypes help to draw out the very real political consequences of a market-based governmental approach to civic status and reproductive choice for mothers during of the late twentieth century.

I will begin with the ideal of the soccer mom. The beneficiary of important gains made by the women's movement, the soccer mom has come a long way from the 1950s white picket fence ideal of civic lineage within the postwar family. The soccer mom can work, but she can also decide to stay at home and raise her children full time. She

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expedited arrest and deportation of aliens suspected of terrorism and other serious enough crimes. Second, the Illegal Immigration Reform and Immigrant Responsibility act (IIRIRA) also increased resources for law enforcement aimed at immigrants, and included provisions for better data collection, worksite monitoring, and more systematic exclusion of undocumented immigrants from Social Security benefits (among other things). Together, these three laws point to a backlash against immigrants at the same time immigration was increasing in the United States, which was connected not only to hostility towards undocumented Latino laborers, particularly in the West, but also to concerns about Muslim terrorism after 1994 throughout the country.

probably went to college, and she might even have a Ph.D.[793] She has access to contraceptives and abortion on the private market, she has the legal and economic ability to make her own reproductive choices about childbirth, and she can opt to adopt a child if she desires. Likewise, by 1996, those who could afford it gained access to myriad new reproductive technologies for creating families in novel ways and overcoming infertility, ranging from the ability to purchase gametes (i.e. sperm and eggs), in vitro fertilization to treat difficulties conceiving a child, and even the option of paying a surrogate mother by essentially renting her womb for the duration of a pregnancy.[794] The federal government refrained from regulating or restricting new reproductive technologies in the United States, granting (through inaction) a green light to this burgeoning "baby market."[795] As a result, citizens of means can in effect "buy a baby" with the rise of these new technologies on an unusually open and unregulated reproductive marketplace, compared to other more restrictive countries such as Spain or Germany.[796]

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[793] The first documented political use of the term "soccer mom" was by Susan B. Casey, a professional woman with a Ph.D., who ran for City Council in Denver, CO in 1995 using the slogan, "A Soccer Mom for City Council." She picked the slogan to bridge the gap between professional and homemakers, and won the race. See MacFarquhar, "What is a Soccer Mom Anyway?"

[794] Ironically, while the government discourages women on TANF from bearing children in a host of different ways, the federal government intentionally refused to act to regulate new reproductive technologies in the United States. 1n 1988, this resulted in a famous custody lawsuit in New Jersey, *In re Baby M*, in which a professional couple (the Sterns) used a surrogacy contract with a woman (Mary Beth Whitehead) who agreed to become pregnant and bear a child for them for $10,000 (more than double that with inflation today), using in vitro fertilization with Mr. Stern's sperm. When Whitehead changed her mind about the surrogacy contract and sued for custody of the child after birth, Mr. Stern was awarded custody. While most nations in the western world regulate surrogacy and new reproductive technologies, the United States Congress has through inaction created a gap in regulations, which pushes the regulation of these new markets of reproduction to state legislatures and the courts. This allowed individuals who could afford it to participate in new "baby markets." *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).

[795] Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Boston: Harvard University Press, 2006).

[796] Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Boston: Harvard Business School Press, 2006).

Whether she sought fertility treatments or not, the soccer mom's role as a mother was valorized. The state gives her family generous tax credits for each of her children. She is the most sought-after consumer on the market, and her political voice was loud enough that it would purportedly decide the 1996 election.[797] That said, the soccer mom is not a poster-child of feminism. While she had greater reproductive and professional opportunities compared to the June Cleavers and Donna Reeds of postwar America, it is also important to note that the entire identity of the soccer mom was rooted in her children. In the words of Susan Carroll, "Even the label "mom," a word children commonly use in referring to their female parent, instead of "woman" or even "mother," symbolically suggested that the interests of her children take precedence over all other interests for the soccer mom."[798] No wonder she was so harried and stressed out, according to the media. With little talk of soccer dads, we don't have a picture of civic equality between the sexes, but rather one of expanding opportunities over time in particular arenas for middle-class and affluent mothers coupled with the specter of more work for them, both inside and outside the home. (Admittedly neoliberal citizenship is more easily accessible to men, who do not bear children and can more easily approximate the ideals of the self-sufficient and unencumbered market actor, yet the point remains that women and women's bodies continue to be the locus of civic reproduction across generations.) Still, with expanded choice and freedom as market actors, some more affluent women could challenge traditional stereotypes and take control of their

[797] Burnette, "Courting Women Voters," 283.
[798] Carroll, "Disempowerment of the Gender Gap," 9-10.

reproductive lives in provocative ways.[799] This is the very form of reproductive freedom and equal protection championed by the Supreme Court in the cases examined in the last two chapters. If a woman can afford to be "independent," insofar as the state does not fund her healthcare or means of survival, then she has access to meaningful choice on the market. Granted economic standing becomes a new avenue for members of traditionally subordinate groups to attain rising civic status, and potentially even become soccer moms or dads. The boundaries are not as firm as they once were (in the days of more explicit legal barriers to equality), but the market continues to maintain a landscape of inequality and inhibit social mobility in similar patterns corresponding to race and gender.

Let us turn to the TANF mother. If the soccer mom is the ideal in 1996, then the mother on welfare, chastised by politicians in debates over welfare reform, is the deviant (non-ideal) mother in the same year. Consider that the biggest legislative achievement leading up to the 1996 campaign was "the end of welfare as we know it," which slashed benefits for the poorest women in the nation and their dependent children.[800] Despite this, President Bill Clinton won reelection against Bob Dole with a gender gap of 11 percentage points, and the soccer mom "deflected attention away from the concerns of many other subgroups of women, including feminists, older women, women on welfare,

[799] Weisberg, "Soccer Mom Nonsense." The author notes that professionals like Murphy Brown on the popular sitcom (1988-1998), a wealthy journalist and news anchor, who decided to become a single mother in her 40s after becoming pregnant outside of marriage could qualify in this broad definition of a soccer mom (e.g., as an affluent, white, suburban mother). Famously criticized by then Vice President Dan Quale, who spoke out against the show in 1992, emphasizing that "bearing babies irresponsibly is simply wrong," the line separating the few professional women who could emulate Murphy Brown from the mother on welfare was enough money to operate within the market without relying on the state.

[800] Statement by President William J. Clinton on Signing the Personal Responsibility and Work Opportunity Reconciliation Act (August 22, 1996).

women of color, and professional women."[801] For those at the top, the state seems small. In fact, in 1996 soccer moms purportedly welcomed a *more active* government when it came to maternal health and family leave protections, enforcing teen curfews, policing crime, and promoting uniforms in schools.[802] This is a far cry from what we encounter in poor communities, in which the state was already active but often in ways that residents perceived as injurious to children. The political voice of women on welfare disappeared in the campaign, drowned out by the soccer mom. The welfare mother was not a key swing voter. She was racially coded as black, geographically coded as urban, and assumed to be uneducated. She was cast as sexually and economically irresponsible. Rather than finding new opportunities for making babies on the market, she was discouraged by the state from procreating at all. If she did happen to become pregnant, then putting her child up for adoption was praised by politicians as the moral option.[803]

Her relationship to the market was fundamentally different than that of the soccer mom. Under TANF, she would face mandated work. She was not a widely courted or valued consumer. This mother is trapped in a regime of contradictory policies, which condemns and stigmatizes her for her lack of market independence and sexual behavior, yet builds barriers to prevent her from escaping poverty by compelling her to participate in the low-wage (service sector) labor market while balancing childcare and basic necessities to the point of "just scraping by." Her chances of escaping poverty are dim, but TANF now measures its success by reducing caseloads rather than helping people

[801] Carroll, "Disempowerment of the Gender Gap," 7.
[802] Ibid., 10.
[803] See *Crossfire*, CNN transcript 1223, November 15 1994, reprinted in Mink and Solinger, *Welfare: A Documentary,* 597-99.

find their way out of poverty. For instance, despite the fact that most women on TANF "remained poor and some lost income." Lawrence Mead labels welfare reform "a triumph," because "between 1994 and 2001, the AFDC/TANF caseload plummeted by around 60 percent, from over 5 million cases to 2 million, vastly its largest fall ever."[804] The greatest success of TANF, according to Mead, is in removing poor women from dependency on the state even if poverty rates remained the same or increased afterwards: "The political message of reform to the poor was to give up claims on government based on weakness. Rather, make claims based on contribution, above all, by working.," and most significantly "reform enforced," in Mead's words, "citizenship."[805]

This brings us to the mutually-dependent relationship between these two mothers, one celebrated and other stigmatized. What is this connection? While soccer moms rely on the service sector, as citizen-consumers, mothers on TANF are now mandated to work in these low-wage service-sector jobs. As Francis Fox Piven and Richard Cloward have argued, welfare is directly connected to low-wage work.[806] Quite literally, "workfare" floods the service sector with laborers, ready to flip burgers at McDonalds, stock shelves at Wal-Mart, or clean the homes of soccer moms for low pay and miserly benefits.[807] It

[804] Mead, "Why Welfare Reform Succeeded," *Journal of Policy Analysis and Management* 26, no. 2 (Spring 2007): 373.
[805] Ibid.
[806] Frances Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Vintage Books, 1971 [1993]).
[807] See Frances Fox Piven, "Welfare to Work," in Mink, *Whose Welfare?,* 83-99. In Piven's words, TANF means that "as steady stream of hundreds of thousands of poor women will flow into the low-wage end of the labor market, competing with those who are already there." After reaching their five-year limit, "women barred from welfare aid will compete in a segment of the labor market that is already saturated with job seekers, with the result that low wages will be driven lower" (89). This is fantastic for business (a flood of prospective employees which means they will work for lower wages), but the competition over low-wage jobs hurts the most vulnerable laborers in society precisely because it floods the market with unskilled low-wage labor (91).

follows that there is an important socioeconomic interconnection between these two types of citizens within the commercialized and corporatized political system. Consider a few examples. On the way to work, the professional makes a quick run into Starbucks for a Caffè Latte prepared for her by a "workfare" participant. While driving her daughter and friends home from a soccer game in her mini-van, a mother might drop by McDonalds to pick up lunch for the team, handed to her at the drive-through window by a recent TANF recipient who has maxed out her time-limit in the program and is now barely able to support her two children and pay her own bills. Often a budget shopper, the middle-class mother picks up school supplies and other household essentials at stores like Wal-Mart, whose shelves are stacked by participants in her state's "welfare to work" program. Although this soccer mom is a valued customer, her practice of responsible "market citizenship" relies on a steady supply of service-sector workers to enable her praiseworthy market behavior.

To be clear, this supply/demand part of my analysis is not original, for it supports the thesis of Piven and Cloward in their classic book, *Regulating the Poor,* analyzing the interdependent relationship between welfare and low-wage work.[808] However, this helps us to more fully grasp the complex contours of neoliberal citizenship and demographic inequality in the United States. By definition, markets are sources of unequal outcomes. In the face of structural inequalities and preexisting psychological biases, human behavior tends to respond to prejudice in ways that reinforce past hierarchies through private practices on the economic market. When citizenship is reproduced based upon

[808] Piven and Cloward, *Regulating the Poor*.

market norms, it follows that the successful neoliberal citizen requires the other less successful, subaltern class. In other words, the neoliberal ideal depends upon its non-ideal counterpart. Even worse, the inconsistent and contradictory aspects of the legislation—for instance, undermining reproductive choice but punishing reproduction, and focusing on responsible motherhood yet forcing mothers to leave their children for work at a young age—actually work against escaping poverty. This leads to a sobering conclusion: Whether due to an alliance between political actors with conflicting agendas or resulting from a fairly widespread agreement about what constitutes "responsible citizenship," there appears to be no authentic or effective government commitment to giving TANF recipients a realistic opportunity to attain this ideal, no matter how "disciplined" they become in their work and reproductive lives.

8.3 Neoliberal Civic Inequality

If we accept that the ideal and the non-ideal citizen are both necessary for this new neoliberal market system, then it follows that the non-ideal is just as much a "neoliberal citizen" as the ideal. They are two sides of the same coin, one lauded and the other demeaned. We have already seen that each plays an integral role in the new economy of civic reproduction, but their market positions are different, and so too is their civic status. On the surface TANF appears to be applying disciplinary mechanisms to those who fall short of the ideal to encourage them to better approximate the market ideal of responsible citizenship, but I argue that this is only a part of what the policy is actually doing for

neoliberal citizenship. Most disturbingly, this civic lineage policy continues to maintain inequalities in citizenship, based upon race, gender, disability, and sexual behavior in the United States.

I have addressed these inequalities by looking at the regulation of motherhood above, but what about its effect on future generations of impoverished children? In many respects, these kids are forgotten by government with the transition from AFDC to TANF. Whereas AFDC placed aid to dependent children first, TANF conversely emphasizes the mandatory work and proper reproductive behavior of parents over the goal of aid to dependent children. Since TANF cuts aid to the entire family after any adult recipient within the household has received five years of assistance, it follows that TANF actually mandates that young children live in poverty if their parents fail to become properly self-supporting and independent within five years. This seems like an irrational policy from the standpoint of raising children to become responsible adult citizens, but it has important implications for the reproduction of American citizenship. While around 9 percent of white families lived in poverty in 1999, the statistics for black families was 25 percent.[809] In addition to growing up with higher rates of poverty, children of color are also exposed to stigmatizing (racialized) rhetoric that labels their mothers as "welfare queens," who raise sons that grow up to become "criminals" and

[809] Alemayehu Bishaw and John Iceland, "Poverty: 1999," *Census 2000 Brief*, U.S. Department of Commerce (1999): 1-9.

daughters that follow in their pathological footsteps.[810] Surely this shapes the way in which young children interpret and internalize their own civic status?

Even worse, people of color already experience disproportionately high levels of police violence and incarceration under the neoliberal state's "law and order" mission.[811] If these forms of surveillance and discipline are not harmful enough from the standpoint of children of color, whose mothers are enrolled in TANF, then lest we forget that the government now completely turns it back on these families after five years of benefits. When this happens and a family remains in poverty, as it all too often does, then the abandonment by the government tells impoverished children as clearly as possible that their country appears more concerned about funding law enforcement and building prisons than helping to create a healthy and solid foundation for their future. From this bizarre network of surveillance and coercion at the strong arm of the government—ranging from welfare, to subpar schools, to prisons—the most vulnerable children in America receive a clarion message from the government that they are not as valuable and do not have the same civic clout or status as the white, middle-class, suburban children of our stereotypical soccer mom. Thus, in addition to explicitly discouraging pregnancy and reproduction among TANF recipients, the government also tells the children born to these mothers—and particularly indigent children of color—that they are less valuable to American society than other children. They are, in effect, second class citizens according to the values and practices of the neoliberal civic lineage regime.

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[810] Soss, Fording, and Schram, *Disciplining the Poor*: They find that TANF caseworkers are unintentionally more likely to sanction black mothers than white mothers with identical case files, due to unconscious race bias encouraged within the system.
[811] See Wacquant, *Punishing the Poor*; Soss, Fording, and Schram, *Disciplining the Poor*.

Neoliberal citizenship depends upon the civic inequalities it produces and reproduces. When we tease apart the political discourse on "responsible" and "irresponsible" citizenship and its connections to welfare reform, as I have done above, then it becomes increasingly clear that there are *at least* two overarching classes of neoliberal citizens, both as much a part of the neoliberal regime as the next, but one celebrated and the other stigmatized. The difference between them is their position in relation to the market, and whether this translates into an acceptable or unacceptable position vis-à-vis the state. If identified as irresponsibly dependent upon the state or vice versa, these two mothers encounter an entirely different neoliberal nexus of policies, ranging from relatively unobtrusive to muscularly strong and interventionist. For this reason, I suggest that the neoliberal state is sustaining a landscape of civic hierarchy by deploying public policy to use the market to do similar work as the preceding postwar civic lineage regime (i.e. prior to the victories of the civil rights and women's movement).

The Supreme Court's TANF rulings at the end of the twentieth century are telling in this regard. As we have seen, a thin market-based judicial approach to equal protection and reproductive freedom is an anemic response to the very real struggles of the members of Americans most vulnerable groups, particularly when applied to a preexisting landscape structured by a long history of inequality due to overt forms of racism, sexism, and class discrimination. With a long line of statutory "welfare rights" cases rendered moot after the 1996 repeal and replacement of AFDC, it is striking that the only significant Supreme Court case involving TANF during the twentieth century

involves the Court supporting a right for U.S. citizens of one state to relocate to another state—essentially a right to travel. In *Saenz v. Roe* in 1999, the Court ruled that the "Privileges or Immunities Clause" of the Fourteenth Amendment grants all Americans the right to relocate as citizens from one state to another.[812] This includes welfare recipients, who are entitled to the full welfare benefits of any state they move to, even if they move to a state with a more generous program.[813] Although in theory an indigent mother can now "shop around" for the most generous and least coercive TANF program—and, for example, even move to another state without a child cap policy if she wishes to have another child—this is hardly a realistic option for most impoverished mothers.

The irony here, of course, is that the idea of moving to pursue a better life is a treasured value in American political culture (and consistent with neoliberal individualism), because it involves the freedom to travel and "pick up and move" in pursuit of a better lifestyle if you can afford it. However, women on welfare are the least likely to have the resources to make such decisions in the first place. Albeit at first glance a ruling in favor of "welfare rights," *Saenz* is above-all an affirmation of the right of any citizen, who can afford to do so, to travel and relocate from one state to another in increasingly neoliberal America. However, AFDC cases limiting the claims of welfare beneficiaries, such as *Dandridge*, continue to serve as controlling precedent for lower courts with regard to allowing states to adopt coercive reproductive policies like "child caps." Since government assistance is treated by the Court as a privilege that a person can

[812] *Saenz v. Roe,* 526 U.S. 489 (1999).
[813] Ibid.

freely chose to accept or reject, rather than ranking Medicaid or TANF as uniquely connected to the basic subsistence and survival of impoverished recipients, then it follows that invasions of otherwise protected rights generally do not violate reproductive freedom or equal protection even when policies like child caps and the promotion of Norplant are intended to coercively influence the procreative choices of recipients. Due to their reliance on government assistance, considered a privilege not a right by the Supreme Court, TANF recipients are vulnerable to government coercion in ways that wealthier women are not. With their right to privacy quite literally privatized on the market, TANF mothers lack the consumer freedom to exercise the range of reproductive choices available to soccer moms and cannot afford to reject public assistance programs that allow the government, to quite Justice Douglas's dissent in *Wyman*, "buy up" their fundamental rights.

Despite the end of formal legal barriers to equality for hitherto excluded and subordinated citizens, the current neoliberal regime reproduces patterns of inequality that reflects a landscape reminiscent of past civic hierarchy and new forms of inequality. The government through TANF is doing indirectly what it cannot constitutionally do directly—exploiting need for governmental assistance as an avenue to interfere with the reproductive choices and sexual behavior of poor women—and combining this with forced work participation to push mothers into the low-wage service market.[814] Resulting from the cooperation of all three branches of national government, with a green light

[814] See e.g., Laurence C. Nolan, "The Unconstitutional Conditions Doctrine and Mandating Norplant on Women on Welfare Discourse," *The American University Journal of Gender, Social Policy, & Law* 3, no. 1 (1994): 15-37.

from the judiciary, we witness the institutionalization of a quintessentially American neoliberal civic lineage regime shaping welfare policy. While easy to overlook at the top, where the state appears smaller and less intrusive to those who approximate a "responsible" neoliberal citizen, those deemed deviant and who are poor experience a much more invasive and disciplinary side of American statecraft, ranging from workfare to a skyrocketing prison system.

Concluding Thoughts

This chapter has examined the triumph of a neoliberal civic lineage regime at the end of the twentieth century by focusing on the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which replaced the sixty-year Aid to Families with Dependent Children (AFDC) program of the 1935 Social Security Act (SSA) with Temporary Assistance for Needy Families (TANF). After examining the ways in which welfare policy has always enforced prevailing civic lineage ideals, ranging from the eugenic side of Mother's Pensions during the Progressive Era to the role of AFDC in promoting the postwar image of what constitutes proper civic reproduction, we turned to the advent of neoliberal discourses about citizenship during the 1970s. The rise of neoliberal citizenship in the United States, as I have argued, emerged in the late 1960s and the 1970s in the wake of the social and political upheavals brought about by the civil rights and women's movements. There is strong evidence that the success of this neoliberal civic lineage approach capitalized on insecurities, both psychological and

structural, arising from changes in the American landscape of civic reproduction.[815] These changes include formal legal equality in race relations associated with the black civil rights movement, upheavals in the industrial economy linked to globalization, and a reorganization in the traditional postwar family due to the women's movement and the sexual revolution. As Soss, Fording, and Shram put it, "Disruptive movements upended laws and norms as they challenged the terms of social control surrounding gender, race, and sexuality. The iconic nuclear family buckled as women flooded the workplace and conventions related to marriage and reproduction underwent rapid change."[816] In support of this retrenchment thesis, the political discourse and policies I have cited throughout the last two chapters indicates that the timing of this rise of neoliberal governance is likely no accident.[817] Instead of embracing these sweeping social changes towards a more equal citizenry in the 1960s and 1970s, we witness a retrenchment and backlash against a more egalitarian feminist notion of civic reproduction, discussed previously as the not fully realized possibility of "voluntary motherhood."

This, then, is the neoliberal landscape of anti-poverty law and policy we encounter at the end of the twentieth century. Given the dismal success rate of TANF when it comes to actually getting families out of poverty, we can conclude that welfare reform appears to fail by its own blunt logic. However, I want to emphasize that PRWORA provides a vital and rarely recognized service for the neoliberal state. Neoliberal citizenship in the United States is built upon a statecraft of market inequality,

[815] Soss, Fording, and Schram, *Disciplining the Poor*, 293.
[816] Ibid., 293.
[817] See Bertram, *The Workfare State*.

and TANF is one of many civic lineage policies that institutionalizes and naturalizes these norms in the everyday lives of Americans. This civic lineage regime promulgates a network of coercive and paternalistic policies to regulate the reproductive behavior of those who fall short of its neoliberal ideal of citizenship. In important respects, neoliberal citizenship appears just as rigid in practice as the civic lineage regimes that preceded it. The main difference is that those who manage to become economically self-sufficient enjoy expanding opportunities under the neoliberal regime. Nevertheless, at the same time it allows for new avenues of civic mobility for some citizens on the socioeconomic front, TANF is doing important civic lineage work for the neoliberal state, including maintaining many past patterns of civic inequality corresponding to race, gender, disability, class, and presumed sexual deviance and promiscuity.

My interrogation of TANF reveals the inconsistencies at the heart of the neoliberal political project, but it also shows how these contradictions exploited and built upon the civic inequalities already existing in the American landscape. Neoliberal citizenship is domestic not global, and it reproduces inequality *prior to* conception and birth; from the cradle to the grave. Although governmental actors no doubt have many often conflicting and complex motivations for embracing neoliberal norms, the role of public policy in this process raises serious concerns about the institutional complicity of the state in maintaining and fostering civic hierarchy in America today.

CHAPTER 7

Conclusion

At the outset of this dissertation, I introduced a new conceptual framework for analyzing citizenship, which I term the 'civic lineage regime.' Like all modern nation states, the United States erects and maintains various laws and geographic boundaries to demarcate citizens from noncitizens. The literature in political science tends to focus on the ways in which immigration law structures citizenship over time. As scholars of immigration emphasize, one of the primary ways in which modern nation-states, like the United States, define themselves over time is by determining who qualifies as members of their political community. But, as I have argued, this is at best half the story. In a similar manner to immigration, governments also regulate the birth of citizens from one generation to the next. I introduce the concept of a 'civic lineage regime' as the domestic counterpart to the 'immigration regime' in structuring civic membership in the United States (and other nations). Just as the immigration regime is comprised of the broad set of laws and policies regulating immigration at any given political moment, the civic lineage regime is comprised of the broad set of laws and policies shaping citizenship by targeting procreation, fertility, and childbirth. These state-building policies, targeting the actual reproduction of citizens, define and redefine the meaning and scope of U.S. citizenship across time by shaping the future "face" of the American polity. Precisely because they

play such a fundamental role in structuring political communities over time, governments have never failed to construct a civic lineage regime of some sort, a reality that is unlikely to change in the future.

My goal in the preceding chapters has been to convincingly document the existence of historically evolving civic lineage regimes in the United States and to describe how they have developed and functioned during the twentieth century. To bring visibility to this deeply constitutive yet largely unexamined dimension of American political development, I have engaged in a close analysis of court cases and other primary sources, such as legislative debates, illustrating the governmental regulation of citizenship through reproductive policies. In particular, I have focused on: involuntary eugenic sterilization during the Progressive Era in Chapter 2, the uneven trajectory of the legalization of birth control and abortion in Chapters 3 and 4, the legislative and judicial contestation over funding abortion under Medicaid in Chapter 5, and Chapter 6 addressed "welfare reform" under TANF at the end of the century. Not only do these examples provide powerful evidence that civic lineage regimes exist in America, but they also point to the fact that the federal and state governments regulate the intimate lives of Americans for many of the same reasons governments seek to control immigration. In both realms, the state makes legal distinctions between who can and cannot become a member by coercively privileging certain visions of American identity over others. In fact, as each chapter illustrates, government policies aimed at regulating the reproduction of citizenship have served (both past and present) to erect and maintain hierarchies of citizenship based on race, gender, ethnicity, class, disability, religion, and sexuality.

I trace the rise and fall of several different civic lineage regimes during the last century. These include the fitter families regime of the Progressive Era, the white picket fence postwar regime, the (as yet) unrealized possibility of a voluntary motherhood regime, and our new dominant neoliberal regime. For the sake of conceptual clarity, it is worth underlining a key difference between the immigration regime and the civic lineage regime, which together make up the two main parts of our overarching regime of governmental regulations and laws shaping the boundaries of U.S. citizenship. Although the regulation of immigration tends to occur in a more clear-cut manner at the national level, as we have seen in each chapter, many of the most pervasive and invasive policies shaping civic lineage in the United States are disproportionately at the state and local level. These reproductive policies are often filtered and distributed through the American system of federalism, which disperses power to the states. However, while varying from state to state, and albeit comprised of contested and changing orders, these civic lineage policies follow broad enough patterns to identify them as demarcating a *decentralized regime* at a given period in U.S. history. More specifically, though there is not a central driving force that makes these civic lineage policies fully coherent at one point (or place) in time, it is clear—based on the explicit discourses I have cited by government officials—that these policies and laws nonetheless add up to a set of interconnected policies, which together form a configuration substantial enough to label as a "civic lineage regime."

Consider, for example, the fitter families regime spearheaded by the eugenics movement during the Progressive Era. This was a decentralized regime, but it was

nonetheless a coherent regime endorsing eugenic ideals. A vast majority of state legislatures adopted eugenic sterilization laws during a short period of time, and acting at the national level, the Supreme Court legitimized these laws as constitutional in the case of *Buck v. Bell*.[818] Moreover, in addition to using *negative eugenics laws* to target those deemed deviant for involuntary sterilization and removal from society in mental institutions, the fitter families regime also included *positive eugenics laws* aimed at encouraging citizens deemed eugenically fit to reproduce. These positive eugenics laws, addressed in several chapters, include the federal Sheppard Towner Act of 1921 to promote infant and maternal health, Mother's Pensions in most states for worthy widows to raise their children at home, and opposition to birth control to maximize the number of children born to citizens with "good" heritage and mainstream middle-class values (i.e. usually native-born white Christians of Anglo-American decent).[819] During the Progressive Era, the fitter families regime institutionalized the ideals of the dominant eugenics coalition, which sets it apart from the conflicting ideal of voluntary motherhood, endorsed by the early birth control movement at the time, and the dominant regimes that followed. For this reason, I have argued that the fitter families ideal clearly constitutes the dominant civic lineage regime during the Progressive Era.

The same decentralized political pattern holds true for the white picket fence regime during the postwar period of American politics. In the wake of the atrocities committed by Nazi Germany, the public health discourse emphasizing eugenics was delegitimized and eclipsed by a discourse on human rights that facilitated the rise of a

[818] *Buck v. Bell,* 274 U.S. 200 (1927).
[819] Skocpol, *Protecting Soldiers and Mothers*, 480-524.

regime based upon a smaller nuclear family, with a homemaker mother and breadwinning husband, and which valued marital privacy over government intrusion in the intimate sexual and reproductive behavior of husband and wife.[820] This regime, however, continued to reinforce formal civic hierarchies in race and gender under the law, which in turn set the stage for the family ideal it promoted to buckle under the victories of the black civil rights movement, the women's movement, and the sexual revolution during the 1960s and 1970s. However, rather than ushering in a more egalitarian regime robustly supporting voluntarism in motherhood for all women, instead we witness a period of legal uncertainty and transition, followed by the rise of a new regime of citizenship emphasizing the privatization and the commodification of reproductive policy. Indeed, though these past overtly inegalitarian conceptions of civic membership are now discredited, my dissertation shows that the conflictual politics involved in constructing an American civic lineage regime continue today in the form of the rise of a new 'neoliberal ideal of citizenship.' This dominant (yet contested) neoliberal civic lineage regime uses the "right to privacy" as a governmental mechanism to push civic reproduction to the private sector of the economy, which cuts against equal citizenship by inscribing patterns of demographic inequality through market forces.

In his introductory guide to the terms and themes concerning Neoliberalism, *Neoliberalism: The Key Concepts*, Mathew Eagleton-Pierce lists everything from 'adjustment' to 'welfare' (including the terms 'freedom' and 'choice') but in over 250 pages, he never mentions the term 'citizen' or citizenship' as being important to

[820] Self, *All in the Family*, 17-75.

neoliberalism.[821] In fact, as the last chapter addresses, the idea of a neoliberal civic ideal—or civic lineage regime—may, at first glance, appear to be a contradiction in terms, because the ideology and practice of neoliberalism tends to undermine the economic significance of the modern nation-state by valorizing the free market and privatization in an increasingly globalized world. But that is only a partial snapshot of the politics of neoliberalism, for it fails to address the way these values—of negative freedom, self-reliance, personal responsibility, privatization, market participation, and consumerism—shape domestic laws regulating the reproduction of citizenship in a "homegrown" manner in all nations, including the United States. A neoliberal nation requires a domestic population of properly neoliberal citizens to make the system work smoothly, which in turn means that it has a political investment in harnessing public policy to cultivate neoliberal citizenship. This is precisely what we see in our dominant neoliberal civic lineage regime today.

In Chapter 6, I make three arguments about neoliberal citizenship worth highlighting in this conclusion. First, the neoliberal ideal of citizenship influencing civic reproduction is not a *transnational* "one size fits all" appropriation of global neoliberalism to the United States, but rather a distinctly *national* appropriation and reworking of neoliberal values within the specific context and cultural values of American citizenship. This accounts for the rise and continuing success of the regime within the United States, and explains the compromises made by the various members within the coalition championing it. Second, I have argued there is strong evidence that

[821] Matthew Eagleton-Pierce, *Neoliberalism: The Key Concepts* (New York: Routledge, 2016).

the rise and triumph of this new regime in the aftermath of the upheavals of the civil rights and women's movements was not an accident, and that anxieties about social change spurred an alliance of fiscal conservatives, racial conservatives, and the religious right in favor of a new market-based approach to the reproduction of citizenship. In the absence of formal mechanisms for maintaining civic hierarchy, the marketization and privatization of rights proved to be an effective mechanism to perpetuate old forms of civic inequality and produce new ones. Third, our contemporary neoliberal state is not a small state when it comes to intervening in the most intimate aspects of the lives of its citizens, as its libertarian proponents of laissez faire economic policy contend: rather the neoliberal state is what I term a 'strong state.' Relatively unobtrusive to those deemed proper citizens, illustrated by my discussion of the soccer mom in Chapter 6, the neoliberal civic lineage regime sponsors a muscularly interventionist state when it comes to citizens, like mothers on TANF, who fall short of the ideal of market responsibility.

The United States, as I have argued, can quite literally be said to "make citizens" through the reproductive policies it sponsors and enforces in society. Rather than being "born equal" to use the famous words of Alexis de Tocqueville—a sentiment echoed by Louis Hartz—this dissertation demonstrates that birth is a fundamental avenue for the perpetuation and institutionalization of civic inequality in America`.[822] Indeed, the neoliberal ideal of citizenship promoted by our current civic lineage regime continues to share many striking similarities with the past, including the disproportionate

[822] Alexis de Tocqueville, *Democracy in America,* Part 2, (1863; repr., New York: Vintage Books, 1990); Louis Hartz, *The Liberal Tradition in America* (1955; repr., New York: Mariner Books, 1991).

representation of parents who are white, middle-class to affluent, able-bodied enough to work, conforming to mainstream Christian family values like marriage, and displaying what is considered to be responsible sexual and reproductive behavior in a market-driven society. In this dissertation, I have added empirical illumination and normative scrutiny to this phenomenon by highlighting myriad ways in which the United States has functioned in the past (and present) as more than merely the liberal democratic society it purports to be in popular constitutional rights discourse about citizenship.[823] It is also, at least in part, a "*civic lineage regime,*" with political leaders and other cultural elites engaged from the nation's outset in a (somewhat feudal-like) political process of creating and perpetuating a range of civic distinctions and hierarchies based upon birth.

Epilogue: Neoliberal civic lineage in the twenty-first century today

This brings me to the question I want to end on: What does this mean today in the twenty-first century? As I write this in 2017, it has been twenty years since the "end of welfare" in 1996 and the political heyday of the soccer mom. Yet the neoliberal regime in many respects only appears to have gained strength with the commercialization and

[823] This highlights another important point of similarity between the civic lineage and immigration regimes. In the words of Daniel Tichenor, " A darker tension at the heart of many immigration policy battles in American political development has pitted universalist ideals against potent traditions of ethnic and racial hierarchy" (Tichenor, *Dividing Lines*, 290). In his "multiple traditions" thesis, Rogers Smith argues that in addition to the political traditions of liberalism and republicanism, emphasizing egalitarian consensualism and popular sovereignty, there is a third tradition of "ascriptive Americanism," which focuses on the inegalitarian role of racial, gender, ethnic, and religious ideas about civic inclusion and status in driving the trajectory of American political development. The regimes that I have documented throughout the course of this study are consistent with Smith's thesis, as is our new neoliberal civic lineage regime. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

privatization of virtually all aspects of social and political life, including reproduction. In fact, the current Trump Administration appears to be fostering not only a nativist backlash against Latino immigrants, Muslims, and other ethnic and racial minorities, but it has also vocalized support for retrenchment in sexual and reproductive policy. Precisely what this will mean for the development of civic lineage in the United States has yet to be seen, but our overarching regime of citizenship appears in flux at the same time that the role of the market economy in regulating reproduction has never been more invasive or pervasive in the lives of Americans.

Today, those who can afford it have the legal ability in many states to effectively "buy a baby." For enough money, an individual or couple can purchase designer gametes (i.e. sperm and eggs), rent a womb through a surrogacy contract, and then pay for childcare and the best schools once the baby is born. Fertility treatments, such as in vitro fertilization, have become common medical interventions for couples having difficulties conceiving their own child. Many opt for adoption. Both fertility treatment and adoption are typically expensive, and are often conducted with the assistance of private companies specializing in the process. For instance, with a vast array of private Cryobank companies, one can search through profiles of male sperm doners on the web and order gametes online for different prices—it often costs more for "premium" semen—and have these gametes delivered by mail in a refrigerated container to one's doorstep.[824] There are also private companies, such as Circle Surrogacy agency, that specialize in finding and

[824]See e.g. Cryos Denmark (advertised as the world's largest sperm bank): https://dk.cryosinternational.com/donor-sperm/ordering-donor-sperm; Manhattan CryoBank: http://www.manhattancryobank.com/guide-to-ordering-donor-sperm/; California Cryobank: https://cryobank.com [last checked July 20, 2017].

overseeing the surrogacy process, so that their customers don't have to worry about the legal details of drawing up and enforcing a surrogacy contract and enjoy the peace of mind to instead focus their energy on the excitement of preparing for the birth of their baby.[825] From my perspective, this booming "baby market" is the clearest example of the new opportunities (for some) that have been made available by neoliberal civic reproduction. Although balancing a family and a professional career is extremely difficult for most women, those who can afford the exorbitant costs of not only fertility assistance (if necessary), but also childcare, housecleaning, extracurricular activities, and the best schools have new opportunities not fathomable to their mothers (or fathers) a generation before. However, these opportunities also remain beyond the financial reach of most citizens today.

Likewise, while I have touched on the topic of marriage throughout this dissertation, I did not include a separate chapter on it. This is in part because the most important recent developments pertaining to neoliberal citizenship within marriage have occurred *after* the end of the twentieth century. In a similar manner to birth control and welfare, the institution of marriage has changed with the rise and fall of different civic lineage regimes. In *Loving v. Virginia* (1967), the Court ruled that laws banning interracial marriage are unconstitutional, because they violate both due process and equal protection.[826] This ruling by the Court, issued during the civil rights movement, struck down a Virginia anti-miscegenation law outlawing interracial marriage, passed in 1924 for eugenic reasons on the *same day* as the state's eugenic sterilization law, discussed

[825] The company's website is: http://www.circlesurrogacy.com [last checked July 20, 2017]
[826] *Loving v. Virginia*, 388 U.S. 1 (1967).

earlier.[827] The *Loving* ruling, combined with the concept of marital privacy in *Griswold* (1965), would later be cited as precedents by the Court to justify expanding marriage to include same-sex couples under the Fourteenth Amendment in *Obergefell v. Hodges* (2015).[828] In his 5-4 majority opinion for the Court in 2015, Justice Anthony Kennedy wrote a paean on marriage that parallels (and far surpasses in length) that written by Justice Douglas in *Griswold v. Connecticut* (1965) fifty years earlier.[829] Moreover, Justice Kennedy also explicitly highlighted civic lineage concerns about same-sex parenthood in this case about marriage. In his words,

> [M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted…Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same sex couples.[830]

This case is an example of the inclusionary dimension of neoliberal citizenship, which provides new market-based opportunities to some hitherto marginalized groups to take full advantage of their privacy rights as "citizen-consumers" using their purchasing power on the market (e.g. both the "baby market" and the "marriage market" are

[827] The full text for the Racial Integrity Act of 1924, which prohibited interracial marriage for eugenic reasons and was passed on the same day as the state's "Eugenical Sterilization Act" is available online: http://www2.vcdh.virginia.edu/lewisandclark/students/projects/monacans/Contemporary_Monacans/racial.html

[828] *Obergefell v. Hodges*, 576 U.S. __ (2015).

[829] In Kennedy's words in *Obergefell*: "Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations…It would misunderstand these men and women to say that they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves."

[830] *Obergefell v. Hodges*, 576 U.S. __ (2015): 15 Online at: https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

booming industries today). But, while the neoliberal civic lineage regime has expanded the reproductive opportunities for some, the darker side of this new regime, as I have documented, is its role in perpetuating and sometimes deepening various forms of civic inequality in the realms of class, race, sexual behavior, and gender.

Since the government will inevitably continue to target civic lineage through law and public policy, it is important to recognize that *there are clearly better and worse ways* to steer the reproduction of citizenship. In this regard, the normative thrust of this dissertation is that history matters today in the realm of reproductive policy and regulation of the newly burgeoning fertility industry. Rather than offering a discouraging critique of the relationship between reproductive policy and the inegalitarian structuring of citizenship, I hope I have shed light on the current political terrain in which we find ourselves—with our dominant *neoliberal civic lineage regime* and a clash between diverging civic lineage orders, including the elusive possibility of a regime of voluntary motherhood someday. As I have shown above, the federal government tends to punt a vast majority of issues involving the reproduction of citizenship onto the market and state governments to structure, but judicial conflicts are bound to increasingly surface in the midst of what Deborah Spar terms the booming "baby business," spurred by dazzling new scientific discoveries in the realm of reproduction that can help individuals and couples seek alternative ways to have children (if they can afford it).[831] State laws already reveal numerous points of controversy: whereas California has fostered a highly profitable gamete market and a lucrative commercial industry facilitating surrogacy

[831] Spar, *The Baby Business*.

contracts, the states of Louisiana and Michigan refuse to recognize such contracts as valid.[832] In the future, how will these legal differences play out in shaping the birth of citizens? A host of new genetic and reproductive technologies, accompanied by shifting norms of procreation and parenthood, will doubtlessly fuel a growing need for innovative government choices in the realm of law and public policy. I hope this project will help set the stage for a more historically sensitive ethical debate about reproductive policy today.

The key set of questions in my view is not whether the government actors will continue to engage in the process of "people-making" (or "reproducing citizens") in the future, but rather how they will go about doing so, and towards what ends? What kind of political and legal boundaries will the federal government and state governments draw? Will our neoliberal regime continue to gain strength in the coming decades, or will it finally be eclipsed by a new coalition of political actors championing a different civic lineage regime? And how will the configuration of these boundaries shape the identity and composition of subsequent generations of America's body politic? How these questions will be answered, and who will answer them, are among the most fundamental issues of American politics in the 21st century.

[832] It only takes a quick search on Google for "surrogacy law by state," and a multitude of professional websites pop up summarizing state laws and providing condensed information about which states are most friendly to surrogacy contracts, based on past court cases. This information reveals that most states have no laws at all (anything goes), others have a history of being particularly friendly to surrogacy contracts (particularly safe bets), a few prohibit or even criminalize engaging in surrogacy contracts (places to avoid), and some permit "traditional" arrangements but discriminate against particular types of prospective parents such as unmarried individuals or LGBT couples. This information is intended to help prospective parents find the best state for such a contract. See e.g. http://allthingssurrogacy.org/surrogacy-laws-state-by-state/

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