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History's Double Edge: A Comment on *Modernization of Marital Status Law*

RICHARD H. CHUSED*

Some of you might wonder why a symposium on divorce and feminist legal theory would begin with a discussion of history. What could the married women's property and earnings acts, now relegated to the mists of history, possibly have to say to those concerned about contemporary family law? Professor Reva Siegel has erased all doubts about the wisdom of looking to history for the creation of a symposium agenda. Her work has immeasurably enriched our understanding of nineteenth-century reforms of married women's property law. By telling us about the "joint property" claim,[1] clarifying the meaning of the earnings statutes adopted before and after the Civil War, and establishing ideological links between various reform eras, she has raised a set of questions that could fill the topical needs of several more symposia like this one.

Professor Siegel's papers fill some gaping holes in the historical understanding of married women's property regulations. Prior to her work, the orthodox history of this area largely ignored the joint property claim, neglecting its roots in early abolitionist and utopian communities and its broad acceptance by pre-Civil War ultraists. Historians claimed that the earliest married women's property reforms enacted before 1848 appeared because of the developing cult of domesticity, the need to rid property markets of impediments to transfer, and concern for debtors during the depression of the late 1830s and early 1840s. Although scholars noted that feminist efforts to influence legislatures began at about the same time women met at the famous Seneca Falls Convention of 1848, lobbying by women supposedly had little influence on earlier reforms.[2] Work on post Civil War reforms has also ignored the joint property claim. The relation-

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* Professor of Law, Georgetown University Law Center. My thanks go to the *Georgetown Law Journal* and The Georgetown University Law Center for sponsoring this symposium, which has produced a wonderful set of papers. Special credit for organizing the event goes to my colleague Mitt Regan, whose energy and talent attracted a gifted set of thinkers to Georgetown.

1. Professor Reva Siegel's paper for this symposium should be read together with a companion piece, Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994), which describes in great detail the contours of the "joint property" rights movement. That article briefly discusses the contours of the earnings statutes taken up more completely in the present symposium. My comments are sparked as much by *Home as Work* as by her work for this symposium. *See* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994).

2. *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983). *See generally* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982).

ship between the Civil War era's attraction to contractarian theories of property and the later married women's property and earnings statutes has been carefully parsed,[3] but no one before Professor Siegel has traced the lengthy web of connections between the earnings statutes, suffrage claims, family law, and nineteenth-century feminist theories about property.

As one of those responsible for propagating the orthodoxy, at least with respect to married women's property acts passed before 1850, I believe that Professor Siegel's work indicates the need for further review of the nexus between feminist movements and married women's property law—even for the earliest antebellum legislation. Although women's conventions and large scale legislative lobbying probably did not blossom until the era of the Seneca Falls gathering in 1848, many of the theoretical roots for that meeting developed in earlier times. There probably are links between married women's property acts adopted in the 1830s and 1840s and the then extant feminist legal theories that were not noticed by myself and others writing about the early legislation. Investigating that possibility is one purpose of this comment. The other is to explore some of the links between Professor Siegel's work and the contemporary debates on the economic consequences of divorce.

I. HISTORICAL REAPPRAISAL

It is impossible to gainsay the intimate relationship between property law and family law. Given the existence of no-fault divorce statutes in all states, contemporary practitioners and academics spend more time on the economic consequences of splintering families than on the underlying reasons for their demise.[4] The historic roots of this link between property and divorce run deep. When, for example, Maryland adopted its first general divorce statute in 1842, after a half-century of reliance upon private acts adopted by the state legislature to control family dissolution,[5] the courts were given

> full power to award alimony to the wife and to award to the wife such property or estate, as she had when married or the value of the same or of such part thereof as may have been sold or converted by the husband,

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3. The best example of this work is Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988).

4. All the papers in this symposium, of course, focus on the economic aspects of divorce. For additional consideration of this topic, see, e.g., MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987).

5. The story of this private act era is told in my just-released book, RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW (1994).

> having regard to the circumstances of the husband at the time of the divorce, or such part of any such property as the court or chancellor may deem reasonable . . . .[6]

This provision had several important consequences. First, aside from alimony, ex-wives had no claim upon any property brought to a marriage by a husband, regardless of whether he owned the asset before marriage or obtained it during the marriage. Although women of intact marriages might claim dower upon the death of a landed husband,[7] that right disappeared upon divorce. Second, a woman could ask the divorce court to restore property she brought to a marriage, but the court was not obligated to give it to her. Courts could, and surely did, take into account the "circumstances of the husband at the time of the divorce." They were also allowed to return to the wife a "reasonable" portion of the property. Put more crassly, it was proper to return less than all the assets a woman brought to the marriage. If the court felt she did not need or deserve the property, there was no requirement that it be restored.

Third, a woman could make no greater claim to property she brought to the family after marriage than she could to property she owned prior to her wedding. This was serious business. Common law rules in effect throughout the United States in the early part of the nineteenth century gave all the personal property, save intimate paraphernalia, of a wife to her husband once he (as routinely occurred) reduced it to his possession. Nothing in the divorce statute required the court to return any of this property upon divorce. All real property of a married woman was subject to her husband's management and control. While divorce terminated the management right, it would not automatically terminate encumbrances validly imposed on the land prior to the divorce.

Many states, including Maryland, provided one limited escape route from the common law property rules. A male property owner could convey assets to a married woman in the form of an equitable separate estate. The documents establishing such an estate usually created a trust, named male trustees to manage the property, and specified the powers the married woman could exercise over the assets. Unless she was explicitly granted authority to order the trustees to convey the property during her life, dispose of the assets at her death, or manage the holdings in accordance

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6. An Act to Give to the Chancellor and the County Courts as Courts of Equity Jurisdiction in Cases of Divorce, ch. 262, 1841 Md. Laws (1842).

7. Traditional common law dower allowed women to claim, ahead of creditors, a one-third life estate in property held by the husband at any time during the marriage. Many modifications to this rule were made in various states, including removal of the preference over creditors, application of the interest only to property actually held by the husband at his death, and easier methods of paying out dower in cash rather than land. *See* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 141-84 (G. Edward White ed., 1986).

with her wishes, a wife was a passive beneficiary of the separate estate. Creation of such a bare separate estate gave to the trustees the power to exercise what were normally the husband's common law marital property rights. Use of the separate estate rose during the 1830s and 1840s.[8] But most women obtaining divorces in those decades did not hold separate estate property. If a woman brought property into her marriage unprotected by a separate estate and then divorced, she was left with the faint hope that a divorce court judge would give part of it back to her. The substantial scope of the restrictions on property ownership by married women makes the strength of the joint property claim much more obvious. Claiming an entitlement to a portion of family wealth was a frontal assault on the economic structure of marriage and divorce.

Alimony was not a satisfactory alternative. Like the return of property to a divorcing woman, alimony would only be awarded if the court found that the ex-husband could afford to pay alimony and that the wife deserved the award. Obtaining alimony, therefore, was not guaranteed. If, for example, property brought to a Maryland marriage by a woman was returned to her because of the misconduct of her ex-husband, she would be denied alimony for lack of need.[9] Husbands deserting the state were unlikely sources for funds. Finally, alimony awards were often small, perhaps only enough to provide some sustenance pending the (presumed) remarriage of the recipient.[10]

The adoption of a married woman's property act in Maryland[11] almost exactly one year after passage of the first general divorce statute in 1842, altered this picture in ways suggesting that debates about the joint property claim and its universal rejection by legislators may have had more to do with the narrow scope of some early married women's acts than I or anyone else has previously noted. Section 1 of the Act allowed married women to "become seized or possessed of any property, real or of slaves, by direct bequest, demise, gift, purchase or distribution, in her own name, and as of her own property, *provided* the same does not come from her husband after coverture."[12] That overt refusal to recognize the legality of joint property, even when established voluntarily by a married couple,[13]

8. Chused, *supra* note 2, at 1372-84.

9. Tayman v. Tayman, 2 Md. Ch. 393, 400 (1851).

10. CHUSED, *supra* note 5, at 97-100, 147-52.

11. Act of Mar. 10, 1843, ch. 293, 1842 Md. Laws. Another, much simpler, married woman's property act was adopted during the prior session. Like most of the early acts adopted in other states, it did nothing more than exempt the property of a wife obtained by the husband upon marriage from the debts of the husband. An Act Regulating Executions against Life Estates in Lands or Tenements, ch. 161, 1841 Md. Laws (1842).

12. Act of Mar. 10, 1843, ch. 293, 1842 Md. Laws.

13. Maryland also had a long tradition of supporting the equitable separate estate for married women. Such estates, usually established in a trust in Maryland, allowed property to be set aside for the sole use and benefit of the wife, free of control by her husband. The 1842

was re-emphasized by the provisions of section 4, which gave to husbands a lifetime right to the "control and management of all such slaves" coming to a married woman. Finally, in what may be a unique provision among the early married women's acts, section 8 provided that

> any married woman who by her skill, industry, or personal labor, shall hereafter earn any money or other property . . . to the value of one thousand dollars or less, shall and may hold the same and the fruits, increase and profits thereof, to her sole and separate use with power as a feme sole to invest and re-invest, and sell and dispose of the same; *provided*, that such money or property shall be liable for the payment of any claim or debt incurred by such married woman . . . .

These three provisions in combination suggest that negative legislative reactions to the joint property claim were an integral part of the married women's property act movement from the beginning. The core of the claim—that married women had a stake in the assets of a marital community because of their domestic labor—was explicitly rejected by the provision banning conveyance of property from a husband to a wife. Even voluntary creation of joint economic communities by husbands and wives were disfavored. The $1000 earnings provision was an important alteration of marital property rules. It allowed married business women to establish a small capital account and obtain credit. But this clause, like the post-Civil War statutes Professor Siegel writes about, dealt with commercial, not domestic, income. Once a married business woman brought her income back to a family account, it was subject to the standard restrictions of the marital property regime that denied couples the right to extend the realm of commonly managed property. And, of course, household labor, including that generated by caring for slaves, was not counted as income of any sort, let alone an asset capable of supporting reallocation of family property rights from husbands to wives.

The 1843 property legislation did have an impact on the economic outcomes of some divorces. Some women did get property back that they brought to their marriages.[14] Property set aside in trusts for the separate use of a married woman[15] or held "in her own name" after passage of the

Married Woman's Act may not have prevented a husband from establishing such a trust, because the language about women becoming "seized or possessed" speaks to the establishment of estates at law rather than equity. But the actual effect of the statute is not clear. The apparent rule was that husbands could not establish separate estates for their wives unless such transfers were part of a separation agreement signed in anticipation of living apart or obtaining a divorce. Conversely, a victimized woman could obtain the benefit of a marital agreement, because of the constructive waiver by her husband of his marital rights. *See* Helms v. Franciscus, 2 Bland Ch. 544 (1830).

14. *See, e.g.*, Tayman v. Tayman, 2 Md. Ch. 393 (1851).

15. *See supra* note 12.

1843 property reforms was not property of a wife owned by the husband and was therefore not subject to the discretionary authority of the divorce courts.[16] Finally, the $1000 earnings provision created some additional opportunities for women to exit a marriage with a small capital account. But Maryland's specific rejection of the core of the joint property claim suggests that rumblings about that claim might have been part of the culture well before the middle of the nineteenth century. Commotion over Oneida and other utopian communities of the time,[17] for example, may have set Maryland legislators on edge about the joint property claim. Giving credence to the actual economic value of work in the home would have required a complete restructuring of nineteenth-century economic and family life. That is exactly why it should not surprise us that the Maryland legislature added specific language to an early married women's act rejecting the joint property claim.

II. CONTEMPORARY ISSUES

Despite the need for further exploration of the relationships between the joint property claim and early married women's property legislation, the central thesis of Professor Siegel's article is congruent with much of the extant historical literature. Those writing about the early married women's acts, which insulated married women's property from the claims of creditors of the husband, conclude that the reforms allowed men to construct safety nets for their daughters and wives during the inevitable downturns of a market economy while retaining the basic rights of husbands to control the organization of their family economies. Under this view, later reforms expanding the scope of married women's property rights were only minor limitations on the continuing authority of husbands to control family life.

In a similar fashion, Professor Siegel concludes that the ability of women to sue for and invest their earnings did little to alter the control husbands retained over their wives' household labor. As long as women were expected to donate the economic value of their household labor to their families, Siegel writes, husbands and fathers were guaranteed continued control of family and cultural wealth. She argues that the adoption of earnings statutes after the Civil War, and the concomitant rejection of the joint property claim, was not a rejection of the basic structure of coverture but only a "modernization" of its form. Employment contracts entered into by married women in the public arena were absorbed into the struc-

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16. *See, e.g.*, Harrington v. Harrington, Ch. Ct. Chancery Papers, Maryland Hall of Records Group No. 17 (Baltimore City, 1847).

17. Some discussion of the communities may be found in Siegel, *supra* note 1, at 1094-98. A recent book, SPENCER KLAW, WITHOUT SIN: THE LIFE AND DEATH OF THE ONEIDA COMMUNITY (1993), provides a wonderful account of the controversies surrounding "complex marriage" as practiced at Oneida.

ture of marriage by allowing women to bring their wages home for family use, without altering the requirement that they perform household work for free. Some contracts with third parties about use of the home for profit-making enterprises were protected by the earnings statutes. But when women's labor was only viewed as part of the household economy, women lost control over its value. Courts uniformly rejected the use of contracts to affirm the value of household labor. The realm of contracts for labor, used as a lightning rod to support the rights of emancipated African Americans in the Reconstruction era, was closed to women seeking value for their family work. Just as historians writing about the early married women's acts argue that the reforms provided an economic cushion during harsh times, Professor Siegel contends that the earnings statutes supplemented family incomes during the tumultuous decades of the late nineteenth century. The idea that women could become independent, autonomous economic actors inside a family was beyond the pale.

This set of conclusions has a profoundly similar ring to much of the debate now swirling around family law. The movement to adopt marital property regimes in common law states was in part designed to capture for homemakers their share of the capital value of a household upon divorce. Rather than paying attention to the formalities of title, courts were freed to evenly or equitably split a couple's property. In theory, the new rules allowed a wife to recover at divorce a fair share of the family wealth accumulated due to her household labor. In recent years, however, we have returned full circle to a new debate about the value of household labor. Since most families do not accumulate significant wealth prior to divorce, neither the new marital property regimes nor the old community law systems confer capital upon most women exiting a marriage. Many women are left in difficult straits because their earning power is often lower than that of their ex-husbands. Indeed, the argument goes, the tendency for women to devote more efforts than men to maintaining household and children, even when employed, is the cause of their lower financial status after divorce. It is now the refusal of modern divorce law to recognize the impact of household labor on the ability of women and men to earn money after the demise of their marriages that has become the subject of debate in the academy.[18] Just as the earnings statutes only

18. The degree to which women exiting marriage are worse off then men exiting marriage is subject to debate. The most widely discussed study is WEITZMAN, *supra* note 4. Weitzman concludes that women are 73% worse off after marriage, while men are 42% better off. *Id.* at 323. Those figures are subject to rather scathing criticism in SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 19-27 (1991). Faludi prefers a number of 33% for women and argues that severe post-divorce income dislocations are often short-lived. *Id.* at 21-22. Of course, 33% is bad enough; Weitzman and Faludi obviously agree that there is a real problem. Recent studies also suggest that husbands of nonworking wives have higher earning potential than husbands of working wives. Tamar Lewin, *Men Whose Wives Work Earn Less, Studies Show,* N.Y. TIMES, Oct. 21, 1994, at A21.

"modernized" the definition of coverture to encompass the entry of women into commercial worlds while ignoring the value of household labor, so too have the new marital property regimes only "modernized" coverture by allowing divorce courts to account for the value of an intact family while still ignoring the impact of household labor on the post-divorce economic status of women.

There is a certain fatalistic quality about this reading of history that could easily defuse continuing efforts to redeploy family wealth to women. Instrumental use of history in modern debates is difficult if reform always places old wine in new bottles, leaving the next generation to repeat the same basic set of political tasks undertaken by their ancestors. On days when I wear my optimistic rather than cynical hat, I prefer to tell another history story. This story suggests that the reform tunnel, though long and full of torturous detours, does have a light and an end.

My story begins with the assumption that women now own a greater share of wealth in the United States than they did a century and one-half ago. Recently published work suggests this assumption began to come true in the last decades of the nineteenth century. Carole Shammas argues that married women's property reforms affected the distribution of assets by gender and became statistically visible a generation or two after the legal changes were adopted. She found that increases in women's wealth began to show up in the daughters and granddaughters of those living when married women's property acts were first adopted.[19] While determining the cause and effect relationship between legal change and accumulation of wealth is as difficult as answering the old queries about chickens and eggs, the end result—women holding more wealth—was not possible without substantial changes in coverture doctrines. There is also quite convincing evidence that the earned income of women employed full-time outside the home, trapped for decades at the level of fifty-nine cents for every dollar earned by men, has risen in the last two decades to seventy cents.[20] While the effect of any particular change in legal culture might not be felt quickly, it is hard to dispute that something has happened between 1830

19. Carole Shammas, *Re-Assessing Married Women's Property Acts*, 6 J. WOMEN'S HIST. 9 (1994).

20. CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 58-82 (1990). This most recent spurt in pay levels is the third major change in rewards obtained by working women. The first began in the 1830s when women streamed into teaching and newly opened factories and mills. The second occurred at the beginning of this century when office work drew large numbers of women. For discussion of the wage gap, see generally Symposium, *The Gender Gap in Compensation*, 82 GEO. L.J. 27, 27-158 (1993). *See also* Sylvia Nasar, *Women's Progress Stalled? Just Not So*, N.Y. TIMES, Oct. 18, 1992, § 3, at 1. Whatever optimism exists because of the increase in the earnings ratio must be tempered by knowledge that much progress is left to be made and that the change may be due as much to the fall of wages for men in some work categories as it is to the rise of women's wages in other parts of the economy. *See* THE AMERICAN WOMAN 1992-1993: A STATUS REPORT 350-52, 359-66 (1992) (Paula Ries & Anne J. Stone eds., 1992).

and 1994. Such data suggests that a mildly optimistic version of the coverture "modernization" story may be told. The tale concludes that coverture, after a long series of "modernizations," now governs a significantly narrower realm than before. Each generation of reforms accommodated slight alterations in the contours of family life, and present-day middle- and upper-class women are more likely to have control of wealth than their historical sisters.

Telling such a story is made particularly difficult by the double-edged quality of property and family law reforms. The dominance of one ideology or another in the political superstructure supporting change in the legal regimes of women's lives has all too often come back to haunt those the reforms were designed to benefit. The history of both women's property and family law reform is littered with mixed results. For example, it is generally agreed that the roles of many women changed in the decades immediately after the Revolutionary War.[21] The emerging ideology of republican citizenship required an educated and thoughtful body politic to support a new political system and a rapidly industrializing nation. This produced a species of equality theory that justified quite separate roles for men and women while still claiming that the genders were equally important to the development of the republic. Women became not only caretakers of their homes but educators of future citizens. Female literacy rates rose dramatically.[22] Women took on new and important roles in social service and religious organizations.[23] And prior to marrying, many women entered the job market to earn money and learn skills that were thought useful to their future domestic lives.[24]

Although many women welcomed the recognition of their new family roles and the increased use of their intellectual capacities, the institution of marriage took on new, and not always attractive, qualities. Women marrying during the era in which early married women's property acts were adopted felt a profound sense of change after their weddings. The freedom they knew as young women to play, earn income as teachers or mill workers, gather with friends, or move to another town disappeared in a blizzard of domestic chores and parental tasks. Their life in the labor market was usually short, lasting only until marriage. Household labor in the separate domestic sphere became something distinctly different from the "public" world of politics and work. Women were excluded from the

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21. *See generally* LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1986).

22. LEE SOLTOW & EDWARD STEVENS, THE RISE OF LITERACY AND THE COMMON SCHOOL IN THE UNITED STATES 157-58 (1981).

23. KEITH MELDER, BEGINNINGS OF SISTERHOOD: THE AMERICAN WOMAN'S RIGHTS MOVEMENT, 1800-1850 (1977).

24. NANCY COTT, THE BONDS OF WOMANHOOD: WOMEN'S SPHERE IN NEW ENGLAND, 1780-1835 19-62 (1977).

"public" realm, while men controlled the disposition of both women's property and their household labor in the separate domestic sphere. The bonds of marriage, Nancy Cott has taught us, were simultaneously rewarding and confining.[25]

As the nineteenth century unfolded, two major changes occurred that had a significant effect on the financial status of women and the ideological role of the family. First, coverture reforms progressed beyond the point of simply insulating wives' assets from their husbands' creditors. By the end of the century, married women in many jurisdictions were allowed to own property of all sorts in their own right. Their fee simples became very much like their husbands' fee simples. A new dichotomy—household labor versus the separate property of a married woman—was added to the previously created distinction between "private" domestic work and "public" remunerative work. Property ownership concepts that were inseparable from the definition of household property at the beginning of the century occupied a new classification by the end of the century. Second, the number of women working before their marriage, the number of women working and never marrying, and the number of women working during their marriage prior to the birth of children rose during the century. Their earnings, along with property obtained by women through inheritance or gift, fell into this new category of separate property owned by women that was much more firmly insulated from husbands' control. The earnings statutes described by Professor Siegel accentuated that trend by affirming the ability of women to retain control of their wages.

None of these changes came close to adopting the joint property claim. Their ideological baggage was also fraught with contradictions. Indeed, their adoption was based on ideologies quite different from those espoused by nineteenth-century ultraists. Rather than following communitarian calls for emancipating women from domestic dependence by establishing feminist sharing regimes or abolitionist calls for self ownership and freedom to control one's labor,[26] most men voting for coverture reforms thought of property ownership by married women as a way of enhancing their wives' separate domestic status and strengthening the economic well-being of their families. While such ideological props meant that nineteenth-century coverture reforms were, in Siegel's language, "modernizations" of coverture, that phrasing may tempt us to ignore the important impacts such reforms had on the economic well-being of women.

By the end of the nineteenth century, the rhetoric of women's separate domestic sphere became a prop used in a wide array of ideological settings. Many of the reforms of the Progressive era were cast as attempts to

25. *Id.*.

26. These and other perspectives are discussed in Siegel, *supra* note 1, at 1094-1108.

solidify the special and distinct status of women. The Women's Christian Temperance Union called for suffrage so that women could vote for politicians willing to ban alcohol in order to protect wives and children from violently drunk husbands.[27] The Consumer's League sought protective labor legislation in order to safeguard the reproductive capacities of working women.[28] Women lobbied for passage of earnings statutes so that they could legitimately seek income for family use. In each case, the images of women earning money, leading the republic to more virtuous levels of behavior, and performing household labor for the benefit of their families and society operated powerfully on the psyche of the body politic.

The same images, of course, were used to tightly constrain women's lives. Some women blamed the continuing use of domestic caricatures for the innumerable rules barring women from "indelicate" positions in an array of institutions, jobs, and political posts. The sense of confinement noted by Cott's early nineteenth-century women was echoed by a long string of nineteenth- and early twentieth-century feminists. Feminists invoked theories of equality, including the joint property claim and the right to contract for one's labor, to support their cause. But when the conservative Supreme Court confirmed the worst fears of Progressive era reformers by using its own vision of equality to invalidate minimum wage legislation because it violated the right of workers to freely contract for their labor,[29] equality theories became seen as potentially dangerous tools that could be used to invalidate protective labor legislation. Early supporters of the Equal Rights Amendment in the Women's Party were marginalized almost immediately after women's suffrage was obtained, confirming that the rhetoric about the special, domestic roles of women was widely accepted.

A quite similar debate surfaced during the Vietnam War era.[30] This time, however, the shift to equality rhetoric made sense to the millions of women who by 1970 had entered the labor force. Large numbers of women with school age children, and later with children of any age, went to work. Domestic demands were no longer a legitimate basis for contending that women should restrain their desires to enter any number of traditionally male realms. Though still focused on the nature of nonhousehold labor, equality rhetoric emphasized change in disparate pay levels, access to a

27. This sort of argument was popularized in a pamphlet by the head of the Women's Christian Temperance Union. *See* FRANCES WILLARD, HOME PROTECTION MANUAL: CONTAINING AN ARGUMENT FOR THE TEMPERANCE BALLOT FOR WOMEN (1879).

28. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (upholding minimum-hours legislation for women only three years after invalidating similar rules for men in Lochner v. New York, 198 U.S. 45 (1905)).

29. Adkins v. Children's Hosp., 261 U.S. 525, 554-62 (1923). *Adkins* was overruled by West Coast Hotel v. Parrish, 300 U.S. 379 (1937), in which the New Deal Court discarded substantive due process theories used to strike dqwn economic legislation.

30. *See, e.g.*, Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

wider array of jobs, gender neutral application and retention rules, and comparable worth.

The renewed interest in the special and valuable attributes of women in recent years is not surprising. Once the doors to most previously closed realms of public endeavor were, at least in theory, opened to women, efforts to reform public roles required a new source of ideas, methods, and experiences. Women, of course, found that source in their own lives. Becoming equal to men has become less important for many women than affirming the use of women's experiences as a basis for further reform.

The ebb and flow of ideological preferences using theories of equality or the special characteristics of women is important. It is in this arena of ideological conflict that the old joint property claim may have its greatest contemporary effect on family law. Use of a joint property claim requires recognition of an entitlement to equal post-divorce financial status between men and women and a recognition that the particular domestic laboring roles taken on by women have long-term economic consequences. It allows us to reward household work while professing a desire to continue the now centuries-old struggle to equalize the economic status of men and women. And, especially in family law, it not only permits, but mandates a search for a rhetoric of obligation that recognizes the continuing economic meaning of domestic labor after a marriage ends.

Much of this symposium is devoted to searching for that family law rhetoric of obligation. The present world of divorce law, like Maryland society in the 1840s, is divided between home and job, marital duty and market autonomy, family and work. There have been changes to be sure. Marital property rules are more likely to require distribution of assets to divorcing wives now than under the 1842 Maryland divorce legislation. Property brought to marriage by women is more likely to retain its separate property status today than in the nineteenth century. The employment market for divorced women is more open now than in 1842. But several very basic assumptions are common to both eras. Jobs outside the home are said to produce marital property; work inside the home has no economic value. Work in the marketplace is voluntary action; performance of tasks in the home fulfills a duty. Employment produces wealth; family produces community.

The seeds for breaking these dichotomies may be found in a new vision of the joint property claim. The original claim, as described for us by Professor Siegel, was based upon the equal valuation of home and work contributions. The assumption was that women would function largely in a domestic sphere and men in a worldly one, that each arena was equally worthy and therefore to be equally valued. The limiting features of that vision became obvious to many by the end of the nineteenth century. Working women refused to be defined by their domestic obligations and therefore displayed less interest in the original joint property claim. Civil

War era feminists, acknowledging the importance of the right to contract for labor in the emancipation movement, became less enamored of an "equality" theory of joint property that reduced the acceptability of non-domestic labor. When one version of equality theory came to be seen as an endorsement of the limitations of the domestic sphere, it was replaced by a new equality theory about right of contract that ignored the economic value of the domestic sphere.

Professor Siegel's work is a signal reminder that use of equality rhetoric through our history has not automatically told us which underlying qualities about life are to be valued. Equality within flawed measures of similarity often injures the least powerful. Her work is also a signal reminder that recognition through history of value in one aspect of women's lives has not always empowered women. Recognition does not always connote payment in kind; sometimes the gift of rhetorical value comes in an empty box. Surely these are also the dilemmas of contemporary family law. Equality without values ignores the special contributions a person or gender might contribute to family life. Valuing different contributions to family life without equality of reward risks disaffection and economic deprivation. Perhaps this symposium can find a path to a new set of theories that views the joint property claim as a viable description of the obligations and benefits taken on by those who marry—a set that, in Professor Siegel's words, attacks the dichotomized conception of family and market undergirding the industrial system and constructs a framework recognizing the interdependent and gendered structure of both these spheres.