A SLICE OF HISTORY UNDERLYING THE CURRENT FINANCIAL PANDEMIC

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I. INTRODUCTION

This is the first in a series of articles designed to chronicle laws within the United States that have impacted the property rights of black women. This first article, and its progeny, will trace this metamorphosis from the nineteenth century, when black women were enslaved, until the twenty-first century when, like the rest of the country, they had to survive one of the country’s worst financial pandemics. Yet, their story of survival is unique and has its own identity.

This historical sojourn is compelling for three interrelated reasons. First, having been inherited from Great Britain, property rights remain one of the most coveted of all democratic rights. Indeed, the Framers of the United States Constitution asserted that property was a “natural right of man.” Second, property rights necessarily support our capitalistic system and are an important element of political freedom. Third, notwithstanding their significance within

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1 Barlow Burke & Joseph Snow, Examples and Explanations: Property 16 (3d ed. 2008) (stating that property law is largely state law and that “[e]ach of our states, territories, and the District of Columbia, with the exception of Louisiana, adopted for its legal system the common law of England”).

2 U.S. CONST. amend. V (ratified 1791). The Framers’ acknowledgment of the significance of property rights are permanently reflected through the Fifth Amendment of the United States Constitution which states, in pertinent part: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added).

3 See infra note 52.


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our legal and economic systems, property rights have not always existed for every member of our society, particularly black women.\textsuperscript{5}

However, it is fundamental that in an ideal democracy, laws should evolve to lead to more just results, thereby resulting in everyone receiving the same rights or having access to the same, including property rights.\textsuperscript{6} Accordingly, two questions will be addressed as part of this series: (1) which laws have impacted the property rights of black women and (2) what remains to be done, particularly during this financial pandemic, to help make the Framers’ assertion a universal truth? To ultimately reach the second question which will be addressed in the last article, this article and its progeny will begin with the first question.

\textsuperscript{5} See infra discussions in Part II: Historical Context; Part III: Property From 1800 - 1850; and Part IV: Apart From The Slave Subculture: Hierarchy Of Property Rights Within The Dominant Culture.

\textsuperscript{6} Joseph William Singer, Democratic Estates: Property Law In A Free And Democratic Society, 94 CORNELL L. REV. 1009, 1042 (2009); see, Alexandra Murray, Marriage- The Peculiar Institution: An Exploration Of Marriage And The Women’s Rights Movement In The 19th Century, 16 UCLA WOMEN’S L.J. 137, 142-143 (2007) (discussing how this sentiment was reflected in July 1848, when “Elizabeth Cady Stanton and Lucretia Mott organized the Seneca Falls convention ‘to discuss the social, civil, and religious conditions and rights of women,’ the first convention of its kind in the United States. It was Stanton who drafted the ‘Declaration of Sentiments and Resolutions’ that would be the cornerstone of the convention. Using the Declaration of Independence as her template, Stanton declared ‘that all men and women are created equal.’ She then went on to illustrate the ‘repeated injuries and usurpations on the part of man toward woman’”); see also, Mary E. Becker, The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective, 59 U. CHI. L. REV 453, 457 (1992) (stating that “[a]n ideal Constitution or Bill of Rights would contain a substantive sex equality provision. At a minimum, such a provision could require judges to take into account detrimental impact on women when approaching other constitutional provisions as well as legislation and other governmental action”). While I believe that it is unrealistic to expect such an “equality provision” to be created, I agree with it in principle. Laws should be created to accomplish our ideals.
Specifically, this article will be divided into four remaining parts. Part II will establish an historical context.\(^7\) While property rights existed in the first part of the nineteenth century, the socio-economic landscape within the country was not designed to extend them to everyone.\(^8\) Rather, the institution of slavery and society’s marginalization of women\(^9\) (historical realities) had two effects. First, they contributed to the ultimate dehumanization of enslaved black women. Second, the historical realities resulted in the creation of a subculture for slaves, one which excluded them from the dominant culture where members in varying degrees enjoyed property rights.

Part III explores the underlying meaning of the word “property” as it has been traditionally defined. However, as a result of the country’s creation of the slave subculture, traditional theories of property alone are inadequate to characterize the meaning of property during this era. Rather, the definition must acknowledge the two distinct cultures and expand the definition to incorporate slaves, generally, and black women, in particular as they were classified within the subculture. Through black women’s classification as chattel or real estate, the effect was to personify “property” and provide additional support to the infrastructure that supported the institution of slavery and held black women and their offspring in bondage.\(^10\)

\(^7\) See infra discussion in Part II: Historical Context, which is divided into the two parts: (1) Traditional Theories Of Property (Part II A) and (2) Extension Of Theories To Incorporate Practical Reality: Personification Of PropertyWithin The Slave Subculture (Part II B).

\(^8\) Starting with the Framers, the legal infrastructure was not designed to provide rights to everyone. See, e.g., Barbara Stark, *Deconstructing the Framers’ Right to Property Liberty’s Daughters and Economic Rights*, 28 *Hofstra L. Rev.* 963, 967 (2000) (stating that “[f]or the Framers, the enjoyment of the right to property, like the enjoyment of civil and political rights, was explicitly limited to white men”).


\(^10\) Stark, *supra* note 8, at 1036 (slave owners viewed black children as additional property); see also, id. at 1045-1046 (stating that children were valued as labor and also were legally the property of the slaveholder. In fact, “[b]lack women under slavery were often forced to reproduce. Sometimes they were paired with another slave. In
To contrast the legal status of enslaved black women, Part IV will look at the groups that comprised the dominant culture and had property rights. However, since property rights existed in varying degrees, this Part will use a hierarchy to show variances among members within the dominant culture. Ultimately, through this lens, a candid, more focused picture of black women and property during this era will have been captured.

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11 See discussion infra Part IV, which discusses how different categories of people into the hierarchy of property rights and is divided into the four parts: (1) White men (Part IV A), (2) White women: The Marital Distinction (Part IV B), (3) Indentured Servants (Part IV C), and (7) Freedmen and Freedwomen (Part IV D).

12 Scholars have written about a variety of subjects. Some have explored the various ways in which laws have evolved and impacted women’s legal rights and social status. See, e.g., BARBARA J. BERG, THE REMEMBERED GATE: ORIGINS OF AMERICAN FEMINISM, THE WOMAN AND THE CITY, 1800-1860 (1980); BLANCHE GLASSMAN HERSCH, THE SLAVERY OF SEX: FEMINIST - ABOLITIONISTS IN AMERICA (1978); C. THOMAS DIENES, LAW, POLITICS AND BIRTH CONTROL (1972); CARL DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (1980); CAROLE SHAMMAS, MICHEL DAHLIN, & MARYLYNN SALMON, INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT (1997); ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES (1979); Elizabeth Bowles Warbasse, The Southern Married Women’s Property Acts In Ante-Bellum America (paper presented at the Society for Historians of the Early Republic Meeting, Memphis, Tenn., July 1982); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY (1979); Jamil S. Zainaldin, The Emergence of Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851, 73 NW. U. L. REV. 1038 (1979); Joan Hoff-Wilson, The Legal Status of Women in the Late Nineteenth and Early Twentieth Centuries, 6 HUMAN RIGHTS 125 (1976-1977); Kathleen Elizabeth Lazarou, Concealed Under Petticoats: Married Women’s Property And The Law Of Texas, 1840-1913 (Ph.D. diss., Rice University, 1980); KEITH MELDER, BEGINNINGS OF SISTERHOOD (1977); Linda K. Kerber, From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early...
II. HISTORICAL CONTEXT

A. Slavery As An Economic Phenomenon: Creation of Slavery Subculture

During the early nineteenth century, the United States was primarily built upon an agrarian economy. Among other theories, scholars assert that cheap labor was needed and


13 See generally, Bray Hammond, Banks And Politics In America From The Revolution To The Civil War (1958) (once Thomas Jefferson became President in 1801, his administration promoted a more decentralized, agrarian democracy commonly referred to as Jeffersonian democracy and based upon the philosophy that the common man needed to be protected from political and economic tyranny and that small farmers were the most valuable citizens); see also, Stark, supra note 8, at 1022-1023 (discussing how the agrarian economy embraced the plantation system and

[A]lthough black women engaged in a wide range of tasks, including highly skilled work such as smithing, they ‘were usually put to [the] hard labor in the fields[.]’ . . . Spinning was virtually the only alternative to labor in the fields except for a few privileged house servants, and generally only the old and sick were allowed to spin.

. . .

In an account published in 1839, Angela Grimke Weld shows how even relatively privileged house slaves suffered. In the winter, for example:

Seamstresses were kept in cold entries to work by the staircase lamps for one or two hours, every evening in winter--they could not see without standing up all the time, though the work was often too large and heavy for them to sew upon in that position without great inconvenience, and yet they were expected to do their work as well with their cold fingers . . .

Conditions were generally worse for women who worked in the fields. Even after Chesapeake farmers began to use plows and carts, for example: “Black women continued their old familiar
that slaves were used to propel the economy.\textsuperscript{15} This view regarded slavery as a profitable\textsuperscript{16} economic phenomenon.

However, even though the institution of slavery was firmly embedded within the country’s fabric and existed in most\textsuperscript{17} of the thirteen colonies,\textsuperscript{18} there were stark differences between the north\textsuperscript{19} and south.\textsuperscript{20} In the northern colonies, slaves never comprised more than five percent of the total colonial population.\textsuperscript{21} By the early nineteenth century, the “original [n]orthern colonies [had] implemented a process of gradual emancipation.”\textsuperscript{22} Other regions

routines of hand hoeing and weeding, as well as grubbing stumps from the swamps in the wintertime, breaking new ground which could not be handled with the plow, cleaning stables, and spreading manure.”

Although the author talks about conditions during the eighteenth century, there are no historical accounts reflecting that conditions substantially changed during the nineteenth century.

\textsuperscript{14} Slaves helped farm tobacco, cotton and corn. Cotton became an important crop following Eli Whitney’s invention in 1793 of the cotton gin, which simplified the process of manufacturing cotton because it separated raw cotton from seeds and other waste. \textit{See} 2 \textsc{Lewis Cecil Gray}, \textit{History Of Agriculture In The Southern United States To 1860} (1933).

\textsuperscript{15} \textit{See}, \textit{e.g.}, Wahl, \textit{supra} note 10 (asserting that “[t]hroughout history, slavery has existed where it has been economically worthwhile to those in power. The principal example in modern times is the U.S. South. Nearly 4 million slaves with a market value of close to $4 billion lived in the U.S. just before the Civil War. Masters enjoyed rates of return on slaves comparable to those on other assets”). \textit{See also}, Sandra R. Zagler Zayac & Robert A. Zayac Jr., \textit{Georgia’s Married Women’s Property Act: An Effective Challenge to Coverture}, 15 \textsc{Tex. J. Women & L.} 81 (2005) (which discusses that the country experienced a financial panic in 1837 and that the resulting depression that followed was then deemed to be one of the worst in the country’s history).

\textsuperscript{16} \textit{See generally}, \textsc{Robert Fogel & Stanley Engerman}, \textit{Time on the Cross: The Economics of American Negro Slavery} (Norton 1995) (asserting that slavery was profitable and that slave masters invested in slaves because they generated high rates of return); \textit{but cf.}, \textsc{Hinton Rowan Helper}, \textit{The Impending Crisis Of The South: How To Meet It} (1860); \textsc{Frederick Law Olmstead}, \textit{A Journey In The Seaboard Slave States, With Remarks On Their Economy} (1861); \textsc{Eugene Genovese}, \textit{The Slaveholders’ Dilemma: Freedom And Progress In Southern Conservative Thought, 1820-1860} (1994) (authors who assert that slavery was unprofitable and inefficient).

\textsuperscript{17} Wahl, \textit{supra} note 10; \textit{see infra} Appendix A: Population of the Original Thirteen Colonies, selected years by type (According to statistical data, as of 1810, two of the original colonies, Massachusetts and New Hampshire, did not have slaves).

\textsuperscript{18} \textit{Id}.

\textsuperscript{19} \textit{Id.} The northern colonies included: Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island.

\textsuperscript{20} \textit{Id.} The southern colonies included: Georgia, North Carolina, South Carolina and Virginia.

\textsuperscript{21} \textit{Id}.

\textsuperscript{22} \textit{Id}.
above the Mason-Dixon line, like Ohio in 1803 and Indiana in 1816, “ended slavery upon statehood.”

As the institution of slavery was waning in the north, it was waxing in the south. Notably, as slavery was becoming less popular in the north, it was becoming increasingly popular in the south; and, although condemned by abolitionists, slavery was condoned by religious institutions. During this era, the southern slave population rapidly increased from approximately 1.1 million in 1810 to over 3.9 million in 1860. This rise must have resulted solely from an increase in births because the Trans-Atlantic importation of slaves ended when Congress passed a Federal law banning it.

Notwithstanding the diminution of slavery in the north, slavery was an institution in the south. It not only fueled the southern economy, it also shaped the country’s social landscape. As

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23 Id.
24 Id. (discussing that the division between the north and south became more relevant and resulted in the split that separated the country and culminated in the Civil War and the enactment of the Emancipation Proclamation).
25 Id. (stating that “[s]cholars have speculated as to why[] without coming to a definite conclusion. Some surmise that indentured servants were fundamentally better suited to the Northern climate, crops, and tasks at hand; some claim that anti-slavery sentiment provided the explanation”).
26 During this era, religious leaders struggled with the question of whether the Bible condemned or condoned slavery. See Mark Noll, The Civil War as a Theological Crisis 29 (2006) (discussing the conflict within the Baptist Church that led to its split into northern and southern organizations. The Southern Baptist Convention was established on the premise that the Bible condoned slavery and that it was acceptable for Christians to own slaves. Northern Baptists opposed slavery); see also, Murray, supra note 6, at 139 (In 1831, in response to churches who condoned slavery, William Garrison, an activist and leader in the “radical Abolitionist movement,” “rejected the church’s use of religion to justify the evils of slavery.” This radical movement empowered women who “had been confronted with a difficult conflict between activism and the demand of the Church that they remain in their traditional domestic role . . . Garrisonian women moved beyond the religious confines of their work, borrowing Abolitionist rhetoric and strategy as the framework for their own movement.”
27 Id.; see supra note 10, which displays Table 2: Population Of The South 1790-1860 By Type.
28 Id.; see also, James A. Rawley with Stephen D. Behrendt, The Transatlantic Slave Trade: A History (2005) (stating that Congress took steps to end American’s participation in the Atlantic Slave Trade by: (1) passing a law in 1794 that “prohibited carrying on the slave trade from United States to any foreign place,” (2) passing another law in 1800 “forbade Americans to have any interest in foreign slave trade,” and (3) passing a law that prohibited the “importation of salves into the United States after 1 January, 1808”); John P. Kaminski, A Necessary Evil?: Slavery and the Debate Over the Constitution (1995) (President Jefferson advocated the abolition of the Foreign Slave Trade on March 2, 1807 and law enacted to prohibit slave trade as of January 1, 1808).
reflected in statistical data, three social groups existed: whites, freed non-whites, and slaves.\(^{29}\) However, these three groups did not comprise a social hierarchy – from top to bottom. Rather, because of the legal status of slaves as objects,\(^{30}\) the dominant culture did not treat\(^{31}\) slaves as if they were part of the same society or culture. With regard to black women in particular, one scholar noted:

> Black women as slaves were outside civil society. . . . Those who were unable to claim self-ownership by reason of their inferior status as slaves – a position dictated by their natural essential inferiority – were simply not part of the calculus and were outside the polity. . . . Under this dualistic philosophy, which embraced freedom and domination simultaneously, “men” were naturally born to freedom just as “slaves” were naturally consigned to subordination.\(^{32}\)

Thus, it is more accurate to recognize that slavery established a unique subculture\(^{33}\) that was separate yet intimately connected to the dominant culture because of its dependence upon

\(^{29}\) See supra note 10, which displays Table 2: Population Of The South 1790-1860 By Type

\(^{30}\) In some jurisdictions, slaves were considered to be human beings if they committed crimes. See HELEN T. CATERALL, ed., JUDICIAL CASES CONCERNING SLAVERY AND THE NEGRO, 5 vols. (Washington. D.C.: Carnegie Institute of Washington 1926-37).

\(^{31}\) See infra discussion in Part III.B footnotes; see also, THE CODE OF VIRGINIA WITH DECLARATION OF INDEPENDENCE AND CONSTITUTION OF THE UNITED STATES; AND THE DECLARATION OF RIGHTS AND CONSTITUTION OF VIRGINIA 747-748 (William F. Ritchie 1849) (Notably, slaves for the most part were illiterate because laws prohibited them from learning. Particularly after 1831, when a slave named Nat Turner who could read and write started a rebellion, a plethora of laws were generated to outlaw educating slaves, free blacks, and children of whites and blacks. For example, in Virginia, the statute provided:

> [E]very assemblage of negroes for the purpose of instruction in reading or writing, or in the night time for any purpose, shall be an unlawful assembly. Any justice may issue his warrant to any office or other person, requiring him to enter any place where such assemblage may be, and seize any negro therein; and he, or any other justice, may order such negro to be punished with stripes.

> If a white person assemble with negroes for the purpose of instructing them to read or write, or if he associate with them in an unlawful assembly, he shall be confined in jail not exceeding six months and fined not exceeding one hundred dollars; and any justice may require him to enter into a recognizance, with sufficient security, to appear before the circuit, county or corporation court, of the county or corporation where the offen[s]e was committed, at its next term, to answer therefor[e], and in the meantime to keep the peace and be of good behavior.)


\(^{33}\) See Stephen Crawford, The Slave Family: A View from the Slave Narratives (chapter in STRATEGIC FACTORS IN NINETEENTH CENTURY AMERICAN ECONOMIC HISTORY: A VOLUME TO HONOR ROBERT W. FOGEL CONFERENCE REPORT (1992)); see also, Stark, supra note 8, at 1051 (This subculture was both philosophical and real.)
slaves who labored to propel the economy.\textsuperscript{34} Thus, if the south was to accomplish its economic goals, slaves, generally, and black women, in particular, had to be regarded as human capital, where the legal dominion of the master was nearly total.\textsuperscript{35}

\textbf{B. Disregard of Gender: “Ain’t I a Woman”}

Sojourner Truth’s\textsuperscript{36} famous statement “[a]in’t I a woman?”\textsuperscript{37} helps to unveil the second historical reality, that the dominant culture disregarded the gender of enslaved women. In this regard, Ms. Truth stated the following:

That man over there says women need to be helped into carriages, and lifted over ditches, and to have the best places everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain’t I a woman? Look at me! Look at my arm! I have plowed and planted and gathered into barns, and no man could head me! And ar[e]n’t I a woman? I could work as much and eat as much as a man – when I could get it – and bear the lash as well! And ar[e]n’t I a woman? I have borne thirteen children, and seen them most all sold off to slavery, and when I cried out with my mother’s grief, none but Jesus heard me! And ar[e]n’t I a women.”\textsuperscript{38}

A former slave who became a significant figure in the abolitionist movement, Ms. Truth remains “a feminist symbol [who] embod[ied] a demand that the category of ‘women’ be reconfigured to

\texttt{Necessarily, as a result of being transported from Africa, slaves were often intentionally separated from their countrymen:
From the earliest efforts of slave traders to separate their captives from those who spoke the same language, black women were denied the right to their African heritage. While this was not systematic, and practices varied widely among slave owners, it was always possible and became increasingly common as the plantation system became increasingly institutionalized. Slaves were ‘compelled to create a new language, a new religion, and a precarious new lifestyle.’

\textsuperscript{36} Id. at 325 (discussing that Ms. Truth’s real name was Isabella Baumfree).
\textsuperscript{37} Id. at 315.
\textsuperscript{38} Id. at 361 n.203.}
include those that [were] not white and not privileged."

Indeed, the dominant culture did not regard black women as “women,” thereby justifying Ms. Truth’s inquiry.

White women’s conception of themselves as mothers, daughters, wives, and sisters of white men came to be intimately tied to idealized images of “true womanhood” through which the virtues of piety, purity, submissiveness, and domesticity were extolled. Even though the actual behavior of most women did not and could not conform to this model, the power of this imagery was pervasive. The cult of true womanhood, like white supremacist conceptions of race, evolved by contrasting white women as the embodiment of morality with Black women as degraded, immoral, and sexually promiscuous others.

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By its very nature this definition of womanhood excluded Black women from the category of “woman.” By defining “Woman” in this way, women whose lives were distant from the ideal were deemed less deserving of protection, even of a paternalistic kind, and were presumptively not virtuous.

If black women had been given recognition, their legal status, albeit inferior to white men, would have been different. Without the disability of slavery, black women would have been in the position of their white female counterparts. During this era, that legal status would not have guaranteed the same property rights as white men; however, enslaved black women, as “women,” would have been in a relatively better position in two ways. First, had they been deemed “women,” they would have been part of the dominant culture, which would have automatically meant inclusion and recognition of their humanity. Second, because of their gender, they still would have been under another disability, the disability of “womanhood.”

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39 Id. at 315.)
40 Harris, supra note 35, at 339-340 (emphasis added) (citation omitted).
41 See infra discussion in Part IV footnotes.
42 See Harris, supra note 35 (where scholar uses the word “womanhood”).
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essence, this would have resulted in their diminution relative to men, but it would have enabled them to receive the benefit of society’s presumption of femininity.43

In contrast, although skin color was the only significant difference between them, there was obviously no comparison between white women and enslaved black women. As slaves, they were part of a subculture, not the dominant one. Further, as objects,44 they could not even get the benefit of the disability of “womanhood.”45 Their worth as slaves,46 who happened to be women, was inherent in their ability to provide labor and biologically create more property for their slave masters.47

Thus, from a socio-economic perspective, two historical realities restricted the ability of enslaved black women within the south to obtain property rights – the institution of slavery and the dominant culture’s inability to acknowledge their “womanhood.” The dehumanizing effect resulted in their ultimate legal status as mere objects and as victims48 of a means to an economic end.

III. PROPERTY FROM 1800-1850

A. Traditional Theories Of Property: One Perspective

43 See id (discussing how women were not virtuous when defined in such a way).
44 Id. at 339-340.
45 See id.
46 See Wahl, supra note 10 (discussing the rapid increase in the number of slaves from 1810 to 1860).
47 See Wahl, supra note 10 (stating that child-bearing women were more expensive); see also, supra note 10, which displays Table 2: Population of the South 1790-1860 By Type.
48 David A. J. Richards, Bondage, Freedom & The Constitution: The New Slavery Scholarship And Its Impact On Law And Legal Historiography: The Slavery Analogy In Modern Constitutional Jurisprudence: Article: Abolitionist Feminism, Moral Slavery, And The Constitution: "On The Same Platform Of Human Rights," 18 CARDOZO L. REV. 767, 811 (1996). Two events during this era began to undermine the institution that made these women victims: (1) Anti-Slavery Convention in London, where the convention ruled that only male delegates could be seated (1840) and (2) women gathered in Seneca Falls to discuss women’s rights, usually taken to mark the emergence of an independent woman’s rights movement in the United States (1848)).
Property has been defined by scholars in countless ways.\textsuperscript{49} Regarded as one of the classical theorists,\textsuperscript{50} William Blackstone\textsuperscript{51} defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world.”\textsuperscript{52} His definition contains “essentially two elements: (1) the physicalist conception of property that required some ‘external thing’ to serve as the object of property rights and (2) the absolutist conception which

\textsuperscript{49}See C.B. Macpherson, \textit{The Meaning of Property}, in \textit{PROPERTY: MAINSTREAM AND CRITICAL POSITIONS} 2 (1978) (containing a detailed discussion of the ways in which property rights were addressed in the eighteenth century); see also, Kenneth J. Vandevelde, \textit{The New Property of the 19th century: The Development of the Modern Concept of Property}, 29 BUFF. L. REV. 325, 328-330 (1980) (asserting that distinctions can be drawn between the definition of property as it evolved with early capitalism and as it peaked in the nineteenth century. He also asserts that during the nineteenth century exclusive, objective property was identified through tangible things, which concept was consistent with the early capitalist economy. During this era, property was defined as “absolute dominion over things.” In the author’s view, this represents the absolutist conception of property. During the twentieth century; however, “[t]his new property was defined as a set of legal relations among persons. Property was no longer defined as dominion over things. Moreover, property was no longer absolute, but limited, with the meaning of the term varying from case to case”); \textit{but cf.} Jeanne L. Schroeder, \textit{Chixnix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property}, 93 MICH. L. REV. 239, 278-279 (1994) (asserting that Vandevelde misreads Blackstone since “Blackstone does not merely describe property as power over a thing . . . he speaks of property as a \textit{claim} to dominion and of the \textit{exercise} of that claim vis-a-vis any other individual in the universe”).

\textsuperscript{50}See Schroeder, \textit{supra} note 49 (providing a general introduction to classical theorists, as well as others).

\textsuperscript{51}JAMES E. KRIER, MICHAEL H. SCHILL, GREGORY S. ALEXANDER, & JESSE DUKEMINIER, \textit{PROPERTY} 24 (5th ed. 2002) (William Blackstone is regarded as one of the leading theorists. Briefly, his biography is as follows: Blackstone was the first professor of English law at an English university. His famous Commentaries on the Laws of England (1765—1769), the first accessible general statement of English law, was popular and influential in both England and the United States, despite being scorned . . . for uncritical acceptance of previous writers and blind admiration of the past. After resigning a professorship at Oxford, Blackstone was appointed to the bench).

\textsuperscript{52}Schroeder, \textit{supra} note 49, at 278 (recognizing how Vandevelde interpreted Blackstone’s definition as containing essentially two elements and stating that:

Blackstone’s own definition of property emphasizes its intersubjective nature in addition to its objective nature. Blackstone not only is aware but expressly states that the concept of dominion can only be understood as the right of one individual in relation to other individuals. Blackstone recognizes property as objective, not only in the sense of relating to an object, but also in the sense of being generally enforceable against the relevant community of legal subjects. [However,] Blackstone does not merely describe property as power over a thing, as Vandevelde suggests; this is reflected in Blackstone’s very careful language. Rather, he speaks of property as a claim to dominion and of the exercise of that claim vis-a-vis any other individual in the universe. . . . Blackstone is scrupulous in his commentaries to refer to ‘property’ only in the sense of a legal right and never in the sense of the object with respect to which the right exists. He speaks of having ‘a property in’ certain things but does not refer to owned objects as ‘property’).
gave the owner ‘sole and despotic dominion.’” With this view, Blackstone regarded property in a very limited sense—an exclusive possessory interest in corporeal objects.

In contrast, the Framers of the United States Constitution had a broader vision of property, as something more than mere ownership of things. According to Jeanne Schroeder, “[the Federalists] spoke of property rights not only in connection with land and the means of production - that is, stock in trade, manufacturing plants, and so on . . . They also spoke frequently of property rights in terms of money lending and investment.”

The Framers may have needed such a broad definition because of their overriding concerns about constitutional rights associated with property, as reflected in the Fifth Amendment of the United States Constitution. Specifically, the Framers established two mandates within that amendment; the first one, which applied to all “property,” required no one to be deprived of it without due process; and the second one, which applied to “private property,” required just compensation as consideration if the government took it for public purposes. With respect to the latter mandate, further evidence of the breadth of the Framers’ definition

54 Id. at 282-83 (critiquing Blackstone’s limited definition by asserting that:
[Although Blackstone understood as a matter of theory that property rights were not limited to rights concerning those objects that can be seen and sensuously possessed, as a matter of practice he might have been unable to derive a convincing account of property rights in modern intangibles. Of course . . . this may have been because during the early capitalist era, when Blackstone was writing, absolutist, possessory rights in corporeal objects had become relatively more important than divided rights in incorporeal objects had become relatively more important when divided rights in corporeal objects, which characterized the previous feudal system of societal organization. . . . Blackstone’s vocabulary was, arguably, sufficient for his time. In other words, although the physical, unitary paradigm of property is technically inaccurate, it may have been adequate to the task of analyzing most eighteenth-century property issues in precisely the same way that the eighteenth-century paradigm of Newtonian physics seemed adequate to describe the macroworld it measured, despite its inaccuracy).
55 Id. at 301 (citing JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990) at 30).
56 See U.S. CONST. amend V (ratified 1791), supra note 2.
57 See id.
exists. They were not only interested in “‘takings’ involving the state’s wrestling of tangible property from an owner’s grasp.” The Federalists “were also concerned with more subtle ‘takings’ that destroyed the value of intangible property in the forms of investment: the adoption of monetary policies, such as the printing of paper money, which [could] cause inflation, as well as bankruptcy and other debtors’ rights legislation.”

The utilitarian and economic theories shifted away from earlier views of property. The utilitarian theory was the precursor to the current economic view of property because of its premise that property is a “convention[n] which men obey because it is [in] their common interest to do so.” Those who endorse the economic theory of property would agree. They would

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58 Schroeder, supra note 49, at 302.
59 Id. at 301-302 (citing Nedelsky, supra note 55, at 30); see also Schroeder, supra note 49, at 302 (citing John O. McGinnis, The Partial Republican, 35 WM. & MARY L. REV. 1751, 1758-66 (1993-1994)); John Locke, Two Treatises of Government at 111-112 (Ian Shapiro eds., 2003). The Framers’ view was influenced by many, including the famous philosopher, John Locke, whose labor theory of property is as follows:

   Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The [labor] of his body, and the work of his hands, we may say, are properly his. WHATSOEVER then he removes out of the state that nature has provided, and left it in, he [has] mixed his [labor] with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it [has] by this [labor] something annexed to it that excludes the common right of other men. For this [labor] being the unquestionable property of the [laborer], no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

60 The theoretical foundation of this theory has been traced back to David Hume who wrote during the eighteenth century. See Dukeminier, supra note 4, at 56 (citing Richard Schlatter, Private Property: The History Of An Idea 239-242 (1951)), who defined this theory by interpreting Hume’s philosophy:

   Against all theories of formal right Hume urged the principle of utility – the rules of justice are conventions which experience has shown to be useful for the promotion of happiness. We obey them, not because we are obligated, but because our self-interest leads us to promote our own happiness in promoting that of the public. Applying this general principle to society, Hume argued that private ownership and its laws had no other origin or justification than utility. If we suppose a society in which nature granted an unlimited supply of goods, we can see that there no laws of property would arise.

   ... The laws of property, then, are conventions which men obey because it is their common interest to do so.

61 Krier, supra note 51, at 53 (stating that “[u]tilitarian theory is, without doubt, the dominant view of property today, at least among lawyers and especially among those working in law and economics”).
62 Dukeminier, supra note 4, at 56 (quoting Schlatter, supra note 60, at 239-242).
assert more specifically that “[e]conomic man is characterized by *self-interested goals* and [a] *rational choice of means*.64 Jeremy Bentham, one proponent of the utilitarian theory, articulated the same fundamental concept of property earlier in the eighteenth century as follows:

> Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.

> There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

> The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law.65

Thus, many theoretical definitions of property exist.66 However, all of them share one common denominator: property is obscure, can be tangible or intangible,67 but is commonly part of “a system of rules governing access to and control of material resources.”68 At its most fundamental level and as applied during the early nineteenth century, property “[c]onfers and rests upon power. It bestows on owners a form of sovereignty over others, because property means that the sovereign state stands behind the owners’ assertions of right.”69

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64 See Robert C. Ellickson, Carol M. Rose, and Bruce A. Ackerman, PERSPECTIVES ON PROPERTY LAW (2d ed. 1995) for references to additional leading economic theorists.

65 See Schroeder, supra note 49 (discussing many theorists who have defined and critiqued property law).

66 For a general discussion of these interests, see Roberta Rosenthal Kwall, Governmental Use of Copyrighted Property: The Sovereign’s Prerogative, 67 Tex. L. Rev. 685 (1989).

67 See Schroeder, supra note 49 (discussing many theorists who have defined and critiqued property law).

68 See Schroeder, supra note 49 (discussing many theorists who have defined and critiqued property law).

69 See Schroeder, supra note 49 (discussing many theorists who have defined and critiqued property law).
Given the dynamic socio-economic condition of the country during this era, which hinged on the co-existence of two cultures, these traditional theories of property seem inadequate. The Blackstonian theory of property, which stresses despotic dominion, comes closest. Yet, it is still incomplete because it merely provides the philosophical basis for the expanded definition of property that existed given the slave subculture. Realistically, “property” during this era had a human element, one that cannot be forgotten.

B. Extension of Theories to Incorporate Practical Reality: Personification of Property within the Slave Subculture

Prior to the enactment of the Thirteenth Amendment, black women played a dual purpose. Existing laws classified them as property and they helped to create it by giving birth to children whom the law, in accordance with the doctrine of partus sequitur ventrem, automatically classified as property. Children’s status followed that of the mother. If the mother was a slave, so were the children. See, M’Cutchen v Marshall, 33 U.S. 220, 241 (1834) (“[i]t is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother”; alternatively, if the mother was free, so were the children); Fulton v. Shaw, 25 Va. 597, 600 (1827) (holding that children of emancipated female slave were free, even though owner emancipated her with a “reservation” that her issue would be slaves; reservation was void).

Their legal status as “property” fell into three categories: real property, chattel, or both. “Whether slaves [were] personal [property] or real estate depend[ed] upon local enactments in the different states.”

70 In 1865, the 13th Amendment abolished the institution of slavery and declared that “neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.” U.S. Constitution Amendment XIII.

71 “The offspring of a slave belongs to the mother, or follows the condition of the mother.” Black’s Law Dictionary ( )

72 Children’s status followed that of the mother. If the mother was a slave, so were the children. See, M’Cutchen v Marshall, 33 U.S. 220, 241 (1834) (“[i]t is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother”; alternatively, if the mother was free, so were the children); Fulton v. Shaw, 25 Va. 597, 600 (1827) (holding that children of emancipated female slave were free, even though owner emancipated her with a “reservation” that her issue would be slaves; reservation was void).

73 Sneed v. Ewing, 28 Ky 460, (1831) (holding that the slaves passed according to lex domicilii, which regulates movable and not technically personal property).

74 Blackman v. Gordon, 2 Rich Eq 43 (1845) (holding that slaves are mere chattels and not protected by the Constitution such that a bequest to emancipate slaves may be avoided by an Act of Legislature before carried into effect); Brandon v. Planters’ & Merchants’ Bank of Huntsville, 1 Stew. 320 (Ala. 1828) (holding that if a slave acquires special property, it is the property of the master).
As real property in some jurisdictions, courts subjected them to the same rules that applied to inanimate plots of land. Specifically, masters held “title” and owned them in fee simple or through life estates. If sold, they could be mortgaged or sold at a sheriff’s sale. In a will, they passed as real estate to devisees; or, if not devised, to personal representatives. In addition, transactions had to be in writing to comply with the Statute of Frauds.

As chattel, standard commercial practices were used to buy and sell them. For example, they were purchased and sold via a bill of sale. In conjunction with the sale, the

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75 JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY (1837), at 40. In some jurisdictions, slaves were regarded as real estate or as chattel. For example, in Kentucky, “as to the law of descents they are considered as real estate but they are chattels for the payments of debts” (citing Chinn v. Respass., 17 Ky 25, 28 (Ky. App. 1824) (stating that Slaves were . . . declared by law to be real estate, and directed to descend as lands descended to the heir at law. But it does not follow that testator, by the devise of his personal estate, did not intend that his slaves should pass; for although slaves were by law made real estate, for the purpose of descent and dower, and perhaps some others, yet they had in law many of the attributes of personal estate. They would pass by a nuncupative will, and bonds would not; they were liable to be sold for the payment of debts, and lands were not; they could be limited, in a grant or devise, no otherwise than personal chattels, and personal actions might be brought to recover the possession of them. Besides, they were in their nature personal estate, being moveable property, and such as might attend the person of the proprietor wherever he went, and in practice they were so considered and treated by the people in general. When, therefore, a man devised his personal estate, he must be understood to intend, that his slaves should pass thereby, unless he used some expressions indicating a different intention . . .)).

76 Id. at 39.
77 See Hawkins’s Adm’r v Craig, 22 Ky. 254 (1827) (stating that slaves are chattels and may be transferred to the husband as dowry).
78 Pierce v. Curtis, 6 Mart. 418 (1819) (discussing a possessor who sold a salve and retained a mortgage for his payment).
79 Id.
80 Walton’s Heirs v. Walton’s Ex’rs, 30 Ky. 58, 62 (1831) (holding that “the testator clearly intended that all of the slaves he owned at the time of the will and their after-born issue were to pass by his will to his wife, who would hopefully emancipate them upon her death, the heirs had no right to the slaves”)
81 M’Dowell’s Adm’xx v. Lawless, 22 Ky. 139 (1827) (stating that slaves devised will pass as real estate immediately to the devisee and if they are not devised, then they will pass to the personal representative).
82 Palmer v. Faucett, 13 N.C. 240 (1829) (recognizing an 1806 statute, which “‘declar[ed] what gifts of slaves shall be valid,’ was made, as it emphatically declares, ‘for the prevention of frauds,’ and may be filly called a statute of frauds” and holding that the gift of a slave also required to be in writing); see Gaunt v. Brockman, 3 Ky. 339 (1808) (discussing an 1758 Act that barred parol gifts of slaves to protect creditors from fraudulent conveyances and protected donors form pretend gifts); see, e.g. WHEELER, supra note 75, at 65 (citing Choat v Wright, 13 N.C. 289 (1830) (referring to the Act of 1819, which stated “all contracts to sell or convey lands or slaves shall be void and of no effect, unless such contract, or some memorandum, or note thereof, be put in writing, and signed by the party charged, except contracts for leases not exceeding three years”)).
83 WHEELER, supra note 75, at 40.
seller also provided warranties\(^{85}\) to guarantee that slaves had sound bodies\(^{86}\) or that they were

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BILL OF SALE OF ABRAHAM VAN VLEEK
Abm. Van Vleek purchased at Vandue of Barent Van Dupail October 28: 1811--
1 Fanning Mill $17.25
1 Red face Cow 13.25
1 Yearling Calf 4.25
1 Plough 1.60
1 Wench Nam. Eve & Child 156.00
8 Fancy Chairs 9.25
One Looking Glass, Ten Table, Six Silver Table Spoons, Six So. Tea Spoons, 10 China tea Saucers, 11 Wo. Cups 1 Tea Pot, Sugar and Milk Cups, 3 Plates Dish and tea Board
The Above Interest from the Date $236.18½

Rcvd. December 26th 1811 of Abraham I. Van Vleek the amount of [ ] within amount in full ------

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Barent I. Goes (illeg.)

\(^{85}\) WHEELER, supra note 75, at 107. Based on the author’s analysis of Thompson v Milburn, 1 Mart. (n.s.) 468 (La. 1823), he stated:

A warranty, is an indemnity against the consequences of any defect in the quality or value of the thing sold. And a representation made at the time of sale is a warranty, if so intended. In general, no implied warranty arises, unless there [is] a fraudulent concealment. And whether there is a warranty or not, should be submitted to the jury. Some of the principles of warranty may be thus stated. Warranty is an indemnity for any defect in the thing sold, as was before stated. And they are express or implied. And all warranties must be made at or before the sale. Warranties are limited, and do not guard against that which may be discovered by sight, as if a horse be warranted perfect, and he wants an ear or tail. And it may be laid down as a general rule[ ] that the vendor is not liable for the quality or soundness of the goods or article sold, unless three [is] an express warranty, or a fraudulent concealment or misrepresentation. The exception in the United States[ ] is[ ] in South Carolina where they have adopted the civil law, which is governed by the maxim that “a sound price requires a sound commodity.” An express warranty of soundness extends to every kind of soundness, known and unknown to the seller, and if it be false, the buyer has his remedy on the warranty. And where there is an express warranty, all implied warranties are excluded; for the law will not imply what is not expressed in a formal contract. (citations omitted).

\(^{86}\) LERNER, supra note 84, at 9 (quoting LUCY CHASE MANUSCRIPT. Photo courtesy of the American Antiquarian Society, Worcester, Massachusetts).

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A SLAVE DEALER’S SALE RECEIPTS

$ 2325
Richmond, Va., October 1st, 1863.
Received of E.H. Sloces Twenty three hundred and twenty five Dollars, being in full for the purchase of One Negro Slave named Margaret, the right and title of said Slave I warrant and defend against the claims of all persons whatsoever, and likewise warrant her sound and healthy to date.

As witness my hand and seal

signed Benja A. Bailey.[SEAL.]

$ 3900
Richmond, Va., Nov. 10th 18??
capable of performing as laborers. Thus, to the extent that buyers discovered any defects, they were in position to require the contract price by pleading that slaves had “redhibitory defects.”

To determine whether the disease was redhibitory, the issue was often not whether the disease was curable in its origin but incurable at the time of the sale. In addition, courts also concluded that a sickness could be considered as incurable and justify a rescission when it baffled the efforts of medical aid and death became imminent.

Although being relegated to the slave subculture and classified as property were demeaning enough, the ramifications of this inhumane life sentence were even more devastating because enslaved black women could neither own property nor benefit from the

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Received of [Undecipherable] Thirty nine hundred Dollars, being in full for the purchase of One Negro Slave named Maria, the right and title of said Slave I warrant and defend against the claims of all persons whatsoever, and likewise warrant her sound and healthy to date. As witness my hand and seal

signed [Undecipherable] (SEAL)

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87 Wheel, supra note 75, at 128.
88 Id. at 107-109 (citing Thompson, supra note 85, at 469) (clarifying the rule stating the code “directs that the action of redhibition must be brought in one year at farthest from the date of the sale, can only receive an application in cases where the vendee is plaintiff, and brings an action.” In Thompson, plaintiff sued defendants to recover the contract price from defendants who refused because of the assertion “that the negro was unsound, and afflicted with redhibitory diseases, incurable in their nature, at the time they purchased him; of which diseases he died.” Id. at 468. Specifically, defendant’s asserted the slave had chronic dysentery. Id. at 470. The issue for the court was whether the disease was in fact incurable in its nature. Id. at 473. However, these redhibitory defects typically had to be immediately pleaded if they were to be used in defense of an action brought to recover the price of the slave. Id. at 471).
89 See Wheel, supra note 75, at 115-116 (citing St. Romes v. Pore., 10 Mart. (o.s.) 30 (1821) (holding that “[a]ilments or infirmities constitute redhibitory defects, when they are incurable by their nature. So that the slave subject thereto, is absolutely unfit for the services for which he is destined, or these services are so inconvenient, difficult, and interrupted, that it is to be presumed the buyer would not have bought her at all, if he had been acquainted with the defect; or that he would not have given so high a price, had he known that such a slave was subject to that sickness, or infirmity”).
90 See Ory’s Syndics v. David, 9 La. 59 (1836) (ordering that the sale of the deceased sale was rescinded, that price for the slave and child paid by the buyer be reduced by the buyer’s medical expense, that the slave and child be sold for payment and costs).
91 Other consequences flowed from being enslaved. First, families could be easily separated. As noted:

The separation of slave families was possibly the most inhumane aspect of chattel slavery. Slaves were denied the right to material possessions, education, satisfying and self-motivated labor, self-improvement, and social mobility. All they had were their family times and their religious beliefs. Nevertheless, they could be wrenched from their families when it suited their master’s whim. Except in a few limited instances, the slave family was subject to the inhumanity of instant destruction.
laws of inheritance (even when their white fathers acknowledged them). Bates v. Holman illustrates this latter rule, where the Supreme Court of Appeals of Virginia examined the estate of Charles F. Bates, a former attorney and farmer in Virginia who had drafted two wills. His widow and mother were parties in the action. In his second will, Bates acknowledged his daughter, an enslaved child presumably on another plantation, as follows:

I have a daughter called Clemensa, at Walter Keeble’s, in Cumberland, I declare her to be free to every right and privilege which she can enjoy by the laws of Virginia. I most particularly direct, that she be educated in the best manner that ladies are educated in Virginia. I give her my lot in the town of Cartersville, and three hundred dollars, to be laid out at interest, renewed yearly, and paid when she marry or come of age.”

The court ultimately ruled that Bates had cancelled both wills and declared him intestate, thereby enabling his widow to obtain the majority of his estate. As stated by one scholar, if the laws of intestacy had been followed, Bates’ daughter Clemensa would have been acknowledged as an heir and given access to her father’s property interests:
A SLICE OF HISTORY UNDERLYING THE CURRENT FINANCIAL PANDEMIC
BLACK WOMEN AND PROPERTY 1800 TO 1850:
BLACK WOMEN AS PROPERTY

Per succession law, neither widows nor parents were entitled to full inheritance. Intestacy law directed the lineal transmission of estates, with a life interest in a conjugal partner. Why then was Bates’ daughter, Clemensa, not permitted to revel in ‘lineal glory? (emphasis added)

None of the several opinions issued by the court noted where Clemensa stood within the line of intestate succession. Her potential status as an “heir,” who might exercise her own claim to the estate, thereby altering the distribution of the estate between Bates’s widow and mother, was completely overlooked. In fact, one of the opinions says, “[T]he law makes ample provision for the widow: but far different is the case respecting his natural daughter, who, together with her future offspring, the law has doomed to perpetual slavery.”

The Bates case illustrates how the institution of slavery permeated the common law within the south. Ultimately, this meant that courts were not always just, at least not for the enslaved. However, this was the reality, given the expanded definition of “property” within the slave subculture. Under no circumstances could “property” own property.

IV. APART FROM THE SLAVE SUBCULTURE: HIERARCHY OF PROPERTY RIGHTS WITHIN THE DOMINANT CULTURE

Within the dominant culture during this era, there were at least five different groups with varying degrees of access to owning property. White men and unmarried white women were at the top of the hierarchy, while married white women, indentured servants, and emancipated men and women completed the list. Although each group did not have equal access to the benefits associated with property ownership, they were obviously better off than those who comprised the slave subculture.

not enforceable until death, while intestate succession governs the default, dictating distribution in the absence of a will”).

98 JOHNSON, supra note 32, at 244.
A SLICE OF HISTORY UNDERLYING THE CURRENT FINANCIAL PANDEMIC
BLACK WOMEN AND PROPERTY 1800 TO 1850:
BLACK WOMEN AS PROPERTY

A. White Men

White men\(^99\) had property rights and were at the top of the hierarchy because the Framers carefully drafted the United States Constitution.\(^100\) As a result, white men, including the Framers themselves, had the Blackstonian\(^101\) ability to exercise absolute and exclusive dominion and control over property. Specifically in their legal capacity as “masters” of slaves, they had “absolute” authority,\(^102\) including the ability to own and punish slaves.\(^103\)

This breadth of control over property was an American achievement and a clear departure\(^104\) from the feudal tenure system\(^105\) which had formerly existed\(^106\) in medieval England.

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99 See supra discussion in Part IV C: Indentured Servants (discussing how not all white males were the beneficiaries).
100 Stark, supra note 8 (“[f]rom the Framers’ perspective . . . propertied white men were the threatened minority in need of protection”).
101 Named for William Blackstone.
102 State v. Mann, 13 N.C. 263 (1829) (stating that the owner or possessor had the uncontrolled authority over the body of a slave such that the owner’s conviction for assault and battery on a slave was reversed).
103 Smith v. Hancock, 7 Ky. 222 (1815) (holding that the slave owner may disperse an unlawful assembly, seize the individuals composing it, and lawfully slay such offenders who refuse to surrender and resist by force); but cf., Fields v. State, 9 Tenn. 156 (Tenn. 1829) (stating that the felonious slaying of a slave, without malice, is manslaughter); State v. Jones, 1 Miss. 83 (Miss. 1821) (stating that murder may be committed by the killing a slave, as well as by the killing a freeman in the State of Mississippi).
104 See ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK AND DALE A. WHITMAN, THE LAW OF PROPERTY, 20-21 (3d ed. 2000). Initially, England maintained an interest in all of the land in North America because the king of England granted land to individual proprietors and proprietary companies. This approach was consistent with the system known as “feudal tenure” in medieval England.

When the King of England granted land in North America to individual proprietors and proprietary companies in the seventeenth and eighteenth centuries, the grants were made in fee simple, to be held of the king and his heirs “in free and common scourge.” Subsequent grants by the proprietors to settlers were also in fee simple. Although subinfeudation seems to have been authorized in all of the colonies except Massachusetts Bay, Plymouth, Connecticut, and Rhode Island subinfeudation seems to have been common only in Maryland, Pennsylvania, and New York. In these states it took the form of grants to settlers in fee simple subject to payment of “ground rents” or “quit rents.” Elsewhere, grantees in fee simple held the king.

The American Revolution clearly ended any tenurial relationship between the English king and American land-holders. Some of the original 13 states adopted the view that the state had succeeded to the position of the English king as “lord” and that tenure continued to exist, while other states enacted statutes or constitutional provisions declaring that land ownership should thenceforth be “alodial” or otherwise declaring that tenure was abolished. Throughout the rest of the United States, it seems clear that tenure never existed. Even in the states where tenure may theoretically still exist between the state and one who owns land in fee simple, tenure would
Under that system, only the King of England held absolute ownership in land. As a result, while the King granted interests to his subjects, they were denied the ability to have exclusive interests in or absolute ownership of the land.  

B.  White Women: The Marital Distinction

White women’s property interests evolved during the early nineteenth century. Initially, two sets of rights existed - one for unmarried women and the other for married women. The property interests of unmarried women appear to have little or no practical significance. For all practical purposes, one who owns land in fee simple anywhere in the United States has “complete property” in (full ownership of) the land. (citation omitted).

105    Id. at 15-16. After the Norman Conquest of England in 1066, the feudal system of landholding was created. William the Conqueror collected all of the land, which had been held by the Saxon nobles, and redistributed it among his principle Norman barons. These Norman barons, who were known as “tenants in chief,” obtained the land in return for the military service which required the tenants to furnish a “specified court of knights for military service when required by the king.” In addition a few of the tenants in chief held their land as a result of a tenure called ‘Serjeanty,’ which meant that the tenants in chief were supposed to fill important offices within the royal household. Finally, the king also granted land to religious bodies which needed land to conduct purely religious duties such as conducting mass. As established, the system of feudal tenure did not result in the tenants in chief or the religious bodies having full ownership of the granted land. The consequences of not having full ownership meant that the tenants in chief as well as their subtenants or the religious bodies had interests that would terminate upon the death of either the lord or the tenant: “if the tenant died first, the land reverted to the lord; if the lord died first, the tenant’s interests terminated and then reverted to the person who succeeded the deceased as lord.” The system of feudal tenure, which had been established in England after the Norman Conquest, began to disintegrate before the Statute Quia Emptores was enacted in 1290.

106    Id. at 19-20. A series of social and legal matters resulted in the demise of feudal tenure. Socially, the personal relationship between the lord and the tenant could not be maintained once. As a result of the Quia Emptores statute, land held and fee simple became freely alienable. In addition, eventually it became impossible to make knight service an “efficient basis for maintaining a royal military force.” In addition, as a result of the Statute of Tenures, all military and serjeanty tenures were converted into socage tenures. Thus, the statute effectively made feudal tenure insignificant under English law. With all of the changes, the English tenant and fee simple had evolved from having a more limited interest in the land to full ownership after 1660.

107    Id.

108    Kevin C. Paul, Private / Property: A Discourse On Gender And Equality In American Law, 7 LAW & INEQ. 399 (1989) (asserting that women have historically been regarded as chattel and remain regarded the same despite the disappearance of overt references to women as chattel); see also, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1989). In this article, a discussion about ethnic groups has not been incorporated because it would be beyond the scope of this article. For a detailed discussion of the experiences that Mexican women, had during this era, when land in the southwest was being annexed to the United States, see Dana V. Kaplan, Women of the West: The Evolution of Marital Property Laws in the Southwestern United States and their Effect on Mexican-American Women, 26 Women's Rights L.Rep. 139 (Mexican women’s experience was less restrictive, particularly given their ability to hold separate property after marriage because civil law was regulated differently than marital property under common law).
women. As early as 1835, however, this distinction became less significant because of the Doctrine of Coverture’s gradual demise through the enactment of the first Married Women’s Property Act. Notwithstanding this metamorphosis, what did not change was the fundamental social status of women. Whether married or not, because of their gender, they were regarded as being inferior to men. Indeed, this view of women was entrenched within English history and stemmed from Judeo-Christian beliefs.

I. Unmarried White Women: Spinster Power and Political Impotence

Like their male counterparts, unmarried white women idealistically enjoyed access to property rights. However, scholars’ opinions regarding this point are not unanimous. Some...
assert that unmarried white women’s rights were comparable\textsuperscript{117} to their male counterparts.\textsuperscript{118}

Indeed, one theorist asserted that unmarried white women had their place and appropriate duties within the social state even though they lacked political power and the right to vote.\textsuperscript{119}

However, in stark contrast, other scholars\textsuperscript{120} concluded that unmarried white women were also “disabled because of their gender which robbed them of “essential rights.”\textsuperscript{121} As a result,

\begin{quote}
§2. The real and personal property, and the rents issues and profits thereof of any female now married shall not be subject to the disposal of her husband; but shall be her sole and separate property as if she were a single female except so far as the same may be liable for the debts of her husband heretofore contracted.

§3. It shall be lawful for any married female to receive, by gift, grant devise or bequest, from any person other than her husband and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, not be liable for his debts.

§4. All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place (emphasis added).
\end{quote}

\textsuperscript{115} \textit{Richard Brandon Morris, Studies In The History Of American Law: With Special Reference To The Seventeenth And Eighteenth Centuries} 113 (1930) (Since primogeniture was abolished in America, which guaranteed the oldest son an inheritance twice as large as younger siblings, women were in as good a position to inherit from their fathers). Book requested via Interlibrary loan to verify date..

\textsuperscript{117} Diane Avery and Alfred S. Konefsky, \textit{The Daughters of Job: Property Rights and Women’s Lives in Mid-Nineteenth Century Massachusetts}, 10 LAW & HIST. REV. 323, 324 (1992) (citing Professor Simon Greenleaf, lecture on “The Legal Rights of Women” at the Salem Lyceum during the 1838-39 season, \textit{H. OLIVER, HISTORICAL SKETCH OF THE SALEM LYCEUM} 43 (1879)) (Professor Simon Greenleaf was a professor and dean of Harvard Law School who lectured on the legal rights of women) In support of this position, Professor Greenleaf during his lectures on the legal status of women in the early nineteenth century asserted that women were equal. He asserted “[s]he is justly neither the servant, nor the sovereign of man; neither the slave of his will, nor the proper object of his obsequious servitude, or his adoration; --but his equal, his fellow-being, his partner in the social state.”

\textsuperscript{118} See \textit{Leo Kanowitz, Women And The Law} 35 (1969).

\textsuperscript{119} Avery, \textit{supra} note 117, at 334. Greenleaf asserted:

\begin{quote}
[I]f she were eligible to one political office, it would be because her sex does not unfit her for any; and the same code that would admit female legislators, ought, in equal reason, to make them eligible to all other offices. But how would ladies themselves regard a female sheriff; or captain of militia? The very constitution of society has, of necessity, allotted these employments to men. Not that he is wiser, and thus more capable of exercising them; but because of the distribution of social duties, these are more befitting his sex. . . .
\end{quote}

\textit{Id.} Greenleaf also asserted that the right to vote was justifiable:

\begin{quote}
Amid the storms which beat without, in the political world, the domestic hearth is yet the sanctuary of repose, and the domestic alter still receives the offering of the united hearts, to the god of peace and love. But if, in addition to all our other sources of party strife, as if the thousand existing elements of contention could not suffice, we were to array male and female electors with their candidate in opposition, it is easier to imagine the uproar that would ensue, than to foretell when and how it would end.
\end{quote}

\textsuperscript{120} \textit{Id.} at 328 (citing Sarah Grimké who drafted 15 letters dealing with the issue of women’s equality published as “Letters on the Equality of the Sexes and the Condition of Women”).
while next in the hierarchy, unmarried white women were not on an equal footing with white men.

Women in the 19th Century were plagued by economic, political, and social inequality. Confined to low paying jobs and unable to vote, many women turned to marriage for financial support and a place in society. . . . Women were often forced to enter undesirable unions because they could not support themselves otherwise. “When a woman therefore is thrown upon her own resources, she has to choose one of two things, marriage or prostitution.”  

Even though scholars disagree, they would all agree that unmarried white women were relatively better off as spinsters than as wives because up until the enactment of the Married Women’s Property Acts, marriage resulted in their “civil death.”

2. Married White Women: Beginning of the Metamorphosis

a. Absolute Impotence Under Doctrine of Coverture

Prior to 1835, two mutually inconsistent sources of rights primarily affected white women’s property interests, the Fifth Amendment and the Doctrine of Coverture. The first source protected property rights (for everyone except for slaves), while the latter one,

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121 Id. at 329 (citing Grimiké at 47) (according to Grimiké in her letter on the legal disabilities of women: There are few things which present greater obstacle to the improvement and elevation of women to her appropriate spear of usefulness and duty, then the laws which have been enacted to destroy her independence, and crush her individuality; laws which, although they are framed for her government, she has not voice in establishing, and rob her of some of her essential rights.

122 Murray supra note 6, at 147 (citations omitted).

123 See Chused, supra note 12, at 1361 n.3 (stating that Arkansas’s act passed in 1835; however, 1839 or 1840 is often stated as the approximation for the beginning of the transition period).


125 U.S. CONST. amend. V (ratified 1791) (stating that “[n]o person shall be declined of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation”).
temporarily\textsuperscript{126} neutralized its significance.\textsuperscript{127} Thus, effectively, the Fifth Amendment only protected property held by white men and unmarried white women.

With respect to the Doctrine of Coverture,\textsuperscript{128} Blackstone defined it as follows:

\textit{When, therefore complaint is made of the hardship of the law, in transferring to the husband, upon the marriage, all the wife’s personal property, the fruits of her industry and the income of her land; let it be remembered that by the same act he is made responsible for all the debts she may owe; is liable for her decent and respectable maintenance; is answerable, to the extent of all his property, for her language and her behavior, though she brought him not a dollar, and though he has married a spendthrift or a shrew; and that her claims on his estate are beyond force to resist, his art of elude, or his power to control).}

\textit{See also, Avery, supra note 117.}

\textit{Specifically, the wife’s disabilities included the following:}

1. Her tangible personality, subject to minor exceptions, instantly became her husband’s property; personality that subsequently came into her possession during the marriage also instantly became his.

2. She did not lose title to real property formerly held by her solely in fee, but her husband acquired an interest known as \textit{jure uxoris}, entitling him to sole possession and control during the marriage. A fortiori, all income from this realty belonged to the husband, with no duty to account to the wife. His interest was alienable at his discretion, and was subject to attachment by his creditors. Any realty later transferred to the wife during the marriage also became subject to \textit{jure uxoris}.

3. If a child was born of the marriage, the husband acquired an estate for his life in all of his wife’s realty, called ‘curtesy initiate’ while she lived, and continuing in him as ‘curtesy consummate’ at her death. Curtesy attached to realty received by the wife at any time before or during the marriage.

4. After their marriage, all real property transferred to the spouses jointly was held in tenancy by the entirety; while the marriage lasted, the husband was entitled to sole control and enjoyment of this property. At the death of either party, the survivor assumed sole ownership.

5. During the marriage, the wife could not contract, sue or be sued on her own behalf.

6. Her husband was entitled to all of her earnings. (citations omitted).
[T]he husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything and her condition during her marriage is called her coverture. Upon this principle, of union [of husband and wife] depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

... 

[F]or this reason a man can not grant anything to his wife . . . for the grant would be to suppose her separate existence."\(^{129}\)

The Doctrine of Coverture’s integration into the American legal system neutralized the significance of the Fifth Amendment because white women, as wives, were unable to own property exclusively or apart from their husbands or enter into contracts. Thus, they lacked standing to utilize the Fifth Amendment because their property rights were subsumed into their husbands.

Specifically, the Doctrine of Coverture had three devastating effects upon the rights of married white women. First, it eliminated their legal identities as property owners and merged the same with their husbands. This effect was most evident when examining the status of property initially owned by women who later married. Once betrothed, coverture prevented white women from possessing or managing property, including property owned prior to the marriage.\(^{130}\) All of their property and contractual rights passed to their husbands.\(^{131}\) Thus, while

\(^{129}\) BLACKSTONE, supra note 127, at 430 (emphasis in original).

\(^{130}\) See, e.g., Burdino v. Amperse, 14 Mich 90 (1866) (stating that in short women lost entirely all of the incidents concerning property and/or the ability to act in her own right).

\(^{131}\) Ultimately, in 1840, however, the equity courts responded to the need the equal property rights for women by establishing the separate estate in equity. This estate enabled a married woman’s land to be held in trust by a trustee. Married women were able to dispose of their property through the trust as if they were feme sole or married women whose rights were theoretically the same as married men. SALMON, supra note 12, at 81 (permitting married women to own and control real property as separate property; however, some equity courts required the women to obtain the husband’s consent, along with the wife’s acknowledgment of the lack of duress); see also CHESTER
white women were not technically divested of property interests held in fee simple before marriage, or to property transferred to them during the marriage, their interests were suspended during the marriage and husbands acquired an interest known as *jure uxoris*. This entitled them to sole possession and control; and, accordingly, gave them the right to all of the income from all property, including that which originally belonged to their wives.

Second, to the extent their “property” was being controlled by their husbands during the marriage, coverture put this property at risk because husbands did not have to account to their wives. In essence, husbands were like trustees without fiduciary duties. As a result, since husbands’ interests were alienable, all of their property could be attached by creditors, thereby making married white women’s “property” vulnerable and subject to seizure.

Third, coverture resulted in married white women’s inability to contract. As wives, they could not contract on their own behalf and certainly were not in a position to bind their separate property, which was now controlled by their husbands. Indeed, any attempt to convey their property, without their husbands, was of no effect. Accordingly, their legal status was essentially worse than the rights of infants since the contract of an infant was merely voidable while that of married white women was typically void.

However, while the Doctrine of Coverture temporarily divested married white women of the ability to assert rights, they were never totally divested of real property interests because of

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**Garfield Vernier, America Family Laws** 167 (1935) (ultimately, the husband is regarded as the beneficiary of the wife’s real property).

132 See Salmon, supra note 12.
133 Id. at 130.
134 Id. at 164.
135 Id. at 144.
136 See Schroeder, supra note 49, at 240.
137 James Schouler, A Treatise on The Law of Marriage, Divorce, Separation, and Domestic Relations, 239 (1921).
their inalienable right to dower. Notwithstanding this right, some scholars maintain that married white women were mere chattel since they, along with their children, were personal property and real property that simply belonged to their husbands.

b. Resurrection of Legal Identity With The Demise of Coverture

During the next phase of the metamorphosis for married white women, substantial changes in laws began to influence the ability of married white women to acquire and control property. Three categories of change are noteworthy.

First, inheritance laws changed. With respect to dower rules, many jurisdictions allowed married white women to waive dower by deed. Such changes affected their inheritance because it gave widows greater access to their deceased husbands’ personal estates, thereby enabling solvent families to emerge with assets upon the husband’s demise. In addition, many statutes enabled widows to have priority over creditors. Finally, some equity courts instituted

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138 See Pollock, supra note 127, at 418-425. The dower interest gave the wife a life estate and one-third of the husband’s realty if she survived him. The dower interest did not include the husband’s personality. Accordingly, the husband could bequeath his chattel and defeat the wife’s claim. Moreover, if the husband did intestate the wife’s claim could be subordinated to the husband’s creditors.

139 Id.


Put in the simplest terms: women were the chattel property of men under law until the early part of the twentieth century. Married women could not own property because they were property. A woman’s body, her children, and the clothes on her back belonged to her husband. When the husband died, another male, not the mother became the legal guardian of the children . . . Married women were what nineteenth century feminists called “civilly dead.”

141 Chused, supra note 12, at 1407 (During this era, many additional changes transpired, including the fact that married White women were able to avoid debtors’ prisons. Arguably, the abolition of imprisonment for women may have been designed to “provide protection for widows and abandoned women: Such women were more likely to be without means of support than young unmarried women and children.”)

142 Id.

143 See id.

144 Id. at 1405, n 241. (“The statues in Alabama provided priority only for real property, Indiana provided for a small amount of money ($100) to be free of debts. Massachusetts law provided priority to creditors, Michigan and Mississippi used the debtor exemption model as the basis for their statutes, and New Hampshire and Vermont gave the courts authority to make an allowance for a widow from an insolvent estate”).
a new separate estate for married white women. This empowered the married white women to gain control over their property.

Second, federal land grant policies changed and gave married white women an opportunity to obtain land. This change was significant because it reflected a departure from earlier policies which were not gender neutral. However, by the 1840’s, land grant legislation provided grants for heads of families in addition to widows. As a result, married white women were able to acquire land.

The enactment of the Married Women’s Property Acts constitutes the third category of change and most significant example of laws that influenced married white women’s control of property and resulted in the demise of coverture. One notable statute was the New York Act.
In essence, the first two sections insulated a married white woman’s property from her husband’s debts and declared that the property was the married white women’s separate property “as if she were a single female.” The third section provided that property obtained after the marriage would also be the married white women’s separate property, as “as if she were a single female.” Thus, through these enactments, married white women had a new legal status comparable to the status of unmarried white women. Marriage no longer stripped them of their legal identities, hindered their ability to control their separate property, or empowered their husbands with absolute control over the same.

Although the Married Women’s Property Acts were designed to undermine coverture, many scholars have asserted arguments to the contrary. For example, some conclude that “most of the acts were designed to establish simpler statutory procedures [concerning] women’s separate property, while changing as little as possible [to] the underlying institution of marriage.” Thus, while the Married Women’s Property Acts helped women gain control relative to their husbands over property, the acts themselves did very little to modify their social standing within the community. Indeed, support exists for the latter conclusion. The judiciary’s inability to completely endorse a married white woman’s separate status from her husband was evident in subsequent decisions made regarding women’s property rights. Thus, given these

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151 See Chused, supra note 12.
153 Id.
154 See, e.g., Seitz v. Mitchell, 94 U.S. 580, 584 (1876) (analyzing a District of Columbia statute which guaranteed married women the right to property they held before or acquired during marriage. In Seitz, Mary challenged the seizure of two tracts of land she had purchased with her own money, which land was seized to satisfy a judgment.
decisions, women were still in need of a revolution to alter their social status to regain their legal identities. Such a move was needed to help modify the views of conservative male legislators as well as conservative judges who were charged with interpreting them.

Accordingly, despite the passage of the Married Women’s Property Acts, many scholars concluded that married white women were still completely subsumed by the superior status of their husbands.\(^{155}\) Essentially, the conclusion of these scholars was premised on the general belief that the variance in legal status between married and unmarried white women was inconsequential because of the underlying social construct of male supremacy.\(^{156}\)

C. Indentured Servants

Indentured servants were “people bound to labor under a contract.”\(^{157}\) While most of them were “immigrants who lacked economic resources to pay for passage” to the United States,\(^{158}\) others were “male and female felons, paupers, vagrants, and political prisoners” that

\(^{155}\) Kevin C. Paul, Private/Property: A Discourse on Gender and Equality in American Law, 7 L. & INEQ. 399, 404-405 (1989) (“[t]he notion that a woman’s existence was completely subsumed in that of her husband underlay the Doctrine of Coverture.”); Mary E. Becker, Politics of Women’s Wrongs and the Bill of ‘Rights’: A Bicentennial Perspective, 59 U. CHI. L. REV. 453, 509 (1992) (asserting that women were excluded from the process that created the Bill of Rights and other substantial documents and as a result have been unable to substantially benefit from any of the existing laws).

\(^{156}\) See Paul supra note 155, at 405 (citing In re Lockwood, 154 U.S. 116 (1894) (stating that the United States Supreme Court leaves the determination of whether the word “person” included women to the State Supreme Court).


\(^{158}\) Id. at 754-755 (stating that immigrants fell into one of two categories: (1) immigrants from England, Scotland and Ireland who stereotypically consisted of paupers to those with gentry status between the ages of 15 and 25 who were bound by contract for a period of four to five years and (2) indentured servants that were called “‘redemptioners’” who “often traveled in larger family groups usually destined for Pennsylvania.” Often [indentured servants] were given time to pay for the cost of passage, which was typically thirty days, or if unable to pay were “sold into servitude by the master of the vessel for whatever period would cover the passage fare”).
the British government wanted to transport to the colonies.  

Indentured servants were like temporary slaves in minor respects. First, they were part of an institution of “bound labor” just as slaves were part of an institution of “bound labor.” Second, during the contractual period of service, indentured servants, like slaves, were “property.” With this legal capacity, or lack thereof, indentured servants, like slaves, could not “marry, trade with others, or travel without the master[s]’ consent.”

However, notwithstanding their similarities to slaves during their period of servitude, white indentured servants were not part of an institution that kept them in perpetual bondage and isolated them because of their hue. As one scholar noted,

White indentured servitude cannot be equated with the enslavement of Africans and African Americans. Any similarities in the early seventeenth century treatment of white indentured servants and “Negro Servants” are insignificant when compared to the racial oppression perpetuated by the institution of American slavery and race prejudice. Indentured servants were to become free; slaves were to remain unfree.

Further, once indentured servants completed their term of service, they either received property or were able to receive public assistance.

Upon the completion of service, indentured servants in most colonies received “freedom dues.” At first, the colonies often made land grants. In early Maryland, for example, perhaps as many as ninety percent of indentured servants received land upon completion of service. Eventually, however, the colonies turned to either monetary payments or payments in kind by the master.

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159 Id. at 756.
160 Id. at 760.
161 Id. at 752.
162 Id. at 757.
163 Id.
164 Id. at 750.
165 Id. at 759.
166 Id. (citations omitted).
Thus, through their access to and receipt of property rights, indentured servants, unlike slaves, had an easier opportunity to become part of the melting pot that comprised the majority culture. Indentured servants only temporarily had to bear the burden of bondage.

D. Freedwomen and Freedmen

1. Ideal Property Rights

Since the institution of slavery prevailed in southern states during this era, freedmen and freedwomen (“liberated people of color”) only lived in the northern section of the country or in those states where slavery had been abolished. In those jurisdictions, their legal status was similar in some respects to that held by unmarried white women. Like the latter, liberated people of color ideally enjoyed basic civil rights like the right to contract or own property (but did not have the right to sit on a jury, vote, or hold office).

As members of the dominant culture, liberated people of color were technically no longer in bondage because they were not directly part of the slave subculture. However, in reality, their ability to seize benefits underlying those rights was limited even though they had “escaped” from slavery and the subculture. For example, such limitations are reflected in *Malinda v Gardner*.

In that case, emancipated black women (Malinda and Sarah) failed in their attempt to overturn a probate court’s decision to let their father’s property escheat to the State of Alabama.

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167 See *supra* note 10, which displays Table 2: Population of the South 1790-1860 By Type.
170 Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 239 (1999) (Ultimately, the children’s lawsuit was not a complete failure. The Supreme Court enabled the intestate’s children from both families to share equally in their father’s estate, but only because of an act subsequently passed by the state legislature. Without the legislation, existing laws would have prohibited such an outcome).
In *Gardner*, the daughters sought to inherit from their father who had died intestate.\(^{171}\) Prior to his demise, the father, along with his companion, the daughters’ mother, had been slaves.\(^{172}\) However, the parents’ slave master had directed their manumission in his will.\(^{173}\) Likewise, Malinda and Sarah, their offspring, had also been emancipated.\(^{174}\)

However, notwithstanding the daughters’ emancipated status when they brought the lawsuit, or their father’s emancipated status at the time of his death, the Supreme Court of Alabama refused to overturn the probate court’s decision as follows:

Malinda and Sarah could not claim as heirs proper of their father, for the reason that both the father and mother were slaves, and persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract, are necessarily incompatible with the nature of slavery.\(^{175}\)

Then, the Supreme Court of Alabama “concluded that the companionate and biological bonds asserted did not yield any legal relationships. Sexual relationships conducted under the rubric of marriage yielded a fixed set of abilities and disabilities that structured the legal relationships of the parties to each other and their offspring.”\(^{176}\) In effect, this Court’s ruling had multiple effects, aside from simply inhibiting the daughters, as freedwomen, from inheriting. As one scholar noted:

The decision in *Gardner* has interesting effects in the allocation of wealth among groups[, which] promotes gender hierarchy. . . . But the fact pattern of *Gardner* identifies the rule’s racial effects. The appellants, Malinda and Sarah, had been manumitted with their father and mother, and hence were not bringing their claims as persons enslaved. But the legal inquiry conducted by the court turned

\(^{171}\) *Gardner*, supra note 169, at 724.
\(^{172}\) *Id.* at 724-725.
\(^{173}\) *Id.* at 725.
\(^{174}\) *Id.*
\(^{175}\) *Id.* at 723.
\(^{176}\) Davis, supra note 170, at 241.
on the characterization of [the parents’] sexual relationship while enslaved. *Even after its removal, the disability of enslavement continued to govern their property rights as free people of color.*

Moreover, this case had even broader implications because it could only have a devastating effect upon liberated people of color:

> The rule has a racial impact in another, perhaps more obvious way, because of the overlap of slavery and race. By law, whites could not be enslaved. Therefore, the rule only applied to the succession of the estates of those who were legally black. The racial rules of enslavement meant that the *Gardner* rule would result in differential treatment between whites and blacks. *While not all blacks were affected, only blacks could be affected.*

2. **Freedmen as Slave-Owners**

The *Gardner* case also illustrates another compelling result of manumission. After Malinda and Sarah’s father became a freedman and left their mother, he started living with another enslaved black woman and became a slavemaster himself. Notably, their father bought his second companion but never emancipated her. As a result, she remained a slave throughout their relationship, and their children became slaves upon birth. However, although the father played a dual role as slave master and companion, once he died his role as slave master governed the outcome of the probate court’s decision. The Court also decided that neither the second female slave companion nor their offspring, also considered slaves, could inherit via the laws of intestacy because they were merely part of the estate that had escheated to the state. In its ruling, the Court stated that “[c]ase law was well-settled that a decedent’s estate could and did

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177 *Id.* (emphasis added).
178 *Id.* at 241-242 (Emphasis added).
179 It should be noted that freedmen typically could only enslave their own family members. *See, e.g.* Kyler & Wife v Dunlap, 57 Ky 561, 567-68 (1857).
181 *Id.* at 238.
182 *Id.*
183 *Id.*
include his own family, even in the case of blacks who publicly held themselves out as family.\textsuperscript{184} Further, as Professor Davis stated:

As the conflict in \textit{Gardner} illustrates, many of these abilities entail property entitlements, thereby shaping economic relations between the parties. Denied these abilities, the enslaved were not entitled to the estates of their deceased companions, nor could their children exercise inheritance rights. Thus, the status of enslavement disabled significant property rights that might normally stem from the formation of sexual families.\textsuperscript{185}

3. Freedmen or Fugitive: Impact of the Fugitive Slave Acts

Notwithstanding their legal status, liberated people of color were always in jeopardy of being recaptured because of the Fugitive Slave Acts of 1793 and 1850.\textsuperscript{186} In essence, the Act of 1793

\begin{quote}
[a]uthorized the executive officers of each state to seek their corresponding officers in other states to have runaway slaves arrested upon an indictment or an affidavit sworn before a magistrate. The escapees could then be transferred to their states of origin or brought before a magistrate, and upon the slaveholder claimant’s successful prosecution of the matter, [she or he] could be given an order permitting removal of the enslaved person.\textsuperscript{187}
\end{quote}

The subsequent Act of 1850 was even more imposing because of the role played by federal marshals:

\begin{quote}
Recognizing that state courts and state officials had become unreliable because they refused to follow the provisions of the Fugitive Slave Act of 1793, the Act removed jurisdiction over such matters to federal marshals and included more stringent punishments of those who would practice civil disobedience. Most controversial though, was that the Act required local whites to aid the federal marshals working on the behalf of Southern owners and their agents in capturing alleged fugitives.\textsuperscript{188}
\end{quote}

\textsuperscript{184} \textit{Id.} at 238 (citation omitted).
\textsuperscript{185} \textit{Id.} at 241.
\textsuperscript{187} \textit{Id.} at 778.
\textsuperscript{188} \textit{Id.} at 784.
Since recapturing slaves may or may not have been legitimate and mistakes could have been made resulting in legitimately freed blacks being thrown back into slavery, some jurisdictions like Ohio passed legislation making it a crime to remove liberated people of color. However, notwithstanding that legislation, the Black Laws of 1804 in Ohio worked in contravention of the same because it protected slaveholders’ rights and supported the Fugitive Slave Act(s) as follows:

[T]he statute set forth that any person who prevented an owner’s recapture of a fugitive could be fined. Nothing in the statute indicated that blacks could testify in their defense.

The Black laws were especially pernicious, insofar as they provided a further basis for limiting blacks’ civil rights within the state of Ohio, notwithstanding their legitimate free status. They could not vote, could not testify against whites, and could not serve on juries. In order to remain in the state, they needed certificates from freedom signed by a court – any court in the United States – certifying their free status. By 1807, they needed to file a $500 bond for good behavior.

The Black laws also had a negative impact on freedwomen:

Mixed-race slave women were not always privileged by their ties to whiteness. If they had been enslaved, they could be returned to slavery if the relatives who owned them would deny them freedom, and when they were “free people of color,” they could be denied access to public education if they did not look “white enough.”

V. CONCLUSION

During this era, this country, particularly in the southern states, consisted of two separate cultures – one for the dominant culture and one for the slave subculture. As a result of this division, property rights existed for the former and not for the latter. However, even as enslaved

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189 Id. at 778.
190 Id.
191 Id. (Citation omitted).
192 Id. at 779.
black women gained their freedom and left the slave subculture, they were still unable to fully permeate the dominant culture to obtain the maximum benefits of those rights. They simply could not escape the vestiges of slavery. Stated another way, since laws like the Fugitive Slave Acts remained in place, they were always susceptible to being thrown back into bondage. As a result, property rights did not become part of the “natural rights” of enslaved or liberated black women. At this point in history, the infrastructure of laws that created the institution of slavery, that marginalized women, and that blocked them from achieving the ultimate goal of having property rights, had yet to be abolished.
A SLICE OF HISTORY UNDERLYING THE CURRENT FINANCIAL PANDEMIC
BLACK WOMEN AND PROPERTY 1800 TO 1850:
BLACK WOMEN AS PROPERTY

Appendix A - Population of the Original Thirteen Colonies, Selected Years by Type\textsuperscript{193}

<table>
<thead>
<tr>
<th>State</th>
<th>1750 White</th>
<th>1750 Black</th>
<th>1790 White</th>
<th>1790 Free (Non-white)</th>
<th>1790 Slave</th>
<th>1810 White</th>
<th>1810 Free (Non-white)</th>
<th>1810 Slave</th>
<th>1860 White</th>
<th>1860 Free (Non-white)</th>
<th>1860 Slave</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>108,270</td>
<td>3,010</td>
<td>232,236</td>
<td>2,771</td>
<td>2,648</td>
<td>255,179</td>
<td>6,436</td>
<td>310</td>
<td>451,504</td>
<td>8,634</td>
<td>-</td>
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<tr>
<td>Delaware</td>
<td>27,208</td>
<td>1,496</td>
<td>46,310</td>
<td>3,899</td>
<td>8,887</td>
<td>55,361</td>
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<td>4,177</td>
<td>90,589</td>
<td>19,829</td>
<td>1,798</td>
</tr>
<tr>
<td>Georgia</td>
<td>4,200</td>
<td>1,000</td>
<td>52,886</td>
<td>29,296</td>
<td>145,414</td>
<td>1,801</td>
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<td>591,550</td>
<td>3,538</td>
<td>462,198</td>
<td>-</td>
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<td>235,171</td>
<td>33,927</td>
<td>111,502</td>
<td>515,918</td>
<td>83,942</td>
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</tr>
<tr>
<td>Massachusetts</td>
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<td>432,964</td>
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<td>550</td>
<td>141,112</td>
<td>630</td>
<td>157</td>
<td>182,690</td>
<td>970</td>
<td>-</td>
<td>325,579</td>
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<tr>
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<td>5,354</td>
<td>169,954</td>
<td>2,762</td>
<td>11,423</td>
<td>226,868</td>
<td>7,843</td>
<td>10,851</td>
<td>646,699</td>
<td>25,318</td>
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<td>11,014</td>
<td>314,661</td>
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<td>918,699</td>
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<td>15,017</td>
<td>3,831</td>
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<td>19,800</td>
<td>289,811</td>
<td>5,041</td>
<td>100,783</td>
<td>376,410</td>
<td>10,266</td>
<td>168,824</td>
<td>629,942</td>
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<td>795</td>
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<td>3,484</td>
<td>958</td>
<td>73,214</td>
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<td>39,000</td>
<td>140,178</td>
<td>1,801</td>
<td>107,094</td>
<td>214,960</td>
<td>4,554</td>
<td>196,655</td>
<td>291,300</td>
<td>10,002</td>
<td>402,406</td>
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<td>129,581</td>
<td>101,452</td>
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<td>12,866</td>
<td>292,627</td>
<td>551,34</td>
<td>30,570</td>
<td>392,18</td>
<td>1,047</td>
<td>299,581</td>
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<td>2,792</td>
<td>58</td>
<td>681</td>
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<td>167</td>
<td>1,005</td>
<td>12,666</td>
<td>361</td>
<td>1,775</td>
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</tbody>
</table>

\textsuperscript{193} Wahl, supra note 10.
### A SLICE OF HISTORY UNDERLYING THE CURRENT FINANCIAL PANDEMIC

**BLACK WOMEN AND PROPERTY 1800 TO 1850:**
**BLACK WOMEN AS PROPERTY**

<table>
<thead>
<tr>
<th>Year</th>
<th>White</th>
<th>Black</th>
<th>Free (Non-white)</th>
<th>Slave</th>
<th>White</th>
<th>Slave</th>
<th>White</th>
<th>Slave</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>1790</td>
<td>340</td>
<td>420</td>
<td>325</td>
<td>777</td>
<td>691</td>
<td>685</td>
<td>3310</td>
<td>247</td>
<td>States</td>
</tr>
<tr>
<td>1810</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

1800

1850

Note: The table above provides historical data on the population of white and black women, including those who were free and those who were slaves, for the years 1790 and 1810. The figures are represented in thousands, indicating the number of individuals in each category.

1790

1810

States

1790

1810

1860

1750

1860

White

Black

Free (Non-white)

Slave

White

Slave

White

Slave

States