

Foreword: Private and Public Revisited Once Again

Mark A. Graber

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Fourth Amendment Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

75 MD. L. REV. 135 (2015)

This Symposium is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

SYMPOSIUM

The 2015 Maryland Constitutional Law Schmooze

FOREWORD: PRIVATE AND PUBLIC REVISITED ONCE AGAIN

MARK A. GRABER*

Once upon a time, American lawyers knew the difference between private and public. Private law concerned relationships between individuals. Public law concerned the structure and powers of government institutions. Contracts was a private law subject. The Contracts Clause of Article I, Section 10 was a public law subject.

Constitutional law policed the boundaries between the private and the public. Government regulations had to have public purposes.¹ Governments could regulate only business “affected with a public interest.”² *Lochner v. New York*³ and other cases implementing the freedom of contract said to be protected by the Due Process Clauses of the Fifth and Fourteenth Amendments focuses on whether the law under constitutional attack was a legitimate exercise of the police power or an illegitimate attempt to support one party in a private bargain.⁴ The religion clauses protected private belief but not public actions.⁵ The state action requirement of the Fourteenth Amendment entailed that Congress could prohibit public discrimination, but not private discrimination.⁶ The New Deal and Great So-

© 2015 Mark A. Graber.

* Jacob A. France Professor of Constitutionalism, University of Maryland Frances King Carey School of Law. Thanks to Deans Donald Tobin and Maxwell Stearns for their support, to all the participants in the 2015 Maryland Constitutional Law Schmooze for the stimulating ideas and willingness to engage, and to the *Maryland Law Review* for their publication and forbearance.

1. See Keith Whittington, *Some Dilemmas in Drawing the Public/Private Distinction in New Deal Era State Constitutional Law*, 75 MD. L. REV. 385 (2015).

2. *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

3. 198 U.S. 45 (1905).

4. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

5. See *Reynolds v. United States*, 98 U.S. 145 (1878).

6. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

ciety obliterated some public/private distinctions while erecting new ones. Government cannot search without a warrant in places where people have a “reasonable expectation of privacy.”⁷ The right of privacy protected by the Due Process Clauses of the Fifth and Fourteenth Amendments encompasses rights to birth control, abortion and intimate behavior.⁸

These and other public/private distinctions are constantly being deconstructed and reconstructed. New Dealers demonstrated that private law was really public law. The freedom of contract made sense only in light of state-made property rules that authorized persons to acquire holdings in certain ways, but not others, and to use those holdings in certain ways, but not others.⁹ Progressive and New Deal reformers insisted that the public was deeply interested in regulations that were formerly thought only to concern private interests.¹⁰ Nevertheless, rather than abandon privacy, privacy moved from economics to the First Amendment and lifestyle choices. Religion became the epitome of a private choice protected from government regulation,¹¹ as did the right to decide whether to bear or beget a child,¹² and the right to decide who to invite into one’s home.¹³

The new private/public distinctions soon became antiquated and in need of further reconstruction. In a welfare state in which government benefits are pervasive, distinguishing private from public actors became increasingly difficult, if not impossible.¹⁴ Feminists complained that the “personal was political.”¹⁵ Conservatives complained when the right to privacy was extended from claims that police ought not to be able to learn about what was happening in marital bedrooms to claims that same-sex couples had the right to marry, a very public action.¹⁶ New technologies

7. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

8. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

9. *See* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

10. *See* *Nebbia v. New York*, 291 U.S. 502, 536 (1934) (finding that “there is no closed class or category of businesses affected with a public interest”).

11. *See* *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting) (finding that private “religious activities which concern only members of the faith are and ought to be free”).

12. *Roe*, 410 U.S. at 152–53.

13. *See* *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (“[I]t is the constitutional right of every person to close his home . . . on the basis of personal prejudice.”).

14. *See* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* (1996).

15. *See* Kimberly D. Bailey, *Lost in Translation: Domestic Violence, ‘The Personal Is Political,’ and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255 (2010).

16. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, CJ, dissenting) (stating that “the privacy cases provide no support for the majority’s position, because petitioners do not seek privacy”).

enabled the police to gain substantial information about residents without ever physically invading a place where persons had “a reasonable expectation of privacy.” These developments spurred commentators and courts to reimagine what was public and what was private. Privacy was slowly transformed into autonomy. David Gray and Danielle Citron imagined a right to quantitative privacy, which prohibited government in certain circumstances from keeping track of all the public actions of particular persons.¹⁷

The Gray and Citron essay, *The Right to Quantitative Privacy*,¹⁸ highlights why the University of Maryland Francis King Carey School of Law is a particularly appropriate site for a constitutional law schmooze devoted to the public and private. For the last decade, Maryland Law has hosted an annual Schmooze where the leading thinkers in the fields of law, political science, history and philosophy discuss pressing issues of constitutionalism. During this time period, that law school has also been home to leading scholars whose work interrogates, deconstructs, and rebuilds distinctions between public and private. Consider:

- Danielle Keats Citron’s *Hate Crimes in Cyberspace*,¹⁹ which explores the extent to which the internet is a public space in which speech ought to be regulated to ensure civil discourse or a private space in which speech may be utterly uninhibited.²⁰
- Frank Pasquale’s *The Black Box Society: The Secret Algorithms That Control Money and Information*,²¹ which discusses how which major corporations aggregate public and semi-public information to manipulate consumers and citizens.
- Martha Ertman’s *Love’s Promises: How Formal and Informal Contracts Shape All Kinds of Families*,²² which considers how the contractual agreements that structure relationships in the public world of work function to structure relationships in the private world of love.
- Jana Singer’s *Divorced from Reality: Rethinking Family Dispute Resolution*,²³ which documents how divorce courts are moving from resolving

17. David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62 (2013).

18. *Id.*

19. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

20. See James Grimmelmann, *The Illegal Process: Basic Problems in the Making and Application of Censorship*, 79 U. CHI. L. REV. DIALOGUE 58 (2013) (discussing additional public and private means of regulating the Internet).

21. FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015); see also Frank Pasquale, *Grand Bargains for Big Data: The Emerging Law of Health Information*, 72 MD. L. REV. 682 (2013).

22. MARTHA ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015).

23. JANA SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* (2015).

private disputes between parties to reintegrating the broken family back into the more general society.

- Richard Boldt and Jana Singer's article, *Juristocracy in the Trenches*,²⁴ which details how courts are more generally moving from private dispute resolution to resolving public problems.

The Papers in this Issue by Elvin Lim, John Compton, Carol Nackenoff, and Keith Whittington provide crucial background material by offering original insights into how Americans at different periods of time have understood the private and the public. Lim sees the Framers of the Constitution of 1787/1791 as laying the constitutional foundations for privacy rights.²⁵ Compton suggests we look to nineteenth-century evangelicals for the notion of moral agency that is at the heart of contemporary privacy rights.²⁶ Nackenoff explores the expansion of what constituted the "public" during the Progressive Era.²⁷ Whittington demonstrates that the "private" was alive and well in state constitutionalism during the New Deal.²⁸

Brookes Brown and Maxwell Chibundu examine the theory of private and public. Both papers explore the nature of "states" or "res publica," the thing public. Brown points out that the state action doctrine may be incoherent because the notion of the state entailed by that doctrine is incoherent.²⁹ Chibundu explores whether such public entities as states may have dignity, a characteristic normally equated with private human beings.³⁰

Some participants in the symposium offer new reflections on longstanding problems of private and public. Henry Chambers and James Oleske are concerned with how privacy impacts free exercise rights. Both comment on the conceptual transformations that occur when free exercise rights once asserted by private individuals are asserted by private institutions. Chambers worries about how free exercise is reinterpreted when the private entity is a religious institution seeking exemptions for federal land

24. Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82 (2006).

25. Elvin T. Lim, *The Federalist Provenance of the Principle of Privacy*, 75 MD. L. REV. 415 (2015).

26. John W. Compton, *Evangelical Reform and the Paradoxical Origins of the Right to Privacy*, 75 MD. L. REV. 362 (2015).

27. Carol Nackenoff, *Privacy, Police Power, and the Growth of Public Power in the Early Twentieth Century: A Not so Likely Coexistence*, 75 MD. L. REV. 312 (2015).

28. Whittington, *supra* note 1.

29. Brookes Brown, *A Conceptual Disaster Zone Indeed: The Incoherence of the State and the Need for State Action Doctrine(s)*, 75 MD. L. REV. 328 (2015).

30. Maxwell O. Chibundu, *Can, Do, and Should Legal Entities Have Dignity?: The Case of the State*, 75 MD. L. REV. 194 (2015).

use and anti-discrimination laws.³¹ Oleske worries about how free exercise is reinterpreted when the private entity is a for-profit business claiming the right to be exempt from federal laws mandating they provide private employees with health insurance plans that include contraception.³² Several papers focus on privacy rights as they have played out in abortion and same-sex marriage. Stuart Chinn explores the distinction between arguments for abortion rights that focus on a more general, universal right to privacy, and arguments for abortion rights that focus on the particular aspects of privacy at issue in the abortion controversy.³³ Ronald Kahn details how changes in public understandings of privacy rights help explain the Supreme Court decisions interpreting the Due Process Clause as forbidding states to prohibit same-sex intimacy and same-sex marriage.³⁴ Judith Baer examines how rights to privacy and equality have dovetailed and conflicted over the past half century.³⁵

Howard Schweber, Julie Novkov, Madison Kilbridge and Jason Iuliano examine new issues raised by technological and conceptual developments in recent years. Schweber points out how changes in the notion of the harms that can be considered public fuel both environmental movements and movements to prohibit pregnant women from abusing alcohol and drugs.³⁶ Kilbridge and Iuliano raise concern about the ways in which new technologies in neuroscience may interfere with mental privacy.³⁷ Novkov takes on a central issue perplexing campus administrators, how to balance public and private concerns, and well as equality interests, when preventing and punishing sexual assault on campus.³⁸

These and other contemporary efforts to figure out the boundary between the private and the public trench on the relationship between the private and the public. One the most common view, the public exists to protect the private. Thomas Jefferson suggested this interpretation of the public/private relationship when he claimed that “all men . . . are endowed

31. Henry L. Chambers, Jr., *Telescoping and Collectivizing Religious Free Exercise Rights*, 75 MD. L. REV. 392 (2015).

32. James M. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, The Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142 (2015).

33. Stuart Chinn, *University Arguments and Particular Arguments on Abortion Rights*, 75 MD. L. REV. 247 (2015).

34. Ronald Kahn, *The Right to Same-Sex Marriage: Formalism, Realism, and Social Change in Lawrence (2003), Windsor (2013), & Obergefell (2015)*, 75 MD. L. REV. 271 (2015).

35. Judith A. Baer, *Privacy at 50: The Bedroom, the Courtroom, and the Spaces in Between*, 75 MD. L. REV. 233 (2015).

36. Howard Schweber, *Legal Epistemologies*, 75 MD. L. REV. 210 (2015).

37. Madison Kilbridge & Jason Iuliano, *Neuro Lie Detection and Mental Privacy*, 75 MD. L. REV. 163 (2015).

38. Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. ____ (2016).

by their Creator with certain inalienable rights” and that “To secure these rights, governments are instituted among men.”³⁹ We have the public sphere to ensure the existence of the more valuable private sphere. Justice Anthony Kennedy took this Jeffersonian position in *Obergefell v. Hodges* when he claimed that a judicially enforceable Constitution was a means of ensuring that actions in the public sphere did not trench on the valuable intimacy and autonomy rights persons enjoyed in the private.⁴⁰ The dissenting opinions responded that the central purpose of the public is to define the private, a view best understood as challenging the majority’s understanding of which public processes best secured the more valuable private.⁴¹

Justice Brandeis’s famous dissent in *Olmstead v. United States* suggests an alternative relationship, that the private provides the foundation for a more robust public. His assertion that “the right to be let alone” is “the most comprehensive of rights and the right most valued by civilized men”⁴² was rooted in the belief that the persons needed privacy to develop their “intellect . . . their beliefs (and) their thoughts.”⁴³ Privacy was a fundamental condition for fulfilling public obligations as a citizen. This commitment to the private as a means for securing the public explains why Justice Brandeis informed the American Jewish community that “to be good Americans we must be better Jews”⁴⁴ and why he insisted in *Whitney v. California* that “public discussion is a political duty.”⁴⁵ Justice Brandeis, the first Jewish Supreme Court Justice, believed that people developed capacities in the private that enabled them to enrich both their public lives and the public lives of their community.

The Brandeisian vision of the public interest in privacy has largely vanished from constitutional discourse. Justice Kennedy spoke for most liberals in *Lawrence v. Texas* when he announced that the home is an enclave for intimate behavior that is of no interest to the public.⁴⁶ What goes on in the home, stays in the home. Those conservative justices and legal

39. Thomas Jefferson, *The Declaration of Independence*, in *THE PORTABLE THOMAS JEFFERSON* 235 (Merrill D. Peterson ed., 1975).

40. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (noting that “[a]n individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act”).

41. See *id.* at 2625 (Roberts, C.J., dissenting) (“By deciding this question under the Constitution, the Court removes it from the realm of democratic decision.”).

42. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

43. *Id.*

44. Louis D. Brandeis, *The Fruits of Zionism*, in *BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS* 50 (Solomon Goldman ed., 1942).

45. *Whitney v. California*, 274 U.S. 357, 365 (1927) (Brandeis, J., dissenting).

46. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.”).

commentators who disagree rarely argue that politics is ennobling, only that some particular rights are not constitutionally protected. When Justice Scalia declared that bans on certain forms of intimacy reflect public beliefs “that certain forms of sexual behavior are immoral and unacceptable,”⁴⁷ he does not explore whether these beliefs are reasonable, are the consequences of considerable deliberation, or ought to be the concern of citizens engaging on politics in a world alternatively threatened by nuclear and climate disasters. One issue this Symposium puts on the table is whether a right to be let alone, that was once a precondition to better citizenship, threatens, in the modern world of hyper-liberalism, to become a right to escape citizenship.

47. *Id.* at 599 (Scalia, J., dissenting).