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Married Women's Property Law: 1800-1850*

RICHARD H. CHUSED**

In the middle of the nineteenth century, numerous jurisdictions passed acts for the protection of married women's property. Many commentators hold the view that these acts were part of a concerted attack on the institution of coverture and the prevailing societal view of married women. Professor Chused takes a fresh look at this conception, tracing the development of the property rights of women in the early 1800s. In Part I, he presents archival material that reflects an increase in wives' control of family property prior to the enactment of married women's property laws. Part II presents an analysis of the legal arena in this pre-enactment period, illuminating reforms that represented a growing trend to ameliorate some of the more extreme features of coverture law. In Part III, the author uses recent literature on women in the early 1800s to show that this trend was accompanied by growth in the responsibility women had for their families. Professor Chused concludes that it is likely that the enactment of married women's property laws reflected an increase in women's family responsibilities, more than their emergence into the larger commercial and political world.

INTRODUCTION

1848 is commonly thought of as the year the women's rights movement began. That year witnessed both the Seneca Falls Convention and the adoption of the well-known New York married women's act. The dearth of literature on women's law in the 1800-1850 period¹ has made it all too easy for the legal community and the modern feminist movement to label 1848 as the pivotal year. The confluence of events in 1848 has created a mythology that the married women's acts adopted in the 1840's were a frontal attack on both the institution of coverture established by the common law and the prevailing cultural view of women as repositories of domestic virtue. Because a public women's movement and married women's legislation appeared in the same decade, it is

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** Associate Professor of Law, Georgetown University Law Center. A number of people have worked with me intensely on this and related projects during the last two years. My colleague Wendy Williams, with whom I teach Women's Legal History, has spent so much time talking with me I have lost all ability to state the extent of her contributions to this article. My gratitude rather than a precise credit will have to suffice. Marjorie Brown, David Zolensky, Robert Stack, Elizabeth Ungar, and Robin Fradkin have provided terrific research assistance. I could not have completed this project without their help. Thanks are also due to Jim Oldham, another colleague newly immersed in legal history, for his guided tour through research into English law.

1. While the literature on women is now growing very rapidly, there is still a remarkable shortage of material on the early 19th century. The best of the general histories is E. FLEXNER, *CENTURY OF STRUGGLE* (rev. ed. 1975). Flexner's section on the Seneca Falls Convention describes some of the early experiences of those women who organized the meeting, particularly their exclusion from the 1840 World Anti-Slavery Convention in London which barred all women. *Id.* at 71-77. The recent release of N. BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982) provides a major improvement in the state of the literature.

thought that women petitioning for change must have "caused" the state legislatures to act. As with many areas of women's history, such speculation may be flawed.

This article takes a fresh look at the development of married women's property acts by making use of three different sets of materials: Archival records, case law and legislative sources, and recent historical literature. Courthouses and archives have records of potentially enormous importance. Property ownership and trends in the disposal of property should reveal a great deal about the pressures leading to the adoption of married women's property acts. My archival work was originally structured to establish an agenda for further research rather than to be a comprehensive study, but this tentative look produced so much useful information that it is appropriate to reveal it now. Results of this work are discussed in Part I.

Part II of this article delves into the vast case law and legislative record of legal events occurring before the married women's acts were adopted. This material includes not only the married women's property acts and related cases, but also an array of legislative and judicial documents in other areas of importance to women. Inheritance standards, probate codes, and divorce law, for example, tell a great deal about developments in married women's property law. In reviewing this material I placed particular emphasis on investigating the importance of English law as a model for American development, the degree to which norms existing in 1840 were actually altered by the new legislation, property law reform trends before 1840, and the relationship between the property acts and other areas of women's law in the first half of the nineteenth century.

All of this material should be viewed against the backdrop of current literature on women in the first half of the nineteenth century. Recent books present a large amount of new and useful information.² By and large historians have concluded that role changes for most early nineteenth-century married women involved increased family responsibilities, not greater participation in the larger commercial and political world. Such a conclusion is consistent with

2. Five works have provided much of the background for my own research in early reform of women's property law. Mary Beth Norton and Linda Kerber have each written a wonderful book on the changing status of women at the turn of the 19th century. M. NORTON, *LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800* (1980); L. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980). C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* (1980) describes substantial developments in the history of the family during the first part of the 19th century. N. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977) weaves together many of the threads of women's special sphere in the early 19th century. And Keith Melder's thesis charts the vast array of social, cultural, and political enterprises of women in the first decades of the 19th century. K. Melder, *The Beginnings of the Women's Rights Movement in the United States, 1800-1840* (1965) (unpublished thesis). Other books of importance for this period include E. FLEXNER, *supra* note 1, at 1-77; B. BERG, *THE REMEMBERED GATE: ORIGINS OF AMERICAN FEMINISM, THE WOMAN AND THE CITY, 1800-1860* (1978); N. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* (1962); E. Warbasse, *The Changing Legal Rights of Married Women, 1800-1861* (February 1960) (unpublished thesis); P. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* (1980); M. Salmon, *The Property Rights of Women in Early America* (1980) (unpublished thesis); J. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978); C. DIENES, *LAW, POLITICS AND BIRTH CONTROL* (1972). *See also* Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038 (1979).

the results of my own archival and legal research which suggests that the early married women's acts made only modest adjustments in coverture law, and that these adjustments generally confirmed rather than confronted prevailing domestic roles of married women. The recent literature is discussed in Part III.

As the nineteenth century began, real property owned by a married woman in a legal estate was subject to the management and control of her husband. Personal property of a wife became the property of her husband as soon as he reduced it to possession. Where equity courts existed, separate equitable estates could be created for married women's property, but the protections to be provided a wife by the equitable forum had to be specifically delineated in the document creating the estate. Although married women's property acts significantly altered the old rules by the end of the nineteenth century, the early wave of reform statutes appearing before 1850 have been given credit for accomplishing too much in the reform of married women's legal status.

In combination, the three parts of this study produce a coherent picture of the developments leading to the adoption of the early acts. The archival work suggests that use of equitable separate estates for married women increased before 1850. Analysis of legislative materials and judicial opinions shows that a number of legal norms having an economic impact on married women were modified before married women's acts appeared. Several reforms, including the liberalization of inheritance rules and divorce laws and the enlargement of benefits for widows and abandoned women, appeared in the early decades of the nineteenth century. Meanwhile, developments in the culture at large created a milieu sympathetic to changes in coverture law. Romantic notions of family formation and maintenance, introduction of industrial production, and increases in literacy and educational goals for children gave women significant family roles. When distressed economic times appeared after 1839, the moment was right for legislatures to codify a portion of the equitable separate estate tradition by insulating wives' property from their spouses' creditors. The acts, usually adopted with little lobbying from women, created a special set of assets available for family use when husbands found themselves in trouble with creditors. Only after this initial wave of debtor protection measures appeared did the women's movement get deeply and successfully involved in substantial reform of coverture law.

I. A STUDY OF WILLS AND TRUST DEEDS

A. INTRODUCTION

While it is generally (and erroneously) supposed that the first married women's property act appeared in 1839,³ little is known about the changes in property ownership patterns and the economic status of women in the decades prior to the appearance of the new legislation. Important questions about whether the mid-century legislation "codified" existing practice, whether mar-

3. In reality the acts began to appear in 1835. See *infra* note 205 and accompanying text (Arkansas act passed in 1835). The use of 1839 or 1840 as an approximation of the beginning of a transition period, however, is appropriate. Most of the early married women's acts appeared in the 1840's. See *infra* notes 207-11 (listing acts).

ried women gained financial influence within the family before 1840 and whether married women benefitted from the separate equitable estate, are answerable only by doing a great deal of sleuthing in courthouse records.⁴ For two reasons, this study was designed to search for changes in participation rates of women in the property system and in the dispositional patterns of family property, rather than for alterations in women's wealth. First, wealth studies suggest that married women's economic status did not change much relative to men's during the nineteenth century. Second, the married women's acts themselves did not legitimate any radical shifts in the economic status of women. One therefore should not expect changes in the patterns of women's wills and deeds during the early decades of the nineteenth century to display dramatic movements of money or other assets. Rather one would hypothesize that the mild changes made by the married women's acts would be preceded by some shifts in the ways families disposed of or controlled their assets. This study suggests that such shifts occurred.

What little is known about women and the economy before 1850 confirms the need to be cautious about claiming that married women's acts caused or resulted from significant shifts in wealth between men and women. During the late eighteenth century subsistence farming was giving way to commercial production and home industry, particularly spinning, needlework, and weaving.⁵ Trade was becoming more pronounced and some men began to leave home to go to work. Increasing agricultural efficiency⁶ and expanding markets began to separate household from work. It became possible for some women, and

4. Two other studies of courthouse documents are available. They are Salmon, *Women and Property in South Carolina: The Evidence From Marriage Settlements, 1730-1830*, 39 WM. & MARY Q. 655 (1982) [hereinafter Salmon, *South Carolina*], and N. BASCH, *supra* note 1, at 100-12. Salmon's study asks some of the same questions posed here and uses somewhat similar research techniques.

5. N. COTT, *supra* note 2, at 21-30. Women played a significant role in these areas, particularly in the provision of cloth for home use. An 1810 government report estimated that two-thirds of all clothing, hosiery, and linen was produced at home. See Summer, *History of Women in Industry in the United States*, in 9 REPORT ON CONDITION OF WOMEN AND CHILD WAGE-EARNERS IN THE UNITED STATES 37-50 (1810 & photo. reprint 1974).

6. See N. COTT, *supra* note 2, at 23-24. During the 19th century, yields per acre for wheat and corn stayed fairly constant. But the man-hours required to produce this yield declined substantially. Data from U.S. BUREAU OF THE CENSUS, *THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* 500 (1976) [hereinafter *STATISTICAL HISTORY*], was used in producing this table:

Year	Wheat		Corn	
	Yield/acre	Man hrs./ 100 bushels	Yield/acre	Man hrs./ 100 bushels
1800	15*	373	25*	344
1840	15*	233	25*	276
1880	13.2	152	25.6	180
1900	13.9	108	25.9	147

* These figures are estimates.

Similar changes in the raising of cotton occurred. Some of this improvement in efficiency probably arose because of improvements in tools such as the cotton gin, scythe, and plow. See Rasmussen, *The Mechanization of Agriculture*, 247 SCI. AM. 76 (1982). There is much debate over the rate of increase in agricultural output in the early United States. The traditional view is that output increased moderately before 1840. Parker & Whartenby, *The Growth of Output Before 1840*, in *TRENDS IN THE AMERICAN ECONOMY IN THE NINETEENTH CENTURY* 191 (National Bureau of Economic Research ed. 1960). Others have argued that there was a more substantial growth in output. Gallman, *The Agricultural Sector and the Pace of Economic Growth: U.S. Experience in the Nineteenth Century*, in *ESSAYS IN*

necessary for others, to undertake chores in addition to those crucial for the operation of a subsistence farm. While the location of activity for most was still the home or a business attached to the home,⁷ sending children off to work in others' homes, in schools, or in the towns became a possibility in some cases.⁸ Although home industry diminished in importance during the first decades of the nineteenth century, teaching, domestic service, and mill work by unmarried women became commonplace by the 1830's.⁹ Wages for single women rose rapidly between 1820 and 1850 when they reached fifty percent of the male level, a plateau which has remained almost unchanged to this day.¹⁰

But the impact of these changes on the economic standing of married women was not great. Women who did work were usually single and tended to obtain low-paying jobs. By 1840, many who had worked as young women were married and without paying jobs, carrying with them only memories of their prior work.¹¹ Historians have provided us vivid anecdotal descriptions of the differences between the lives of married and unmarried women to demonstrate that by 1840 many women considered marriage to be a large step from relative freedom into an important, but confining, social role.¹² Even as late as 1890 less than five percent of all married women worked,¹³ and women's share of the nation's wealth did not rise during the nineteenth century. Wealth studies suggest that white women constituted less than ten percent of wealth holders and that wealth holders constituted less than two percent of the total

NINETEENTH CENTURY ECONOMIC HISTORY: THE OLD NORTHEAST 35 (D. Klingaman & R. Vedder eds. 1975).

7. For example, shops and boarding houses both drew women's attention. N. COTT, *supra* note 2, at 42-43.

8. *Id.* at 31-36.

9. *Id.* at 36-37; S. LEBERGOTT, MANPOWER IN ECONOMIC GROWTH: THE AMERICAN RECORD SINCE 1800 520 (1964). By 1830, women and children comprised a large percentage of the industrial labor force, which they maintained despite a relative decline in the textile industry after 1830. A. GOLDIN & N. SOKOLOFF, WOMEN, CHILDREN, AND INDUSTRIALIZATION IN THE EARLY REPUBLIC: EVIDENCE FROM THE MANUFACTURING CENSUS (NBER Working Paper No. 795, 1981). Even on the frontier, working single women comprised a significant segment of the community. See J. JEFFREY, FRONTIER WOMEN: THE TRANS-MISSISSIPPI WEST 1840-1880 87-94 (1979). Dramatic increases in teaching employment also appeared as a result of the development of universal elementary education. See W. ELSBREE, THE AMERICAN TEACHER: EVOLUTION OF A PROFESSION IN A DEMOCRACY 199 (1970); I. T. WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 460-83 (1929); Bernard & Vinovskis, *The Female School Teacher in Ante-bellum Massachusetts*, 10 J. Soc. Hist. 332 (1977). Bernard and Vinovskis conclude that one out of every five antebellum Massachusetts women taught school during her lifetime, even if the total percentage of women in the entire workforce at any one time was small. Bernard & Vinovskis, *supra*, at 338.

10. A. GOLDIN & N. SOKOLOFF, THE RELATIVE PRODUCTIVITY HYPOTHESIS OF INDUSTRIALIZATION: THE AMERICAN CASE, 1820-1850 (NBER Working Paper No. 795, 1981). As of 1970, full-time white women workers earned about 59% of a male worker's wage. STATISTICAL HISTORY, *supra* note 6, at 305.

11. In fact, the proportion of working married women remained very low until recently. See A. GOLDIN & N. SOKOLOFF, *supra* note 10. It is unlikely that women's labor produced much wealth for most women. Wages were too low. See *id.*

12. See N. COTT, *supra* note 2, at 80-83.

13. STATISTICAL HISTORY, *supra* note 6, at 133. Data from STATISTICAL HISTORY at 129-34 provides additional material for this table:

population in the Revolutionary War years,¹⁴ and that in 1860, women's and children's wealth still constituted less than ten percent of men's wealth.¹⁵ Average men's wealth was much higher than women's.¹⁶

Thus, one would not expect a study of intestate and testate estates to display dramatic increases in women's wealth. Rather, discussion of the evolution of women's property law during the first half of the nineteenth century must focus on the mechanisms by which wealth was controlled. While some tentative effort is made here to look for wealth indicia in the archival data, the primary focus is on changes in the dispositional patterns for women's property.

B. METHODOLOGY

Document studies were undertaken in Dukes County, Massachusetts, and Baltimore City and County, Maryland, for the period 1800 to 1850.¹⁷ The different sizes of the document banks available necessitated somewhat differ-

Year	% of labor force that is female	% of female labor force that is:		
		single	widowed/ divorced	married
1870	14.8	—	—	—
1880	15.2	—	—	—
1890	17.2	68.2	17.9	13.9
1900	18.3	66.2	18.4	15.4
1910	19.9	60.2	15.7	24.7
1920	20.4	77.0*	—	23.0
1930	22.0	53.9	17.2	28.9

* For this entry, single also includes widowed and divorced women.

By 1979, the situation was quite different, with 60% of the female labor force married and 50% of the married women working. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980 402 (101st ed. 1980) [hereinafter STATISTICAL ABSTRACT].

It is possible that the five percent married women working data is misleading. Even though few unmarried women were working at any one time early in the 19th century, a large number of women worked at some time before marriage. See *supra* note 9. Perhaps by 1890, a large number of married women had worked at some point (probably before starting a family), even if only five percent of married women worked at any particular point in time.

14. A. JONES, WEALTH OF A NATION TO BE 39 (1980).

15. L. SOLTOW, MEN AND WEALTH IN THE UNITED STATES, 1850-1870 200, n.12 (1975).

16. Compare L. SOLTOW, THE RISE OF LITERACY AND THE COMMON SCHOOL IN THE UNITED STATES 156 (1981) with L. SOLTOW, *supra* note 15, at 23, 64-65, 156. This outcome is confirmed by the very tentative data available from the Dukes County wills study which show that the men's estates tended to be much larger than the women's. The average size of the nine male inventories reviewed was over \$6000 (These wills were not randomly selected. Rather, they were picked because they involved petitions by women for widow's allowances). The female inventories averaged a bit less than \$950. See *infra* Table 8.

17. Given the original exploratory purposes of this research, the locations were chosen for reasons of convenience. There are, however, important characteristics of these two locations which make them very useful. The Baltimore area provides both urban and rural areas for study. The lack of significant differences between the two areas is itself interesting. See *infra* note 63 (comparing Baltimore city and county results). The two areas also provide different legal milieus, with Maryland probably having a stronger equity tradition. Compare M. SALMON, *supra* note 2, at 162-82 (discussing Maryland's equitable enforcement of marriage settlements) with E. Warbasse, *supra* note 2, at 44-45 (discussing Massachusetts' refusal to create equity courts or grant equity powers to its law courts). Consistent results between the two areas give some basis for suggesting that future replicative work will reveal similar trends.

The Dukes County study was made at the Courthouse in Edgartown, Massachusetts, on Martha's Vineyard. For the years in question, the clerk took the handwritten indices and recorded document books out of her safe. There is no cataloging system. The indices are basically in chronological order. Next to each name in the index is a list of documents recorded in the case, and next to each document is

ent research techniques in the two locations. In Dukes County the Register of Probate Index provided a list of volume and page entries for matters in which documents were recorded. Prior to 1820 about one-third of the indexed matters gave only the name of the person involved in court action followed by an entry like "records not recorded." After 1820 the index was much more complete. A "no record" entry might not even involve a deceased person, because the index also included other probate matters such as guardianships and incompetencies. The total number of entries was not very large. Meaningful data therefore are useful only for periods of a decade or longer. The number of men's and women's estates (both with and without wills) and the number of "no record" entries for each decade is displayed in Table 1.

TABLE 1: DUKES COUNTY RECORDS

Years	Male Estates	Female Estates	Male No Record	Female No Record
1801-1810	44	1	21	0
1811-1820	39	3	28	2
1821-1830	88	14	5	1
1831-1840	88	17	5	1
1841-1850	92	16	0	0

All the recorded women's wills in Dukes County from 1801-1850 were read. A number of the women's estates (both testate and intestate) contained inventories; they were also read. Some men's wills involving disputes over spousal estate shares were reviewed as well.

The Baltimore study was done from a significantly larger document base. Sampling was necessary. Index data on estates with wills were taken for the years 1800, 1805, 1810, 1815, 1820, 1825, 1830, 1835, 1840, and 1846.¹⁸ All women's wills were read for the years 1810, 1825, 1840, and 1846. A few men's wills were read for 1810, 1825, 1840, and 1846 as well.¹⁹ Finally, a search was made in the deed index for trust documents establishing separate estates for married women. Documents discovered in the index were read for the years 1810, 1825, and 1840.

C. THE LEGAL STAGE IN 1800

As the nineteenth century opened, the status of women's property was in the

a book and page number where it may be found in the volumes of recorded documents. I simply recorded the names, documents, books, and page numbers that I was interested in and looked them up.

The same basic system operates at the Maryland Hall of Records in Annapolis, except that the volume of records was much larger, and the recorded documents were on microfilm. Indices to the Register of Wills and the land records for Baltimore were checked first. Relevant volume and page numbers were listed and the materials were read.

18. 1846, rather than 1845, was selected to provide an additional year of breathing space from the married woman's acts adopted by Maryland in 1842 and 1843.

19. The men's wills were sampled by turning the microfilm crank 10 times and reading the first male will to appear thereafter.

midst of a lengthy period of transformation. While land transfer systems had been streamlined and married women's dower rights had been modified to permit easier transfer of titles,²⁰ substantial reform of the testate and intestate roles of women had just begun. Reforms of the post-Revolutionary War era enhanced the ability of women and children to be beneficiaries of intestate estates. Even before primogeniture was abolished in England, many of the American colonies had rejected it. A deluge of reform statutes finished the job after the Revolutionary War.²¹ New laws covering intestate succession in New England provided for descent to widows and children of both sexes.²² These statutes were of considerable importance because the vast bulk of people never wrote wills.²³ The changes in intestacy rules, therefore, operated to provide a minimum level of economic security for some surviving widows and children.²⁴ Thus, well before 1800, married female children and widows could inherit property. And even though wealthier men of the early nineteenth century tended to will assets to women in life estates or other forms that insulated the property from the creditors of present or future husbands,²⁵ it was not uncommon for married women to own assets long before women's property acts were adopted.

Most jurisdictions, however, did not pass statutes granting married women contractual or testamentary control over property held at law until well into the nineteenth century.²⁶ The power to dispose of property by will was granted in a few places early in the nineteenth century, but statutory reform most commonly occurred after 1850.²⁷ Will studies suggest that women did

20. See *infra* notes 157-82 and accompanying text (discussing reforms affecting ease of transfer).

21. R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 72-81 (1930). England did not abolish primogeniture until 1926. *Id.* at 77. Fee tails met the same fate as primogeniture in the colonies. *Id.* at 82-103.

22. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 57-60 (1973).

23. *Id.* at 220.

24. The intestate succession reforms also had some of the same effects as dower reform—land was less likely to be encumbered by future interests that would lower its marketability. Primogeniture mandated takers for a significant period of time. The new intestate succession statutes provided for estates to be divided into shares and distributed. While some assets would be distributed to tenants in common, partition was available to settle ownership disputes and, if necessary, to force sales of the disputed assets. See L. FRIEDMAN, *supra* note 22, at 57-58.

25. *Id.* at 220-21. This trend may have begun to disintegrate by mid-century. See *infra* Table 13.

26. Connecticut is an interesting exception, providing for wills in 1809. This is particularly puzzling because the Connecticut colony is thought to have been most restrictive of women's property rights. See M. SALMON, *supra* note 2, at 324-39. What, then, were women being permitted to transfer by will? A study of estate records in Connecticut should be fascinating.

27. In general, women lost their interest in personal property upon marriage and therefore had nothing to will before 1800. As to real property, instruments in the nature of wills for the disposition of equitable estates were sometimes enforced, but they were seldom written. Women could dispose of personal property with the consent of their husbands. See 2 J. BISHOP, *COMMENTARIES ON THE LAW OF MARRIED WOMEN* 421-36 (1875); M. SALMON, *supra* note 2, at 119-25. Salmon found records of decisions from the 1790's permitting women to devise their own property in Pennsylvania and Maryland. M. SALMON, *supra* note 2, at 119 n.49. In my study of Maryland wills, women began to write wills with greater frequency as the 19th century unfolded. But most of the will writers were either widows or unmarried women, and most of the property being willed was personal, not real. In general, legislation providing women with the power to write wills came slowly. While some states acted during the early decades of the 19th century, there is no clear time period in which this reform arrived. Some states had fairly well-developed equitable rules permitting married women to write wills if their deeds permitted it. See *infra* note 29. Statutes appeared in a few states at very early dates. Connecticut: Act of May, 1809, ch. VII, 1809 Conn. Pub. Acts 15 (May Sess. 1809); Florida: Act of June 29, 1823, 1825 Florida Territorial Legis. Council Acts 101 (2d Sess. 1823); Ohio: Act of Feb. 18, 1808, ch. XVIII, § 1,

not make wills in significant numbers until after 1800.²⁸ For the most part, a married woman's property was disposed of at death either by the operation of intestate succession laws or by the constraints contained in the equitable instrument establishing her title to the property.²⁹ These inheritance rules followed the more general structure of coverture law under which a married woman's real estate was subject to the management and control of her husband, and her personal property, once in the possession of her spouse, was permanently lost by the wife. While a number of exceptions to these rules arose in various areas of the United States, especially in jurisdictions with

1807 Ohio Acts 64 (1808). The Ohio statute was re-enacted in slightly revised versions in 1810, 1840, and 1852. While the roots of the Ohio legislation presumably were in the Northwest Ordinance, more study of this statute is needed. It is also a bit of a mystery why Connecticut moved so early. Warbasse suggests that judicial changes of heart over the old common law rules made legislative action necessary. E. Warbasse, *supra* note 2, at 15-16. Florida's statute probably resulted from its Spanish civil law heritage. A few states also adopted statutes that basically codified the common law rule that wives could write wills with their husband's consent. Maryland: Act of Mar. 10, 1843, ch. 293, § 6, 1842 Md. Laws (1843); Massachusetts: Act of Mar. 3, 1842, ch. 74, 1842 Mass. Acts 527; Pennsylvania: Act of Apr. 8, 1833, No. 128, § 2, 1833 Pa. Laws 249. Other states adopted statutes permitting women to write wills in pursuit of powers. New York: N.Y. Rev. Stat., art. 3, §§ 80, 87, 110, 1829 N.Y. Rev. Stat. 731; Pennsylvania: Act of Apr. 8, 1833, No. 128, § 2, 1833 Pa. Laws 249. A few states adopted limited wills acts in the 1840's. Alabama: Act of Feb. 4, 1846, No. 19, §§ 1-3, 1845 Ala. Acts 23, 24 (1846) (abandoned or mistreated wives only); Indiana: Act of Jan. 26, 1847, ch. LXXIX, 1846 Ind. Acts 108 (1847) (real property only); New Hampshire: Act of July 2, 1841, ch. 157, 1841 N.H. Laws 533 (deserted wives) and Act of June 27, 1845, ch. 236, 1845 N.H. Laws 235 (real property). Most states adopted general wills-enabling statutes after 1850. The exceptions include Michigan: MICH. CONST. of 1850, art. XVI, § 5; Pennsylvania: Act of Apr. 11, 1848, No. 372, §§ 5-6, 1848 Pa. Laws 536, 537; New York: Act of Apr. 11, 1849, ch. 375, 1849 N.Y. Laws 528. The later enactments include Arkansas: ARK. CONST. of 1868, art. XII, § 6; Georgia: REV. CODE § 2375 (1867); Indiana: Act of Mar. 3, 1859, ch. CXLI, 1859 Ind. Acts 245; Kansas: Act of Feb. 11, 1858, ch. 2, 1858 Kan. Territorial Sess. Laws 327; Massachusetts: Act of May 5, 1855, ch. 304, 1855 Mass. Acts 710; New Jersey: Act of Apr. 12, 1864, ch. CCCXCVI, 1864 N.J. Laws 442; New Hampshire: Act of July 8, 1854, ch. 1522, 1854 N.H. Laws 1418; Act of July 4, 1860, ch. 2342, § 3, 1860 N.H. Laws 2248; North Carolina: N.C. CONST. of 1868, art. X, § 6; Rhode Island: 1856 R.I. Pub. Laws 68 (Jan. Sess. 1856); South Carolina: Act of Dec. 12, 1866, 1866 S.C. Acts 473; Tennessee: Act of Feb. 21, 1852, ch. CLXX, § 4, 1851 Tenn. Pub. Acts 259. In some states, late enactments still prohibited married women from writing wills. See Kentucky: Gen. Stats., ch. 113, § 2 (1873).

28. K. LOCKRIDGE, LITERACY IN COLONIAL NEW ENGLAND 38 (1974); A. JONES, *supra* note 14, at 39. A. JONES, AMERICAN COLONIAL WEALTH: DOCUMENTS AND METHODS (1977) (3 volumes) reproduces all the inventories used in Jones' WEALTH OF A NATION TO BE. There were 82 women's estates. Forty-two wrote wills, 39 died intestate and for one woman, testacy status is not known. This 52% rate of testacy is a bit lower than that found in Dukes County. See *infra* Table 7.

29. In a number of states, early equity cases provided that married women could write wills to dispose of real property if the instrument giving title permitted it. See *Beach v. Manchester*, 56 Mass. (2 Cush.) 72 (1848); *Wilkinson v. Wright*, 45 Ky. (6 B. Mon.) 576 (1846); *Yates Will*, 32 Ky. (2 Dana) 215 (1834); *Lewis v. Hudson*, 6 Ala. 463 (1848); *Shaw v. Dawsey*, 26 S.C.L. (1 McMul.) 247 (1841); *Ewing v. Smith*, 3 S.C. Eq. (3 Des.) 417 (1813); *Rogers v. Smith*, 4 Barr 93 (Pa. 1840); *Lowery v. Tiernan*, 2 H. & G. 34 (Md. 1827); *West v. West's Executor*, 24 Va. (3 Rand.) 373 (1825); *Jaques v. Methodist Episcopal Church*, 17 Johns. 548 (N.Y. 1820). A will devising personal property required the husband's consent, unless an instrument under which property was held provided a right to dispose of property by will. See, e.g., *Lewis v. Hudson*, 6 Ala. 463 (1844); *Reed v. Blaisdell*, 16 N.H. 194 (1844); *Marston v. Norton*, 5 N.H. 105 (1830); *Yates Will*, 32 Ky. (2 Dana) 215 (1834). See also 2 J. BISHOP, *supra* note 27, at 412-36.

A few states applied the equity rules very liberally, holding that general statements creating a separate estate implied the right to dispose of the property by will. *Lamb v. Wregg*, 8 Port. 73 (Ala. 1838); *Lewis v. Hudson*, 6 Ala. 463 (1844); *Jaques v. Methodist Episcopal Church*, 17 Johns. 548 (N.Y. 1820). Kentucky appeared to be such a jurisdiction, *Yates Will*, 32 Ky. 215 (1834), but a narrow rule emerged later, *Wilkinson v. Wright*, 45 Ky. (6 B. Mon.) 576 (1846). Maryland took the opposite trend. Compare *Tarr v. Williams*, 4 Md. 68 (1853), with *Cooke v. Husbands*, 11 Md. 486 (1857).

strong equity traditions supporting the creation of separate estates for married women, wives were treated as civilly dead persons in many situations.

Massachusetts and Maryland common law followed these general trends. In Massachusetts, case law placed severe constraints on married women's right to will property at law, prohibiting the devising of real estate and requiring the husband's consent for the devising of personal assets.³⁰ Both of the married women's wills found in Dukes County were written in 1810, though they were not probated until 1815 and 1821. The scarcity of married women's wills probably reflects the common law rules. A statute permitting married women to write wills with their husband's consent was adopted on March 3, 1842, but the act was construed to prohibit devises to husbands.³¹ This result was overruled by statute on April 15, 1850. In 1842, Maryland adopted a statute permitting married women to write wills with their husband's consent. Married women's property acts were passed in 1842 and 1843. In both Maryland and Massachusetts the power of a wife to dispose of equitable property at death was limited to the rights granted by the instrument under which she took title.³²

The development of inheritance rights of women and children during the late eighteenth and early nineteenth centuries required some method for legitimating the holding of property by married women. Finding the methods used before 1840 is sometimes difficult. Although the Baltimore document study suggests the separate equitable estate was the logical choice in most jurisdictions, America's varied reception of equity forces legal historians to search state-by-state for the ways in which women typically held property. While English chancery had both developed rules for a wife's separate estate and declared dower inapplicable to equitable estates by the end of the eighteenth century, the colonies did not uniformly adopt chancery.³³ While the Southern colonies generally had equity courts, New England practice was spotty.³⁴ The Northwest Ordinance specifically called for reception of the common law, but was silent as to equity.³⁵ Although this omission was probably not meant to prohibit creation of equity courts,³⁶ not all the territories so understood it, leading to different results in the various jurisdictions.³⁷

Not until well into the nineteenth century did most American states and

30. *Osgood v. Breed*, 12 Mass. 525 (1815).

31. *Morse v. Thompson*, 58 Mass. (4 Cush.) 562 (1849).

32. *Beach v. Manchester*, 56 Mass. (2 Cush.) 72 (1848); *Lowery v. Tiernan*, 2 H. & G. 34 (Md. 1827); *Miller v. Williamson*, 5 Md. 219 (1853).

33. Katz, *The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY* 257 (D. Fleming & B. Bailyn eds. 1971); L. FRIEDMAN, *supra* note 22, at 47-48; E. Warbasse, *supra* note 2, at 38-42; Wilson, *Courts of Chancery in the American Colonies*, in 2 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 779 (1908); M. SALMON, *supra* note 2, at 150-233.

34. 1 J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* 62 n.1 (1836); E. Warbasse, *supra* note 2, at 39-48. M. SALMON, *supra* note 2, at 150-233, catalogues in great detail the differences in equity traditions in four states, concluding that the Southern jurisdiction she studied maintained stronger traditions than the Northern areas.

35. See generally Blume, *Chancery on the American Frontier*, 59 MICH. L. REV. 49 (1960).

36. *Id.* at 54.

37. Despite the terms of the Northwest Ordinance, Michigan gave its supreme territorial court equity jurisdiction as early as 1805. *Id.* at 55-56. But the early history of chancery in the territories varied, and Congress frequently had to step in later to resolve any lingering ambiguities. See Blume & Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions*, 61 MICH. L. REV. 39, 54-59 (1962).

territories have chancery courts. While Story argues that equity, once adopted, was accepted with much less variation than the common law,³⁸ there is little modern commentary analyzing his arguments. Thus, during much of the formative period of English chancery rules on coverture,³⁹ America was in a state of "equitable disarray." Although some have attributed the cool reception given equity courts to antipathy to the English crown,⁴⁰ a more sophisticated explanation suggests that the desire of colonial legislatures to control chancery courts rather than leave them to the prerogatives of the crown led some areas to resist the adoption of equity. There was less opposition to the principle of equitable relief itself than to the institutions supporting it.⁴¹ Furthermore, there is evidence that substitutes for equity, such as private bills and courts of law serving equity traditions, existed in some jurisdictions.⁴²

Colonial and early American reception of equitable coverture rules reflect the variety in reception of equity law generally. Despite the contentions of Kent and Story that equity generally provided a release from the more egregious common law coverture norms,⁴³ there is a growing body of recent work confirming that the vagaries of local precedential and procedural settings created significant variety among the colonies and newly independent states.⁴⁴ While the resistance to equity in parts of the Northeast during the late eighteenth and early nineteenth centuries⁴⁵ is one of the causes of the variety, there are also intriguing indications that private legislative bills were used in some jurisdictions to alter more traditional coverture rules,⁴⁶ and that some common

38. 1 J. STORY, *supra* note 34, at 62-65.

39. See *infra* notes 100-96 and accompanying text (discussing English developments).

40. See E. Warbasse, *supra* note 2, at 42-45.

41. See Katz, *supra* note 33, at 271-72 (resistance to equity recognized the need for such an institution but feared its abuse in the hands of the executive). Warbasse recognized that alteration of New York's equity practice arose because of complaints about the complexity of equitable procedure, not the notion of equity itself. E. Warbasse, *supra* note 2, at 217-18.

42. See Katz, *supra* note 33, at 283; Salmon, *Equality or Submersion?: Feme Covert Status in Early Pennsylvania*, in WOMEN OF AMERICA: A HISTORY 92 (C. Berkin & M. Norton eds. 1979).

43. J. KENT, COMMENTARIES ON AMERICAN LAW 136-49 (1826); 2 J. STORY, *supra* note 34, at 596-655. Both Kent and Story wrote without close attention to actual practice at the time in the various jurisdictions. Morris later wrote in a similar vein that equity was a general release valve from the restrictions of the coverture rules at law. R. MORRIS, *supra* note 21, at 135.

44. Compare M. SALMON, *supra* note 2, at 162-81; Salmon, *supra* note 42, at 92-113; and L. KERBER, *supra* note 2, at 139-55 with E. Warbasse, *supra* note 2, at 42-48; and J. SPRUILL, WOMEN'S LIFE AND WORK IN THE SOUTHERN COLONIES 361-64 (1938). For material on reception of equity, see generally Blume, *supra* note 35; L. FRIEDMAN, *supra* note 22, at 185-86; I R. POWELL, THE LAW OF REAL PROPERTY 447-52 (rev. ed. 1981); 1 J. STORY, *supra* note 34, at 62-64. Some of the carefully written commentary in 19th-century treatises confirms that equitable coverture rules were received in a variety of ways. See 1 J. BISHOP, *supra* note 27, at 16-22 (1873); J. SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 167-69 (3d ed. 1882) [hereinafter SCHOULER, DOMESTIC RELATIONS]; 1 J. SCHOULER, TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS 264-66 (rev. ed. 1921). This last work is the sixth edition, as revised by Blakemore, of a work originally written in 1870.

45. See *supra* notes 33-34 and accompanying text (discussing resistance to equity in Northeast).

46. Until the mid-19th century, private bills were sometimes passed in traditional equitable coverture areas. L. KERBER, *supra* note 2, at 150-51 (petitions for feme-sole status); J. SPRUILL, *supra* note 44, at 361-62 (petitions for feme-sole status); Zainaldin, *supra* note 2, at 1043-44 (petitions for divorce, legitimacy of birth, change of name, and adoption); E. Warbasse, *supra* note 2, at 75, 169 (petitions for feme-sole status). For an unsatisfactory history of special bills, see Cloe & Marcus, *Special and Local Legislation*, 24 KY. L.J. 351, 355-58 (1936). Cooley wrote at length about special bills in his famous treatise, but only those bills dealing with granting new trials, conferring power on guardians to sell

law courts acted as surrogate equity courts.⁴⁷ The use of the separate estate as a model in many of the married women's acts indicates that equity's influence grew as the nineteenth century unfolded.⁴⁸ In fact, there is some evidence that reception occurred in reverse—American treatises were being "received" in England during this period.⁴⁹

While it is fair to suggest that the chancery picture varied in the era before the adoption of married women's acts, the lack of scholarship on private bills⁵⁰ and common law forms of equity in the coverture law makes it difficult to evaluate the situation. Furthermore, the increased use of equity precedents in the nineteenth century occurred shortly before the emergence of movements to merge law and equity,⁵¹ to restrict legislative authority to enact private bills,⁵²

lands, validating irregular judicial proceedings, and divorces. See T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 103-35 (5th ed. 1883).

From my own research, the state of Alabama is an interesting example. On March 3, 1848, the state legislature enacted a law providing that abandoned married women could apply to chancery for a decree permitting them to act as feme soles. Act of Mar. 3, 1848, No. 40, 1847 Ala. Acts 100 (1848). During that same session of the legislature, private bills granted feme-sole status to 35 women. Among them were acts for the relief of Mary Sitton, Act of Jan. 15, 1848, No. 368, 1847 Ala. Acts 411 (1848); Mary H. Clopton, Act of Feb. 29, 1848, No. 370, 1847 Ala. Acts 412 (1848); Margaret Craig, Act of Mar. 4, 1848, No. 372, 1847 Ala. Acts 413 (1848); Martha C. Towles, Act of Mar. 2, 1848, No. 373, 1847 Ala. Acts 414 (1848); Christian Linington Child, Act of Mar. 3, 1848, No. 374, 1847 Ala. Acts 415 (1848); Susannah C. Waldron and Kitsey Ann Stephens, Act of Feb. 22, 1848, No. 375, 1847 Ala. Acts 415 (1848); Aurelia Mary Carpenter, Act of Mar. 3, 1848, No. 377, 1847 Ala. Acts 416 (1848); Obedience Ledlow, Act of Feb. 25, 1848, No. 377, 1847 Ala. Acts 416 (1848); Mary Brame, Act of Feb. 11, 1848, No. 378, 1847 Ala. Acts 417 (1848); Susan B. Gee, Act of Feb. 28, 1848, No. 379, 1847 Ala. Acts 417 (1848); Sylvia Fowler, Act of Mar. 4, 1848, No. 380, 1847 Ala. Acts 417 (1848); Mary Peoples, Act of Mar. 6, 1848, No. 381, 1847 Ala. Acts 418 (1848); Bethaney Grimes, Act of Mar. 3, 1848, No. 383, 1847 Ala. Acts 418 (1848); Mourning Hanelson, Act of Mar. 4, 1848, No. 384, 1847 Ala. Acts 419 (1848); Elizabeth Rickard, Act of Mar. 6, 1848, No. 387, 1847 Ala. Acts 420 (1848); Olivia Lanier, Act of Feb. 21, 1848, No. 391, 1847 Ala. Acts 421 (1848); and Eliza N. Randall, Act of Feb. 4, 1848, No. 392, 1847 Ala. Acts 422 (1848). The practice of enacting private bills for abandoned wives was a longstanding habit. A review of Alabama state session laws (I did not look at territorial enactments) reveals that such private bills were enacted very frequently after 1840 and with lesser frequency as far back as 1826. The legislature did not meet in 1846. Alabama switched to biannual sessions after 1845. I found that 4 women were granted feme-sole status by such acts in the 1845 session, 35 in 1844, 10 in 1843, 10 in 1842, 5 in 1841, 2 in 1840, 2 in 1839, 2 in 1838, 6 in 1837, 3 in 1836, 3 in 1835, 4 in 1834, 4 in 1833, 2 in 1832, and 1 each in 1831, 1828, and 1826. There also was a scattering of other private acts dealing with the power of married women to sell slaves and dispose of property as guardians or administrators.

47. See the tempting generalizations by Katz, *supra* note 33, at 283, and the tidbits on Pennsylvania, Liverant & Hitchler, *A History of Equity in Pennsylvania*, 37 DICK. L. REV. 156 (1933); I J. BISHOP, *supra* note 27, at 9-12; and Fisher, *The Administration of Equity Through Common Law Forms in Pennsylvania*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 810 (1908). See generally M. SALMON, *supra* note 2 (discussing common law courts and equity).

48. Kent's COMMENTARIES appeared in 1827, Story's in 1836. That equity and the notion of the wife's separate equitable estate were "in the air" by the 1820's seems clear. Illustrations of its use appear in this era, even in New England. See *Porter v. Bank of Rutland*, 19 Vt. 410 (1847) (dispute over 1824 trust); *Ayer v. Ayer*, 33 Mass. (16 Pick.) 327 (1835) (dispute over 1824 trust involving transfer of asset from mother to daughter). See also *Conway v. Hale*, 5 Tenn. (4 Hayw.) 1 (1817).

49. See Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 671 (1981).

50. For starters, I undertook a study of Ohio's private bills in the 19th century. Although divorce and other expected subjects were treated by private bills, there was nothing to suggest that the legislature of Ohio was a forum used to loosen the boundaries of coverture. This may be because Ohio had an early and strong equity tradition, or because dower was protected. See *infra* note 173 (discussing extent of dower rights in Ohio). In any case, the dearth of bills on the subject suggests that there is vast state-by-state variation in this area.

51. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 265-66 (1977), suggests that the merger of law and equity in the second half of the 19th century was an effective limit on equity. To the extent this is true in coverture law it significantly complicates analysis of both equity and the role of

and to codify the law generally. The equitable separate estate, therefore, was not only a precursor to the married women's acts,⁵³ but was also enmeshed in the more general package of reform movements in the first half of the nineteenth century. For example, New York's enactment of substantial reforms in trust law, which made the establishment of married women's estates more difficult, is an intriguing sign of the links between married women's law reform and the early nineteenth-century movement to merge law and equity and reform pleading practices.⁵⁴ More research must now be done to link codification of coverture rules to the equitable and legislative situations extant in states other than New York.⁵⁵

The great variety in early American chancery practice is particularly important for analysis of married women's acts. The language of separate estates became an important part of much of the legislation. The chancery model, which permitted the use of special trust instruments to provide for married women's assets, was formalized, and the complexity of early formats was abandoned in favor of simple conveyancing language. Whatever the differences between American and English chancery law may have been, there can be little doubt that the idea of a separate estate was well-known in America long before married women's acts were adopted. It also seems certain that the slow growth in the use of the married women's separate estate eventually compelled

married women's property acts. In New York, for example, the married woman's act of 1848 was adopted in the same legislative session that adopted the Field Code, two years after equity courts had been abolished and three years after the state Chancery Court had held that an active trustee was necessary in separate equitable estates. See *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34, 5 N.Y. Ch. 288 (1845); E. Warbasse, *supra* note 2, at 205-29. While Horwitz's theory that equity in New York was limited may be true, it is not clear that his theory may be extended to other states. In addition, the New York equity changes were apparently not duplicated elsewhere before married women's acts were adopted. The New York setting is particularly interesting because of the clear interplay between law, equity, procedure, judicial decisions, and the reshaping of women's roles. See generally P. RABKIN, *supra* note 2, at 61-90 (discussing the New York setting); N. BASCH, *supra* note 1 (same).

52. C. BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS 6-7 (1894). It is interesting to note that far-reaching constraints were imposed on the enactment of private bills by the New York Constitution adopted in 1846, only two years before passage of New York's first married women's act. *Id.* at 7.

53. E. Warbasse, *supra* note 2, at 289, notes that states with strong equity traditions tended to lag behind other states in adopting married women's acts, thus casting doubt on any theory that equity led to enactment of the statutes. Although Warbasse's theory may be true for acts adopted after the initial wave of debt statutes, see *infra* notes 263 (listing separate estate statutes of the 1850's) and 361 (listing earnings statutes of the 1870's), she appears to be partially in error as to the early acts. The lag may simply confirm the idea that the early acts were not very far-reaching and that the later statutes found tougher sledding in the more traditional Southern legal milieu.

54. P. RABKIN, *supra* note 2, at 52-90. Rabkin's work on the relationship between the codification movement and the New York married women's act is very useful. Not only is it consistent with Horwitz's general description of the rise of codification in the first half of the 19th century, M. HORWITZ, *supra* note 51, at 17-18, but it also begins the task of linking coverture rules to other general trends in the legal arena.

55. One of the interesting questions not answered by Rabkin's work is the relationship outside of New York between changes in rules of civil procedure and the emergence of married women's acts. New York was among the first states to revamp its procedural system. To the extent that equity and law were merged, legislation might have been necessary to preserve existing equitable rights of married women. Examining equity practice prior to the adoption of married women's acts might prove a useful line of inquiry in states that adopted reforms in court practice about the same time they passed married women's legislation. At first glance, it does not appear that significant procedural reform occurred before married women's property acts were passed in other jurisdictions.

a simplification of the process by which a separate estate was created and maintained.

But just as with disposition of women's property at death, there was probably not enough married women's property held at equity in 1800 to command the attention of late eighteenth-century reformers.⁵⁶ Nor was there yet a general cultural desire to permit a married woman, rather than the person creating an equitable separate estate, to control the disposition of a separately held asset.⁵⁷ Not until separate equitable estates were routinely used by both men and women to control family wealth, rather than simply by wealthy fathers to protect their daughters from creditors of untrustworthy husbands, would the law likely respond with significant alterations in form. Therefore, one of the most important tasks for any archival study of married women's property is to investigate the changing rates at which equity was used to protect such property.⁵⁸

D. FINDINGS

The proportion of recorded wills in Massachusetts and Maryland written by women rose significantly between 1800 and 1850.⁵⁹ At first glance, the data on wills in Tables 2 and 3 supports the thesis that women began to exercise more control over property as the nineteenth century developed.

TABLE 2: DUKES COUNTY⁶⁰

Years	Number of Male Wills	Number of Female Wills	Percent of Wills Written By Females
1801-1810	40	1	2%
1811-1820	26	2	7%
1821-1830	46	10	18%
1831-1840	35	12	26%
1841-1850	45	13	22%

56. Note that women generally did not write wills before 1800, *see supra* note 28 and accompanying text, and that women held very little property before 1800. *See supra* notes 13-16 and accompanying text.

57. Even after 1800, married women's ability to dispose of their separate property was generally limited by the contents of the trust deed under which they took title. *See supra* notes 29-32 and accompanying text (discussing constraints on women's ability to dispose of their separate property).

58. A trust deed search in Dukes County is yet to be done. In addition, a large sample of male wills needs to be read. If the female wills are indicative of trends, separate estate language does begin to appear in some wills after 1830. The data is much too tentative at this point to be useful.

59. Data in both tables are from the indices for Dukes County and Baltimore. These results are fairly consistent with earlier studies suggesting that women's wills did not appear in significant numbers until after 1800. K. LOCKRIDGE, *supra* note 28, at 38, 128 (noting dearth of samples of women's handwriting); A. JONES, *supra* note 14, at 39 (showing that few women were "wealth holders" in the Thirteen Colonies in 1774).

60. This data, of course, does not include the "no record" cases. *See supra* Table 1. The reliability of the pre-1820 data is therefore more dubious, especially for men. The low number of "no record" entries for women suggests that their data are more useful.

TABLE 3: BALTIMORE CITY AND COUNTY

Year	Number of Male Wills	Number of Female Wills	Percent of Wills Written by Females
1800	68	7	9%
1805	63	13	17%
1810	75	13	15%
1815	72	27	27%
1820	68	26	28%
1825	95	19	17%
1830	96	30	24%
1835	82	28	25%
1840	71	47	40%
1846	86	53	38%

It would be improper to argue, however, that the appearance of more women's wills indicates that women were behaving in remarkably different ways in 1850 than they were in 1800. There were differences, but they were subtle. Though the proportion of probated wills written by women rose, it does not follow automatically that the proportion of women writing wills rose. In fact, as Table 4 indicates,⁶¹ the proportion of women's wills in relation to the adult death rate⁶² in Baltimore did not rise during this period.

TABLE 4: WOMEN'S WILL-WRITING RATE—BALTIMORE

Time Period	Avg. Number of Female Wills/Yr. for Baltimore City and County	Avg. Adult Death Rate/Yr. for Baltimore City	Female Wills as Percent of Death Rate
1815-1819	24.2	613.8	3.9%
1820-1824	25.0	948.4	2.6%
1825-1829	26.8	796.2	3.4%
1830-1834	34.4	1189.4	2.9%
1835-1839	44.2	979.2	4.5%
1840-1844	38.2	995.4	3.8%
1845-1849	50.4	1441.2	3.5%

These figures do not give true will-writing rates because the will data cover a larger geographic area⁶³ than the death rate data, and the death rates include

61. Death rate data for all Baltimore tables are taken from W. HOWARD, PUBLIC HEALTH ADMINISTRATION AND THE NATURAL HISTORY OF DISEASE IN BALTIMORE, MARYLAND, 1797-1920 521-23 (1924).

62. "Adult" is defined as those persons age 20 and above.

63. Will data are for both city and county. Where data was available in the wills actually read, there appeared to be no significant difference between the will-writing rates of the city and county. Since

both men and women. Nonetheless, Table 4 is very valuable as a trend indicator since the same data bases are used as measuring devices for both genders. The women's will-writing rate only kept pace with population trends. The proportion of wills written by women increased in Baltimore only because, as Table 5 suggests, men wrote fewer wills as the nineteenth century progressed.⁶⁴

TABLE 5: MEN'S AND WOMEN'S WILL RATES
FOR SELECTED YEARS—BALTIMORE

Selected Years	Number of Male Wills City & County	Number of Female Wills City & County	Baltimore City Adult Deaths	Male Wills as Percent of Deaths	Female Wills as Percent of Deaths
1815 and 1820	140	53	1267	11.8	4.2
1825 and 1830	191	49	1691	11.3	2.9
1835 and 1840	153	75	1872	8.2	4.0
1846	86	53	1234	7.0	4.3

The data for Dukes County are not as easily used to determine trends in will-writing rates because of the large number of male "no record" entries for the 1800-1820 period. Death rate data are also not easily available. A crude estimate may be made by tabulating a will-writing rate based on population rather than death rates. The results of such a tabulation, as can be seen in Table 6, produce much less clear data than for Baltimore. Even so, it does appear that women began writing wills at a greater rate after 1820.

locale was not available in the death rate data and will indices used to compile this data, I had to fudge a bit and use the wills themselves to find locale and the census to find population trends. Nonetheless, the data are quite useful as a means of discussing rate change over time, especially since there does not appear to be any significant difference in will writing rates between city and county when population is used as a rate base.

City Versus County Will-Writing Rates

Year	% of Population in City*	% Female Wills From City
1800	46%	—
1810	63%	100% (2/2)
1820	66%	—
1825	—	71% (12/17)
1830	69%	—
1840	77%	72% (26/36)
1846	—	74% (31/42)
1850	80%	—

* This figure represents the percent of the combined populations of the city and county that resided in the city. The population data is taken from the decennial census. The percent data on residence is derived from statements made in the wills about the residence of the testator.

64. The index was combed for male wills in selected years only. Nonetheless, the trends are quite clear when compared to the female data for the same selected years. As with Table 4, *infra*, Table 5 does not give true will-writing rates since the will base is city and county, the death base is city only, and will-writing rates are figured from total adult deaths, not just male or female deaths.

TABLE 6: WILL-WRITING RATES—DUKES COUNTY⁶⁵

Years	Number of Male Wills	Number of Female Wills	Population as of Last Yr. of Decade	Male Wills as Percent of Population	Female Wills as Percent of Population
1801-1810	40	1	3118	1.3%	—
1811-1820	26	2	3290	0.8%	—
1821-1830	46	10	3517	1.3%	.3%
1831-1840	35	12	3958	0.9%	.3%
1841-1850	45	13	4540	1.0%	.3%

Just as women may have bucked the male trend to lower will-writing rates, those women with property may have died testate more frequently than their male counterparts. The Dukes County index produced some data on the proportion of probated estates that were intestate. These data certainly overstate the use of wills since many estates were not probated.⁶⁶ Table 7 gives the proportion of probated estates that were testate.

TABLE 7: TESTACY RATE—DUKES COUNTY

Years	Male Recorded Estates Testate (%)	Female Recorded Estates Testate (%)	Number of "No Record" Entries	
			Male	Female
1801-1810	91% (40/44)	— (1/1)	21	0
1811-1820	67% (26/39)	— (2/3)	28	2
1821-1830	52% (46/88)	71% (10/14)	5	1
1831-1840	40% (35/88)	71% (12/17)	5	1
1841-1850	49% (45/92)	81% (13/16)	0	0

After 1830, twenty-four percent (25/105) of the testate estates were female, but only seven percent (8/108) of the intestate estates were female.

There are at least two possible explanations for the tendency of the women's will-writing rate to stay constant while the men's declined, and for women with assets to write wills at a higher rate than men. First, it is possible that women were making a subtle statement of goals by attempting to control the disposition of their assets in the face of countervailing male trends. And second, it may be that constraints on the ability of women to hold property were being

65. Population data is taken from 2 C.E. BANKS, HISTORY OF MARTHA'S VINEYARD (1911). The population figures in Table 6 are the sums of data for each of the three non-Indian towns on the island at the relevant times. These data are in the Annals for each town contained in volume 2 of Banks' work at pages 15-16 of the Annals of Edgartown, pages 5-6 of the Annals of Tisbury, and pages 5-7 of the Annals of Chilmark.

66. Certainly the vast bulk of people never wrote wills. See L. FRIEDMAN, *supra* note 22, at 220 (estimating that less than five percent of the persons who died each year left wills that passed through probate). Similar data for Baltimore was not gathered for this study.

released so that the opportunities for taking dispositional control were more frequently available. Some support for both theories is present in the data.

There is something intriguing about women writing wills when the size of even their probated estates was probably smaller than that of their male counterparts. While the data is too tentative to rely upon with great confidence, there is certainly a possibility that women with small estates were taking extra care to guide the disposition of their possessions at death. The Massachusetts study revealed a number of detailed inventories, though not enough to create a large sample. The average size of the inventories of women's estates suggests some income growth among women writing wills in the nineteenth century.

TABLE 8: SIZE OF FEMALE ESTATES—DUKES COUNTY

Time	Number of Wills with Inventories	Average Size	Number of Intestate Estates with Inventories	Average Size
1840-1850	7	\$1364	4	\$540
1800-1839	3	871	4	637 ⁶⁷

Nonetheless, it appears that these estates were significantly smaller than men's estates. Among the ten men's estate files examined in which widows requested an allowance out of their husband's personal estates, eight were intestate. Of these eight, six were appraised at a value over \$1,000. One was appraised at almost \$20,000. Both of the testate estates were very large. While this is certainly not a random sampling of men's estates, the vastness of the difference between the values of these estates and their female counterparts gives rise to the thesis that women were writing wills in situations where men would not have done so. The detailed disposition of small items such as clothing, furniture, and housewares in a large number of the women's wills in both Dukes County and Baltimore also supports the thesis that women were taking special care with the disposition of their assets.

An array of other data confirms that even if women were not consciously exercising control more frequently as the century progressed, men were becoming more willing to let them. Evidence of two sorts is available. First, data on the gender of beneficiaries demonstrate that both male and female wills tended to favor women as primary beneficiaries. Second, use of the equitable estate for married women grew over time and changed in form to permit married women greater dispositional authority.

One of the more fascinating findings of the study, as illustrated by Tables 9 and 10, is that both men and women tended to dispose of property to women rather than to men. The data gathered preclude the argument that women's preference to repose assets with women was more pronounced than men's preference to do the same thing. The primary beneficiary of each will was usually very clear. When there was doubt about a particular will, but all the possibili-

67. Two other partial inventories existed suggesting administered estates in the range of \$30 and \$300, respectively.

ties were of one sex, the primary beneficiary was tabulated in the "other" category for that gender. When it was not clear whether one sex or another was the primary beneficiary, the will was labeled as "mixed."⁶⁸ The years represent the year of probate, which was not always the year in which the will was written. These two tables show that both men and women favored women as primary beneficiaries in their wills and that this trend, at least in Baltimore, increased over time.

TABLE 9: PRIMARY BENEFICIARIES OF WOMEN'S WILLS

Primary Beneficiaries		Dukes County (all years)	Baltimore:		
			1810 and 1825	1840	1846
Females:	Daughter	7	5	11	8
	Mother	2	0	1	3
	Sister	3	3	3	6
	Other	3	4	4	8
	Total	15(50%)	12(43%)	19(49%)	25(53%)
Males:	Son	4	2	6	2
	Nephew	3	1	0	3
	Other	3	4	3	4
	Total	10(33%)	7(25%)	9(23%)	9(19%)
Mixed:	Children	2	6	4	5
	Other	3	3	7	9 ⁶⁹
	Total	5(17%)	9(32%)	11(28%)	13(28%)
Total Wills		30(100%)	28(100%)	39(100%)	47(100%)

68. The few cases where it was not possible to make any conclusion or the cases where the will could not be found have not been included in the tables.

69. One of these wills involved charity as the primary beneficiary.

TABLE 10: PRIMARY BENEFICIARIES OF MEN'S WILLS (BALTIMORE)⁷⁰

Primary Beneficiaries	Total Male Wills	1810 and 1825 Wills	1840 and 1846 Wills
Female: Wife	6	0	6
Wife, then daughters	5	0	5
Daughter	3	2	1
Other female	5	4	1
Total	19(58%)	6(46%)	13(65%)
Male: Other male	2	2	0
Total	2(6%)	2(15%)	0(0%)
Mixed: Wife, then children	4	2	2
Children	3	1	2
Other mixed	5	2	3
Total	12(36%)	5(38%)	7(35%)
Total Wills	33(100%)	13(100%)	20(100%)

Of even greater importance than beneficiary trends, the wills demonstrate that testators of both genders began to grant female beneficiaries, and more importantly, married female beneficiaries, greater control over the ultimate disposition of their assets. While studies of wills have suggested that wealthy men of the early nineteenth century tended to will assets to women in life estates or other forms that would insulate the property from creditors or from present or future husbands,⁷¹ the Baltimore data demonstrates that trend may have diminished by mid-century. None of the thirteen men's wills probated in 1810 or 1825 named a wife as the sole primary beneficiary. Of the twenty 1840 and 1846 wills, six named a wife as primary beneficiary⁷² and four more provided for interests in a wife, followed by grants to daughters. Furthermore, the wills confirm that the equitable estate became an increasingly preferred device as the century progressed. This was true for both men's and women's wills, although the male sample is small. Table 11 shows the percentage of wills that either created a trust with a woman as a beneficiary, or used sole and separate estate language in a grant to a woman, or combined both devices.

70. The Baltimore male sample included 3 wills from 1810, and 10 each from 1825, 1840, and 1846. The sample was gathered by turning the microfilm crank 10 times and stopping at the next male will.

71. L. FRIEDMAN, *supra* note 22, at 220-21.

72. Five of the six were straightforward grants to wives. The other had a restriction if the widow remarried.

TABLE 11: USE OF SEPARATE ESTATE—BALTIMORE

Year of Probate	Female Wills With Separate Estate	Male Wills With Separate Estates
1810 and 1825	14% (4/29)	8% (1/13)
1840	15% (6/41)	
1846	25% (12/48)	25% (5/20) ⁷³

This trend is further confirmed by data on use of deeds creating separate equitable estates in Baltimore. A search of deed indices was made for January to June, 1810, 1825, and 1840. This search, as seen in Table 12, revealed that the appearance of separate estate trust deeds increased at a rate just a bit lower than women's wills.

TABLE 12: WILLS & TRUST DEEDS FOR SELECTED YEARS—BALTIMORE

Year	Number of Women's Wills	Number of Separate Estate Deeds
1810	13	8
1825	19	11
1840	46	17

Analysis of these deeds also reveals that the later instruments gave married women more dispositional authority more frequently (see Table 13).

TABLE 13: TRUST DEED DISPOSITIONAL AUTHORITY—BALTIMORE

Year of Instrument	Full Disposal Authority	Limited Disposal Authority	Life Estate With Designated Remainders
1810	4	1	3
1825	4	2	5
1840	11	4	2

The limitations on dispositional authority varied substantially from instrument to instrument. Among the limitations were a spousal consent requirement, designation of a class from whom grantees must be selected, and grant of either sale or will capacity but not both. If the 1810 and 1825 instruments are combined, fifty-eight percent (11/19) of the women obtained some disposi-

73. This entry covers both 1840 and 1846.

tional authority. Eighty-eight percent (15/17) of the 1840 instruments provided some powers of disposal to women.

Because married women rarely wrote wills in the early nineteenth century, use of will data alone to tabulate the rates at which women disposed of property at death is artificially low if nontestamentary methods of transfer were available to wives. Trust instruments granting disposal authority were just such a substitute for testation. Combining the trust deed data for 1825 and 1840 with the will data produces the intriguing, but tentative, conclusion that by 1840 the effective will-writing rate for women rose to the same level as for men. If we assume that the number of trust deeds found for the January to June periods of 1825 and 1840 represents exactly half of the rate for each year, then the following table results:

TABLE 14: WILL/TRUST DEED RATES⁷⁴

Year	Male Wills Per Year	Female Wills Per Year	Trust Deeds Per Year	Baltimore City Adult Deaths	Male Wills as % of Deaths	Female Wills And Trust Deeds as % of Deaths
1825	95	19	12	772	12.3	4.0
1840	71	46	30	932	7.6	8.2

The column for Trust Deeds Per Year includes only deeds giving women some dispositional authority; the other deeds involve no substitute for testamentary capacity. Similarly, the final column adds wills to trust deeds granting some dispositional authority. Use of death rates is an artificial device for measuring trust deed rates, and the use of only a two-year sample renders the results tentative at best. At a minimum it is fair to suggest that by 1840 married women in Baltimore had obtained significantly more authority to dispose of assets at death than had previously been the case. It may be that the will-writing rate for men fell in part because women were being substituted as testamentary actors.

The Baltimore trust deed data also confirms the availability of equity as a means of limiting the impact of common law restrictions on married women. While virtually no married women's wills were found in either Dukes County or Baltimore (see Tables 15 and 16),⁷⁵ the testamentary capacity of married women did not necessarily remain unchanged between 1800 and 1850.

74. Remember that the will rates in this table are not real since the death base includes all adults in the city and the will and trust deed rates include both the city and the county. Death rates are taken from the same source as Table 4, *supra*.

75. In Tables 15 and 16 the columns labelled "probably widow or single" involve wills where the circumstances strongly suggested the woman's status, but the status was not stated explicitly. For example, a woman who willed property to her mother, and had the same last name as her mother was almost surely a single woman.

TABLE 15: MARITAL STATUS OF FEMALE TESTATORS—DUKES COUNTY

Decade of Probate	Widow or Single	Probably Widow or Single	Married	Unclear
1801-1810	1	0	0	0
1811-1820	0	0	1	1
1821-1830	7	1	1	1
1831-1840	7	2	0	3
1841-1850	9	3	0	1

TABLE 16: MARITAL STATUS OF FEMALE TESTATORS—BALTIMORE

Year of Probate	Widow or Single	Probably Widow or Single	Married	Unclear
1810	6	2	1	4
1825	8	7	0	4
1840	15	14	2	15
1846	21	18	2	7

E. CONCLUSION

The post-1820 appearance of women's wills, the growth in use of the equitable separate estate in wills by both male and female testators, and the increase in use of trust deeds with disposal powers indicates that some growth occurred in the ability or propensity of Maryland's women to dispose of property. This growth, however, occurred within very narrow bounds. The rate at which women's will-writing increased only kept pace with population growth; the proportion of wills written by women increased only because Baltimore men wrote fewer wills as the nineteenth century progressed. Married women's dispositional authority was constrained by the wishes of their grantors. The use of trust deeds with dispositional powers, if thought of as substitutes for wills, may push the women's "will-writing" rate to the level of the men's rate, but these instruments were inherently creatures of male draftsmen. All this suggests that small changes were occurring. Because women were probably not wealthier in relation to men in 1850 than they were in 1800,⁷⁶ there may have been a slow trend toward giving women dispositional authority over property at the expense of some fathers, husbands, and trustees.

76. General historical information suggests that women's proportion of wealth did not rise in the first half of the 19th century. Compare A. JONES, *supra* note 14, at 39 with L. SOLTOW, *supra* note 15, at 200 n.12. A complete investigation of the reasons for the different will-writing rates of Baltimore men and women is necessary, but is beyond the scope of the present study. If men of lesser wealth tended to stop writing wills over time and women of similar or growing wealth began appearing as will-writers, perhaps some rewriting of known history would be possible. If the numbers in Table 8, *supra*, hold up with larger samples, some interesting conclusions could be drawn, especially since the 1840's was a time of deflation. See generally A. COLE, *WHOLESALE COMMODITY PRICES IN THE UNITED STATES: 1700-1861* (1938). On the other hand, whaling produced a great deal of wealth in Dukes County during this period. The increase in women's wealth, if any, may simply reflect community trends.

The results of this study confirm that research into the actual use of wills, trusts, and other forms of control over property will reveal a great deal about social patterns and customs prior to the adoption of married women's acts. But the varied reception given equity in America requires caution in drawing general conclusions from any single piece of research. Two other studies of early nineteenth-century documents, which reached somewhat different conclusions than this study, suggest an agenda for further work.

Marylynn Salmon, in her study of marriage settlements in South Carolina,⁷⁷ found that between 1730 and 1830 control of marriage settlement property by men remained fairly constant, control by women fell, and control by couples rose.⁷⁸ Authority, she found, moved from women alone toward joint management by husbands and wives. Salmon, pointing to Mary Beth Norton's conclusion that women's participation in family governance increased in the decades surrounding the turn of the nineteenth century,⁷⁹ suggested that the changes in control arose because women needed less autonomy as they "exercised more authority over the general fund of family property."⁸⁰ Salmon also found that descent of settlement property to children increased over time, while control of descent by women declined.⁸¹ She tentatively concluded that marriage settlement form became more standardized by the nineteenth century, and that the standardized children descent provisions were accepted because wives had become more secure about their financial autonomy while alive and generally desired their children to have their property at death.⁸²

Both Salmon's overall finding that control of marriage settlement property in South Carolina became more egalitarian by 1830 and my conclusion that women may have gained authority over property at the expense of some men are consistent with Norton's thesis that women's role in family decisionmaking grew in importance between 1750 and 1830. But Salmon's twist that control by couples replaced control by women is different from my suggestion that control by women replaced control by men. In part this may be due to the different ways the data were gathered. Salmon looked at changes in the form of marriage settlements over time. I was interested as much in the rates at which women participated in the property transaction process as in the authority of women to dispose of trust assets. Insofar as our reviews of trust instruments alone are concerned, our results may turn out to be consistent. A larger Maryland sample of trusts may change my results. Salmon's look at a century of documents may have caught a long trend, while my look at half a century may mirror the last half of Salmon's data. Looking only at the South Carolina marriage settlements from 1800 to 1830, Salmon does appear to have found a slight increase in control by women and couples, and a slight decline in control by men.⁸³ In addition, my tentative conclusion that women may have replaced some men as actors in the property system arises from a look at combined

77. Salmon, *South Carolina*, *supra* note 4, at 668.

78. *Id.* at 668-72.

79. M. NORTON, *supra* note 2.

80. Salmon, *South Carolina*, *supra* note 4, at 669.

81. *Id.* at 677-79.

82. *Id.* at 677.

83. *Id.* at 672.

patterns in both wills and equity instruments, rather than equity instruments alone. Further research on the rates in which women participated in all sorts of transactions, in addition to the forms of these transaction, is needed before solid conclusions may be reached about the status of women just prior to the adoption of married women's acts.

It is also possible that the studies display significant differences in the use of equity between the Deep South and the more industrialized border areas. It is logical to hypothesize that further research into Southern and border state equity documents will provide clues about why Southern states tended to adopt the first wave of married women's acts insulating wives' property from husbands' creditors, but spurned many other reforms adopted in the North after 1850, while some border jurisdictions moved quickly to revamp most major common law coverture rules.⁸⁴ If Southern equity documents show that the role of women was reduced prior to the era of married women's acts, and that married women's acts were adopted in bad economic times to solidify a fairly narrow role of married women in equitable separate estates, one would expect that further legislation to enlarge married women's autonomous role in the family would not readily be adopted. If border state documents confirm that women were seen more as autonomous persons in a marriage than as subservient financial partners, one would expect a somewhat different legislative response.

The only published study of Northeastern documents from the early nineteenth century raises as many questions as it answers. Norma Basch, in her study of New York married women's legislation,⁸⁵ undertook a small study of wills in Westchester County. Although she sampled only two years of documents, Basch found that there was little change in the content of wills between 1825 and 1850,⁸⁶ that sons were favored over daughters,⁸⁷ and that women were usually denied power over the disposition of trust assets or granted only interests for life.⁸⁸ These results conflict somewhat with my Massachusetts results, where women seemed to fare somewhat better. Basch's work, like mine, needs to be replicated with much larger samples. In addition, Basch did not focus on the possibility that women fared better in *inter vivos* trust instruments or that participation rates of women in various aspects of property decision-making may have increased, even if the contents of wills did not change.

Trust deeds were certainly used in New York, but the lack of comprehensive recording statutes led Basch not to study them except through judicial decisions.⁸⁹ Nonetheless, Basch's work confirms that the equity jurisprudence in New York⁹⁰ was underlaid with use of trusts in wills at least as early as 1825. While there is certainly the possibility, affirmed by other work,⁹¹ that North-

84. See *infra* notes 204-11 and accompanying text (discussing the first wave of acts insulating wives' property); see also *infra* notes 260-73 and accompanying text (discussing reason for and extent of reforms).

85. N. BASCH, *supra* note 1, at 100-12.

86. *Id.* at 101-03.

87. *Id.* at 101, 105.

88. *Id.* at 108.

89. *Id.* at 73.

90. See *id.* at 70-100 (reviewing cases).

91. Salmon, *South Carolina*, *supra* note 4.

eastern jurisdictions with equity traditions operated more conservatively before 1850 than Southern or border states, there is now little doubt that once the reforming impulses of the abolitionist era struck with full force, many of the more rigid impulses of Northern coverture law fell.⁹² If more complete explorations of the terms of Northern trusts confirm Basch's findings, it may be that the great dissonance between the reality of day-to-day property usage and the aspirations of women in a quickly industrializing region provided significant strength to the Northeastern women's movement after 1850.

II. THE ADOPTION OF MARRIED WOMEN'S PROPERTY ACTS

The Baltimore data confirm that the equitable separate estate underwent significant development from 1800 to 1850, and that the availability of equity to protect married women's property was known well before married women's acts were adopted. But equity was not the only impetus for reform of married women's property law. Like equity, many of the sources for coverture law reform had both English and American roots. The obvious relevance of English law makes it easy to underestimate the importance of American legal developments. In this section, I place English law in its proper perspective and expose the multiplicity of American legal developments during the first half of the nineteenth century that shaped the married women's acts.

A. THE ENGLISH ROOTS

While Blackstone's famous 1765 commentaries were the focus of much of the nineteenth-century public debate on women's law, there is remarkably little legal history scholarship on the influence of Blackstone, or even of English law generally, on nineteenth-century American coverture law. There is literature suggesting that English legal materials were more influential in the 1820's and 1830's than before,⁹³ that along with moral revivals and Jacksonian idealization of the strong male farmer came legal Anglicism, treatise writing, and codification movements.⁹⁴ Legal education, which along with education generally, developed and grew from the 1790's through 1830, was heavily influenced by the treatise writers, English law, and Blackstone.⁹⁵ Yet these very facts make it unlikely that Blackstone became the subject for public debate in the 1840's because contemporary law reflected his eighteenth-century ideas. Rather, it is likely that conservative segments of the legal and academic communities were searching British treatises for precision in an era of multiplying sources for legal rules.⁹⁶ Blackstone's writings were easily understood both by

92. See *infra* notes 204-11, 260-73 and accompanying text (detailing reforms).

93. Zainaldin traces the reemergence of conservative English child custody cases in the 1830's, perhaps encouraged by the heavy use of English cites in the treatises of Kent and Story. Zainaldin, *supra* note 2, at 1059-68. See also Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 759-767 (1976) (discussing the growing influence of Blackstone on legal education in the period).

94. See P. RABKIN, *supra* note 2, at 40-60; Bloomfield, *William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-1830*, 11 AM. J. LEG. HIST. 234 (1967); C. COOK, *THE AMERICAN CODIFICATION MOVEMENT: STUDY OF ANTEBELLUM LEGAL REFORM* (1981).

95. See Nolan, *supra* note 93, at 759-67 (discussing Blackstone's impact on legal education in early America).

96. See C. COOK, *supra* note 94, at 46-48 (noting that by 1815 sources for American law were quickly

men reading to become lawyers in a culture loosening the constraints on entry into the legal profession⁹⁷ and by women publicly criticizing the extant order.

For a number of reasons, Blackstone's vision of reality⁹⁸ is a less than satisfactory basis for measuring the influence of English coverture law. First, English law changed between the time Blackstone wrote and the opening decades of the nineteenth century. Second, by 1800 important differences between American and English law existed in conveyancing, dower, intestate succession, equity, and divorce.⁹⁹ Third, the overall impact of English law on coverture developments was diffuse. So many other influences were at work during the early nineteenth century that English law was only one of numerous factors. Well before married women's legislation appeared, American law witnessed the arrival of the codification and treatise movements, the rise and incipient decline of legislative private bills, and the appearance of efforts to merge law and equity. To ignore these and other legal developments by focusing on Blackstone's version of our English heritage is to miss the peculiarly American context of married women's property legislation.

1. Change in English Coverture Law

Blackstone wrote his Commentaries while the separate equitable estate of a married woman was reaching maturity in English chancery courts.¹⁰⁰ Decisions rendered in the late eighteenth century both subjected a wife's separate property to her debts, and narrowly construed dispositional powers in trust instruments to avoid overreaching by husbands.¹⁰¹ The failure of much modern scholarship to note the changes in English law during the very era in which America began seriously to reconsider the legal status of women is quite remarkable.¹⁰² Many have written of English law as if it were monolithic and

proliferating). Case reports, statutes, and books were emerging in a nation with more than twenty states. Doctrinal and theoretical diversity was becoming commonplace. Uncertainty over legal norms was becoming a real concern for many.

97. *Id.* at 158-60, 172-73. See also L. FRIEDMAN, *supra* note 22, at 276-78.

98. The 1803 St. George Tucker edition of BLACKSTONE'S COMMENTARIES was the most prominent of the early American editions of the 1765 English treatise. Chapter XV, part III, on the law of husband and wife, at 441-45, is the section most often chastised. There Blackstone writes that "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."

99. Divorce is an enormous area all by itself. I have chosen largely to pass by this area for now because so little good work has been done and the task is so enormous. Blake, *supra* note 2, does make it clear that divorce was an early and important area where the colonies differed notably from England. But the lack of work on the economics of divorce—the relative positions of men and women before, during, and after marriage—makes it very difficult to evaluate the importance of the growth of divorce between 1780 and 1840. If the major thesis of this article is correct, one should find reforms between 1800 and 1850 that provided divorced women slightly greater rights to property or money upon divorce. This would occur not because of any modern notions about protecting women, but to protect increasing numbers of children coming into the custody of women and to prevent women on the edge of poverty from becoming public charges.

100. Holdsworth writes that by 1750 property could be set aside in a separate estate or disposed of by a married woman by will or gift without a husband's consent. 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 275-76 (1938 & photo. reprint 1966).

101. 12 W. HOLDSWORTH, *supra* note 100, at 325-26.

102. There is a fairly large body of literature on the reception of English law. Among the more interesting items suggesting the diffuse nature of America's reception of English law are G. HASKINS, LAW & AUTHORITY IN EARLY MASSACHUSETTS 113-40 (1960); M. HORWITZ, *supra* note 51, at 3-30; D. KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY 1629-1692 3-63 (1979); W.

unchanging.¹⁰³ Holdsworth notes that English law on married women changed substantially during the seventeenth and eighteenth centuries. The general outlines of common law coverture rules emerged in the thirteenth century.¹⁰⁴ Upon marriage, the husband gained power and control over his wife's freehold estate for the term of the marriage, or, upon the birth of a child, for the husband's life, and obtained ownership of his wife's personal property. A woman's ability to contract was suspended upon marriage. Equitable exceptions to these rules did not emerge until the late sixteenth century,¹⁰⁵ when antenuptial contracts and trusts for the separate use of the wife appeared.¹⁰⁶ The chancery cases also gave wives power to will their separate estates, donate them to their husbands, sell them to strangers, and perhaps deal with them by contract.¹⁰⁷ Though consent of the husband for the establishment of the separate equitable estate was still necessary,¹⁰⁸ equity courts of the late seventeenth century began to require an "equity to a settlement" to insure some financial safeguards for wives whose husbands sought to make use of assets in a separate estate.¹⁰⁹ This period also saw the emergence of enforceable separation agreements, support decrees for wives leaving their marital home due to the fault of the husband,¹¹⁰ and cases confirming the ability of married women to execute powers.¹¹¹ Not until the mid-eighteenth century did chancery courts take the crucial step of recognizing a separate estate created without the husband's consent.¹¹² In a related development, the courts began to examine dispositions of a separate estate more carefully to avoid coercion by husbands.¹¹³ The separate estate became subject to the debts of married women by the end of the eighteenth century.¹¹⁴

Dower also changed dramatically from its fifteenth-century roots.¹¹⁵ By the fifteenth century the one-third share was established, and it was clear that dower could be avoided if land was sold by means of a fine and the wife was

NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 1-64 (1975); E. Warbasse, *supra* note 2, at 3-6; Blume & Brown, *supra* note 37; DePauw, *Women and the Law: The Colonial Period*, 6 HUMAN RIGHTS 107 (1977); Nolan, *supra* note 93; Note, *The Tennessee County Courts Under the North Carolina and Territorial Governments: The Davidson County Court of Pleas and Quarter Sessions, 1783-1796, as a Case Study*, 32 VAND. L. REV. 349 (1979) [hereinafter Note, *Tennessee County Courts*]; Goebel, *Ex Parte Clito*, 54 COLUM. L. REV. 450-59 (1954) (reviewing O. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

103. Authors often speak of the common law without reference to its modification over time. See, e.g., R. MORRIS, *supra* note 21, at 128, 155, 164, 166, 173, 185, 195, 197; P. RABKIN, *supra* note 2, at 19-22; L. KERBER, *supra* note 2, at 139-41.

104. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 520-33, 541-43 (1908 & photo. reprint 1966).

105. 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 428-29 (2d ed. 1937).

106. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 310-15 (1924).

107. *Id.* at 315.

108. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 645 (2d ed. 1937 & photo. reprint 1966).

109. *Id.*

110. *Id.* at 646.

111. 7 W. HOLDSWORTH, *supra* note 108, at 180-81.

112. 12 W. HOLDSWORTH, *supra* note 100, at 275-76. See also P. RABKIN, *supra* note 2, at 81. Rabkin notes that chancery development gradually permitted fathers to guarantee that the property they passed on to their daughters would be free from the clutches of untrustworthy husbands. It was to protect daughters, Rabkin argues, more than to free wives that the chancery acted. *Id.*

113. 12 W. HOLDSWORTH, *supra* note 100, at 276, 324-26.

114. *Id.* at 325.

115. 3 W. HOLDSWORTH, *supra* note 104, at 193.

examined separately by the court.¹¹⁶ Even at this early date, other devices for avoiding dower had emerged, including the use of jointures and premarital settlements providing for life estates in the husband's lands at his death.¹¹⁷ The development of jointure led to the already mentioned development of ante-nuptial contracts and trusts for the separate use of the wife. By the middle of the eighteenth century, it was clear that equitable estates were free of dower.¹¹⁸ While the lack of dower at equity was reversed by statute in 1833, the same act provided for dower only in lands actually held at death by the husband.¹¹⁹ Thus, the English rules governing both dower and coverture at equity underwent significant changes from the time America was first colonized in the early seventeenth century through the turn of the nineteenth century.

Coverture doctrines at law were also under stress in the same period. For some time before the turn of the eighteenth century, it was clear that married women divorced from bed and board, abandoned by their husbands, or left behind after their husband's banishment from the realm could act as single women.¹²⁰ During the eighteenth century, cases arose where women, living apart on separate maintenance provided by their husbands after a marital separation, pled coverture as a defense to actions by their creditors.¹²¹ Lord Mansfield, confronted with such a dispute in *Corbett v. Poelnitz*¹²² in 1785, took the opportunity gently to criticize the extant coverture rules at law, and to bind the separately maintained wife to her contract as if she were a feme-sole.¹²³ Though the case was overruled after Mansfield left the King's Bench,¹²⁴ it is clear from the judicial turmoil and the commentary of the day that the less central portions of the coverture rules were under attack even at law.¹²⁵ Mansfield's opinion in *Corbett* spoke of "new customs and new manners"¹²⁶ and noted the growing prevalence of deeds under which a married woman assumed the appearance of a feme-sole.¹²⁷ Mansfield's general penchant for liberalizing rules of commercial transactions meshed neatly with his attempt to reform coverture rules as they applied to married women acting independently in the business world.¹²⁸

116. *Id.* at 193.

117. *Id.* at 196.

118. *Id.* at 196-97.

119. *Id.* at 197.

120. 1 J. POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* 75-77 (1790).

121. *See id.* at 77-93; C. FIFoot, *LORD MANSFIELD* 217-18 (1936); 1 W. EVANS, *A GENERAL VIEW OF THE DECISIONS OF LORD MANSFIELD* 99-110 (1803); *Ringstead v. Lady Lanesborough*, 99 Eng. Rep. 610, 3 Douglas 197 (1783); *Corbett v. Poelnitz*, 99 Eng. Rep. 940, 1 Term Rep. 5 (1785); *Marshall v. Rutton*, 101 Eng. Rep. 1538, 8 Term Rep. 545 (1800).

122. 99 Eng. Rep. 940, 1 Term Rep. 5 (1785).

123. *Id.* at 945, 1 Term Rep. at 8.

124. *Marshall v. Rutton*, 101 Eng. Rep. 1538, 8 Term Rep. 545 (1800).

125. *See J. POWELL, supra* note 120, at 77-93. In the most widely-circulated American edition of *BLACKSTONE'S COMMENTARIES*, that of St. George Tucker issued in 1803, there are a number of notes critical of the Blackstone version of coverture. *BLACKSTONE'S COMMENTARIES* 441-45 (S.G. Tucker ed. 1803). Some of these notes are reprints of those penned by Edward Christian, who had edited an earlier English edition of the *Commentaries*. Tucker added a few references, including one to *Corbett v. Poelnitz*. *Id.* at 943. *See also* Nolan, *supra* note 93, at 736-37.

126. 99 Eng. Rep. at 942, 1 Term Rep. at 8.

127. *Id.* at 943, 1 Term Rep. at 9.

128. Though Mansfield apparently was not well-received in America after the Revolutionary War,

Another indication of the pressure Mansfield must have felt is revealed by cases on the custom of London, confirmed by the courts of law beginning at the end of the sixteenth century and continuing through the eighteenth century.¹²⁹ According to the custom, women could sue and be sued on debts arising out of trade in which their husbands did not intermeddle. While the cases do not reveal whether the custom was more heavily used in Mansfield's time than in prior centuries, one would certainly hypothesize that it, or some substitute, was.¹³⁰ The growth, if any, in the wealth and commercial activity of the wives of London¹³¹ may have imposed pressures on both the coverture rules at law and on the equitable notion of the separate estate. It is quite possible that use of the custom declined rapidly in the late eighteenth century once equity had affirmed the ability of women to use separate estates free of their husbands' control.

Changes in English law were well-known in America before 1840. The most widely used edition of Blackstone, that edited by Tucker in 1803,¹³² had some significant debunking notes and commentary. Even suffrage for unmarried women was implicitly approved in a note saying that women "pay taxes without having the liberty of voting for representatives; and indeed there seems at present no substantial reason why single women should be denied this privilege."¹³³ "I fear," the note goes on, "there is little reason to pay compliment to our laws for their respect and favour to the female sex."¹³⁴ In addition, the early American treatises by Kent and Story¹³⁵ noted many developments, especially at equity, which had flowered in England since Blackstone's time. My archival work certainly confirms this. Furthermore, studies of court and other records in frontier areas indicate that some frontier lawyers and judges paid lavish attention to English and American precedents in the early nineteenth century, and that they had access to a wide array of case reports and treatises

see Goebel, *supra* note 102, at 455-56; M. HORWITZ, *supra* note 51, at 18, his work was better known and perhaps more influential by the time of Kent and the beginnings of the treatise movement in the United States. See 2 J. KENT, *supra* note 43, at 133-36; M. HORWITZ, *supra* note 51, at 257-58; L. FRIEDMAN, *supra* note 22, at 95.

129. *Chamberlain v. Throp*, 74 Eng. Rep. 121, 1 Leonard 130 (31 Eliz., 1589-1590); *Bowett v. Langham*, 124 Eng. Rep. 299, Hetley 9 (3 Car., 1628-1629); *Langham against the wife of John Bewett*, 79 Eng. Rep. 661, Croke Car. 68 (3 Car., 1628-1629); *Barns v. Barns*, 90 Eng. Rep. 32, Skinner 66 (34 Car. 2, 1683-1684); *Fabian v. Plant*, 89 Eng. Rep. 525, 1 Shower, K.B. 183 (3 W. & M., 1690-1691); *Anonymous*, 88 Eng. Rep. 1549, 12 Modern 603 (13 Will. 3, 1702-1703); *Mrs. Pool's Case*, 88 Eng. Rep. 1021, 11 Modern 253 (8 Anne, 1710-1711); *Caudell v. Shaw*, 100 Eng. Rep. 1065, 4 Term Rep. 361 (1791).

130. The frequency of reported cases in Viner's Abridgement goes down in the eighteenth century as compared with the seventeenth century. Perhaps this is because of the increasing utility of trusts, powers, and other devices to avoid the restrictions of the coverture rules at law. There may have been less need to dispute the legitimacy of the custom if other tools were available to women to protect their commercial interests.

131. That wives were involved in trade is fairly clear. See M. GEORGE, *LONDON LIFE IN THE XVIIITH CENTURY* 168-73, 175, 181-85, 195, 198, 202, 207-08, 427-29 (1925). It is not at all clear that the same may be said of married women in the United States, since little scholarship exists on the commercial role of married women in the early part of the century. Two works by E. Dexter, *COLONIAL WOMEN OF AFFAIRS: WOMEN IN BUSINESS AND PROFESSIONS IN AMERICA BEFORE 1776* (1924) [hereinafter E. DEXTER, *COLONIAL WOMEN OF AFFAIRS*] and *CAREER WOMEN OF AMERICA 1776-1840* (1950), pay no attention to marital status.

132. See Nolan, *supra* note 93, at 737 n.38.

133. 2 BLACKSTONE'S COMMENTARIES 445 (S.G. Tucker ed. 1803). The note was written by Edward Christian, an Englishman, not Tucker, shortly before Tucker did his work.

134. *Id.*

135. J. KENT, *supra* note 43; J. STORY, *supra* note 34.

within a very short time after the areas were opened for settlement.¹³⁶ Available treatises included not only the expected volumes, such as Blackstone and Kent, but also a number of now obscure American and English books.¹³⁷ There is every reason to believe that the influence in America of Blackstone's conservative commentary on coverture law was equally balanced by general knowledge of the more liberal equity concepts emerging after the Revolutionary War. As Nolan has concluded about Blackstone generally, "The Commentaries did significantly influence the evolution of American institutions, but their influence on each differed in kind and degree. In every case, however, Blackstone's influence was more oblique and more diffuse than his biographers have claimed."¹³⁸

2. Early Differences Between English and American Coverture Law

Although our legal system was based in very substantial part on English models,¹³⁹ there were enough differences between English and American coverture law to suggest that the United States was marching to a significantly different drummer by 1800. The earliest settlers were confronted with many problems not routinely dealt with by English law. There is evidence that women, sometimes even married women, received land grants in some of the Colonies.¹⁴⁰ While this practice may have been designed to attract women to the new Colonies,¹⁴¹ it is also possible that the exigencies of colonial life sometimes forced relaxation of the strict roles of husbands and wives.¹⁴² There is some literature suggesting that early colonial married women did not labor under legal restrictions to the extent Blackstone's commentaries would sug-

136. Brown, *Frontier Justice: Wayne County 1796-1836*, 16 AM. J. LEG. HIST. 126 (1972); Blume, *supra* note 35, at 88-95; Note, *Tennessee County Courts*, *supra* note 102, at 377-82. These studies looked at cases not generally reported by the digest system. But even in early reported opinions, the knowledge of chancery developments seems quite up-to-date. See, e.g., *Trustees of Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 77 (N.Y. 1817); *Franklin v. Creyon*, 1 Harp. Eq. 243 (S.C. 1824); *Trenton Banking Co. v. Woodruff*, 2 N.J. Eq. (1 H.W. Green) 117 (1838); *Porter v. Bank of Rutland*, 19 Vt. 410 (1847).

137. Nolan's thesis that Blackstone's influence was somewhat diffuse is lent credence by Brown's work on the Michigan territorial records. See Brown, *supra* note 136 (suggesting that frontier lawyers possessed and used same sources of law as their metropolitan contemporaries).

138. Nolan, *supra* note 93, at 732.

139. See C. COOK, *supra* note 94, at 3-45. But even as to the general influence of English law, there does appear to be some agreement that legislative differences arose in great profusion. The Northwest Ordinance, for example, required the new territory's Governor and judges to adopt statutes previously enacted by one or another state "as might be necessary and best suited to the circumstances of the district." Blume & Brown, *supra* note 37, at 523. See generally BROWN, *BRITISH STATUTES IN AMERICAN LAW: 1776-1836* (1964); Blume, *Legislation on the American Frontier*, 60 MICH. L. REV. 317 (1962). This provision governed much of the territorial development of the United States, since the Northwest Ordinance was extended from time to time to other territories. As a result, territorial statutes tended to be eclectic in origin. The tendency for legislatures to copy other statutes has apparently been a constant in American legal history. See L. FRIEDMAN, *supra* note 22, at 78-81. Even in 17th-century Massachusetts the practice occurred, and it was continued in the other Colonies. See Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103 (1949); Haskins, *Codification of the Law in Colonial Massachusetts: A Study in Comparative Law*, 30 IND. L.J. 1 (1954).

140. J. SPRUILL, *supra* note 44, at 9-12, 340; R. MORRIS, *supra* note 21, at 131; M. RYAN, *WOMANHOOD IN AMERICA* 6-7, 13 (1979). See also the numerous anecdotes of women landowners in E. DEXTER, *COLONIAL WOMEN OF AFFAIRS*, *supra* note 131, at 98-125. Unfortunately, Dexter did not focus on the marital status of her subjects or the impact of coverture rules.

141. J. SPRUILL, *supra* note 44, at 9-12.

142. See M. RYAN, *supra* note 140, at 1-40 (discussing roles of women in colonial society).

gest.¹⁴³ However significant the initial colonial land grants to women and the somewhat looser rules of the earlier colonial era, there is little disagreement that the practices were altered and that English law became more influential as the Colonies developed. The more traditional English pattern of the husband's dominance certainly governed in most places during the late seventeenth and the greater part of the eighteenth century.¹⁴⁴ Nonetheless, early variations in colonial practice and different traditions in colonial administration left opportunities open for novel American practices to develop.

These generalizations about married women's law coincide with the conclusions drawn in the general literature on pre-Revolutionary War use of English law in the colonies. As the colonies matured, English legal models became more important.¹⁴⁵ Nonetheless, substantial room was left for independent development of American legal institutions.¹⁴⁶ Even though American legal developments were subjected to appellate review by the Privy Council during much of the colonial era,¹⁴⁷ it is likely that such review was used only to protect the Crown's power to direct colonial legal institutions and to promote the economic interests of Great Britain.¹⁴⁸ As Goebel notes,¹⁴⁹ the Colonies, lacking the centralized institutions of the English chancery system, adopted particularized procedural formats from their earliest days.¹⁵⁰ The diffuse system gave significantly more control to judges than in England.¹⁵¹ Furthermore, the diverse needs of the Colonies, and the ability of the settlers to adopt their own legislation, naturally led to deviations from English common law practice. Much of the new law avoided Privy Council censure.¹⁵² Finally, Goebel notes that the colonists generally acted as if they had the authority to decide which English statutes were applicable to their territory.¹⁵³

By the end of the colonial era, therefore, the American legal system was peppered with localized procedural systems and variegated lines of cases and statutes. Judges and legislators alike considered themselves to be repositories

143. R. MORRIS, *supra* note 21, at 126-200; Gundersen & Gampel, *Married Women's Legal Status in Eighteenth Century New York and Virginia*, 39 WM. & MARY Q. 114 (1982).

144. J. SPRULL, *supra* note 44, at 340-66; L. KERBER, *supra* note 2, at 119-84.

145. L. FRIEDMAN, *supra* note 22, at 42-49.

146. See, e.g., Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1970); L. FRIEDMAN, *supra* note 22, at 15-16, 30-32. See generally G. HASKINS, *supra* note 102 (suggesting diffuse nature of America's acceptance of English law); M. KAMMEN, *COLONIAL NEW YORK: A HISTORY* 91-94 (1975) (same); Gundersen & Gampel, *supra* note 143 (same).

147. During the earliest years of the colonies, direct English control of American legal development was weak at best. 1 R. POWELL, *supra* note 44, at 99-102; see Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931). Only after the Restoration in 1660 did the Crown begin to exercise more control over its colonial domain. This early period of relative freedom in the colonies planted the seed for much of the power exercised by the judicial and legislative authorities in the 18th century. See L. FRIEDMAN, *supra* note 22, at 43-45. Of course, some colonies developed legal systems from non-English roots because of the early exploration patterns of the European powers. M. KAMMEN, *supra* note 146, at 91-94.

148. Goebel, *supra* note 102, at 466.

149. Goebel's piece is a severe critique of O. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

150. See also G. HASKINS, *supra* note 102, at 113-40.

151. Goebel, *supra* note 102, at 464.

152. *Id.* at 464; L. FRIEDMAN, *supra* note 22, at 43. See also M. HORWITZ, *supra* note 51, at 1-30; W. NELSON, *supra* note 102, at 9-10.

153. Goebel, *supra* note 102, at 465; see also L. FRIEDMAN, *supra* note 22, at 78-81.

of substantial legal authority. Similarly, the post-war process of deciding which segments of colonial legal institutions were to be left intact gave a great deal of discretion to judges, and statutes were received if local demands warranted. The problem for revolutionary era courts was to keep legal systems operating, rather than to simply reject, or accept, English law.¹⁵⁴

Modern legal historians studying coverture are now recognizing that post-war judicial and legislative decisions on the applicability of English law in the state, territorial, and federal systems were not uniform.¹⁵⁵ An array of recep-

154. Goebel, *supra* note 102, at 467-68. Although Horwitz is more sympathetic than Goebel to the idea that natural law concepts motivated much of the legal community's actions in the 18th century, the factual predicate for his theory is similar to Goebel's. Compare Goebel, *supra* note 102, at 456-57, with M. HORWITZ, *supra* note 51, at 7-9. See also W. NELSON, *supra* note 102, at 13-35. Horwitz, like Morris, *supra* note 21, is subject to the criticism that he makes very broad generalizations from scattered evidence. Nonetheless, his generalizations are useful categories even if only as a starting point for measurement. Horwitz argues that Revolutionary War era lawyers had great respect for the common law system, despite colonial deviations from English rules of law. See also L. FRIEDMAN, *supra* note 22, at 95-96. Precedent was important in the formation of norms that generally governed the human condition. M. HORWITZ, *supra* note 51, at 4-5. While common law was equated with the divination of customary practice and natural law, *id.* at 7-8, statutes were perceived as man-made instruments of the Crown. While the colonists felt entitled to the common law system, if not its results, *id.* at 8, they felt free to alter English statutes. As a result, both judges pronouncing the common law and legislators enacting statutes ignored English solutions when necessary. Not until well after the Revolution did reactions set in decrying the diversity of judge-made law, *id.* at 18, and seeking the general unification and codification of legal norms, *id.* at 9-30, 253-56. The treatise tradition, which grew vigorously in the United States after 1820, also undertook to rationalize the diverse case law. The trend began with Kent's COMMENTARIES in 1827 and Story's COMMENTARIES ON EQUITY in 1836. But before the reaction, judges were emboldened to decide cases by reference to perceived public policy needs, M. HORWITZ, *supra* note 51, at 30, and legislatures felt free to adopt far-ranging alterations in English law. L. FRIEDMAN, *supra* note 22, at 97-100. By the turn of the 19th century, Horwitz argues, legal thought had moved from natural law to law as an instrument of social policy.

155. The best of the recent articles on variations during the colonial era is Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 LAW & HIST. REV. 1 (1983). Salmon argues that modern legal historians may not with confidence rely on the general conclusions of an earlier generation of historians, including Morris, Beard, Dexter, and Bensen. Johnston opened the recent law journal debates on many of the questions taken up in this paper. Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033 (1972). His cites to R. MORRIS *supra* note 21, suggest the difficulty Johnston had in deciphering the reception of English law in a culture as diverse as early America's. Even though chapter III of Morris' book has been aptly applauded as a path-breaking work, it is most certainly flawed. See M. SALMON, *supra* note 2, at 18-21. Morris drew a generally optimistic conclusion about the improved colonial status of women by noting a number of scattered examples of exceptions to the general English practice. Although these examples are very useful and interesting, they do not arise out of the intense cultural analysis necessary to support Morris' overall conclusion. See Goebel, *supra* note 147, at 416 n.3. Indeed, Morris was at times wrong in suggesting that his examples were exceptional and different from English practice. For example, Morris notes that a Mistress Margaret Brent acted as Maryland Governor Calvert's executor beginning in 1647. R. MORRIS, *supra* note 21, at 132-33. This is said to be an example of a woman acting as an attorney. But women were acting as executors of estates in England for some time before 1647. 3 W. HOLDSWORTH, *supra* note 104, at 528, 544; 7 W. HOLDSWORTH, *supra* note 108, at 180. Similarly, in an effort to make American commercial practice seem more open to women, Morris dismisses the English feme-sole trader status "merely as a local custom in some of the commercial boroughs," citing 3 W. HOLDSWORTH, *supra* note 104, at 525. But the period Holdsworth described was much earlier than the 17th century. Morris also ignores other available material on feme-sole trader status in England. See *infra* notes 183-96 and accompanying text. The custom of London can hardly be so easily dismissed. It is also not clear that Dexter's books, COLONIAL WOMEN OF AFFAIRS: WOMEN IN BUSINESS AND PROFESSIONS IN AMERICA BEFORE 1776 (1924) and CAREER WOMEN OF AMERICA 1776-1840 (1950) portray any different picture than that of London given by M. George in chapter IV of LONDON LIFE IN THE XVII CENTURY (1925). The colonies may have been more open to businesswomen than England, but Morris fails to make a case for that view. Morris also suggests that ante-nuptial contracts calling for husbands to dispose of assets by will to their wives were not clearly enforceable in England in the 17th century, while they were in the Colonies. R. MORRIS,

tion statutes was passed in the late eighteenth and early nineteenth centuries, and they differed in the era of English common law to be followed, the acceptance of equity, and the binding force of statutes.¹⁵⁶ Reception statutes frequently gave courts some discretion to decide which English precedents or statutes to apply. In addition, legislatures took upon themselves the task of resolving many disputes by passing private bills. In this milieu, pre-war changes in coverture-related legal norms were unlikely to be impeded by English interests. After the war, there was room for legal institutions to reexamine coverture law.

Development of Conveyance Reforms.

From early in the eighteenth century, simplified documentary systems of land transfer emerged in most, but not all, of the Colonies.¹⁵⁷ The vast number of land transfers occurring in the eighteenth and nineteenth centuries required simple conveyancing methods. Warranty and quit claim deeds emerged in easily useable forms early in the eighteenth century.¹⁵⁸ The Northwest Ordinance provided for transfer of property by deed, free of the technical constraints of English common law.¹⁵⁹

supra note 21, at 135-36. Morris ignores, however, the contemporaneous development of trusts in England that served the same purposes. 5 W. HOLDSWORTH, *supra* note 106, at 312-15. Finally, Morris' examples are localized. There is no way to know the depth or breadth of the colonial practice from his discussion.

156. Although some American reception statutes referred to specific dates for determination of the English common law to be received, almost all the reception statutes allowed local judges discretion in deciding when to declare the law to be "received." Even in areas where reception statutes designated a specific date, judges were left with discretion to adopt later English case law. L. FRIEDMAN, *supra* note 22, at 97-100. It is therefore predictable that the American legal system absorbed some segments of English law and rejected others.

The most comprehensive summary of reception provisions appears to be 1 R. POWELL, *supra* note 44, at 72-363. Every state's situation is discussed. A number of states had time-specific provisions. In 1776, for example, Virginia adopted a statute providing for reception of "the common law of England, and statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the First 1607, and which are of a general nature, not local to that Kingdom." 1 REVISED CODE OF THE LAWS OF VIRGINIA 135 (1819). The statutory segment of this provision was significantly narrowed in 1792 after Jefferson completed a general statutory revision project for the state. Blume & Brown, *supra* note 37, at 480. Massachusetts provided in its first constitution that "All the laws which have heretofore been adopted, used, and approved . . . and usually practised on the courts of law shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." MASS. CONST. ch. VI, art. VI (1780). While this was later construed broadly to permit discretionary adoption of English law, *Commonwealth v. Churchill*, 2 Metc. 118 (Mass. 1840), it obviously lacked the certitude of Virginia's code. The Virginia Ordinance of 1776 was adopted by the territorial government of the Northwest Territories in 1795. Blume & Brown, *supra* note 37, at 39. The Northwest Ordinance itself provided simply that the territory's inhabitants should have the "benefits of . . . judicial proceedings according to the courts of the common law." *Id.*

The statutes frequently left much discretion with courts. In Vermont a fairly typical statute was passed providing for reception of common law "not repugnant to the Constitution, or to any acts of the legislature of this state." 1 Vt. 118 (1793). A contemporaneous commentary on this act by the Chief Justice of the Vermont Supreme Court noted that circumstances were different in America from England, that monarchy and aristocracy had been overthrown, and concluded that the reception statute should not be read to accept principles "which from the peculiar circumstances of that government, exist only in England." Chipman, *A Dissertation on the Act Adopting the Common and Statute Laws of England*, 1 Vt. 117, 138 (1793).

157. R. MORRIS, *supra* note 21, at 69-72; L. FRIEDMAN, *supra* note 22, at 54-57; G. HASKINS, *supra* note 102, at 171-73. New York, interestingly enough, was among the later states to alter its conveyance rules. See Gundersen & Gampel, *supra* note 143, at 125-27 (1982); M. SALMON, *supra* note 2, at 31-37.

158. L. FRIEDMAN, *supra* note 22, at 207-09.

159. Blume, *supra* note 139, at 326-27.

While these provisions were probably inserted in the Ordinance to benefit the Ohio Company, which was seeking rights to develop Ohio,¹⁶⁰ they had effects on coverture rules as well. The use of a fine and recovery to convey a married woman's interest in her husband's land gave way to joint conveyance accomplished by signature.¹⁶¹ Even though many Colonies, states, and territories retained the English practice of approving a land sale only after a married woman was separately examined before a judge or magistrate,¹⁶² the general liberalizing of conveyancing practices had substantial impact.¹⁶³ While in hindsight the ease with which a wife's dower or other interest in real property could be transferred may be viewed as a double-edged sword,¹⁶⁴ there is little doubt of its importance in early American women's law.¹⁶⁵

Development of Dower. Among the active debates in women's legal history, that involving reception of English dower may be the most lusty. The notion that dower was imported untouched from England is universally viewed as untenable.¹⁶⁶ The debate concerns whether the American changes were more¹⁶⁷ or less¹⁶⁸ favorable for women than the English law. Scholars on both sides of the controversy may be correct. Nineteenth-century scholarship indicates that dower was treated more favorably in some parts of the country than in others.¹⁶⁹ Some Colonies and states awarded dower in equitable estates; others did not.¹⁷⁰ Some states awarded dower in land held during coverture, others only in land held at death.¹⁷¹ Although Pennsylvania law has recently been strongly criticized,¹⁷² evidence suggests that neighboring Ohio

160. *Id.*

161. R. MORRIS, *supra* note 21, at 147-55; L. KERBER, *supra* note 2, at 145; 1 J. BISHOP, *supra* note 27, at 406-10.

162. 1 C. SCRIBNER, A TREATISE ON THE LAW OF DOWER 29-31, 37 (1867) (practice retained in Connecticut, New York, and North Carolina); 1 J. BISHOP, *supra* note 27, at 410-15; M. SALMON, *supra* note 2, at 37-83.

163. Dower, for example, was easier to defeat by conveyance than in England, at least at law. See 1 J. BISHOP, *supra* note 27, at 312-15; 2 C. SCRIBNER, *supra* note 162, at 268-78.

164. The use of separate examinations to protect women from overreaching husbands could act beneficially. It could also be an unnecessary hurdle, or could lapse unfairly into informality. See L. KERBER, *supra* note 2, at 145; Salmon, *supra* note 42, at 101-06.

165. Despite the easing of transfer restrictions, the general content of the husband-dominating coverture rules certainly continued. Married women's contracts were still not generally enforced, so promises to convey or warranties to guarantee title were frequently unenforceable. Immediate conveyances without contractual preliminaries were easier.

166. J. SPRUILL, *supra* note 44, at 359-60; L. FRIEDMAN, *supra* note 22, at 59, 375-76; L. KERBER, *supra* note 2, at 123-32, 146-48; M. HORWITZ, *supra* note 51, at 56-58; R. MORRIS, *supra* note 21, at 155-64; Salmon, *supra* note 42, at 106-08. Though not cited by the recent authors, the only significant 19th-century American treatise on dower confirms the recent work. See 1 C. SCRIBNER, *supra* note 162, at 23-57 (state-by-state review of dower law describing numerous state-by-state differences from English law).

167. See generally R. MORRIS, *supra* note 21, and J. SPRUILL, *supra* note 44 (arguing American changes in dower were more favorable to women).

168. See generally L. KERBER, *supra* note 2; M. HORWITZ, *supra* note 51; L. FRIEDMAN, *supra* note 22; and Salmon, *supra* note 42 (arguing American changes in dower were less favorable to women).

169. See 1 C. SCRIBNER, *supra* note 162, at 23-57; M. SALMON, *supra* note 2, at 264-98.

170. 1 C. SCRIBNER, *supra* note 162, at 382-90, 396-417.

171. *Id.* at 589-601.

172. See Salmon, *supra* note 42, at 108. Salmon's judgment that dower was placed in jeopardy by 18th-century Pennsylvania law may not tell the entire story. Scribner writes:

But the courts of Pennsylvania have not left the widow to the uncertain and precarious provision contemplated by the above statute. That enactment being limited to the estate

had a lengthy tradition of protecting married women's dower interests.¹⁷³ In addition, England was limiting the impact of dower during the eighteenth century. The substantial use of equity practice in England led to very general avoidance of dower rules during the reception eras.¹⁷⁴ When dower reform came before Parliament in 1833, dower was extended to equitable estates, but only those actually held by the husband at death.¹⁷⁵ Thus, whether American law was more or less favorable to women may be impossible to assess with certainty.

The early dower statutes exhibit several interesting characteristics. They were sometimes passed in acts containing more general conveyancing reforms permitting transfer by deed,¹⁷⁶ or with provisions for the separate examination of married women.¹⁷⁷ The link between conveyance reform and dower is also illustrated by those statutes that provided widows a right to reject either dower or the provisions of their husbands' legitimate wills in favor of a statutorily prescribed share of their deceased husbands' estates.¹⁷⁸ Such statutes were passed in some states shortly after the Revolutionary War, and the practice existed well before the war in some areas.¹⁷⁹ This elective share scheme did

which the husband held at his death, and in respect of which he died intestate, the courts have determined that as to lands which were aliened by him during the coverture without the concurrence of the wife, or which he attempts to dispose of by will to her prejudice, she may take her dower as by common law.³ This doctrine is the result of judicial construction, solely, and appears to be unsupported by any express law upon the subject. It is now too well established, however, by an unbroken current of authority, to admit of serious question or doubt.

While adopting the rule of the common law to the extent just stated as a part of the law of Pennsylvania, the courts have gone one step further in behalf of the widow. They have so far modified that rule as to give dower in equitable as well as legal estates. In *Kelly v. Mahan*, it was held that dower may be had of a mere improvement claim, and in *Shoemaker v. Walker*, the right of dower in equitable estates was expressly determined. "In Pennsylvania," said Tilghman, Chief Justice, after remarking upon the doctrine of common law, "the usage has been more reasonable, and more analogous to the general principles of dower."

1 C. SCRIBNER, *supra* note 162, at 410. Scribner's footnote 3 refers to a line of decisions starting with *Borland v. Nichols*, 12 Pa. (2 Jones) 42 (1849). The intriguing question is whether this case was a shot out of the blue or a reflection of more long-standing practice. If the latter turns out to be true, the 18th-century dower statutes in Pennsylvania may not be read to be as harsh to women as Salmon suggests. Statutes providing widows a right to elect a share of their husbands' estate were passed on Apr. 8, 1833 (1833 Pa. Laws 250, § 11) and Apr. 11, 1848 (1848 Pa. Laws 537, § 11).

173. The Northwest Ordinance provided for dower as did later territorial and Ohio state statutes. There, in contrast with Pennsylvania, dower was not subject to a husband's debts. Jointure could be waived under a Jan. 19, 1804, statute. Ch. XIV, § 2, 1804 Ohio Acts 34-35. Equitable assets held at death became subject to dower under a Feb. 12, 1805, statute. Ch. X, 1805 Ohio Acts § 1. Dower at law was not restricted to lands held at death, nor did a wife lose the benefit of the increase in value of the land from the date of its sale to the date of assignment to her. *Allen v. McCoy*, 8 Ohio 418, 466-67 (1838). For a more complete review of Ohio dower cases see M. Brown, *Reception of English Common Law and Chancery in Ohio* 14-22 (1981) (unpublished paper) (copy on file at *Georgetown Law Journal*).

174. 1 C. SCRIBNER, *supra* note 162, at 367-68.

175. 3 W. HOLDSWORTH, *supra* note 104, at 197.

176. 1 C. SCRIBNER, *supra* note 162, at 31, 38, 44 (New York, Georgia, and New Hampshire).

177. *Id.* at 31, 40-41 (New York, Rhode Island, and Maryland).

178. *See id.* at 27, 33, 36-42, 46, 49-50 (Massachusetts, Delaware, North Carolina, Tennessee, Georgia, Mississippi, Alabama, Maryland, Vermont, Ohio, and Illinois). *See also* 2 C. SCRIBNER, *supra* note 162, at 413-17, 464-97.

179. Many states passed such statutes in the 1820's and 1830's. *See infra* note 239. But earlier examples of the practice also exist. Kentucky passed a statute in 1797 giving widows the right to elect the share of their deceased husbands' estates they would have received under intestacy. Act of Feb. 24, 1797, § 24, 1797 Ky. Acts 162. But it is apparent that the practice described in this general enactment on wills was in existence well before that. *See Trigg's Administrator v. Daniel*, 5 Ky. (2 Bibb) 301 (1811). Similarly, Maryland's general codification of the law of wills passed in 1798 provided that a

not always give widows the right to take a share of the personal estate of their husbands prior to the payment of debts. It did, however, provide some increased access to wealth while the institution of dower was fading in significance. In cases where a woman elected to take her statutory share, she usually had to waive her dower rights. Thus these statutes also had the effect of removing dower as an encumbrance upon lands distributed to persons other than widows.¹⁸⁰ The same trend is displayed by the late eighteenth- and early nineteenth-century growth of statutes permitting or requiring dower to be awarded in a single cash sum upon the death of the husband.¹⁸¹ Such release of dower rights freed the underlying fee simple of constraints impeding alienation. The perceived need, at least in some Colonies and states, to make land transfer as simple and as free of encumbrances as possible sometimes had the effect of reducing the scope of protection afforded married women.¹⁸²

Feme-Sole Trading. An interesting contrast to the early developments in conveyancing and dower law is presented by the general lack of feme-sole trader acts in the Colonies. One might hypothesize that any historical trend to protect commercial dealing would carry over to permit women to act and be held accountable for business contracts. The general colonial acceptance of the law merchant¹⁸³ in the seventeenth and eighteenth centuries suggests that the colonies were not oblivious to the needs of trade. It is also clear that some women were traders in America.¹⁸⁴ How then can the presence of a broad feme-sole trader statute in only one colony¹⁸⁵ and the delay in development of trading rights for married women until late in the nineteenth century be explained?

Several hypotheses are plausible. Perhaps married businesswomen used trusts or separate estates, especially in the South.¹⁸⁶ Northern examples of

widow could reject her husband's will in favor of dower and a third of the personal estate. Act of Jan. 20, 1798, ch. 101, 1798 Md. Laws § 15. Here, too, case law suggests that the practice existed long before the statute. See *Coomes v. Clements*, 8 Md. 382, 385 (1821). See also North Carolina: Ch. XXXII, April 1784 Session; Virginia: Ch. LX, October 1785 Session.

180. M. HORWITZ, *supra* note 51, at 56-58, suggests that commercial pressures in early America sometimes led to significant changes in dower rules, effectively denying widows access to the increased capital values of unimproved land. See also L. FRIEDMAN, *supra* note 22, at 375-76.

181. See 2 C. SCRIBNER, *supra* note 162, at 612-55. Scribner gives a fairly detailed description of developments in Maryland and South Carolina. See *id.* at 637-46, 646-50.

182. Kerber's fascinating study of the relation between dower and the treason confiscation acts of the Revolutionary War era makes an analogous point. To the extent that the threat of losing dower upon going over to enemy territory was used as a device to influence married women's political loyalties, dower was being used for social purposes deemed more important than the economic well-being of married women. See L. KERBER, *supra* note 2, at 123-36.

183. L. FRIEDMAN, *supra* note 22, at 69.

184. Spruill, *supra* note 44, at 276-313; E. DEXTER, COLONIAL WOMEN OF AFFAIRS, *supra* note 131; E. DEXTER, CAREER WOMEN OF AMERICA 1776-1840 (1950); Gundersen & Gampel, *supra* note 143, at 129-33. See also Norton, *A Cherished Spirit of Independence: The Life of an Eighteenth Century Boston Businesswoman*, in WOMEN OF AMERICA: A HISTORY 49 (C. Berkin & M. Norton eds. 1979).

185. South Carolina was the single colony. It is described in J. SPRUILL, *supra* note 44, at 362 n.80; L. KERBER, *supra* note 2, at 148-49; 2 J. BISHOP, *supra* note 27, at 418-20. Pennsylvania also had an early (1718) feme-sole trader statute, but it was limited to wives of mariners at sea. See 2 J. BISHOP, *supra* note 27, at 420; J. KELLY, A TREATISE ON THE LAW OF CONTRACTS OF MARRIED WOMEN 504-05 (1881).

186. See J. SPRUILL, *supra* note 44, at 362-65. Equity was received more warmly in the South than in the North. See *supra* notes 33-42 and accompanying text (discussing practice of equity in the states).

feme-covert trader trusts may have existed which have not yet been uncovered.¹⁸⁷ Legislative private bills were used in some jurisdictions to grant women the power to trade, but extensive studies of this activity have not been done.¹⁸⁸ Other areas that may reveal explanations for the lack of trader statutes include the law of agency,¹⁸⁹ the use of arbitration,¹⁹⁰ and the use of specialized business tribunals for which reported decisions were not generally published.¹⁹¹ The most likely explanation, however, is that many of the women operating businesses outside their homes were not married,¹⁹² and that the few married businesswomen worked with their husbands or subjected themselves to the general rule that a wife's income belonged to her husband.¹⁹³ In contrast to the development of the custom of London in England, American law simply may not have reflected commercial reality for the few married women involved in business.¹⁹⁴

Thus, by 1800 American law had freed land from some of the constraints of technical conveyance and dower rules while apparently leaving married women's business rights constrained by coverture doctrines. The reduction of home industry and the rise of a wage system for employed women may have meant that there was little need to free them from commercial constraints. And certainly trading by a married woman separate from her husband and her home was likely to be subject to some public disapproval.¹⁹⁵ While the begin-

187. Some feme-sole trader trust cases do exist in the northeast. See *North Am. Coal Co. v. Dyett*, 7 Paige Ch. 9 (N.Y. Ch. 1837); *Stammers v. Macomb*, 10 N.Y. Common L. Rep. (2 Wend.) 454 (1829).

188. See J. SPRUILL, *supra* note 44, at 361-62; 2 J. BISHOP, *supra* note 27, at 475-76 (Alabama); M. BENSON, *WOMEN IN EIGHTEENTH CENTURY AMERICA* 241 (1935) (Virginia); L. KERBER, *supra* note 2, at 150-52 (Connecticut). It is intriguing that many states later imposed specific restrictions on passage of bills dealing with land transfers of persons under civil disabilities. See C. BINNEY, *supra* note 52, at 143-44.

189. Old American treatises suggest that married women may have been treated as agents of their husbands even when the relationship was established by practice and behavior rather than by express documents. See J. STORY, *COMMENTARIES ON THE LAW OF AGENCY* 8 (1844); 1 F. LIVERMORE, *TREATISE ON THE LAW OF PRINCIPAL AND AGENT* 28-34 (1818); J. DUNLAP, *TREATISE ON THE LAW OF PRINCIPAL AND AGENT* 163-64 (1847). See also M. BENSON, *supra* note 188, at 240.

190. J. MORSE, *THE LAW OF ARBITRATION AND AWARD* 26-29 (1872) has a fascinating suggestion that businessmen could voluntarily agree to arbitrate with a married woman in the early 19th century.

191. This was certainly a common practice in mercantile England, but there has been no investigation of the phenomenon here.

192. The presence of large numbers of married women in the labor force is a 20th-century phenomenon. At the end of the 19th century, less than 20% of women were in the labor force. About 40% of unmarried women, but only five percent of married women, were in the labor force. The number of married women in the labor force increased significantly during World War II, fell a bit after the war, and then began a sustained climb. *STATISTICAL HISTORY*, *supra* note 6, at 133 (table of women's employment). Today, over half of married women are in the labor force. *STATISTICAL ABSTRACT*, *supra* note 13, at 402 (table of women's employment).

193. See 1 J. BISHOP, *supra* note 27, at 140-42.

194. See L. KERBER, *supra* note 2, at 152; Gundersen & Gampel, *supra* note 143, at 131. An early Massachusetts case certainly suggests that absent use of a trust or other device, feme-sole traders operated at some risk. In *Russell v. Brooks*, 24 Mass. (7 Pick.) 65 (1828), Eleanor Swan operated a fur manufacturing business while her husband Joshua visited her on Sundays and lived in adultery with another woman. The case apparently arose because the husband's business had become insolvent in 1819, leaving his estate heavily indebted. The couple had separated in 1815, but had not divorced. The court held that money received and notes taken by the wife in her separately operated business prior to the 1821 death of her husband were owned by his estate. *Id.* at 67.

195. Even the most famous of 19th-century women tended to withdraw from public life upon marriage and risk censure upon reentry before divorce or widowhood. Biographers are now beginning to be quite sensitive to the problems such constraints caused. See generally J. FURNAS, *FANNY KEMBLE: LEADING LADY OF THE NINETEENTH CENTURY STAGE* (1982). Furnas devotes considerable attention

nings of reform of land transfer and inheritance rules in order to insure the economic viability of surviving widows in the face of dower's decline was perfectly compatible with the late eighteenth-century emergence of concern for family well-being,¹⁹⁶ feme-sole trading by married women may have been seen as quite another matter.

3. Summary

This review of reception resolves a few issues and opens up many more. While English law and equity provided substantial impetus to the development of coverture law in this country, each American jurisdiction developed variations from the general pattern. English influence, however, was not the most significant barrier to the reform of American coverture law. The more liberal aspects of English equity were also influential during the early nineteenth century. In addition, too many important differences between English and American law had appeared by 1800 to conclude that the later reform movement was simply a throwing off of colonial remnants. Rather, it appears that by 1800 American legal institutions were beginning to grapple with changing family patterns and growing commercial interests. Divorce was growing just as romantic companionate marriage emerged. New methods of providing surviving spouses and children with means of support were emerging at the same time that substantial impediments to transfer of property were being removed. The vast difference between married men and women in their job patterns and wealth made it easy to legislate separately about their property, and to create different systems of control. The very notion of a separate estate for married women, which was reaching maturity at the time historians tell us that the modern family was emerging, could be expected to grow and take on characteristics consistent with the still limited but expanding role of most early nineteenth-century married women. The unfolding of these developments is the next part of the tale.

B. THE MARRIED WOMEN'S ACTS

During the 1700's women rarely publicly expressed dissatisfaction with the legal institution of coverture.¹⁹⁷ Alterations in legal rules before 1800 were

to the marital controversies of Fanny Kemble, including property disputes, problems with her English property trust, and loss of contact with her daughters from the time of her divorce until the daughters reached the age of majority.

196. See *infra* notes 336-39 and accompanying text (discussing Degler's work on the emergence of the American family).

197. There certainly were some early examples of women pressing their male contemporaries for significant alterations in gender roles. Among the most famous of these early exchanges is that between Abigail and John Adams, Abigail writing to John that "If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation." Abigail Adams to John Adams, Mar. 31, 1777, in *FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE, ABIGAIL ADAMS, DURING THE REVOLUTION* 149-50 (C. Adams ed. 1876). The correspondence is reprinted in a readily available documentary history, *THE FEMINIST PAPERS* 7-15 (A.S. Rossi ed. 1973). Like most women in her day, however, Abigail Adams largely kept her ideas private, in letters to her husband and to her friends. See L. KERBER, *supra* note 2, at 73-85. Some English materials were beginning to find their way to these shores, such as Mary Wollstonecraft's *VINDICATION OF THE RIGHTS OF WOMEN* (1792) and the lectures and pioneering work in education of Scotswoman Frances Wright. See E. FLEXNER, *supra* note 1, at 27-28. It really was not

generated more by economic needs than by any widely articulated desires to redefine the role of American women.¹⁹⁸ By the late 1840's the nature of the debate changed. Legal rules became subjects of public debate, statutes were adopted in a number of jurisdictions, movements arose, and controversy boiled. What happened? The roots for this change are certainly not limited to the need for simplified means of exchanging land. The married women's acts themselves reflect the complexity of developments in the first half of the nineteenth century.

According to conventional historical views,¹⁹⁹ Mississippi adopted the first married women's property act in 1839.²⁰⁰ In fact, the acts were passed in at least three waves, beginning in 1835, and each wave arose for somewhat different reasons. The first group of statutes, passed almost entirely in the 1840's, dealt primarily with freeing married women's estates from the debts of their husbands.²⁰¹ By and large these statutes left untouched the traditional marital estate and coverture rules. The second wave of legislation, the most frequently discussed, established separate estates for married women. These statutes appeared over a long period of time beginning in the 1840's and ending after the Civil War.²⁰² The third set of statutes took the important step of protecting women's earnings from the institution of coverture. These laws generally did not appear until after the Civil War, although Massachusetts enacted an early statute in 1855.²⁰³

The first wave of legislation protecting the property of married women from the debts of their husbands emerged in a deluge. Almost every state and territory then in existence adopted such legislation.²⁰⁴ While there were a few general patterns to the enactments, their terminology differed and remarkably little verbatim copying occurred. The earliest statute I have found that deals

until the 1830's, when the Grimke Sisters surfaced, that women's issues became subjects of widespread public debate. See *infra* note 346 and accompanying text (discussing Grimke Sisters).

198. Though individual petitions were filed with legislatures, see L. KERBER, *supra* note 2, at 85-99, it would be a generation before more organized and overt activity would emerge.

199. The only work noting the existence of the 1835 Arkansas statute is E. Warbasse, *supra* note 2, at 159.

200. L. FRIEDMAN, *supra* note 22, at 185. See Brown, *Memorandum on the Mississippi Women's Law of 1839*, 42 MICH. L. REV. 1110 (1944) (discussing the origin of the Mississippi statute and the debate surrounding its passage). In fact, Florida moved well before Mississippi, and as this article later suggests, there were a number of other legislative actions which were precursors to the later women's acts. Florida's statute appears to have been the result of a desire to protect marriage arrangements made under civil law before the territory became American, since only pre-1824 married women were protected by the legislation. W. CORD, A TREATISE ON THE LEGAL AND EQUITABLE RIGHTS OF MARRIED WOMEN 719 (1861); E. Warbasse, *supra* note 2, at 77, 163.

201. See *infra* notes 204-11 and accompanying text (discussing first phase).

202. This legislative phase overlapped with the debt statutes. But the early statutes inevitably needed refinement to account for ambiguity, enlarged goals, or hostile judicial reception. For some of the separate estate statutes, see *infra* notes 207, 209, and 263.

203. Massachusetts' act was adopted on May 5, 1855. For other earnings statutes, see *infra* note 361.

204. Finding this statutory material is difficult unless one has access to the session laws and codes of all the states and territories. The session laws are now available on microfiche, but for the benefit of readers who are not fortunate enough to have access to such material, I have included in the notes that follow citations to some of the major 19th century treatises that discuss married women's acts. The treatises used are J. BISHOP, *supra* note 27; W. CORD, *supra* note 200; J. KELLY, *supra* note 185; J. ROBINSON, THE LAW OF HUSBAND AND WIFE (1890); R. TYLER, COMMENTARIES ON THE LAW OF INFANCY AND THE LAW OF COVERTURE (1873). In addition, references to these statutes by E. Warbasse, *supra* note 2, have also been included. On the New York acts, see P. RABKIN, *supra* note 2; N. BASCH, *supra* note 1.

directly with marital property and husband's debts was adopted by the territorial legislature in Arkansas in 1835.²⁰⁵ This largely undiscussed piece of legislation protected a wife's property from debts incurred by her husband prior to marriage. Only Alabama appears to have borrowed this legal formula.²⁰⁶ Following Mississippi's lead in 1839, three other states protected married women's slaves from their husband's creditors.²⁰⁷ A number of jurisdictions protected only the real property of married women from debts of their husbands.²⁰⁸ Most statutes, however, went further and included both real and personal property under the umbrella of protection.²⁰⁹ About half of the legis-

205. Act of Nov. 2, 1835, 1835 Ark. Terr. Laws 34-35; E. Warbasse, *supra* note 2, at 159.

206. In 1846, after a long period of acting by private bill, Alabama adopted an act granting feme-sole status to abandoned married women. Act of Jan. 31, 1846, 1845 Ala. Acts 24 (1846). Jurisdiction to handle such cases was given to the equity courts in March 1848. The last section of the 1846 act protected the property of married women from ante-nuptial debts of the husband. This scheme lasted only two years. On March 1, 1848, Alabama adopted a separate estate married women's act. Act of Mar. 1, 1848, 1847 Ala. Acts 79 (1848).

207. Mississippi: Act of Feb. 15, 1839, ch. 46, 1839 Miss. Laws 72; 2 J. BISHOP, *supra* note 27, at 535; W. CORD, *supra* note 200, at 722-23; J. KELLY, *supra* note 185, at 427; E. Warbasse, *supra* note 2, at 138-60. Maryland: Act of Mar. 10, 1843, ch. 293, 1842 Md. Laws 33 (1843); E. Warbasse, *supra* note 2, at 155-59. Kentucky: Act of Feb. 23, 1846, ch. 368, 1845 Ky. Acts 42 (1846); 2 J. BISHOP, *supra* note 27, at 515-16; W. CORD, *supra* note 200, at 603-06; E. Warbasse, *supra* note 2, at 173. Arkansas: Act of Dec. 8, 1846, 1844 Ark. Acts 38 (1846); 2 J. BISHOP, *supra* note 27, at 478-79; W. CORD, *supra* note 200, at 731-32; E. Warbasse, *supra* note 2, at 159-60. The Maryland statute is very similar to Mississippi's. It added, however, sections giving married women the right to make a will and to retain up to \$1,000 as separate property. Arkansas' statute is also much like Mississippi's. Kentucky took a separate path, merging its slave provisions with others protecting the real property of married women from the debts of husbands. The Mississippi, Maryland, and Arkansas statutes also have very general provisions apparently creating a separate estate in married women.

208. The earliest of these statutes was that of Maryland: Act of Mar. 1, 1842, ch. 161, 1841 Md. Laws (1842); 2 J. BISHOP, *supra* note 27, at 100. Statutes followed in Connecticut: Act of June 10, 1845, ch. XXXIX, 1845 Conn. Acts 36; 2 J. BISHOP, *supra* note 27, at 7; W. CORD, *supra* note 200, at 736; J. KELLY, *supra* note 185, at 336; E. Warbasse, *supra* note 2, at 191. Iowa: Act of Jan. 2, 1846, ch. 5, 1845 Iowa Terr. Acts 40 (1846); E. Warbasse, *supra* note 2, at 204-05. Kentucky: Act of Feb. 23, 1846, ch. 368, 1845 Ky. Acts 42 (1846); *see supra* note 207. Indiana: Act of Jan. 23, 1847, ch. VI, 1846 Ind. Acts 45 (1847); E. Warbasse, *supra* note 2, at 205. Vermont: Act of Nov. 15, 1845, No. 37, 1847 Vt. Acts 26 (1845); J. KELLY, *supra* note 185, at 526; E. Warbasse, *supra* note 2, at 192. North Carolina: Act of Jan. 29, 1849, ch. XLI, 1848 N.C. Sess. Laws 12 (1849); 2 J. BISHOP, *supra* note 27, at 555-56; J. KELLY, *supra* note 185, at 463. Tennessee: Act of Jan. 10, 1850, ch. XXXVI, 1849 Tenn. Pub. Acts 111 (1850); 2 J. BISHOP, *supra* note 27, at 569; J. KELLY, *supra* note 185, at 517-18. Maryland's statute was a very simple, one sentence enactment. In fact, Maryland adopted a more detailed statute modeled after Mississippi's about a year later. *See supra* note 207. The statutes in Connecticut, Iowa, Indiana, Vermont, North Carolina, and Tennessee are similar in content, but the language in each varies from the prior enactments.

209. Michigan: Act of Mar. 11, 1844, No. 66, 1844 Mich. Pub. Acts 77; 2 J. BISHOP, *supra* note 27, at 532-33; J. KELLY, *supra* note 185, at 416; E. Warbasse, *supra* note 2, at 202-03. Maine: Act of Mar. 22, 1844, ch. 117, 1844 Me. Acts 104; 2 J. BISHOP, *supra* note 27, at 518; R. TYLER, *supra* note 204, at 675; E. Warbasse, *supra* note 2, at 200-01. Massachusetts: Act of Mar. 25, 1845, ch. 208, 1845 Mass. Acts 531; 2 J. BISHOP, *supra* note 27, at 525; J. KELLY, *supra* note 185, at 411; E. Warbasse, *supra* note 2, at 190-91. Alabama: Act of Jan. 31, 1846, No. 20, 1845 Ala. Acts 24 (1846); W. CORD, *supra* note 200, at 725; J. KELLY, *supra* note 185, at 291; E. Warbasse, *supra* note 2, at 170 (ante-nuptial debts only), and Act of Mar. 1, 1848, No. 43, 1847 Ala. Acts 79 (1848) (real and personal property generally); Florida: Act of Mar. 6, 1845, No. IX, 1845 Fla. Terr. Laws 24; Ohio: Act of Feb. 28, 1846, 1845 Ohio Laws 75 (1846); W. CORD, *supra* note 200, at 709-10; J. KELLY, *supra* note 185, at 467; E. Warbasse, *supra* note 2, at 205. New Hampshire: Act of July 10, 1846, ch. 327, 1846 N.H. Laws 307; 2 J. BISHOP, *supra* note 27, at 544; J. KELLY, *supra* note 185, at 444; R. TYLER, *supra* note 204, at 681-82; E. Warbasse, *supra* note 2, at 191. New York: Act of Apr. 7, 1848, ch. 200, 1848 N.Y. Laws 307; 2 J. BISHOP, *supra* note 27, at 545-47; W. CORD, *supra* note 200, at 649; J. KELLY, *supra* note 185, at 455; R. TYLER, *supra* note 204, at 635-36; E. Warbasse, *supra* note 2, at 205-40. Pennsylvania: Act of Apr. 11, 1848, No. 372, 1848 Pa. Laws 536; 2 J. BISHOP, *supra* note 27, at 560-61; W. CORD, *supra* note 200, at 660-63; J. KELLY, *supra* note 185, at 486-87; E. Warbasse, *supra* note 2, at 236. Missouri: Act of Mar. 5, 1849, 1848 Mo. Laws

lation also included general statements that married women could hold property separate and apart from their husbands.²¹⁰ These generalized attempts to permit married women to control their own property were frequently construed narrowly by the courts.²¹¹ This judicial hostility made it apparent that later legislative efforts would be required to complete the married women's property reform movement.

There are a number of explanations for the appearance of the first wave of married women's acts in the 1840's. First, widespread economic problems prompted numerous changes in debtor's law and made exemptions of property from attachment by creditors a pressing concern. Second, legislation chipping away at a number of the harsher consequences of coverture law had been enacted in earlier parts of the century. Abandoned women and widows were the objects of much attention; divorce laws changed; imprisonment of women for debt disappeared; and family law developed. If further reform was to occur, the institution of coverture had to become the focus of attention. Third, the fact that public debate about the role of women in society and legislation protecting the property of married women appeared in the same decade is not mere coincidence. Although it is difficult to argue that lobbying or petitioning by women or their supporters led directly to the passage of most of the debt statutes, the legal and cultural developments of the first third of the century certainly created a more sympathetic environment for their enactment.

1. The Economy of the 1840's and Debtor Legislation

The economic climate of the 1840's was established by the Panic of 1837. Some have called the depression that followed one of the worst in our history, describing devastation in virtually every phase of the economy.²¹² Others argue that the economic problems were concentrated in trade and commercial

67 (1849); J. KELLY, *supra* note 185, at 433. Connecticut: Act of June 22, 1849, ch. XX, 1849 Conn. Acts 16; 2 J. BISHOP, *supra* note 27, at 7; W. CORD, *supra* note 200, at 737; J. KELLY, *supra* note 185, at 336; E. Warbasse, *supra* note 2, at 190. Wisconsin: Act of Feb. 1, 1850, ch. 44, 1850 Wis. Laws 29; 2 J. BISHOP, *supra* note 27, at 572; W. CORD, *supra* note 200, at 715. New Jersey: Act of Mar. 25, 1852, ch. CLXXI, 1852 N.J. Laws 407; 2 J. BISHOP, *supra* note 27, at 545. These statutes are remarkably varied in content. Those of Alabama (second act), Michigan, Maine, Massachusetts, Iowa, New York, Pennsylvania, and Wisconsin each have clauses providing that a married woman's property should be hers as if she were unmarried, or in her own name. The acts of Alabama (first act), Ohio, Missouri, and Connecticut lacked such phraseology. In addition, some of the acts dealt with other subjects such as abandoned wives (Alabama's first act); intestate shares (Alabama's second act); conveyancing (Ohio); husband's trusteeship in the property of his wife (Connecticut); ante-nuptial contracts, conveyancing, intestacy, wills, and trusteeships (Massachusetts and New Hampshire); conveyancing, wills, and intestacy (Pennsylvania), and wills (Wisconsin). Rhode Island, in its codification of 1844, also adopted a general debt statute. E. Warbasse, *supra* note 2, at 197.

210. See *supra* notes 204-09.

211. The hostile reception given the New York act has been told by others. See P. RABKIN, *supra* note 2, at 125-38; E. Warbasse, *supra* note 2, at 237-40. Warbasse also tells of similar hostility in Maine, Rhode Island, and Pennsylvania. E. Warbasse, *supra* note 2, at 201, 237, 241-44. Courts in other states may have been more favorably disposed to married women's acts. See M. Brown, Reception of English Common Law and Chancery in Ohio, 67-75 (1981) (unpublished paper) (copy on file with author). The state courts in Oregon also construed their acts broadly. See *Brummet v. Weaver*, 2 Or. 168 (1866). As with much of the legal history in this area, the possibility of a mixed picture is high. But there is little doubt that the narrow contents of most of the first wave of married women's acts, together with judicial hostility, necessitated the passage of more legislation in following years.

212. R. McGRANE, THE PANIC OF 1837 1 (1965).

sectors of the economy, not in industrial and agricultural production.²¹³ In any case, a number of strains in the economy of the young United States appeared about this time. Extensive land speculation in the Western states and territories occurred during the 1830's. Revenues from land sales skyrocketed in the middle of the decade.²¹⁴ Government investigations of widespread land office abuses also occurred.²¹⁵ In 1836 Congress considered legislation to return to the states a budget surplus generated in significant part by land sales. In 1837, however, following a precipitous decline in land revenues, Congress found itself confronting a budget deficit.²¹⁶ Large-scale borrowing by states and territories for the construction of internal improvements occurred in the 1830's. After the panic, states heavily obligated to pay off internal improvement bonds found themselves at or near bankruptcy.²¹⁷ Textile and other manufacturing industries grew dramatically in the Northeast in the 1830's.²¹⁸ After the panic, however, industry was in general decline. Cotton sales overseas boomed in the 1830's, but by the following decade the world's cotton trade was in disarray due to falling prices.²¹⁹ Prices for slaves also fell dramatically.²²⁰ The cause of the economic collapse is the subject of some debate, but most explanations focus on some or all of the following factors: Excessive land speculation, enormous balance of trade deficits, heavy borrowing for internal improvements by states and territories, concentration of bank ownership, decline in European demand for cotton, and President Jackson's dismantling of the national bank and issuance of the *Specie Circular* in 1836.²²¹ Whatever the cause or causes of the panic, the resulting economic stress was the impetus for the enactment of numerous pieces of legislation on bankruptcy, banking, and debtor's rights at both the federal and state levels. A look at some of this legislative activity makes the first wave of married women's property acts a logical part of a much larger movement of economic reform.

Proposals for bankruptcy legislation at both the federal and state levels appeared frequently during the first half of the nineteenth century. Prior to 1841, Congress had enacted bankruptcy legislation only once. This early act, passed in 1800, was designed as a five-year measure, but was repealed after only three years.²²² After the onset of distressed economic times in 1839, new demands

213. P. TEMIN, *THE JACKSONIAN ECONOMY* 148-77 (1969).

214. Revenues from land sales rose from four million dollars in 1833 to almost \$25 million by 1836. That extraordinarily rapid rise was followed by an even more precipitous decline to just under \$7 million in 1837. Sales fell further to about \$2 million a year in the mid-1840's. P. TEMIN, *supra* note 213, at 168; HAMMOND, *BANKS AND POLITICS IN AMERICA* 451 (1957). For a general review of land speculation see R. MCGRANE, *supra* note 212, at 43-69; HAMMOND, *supra* note 214, at 452-53; P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 177-78 (1968).

215. R. MCGRANE, *supra* note 212, at 58-61; P. GATES, *supra* note 214, at 173-75.

216. HAMMOND, *supra* note 214, at 451-52; S. REZNECK, *BUSINESS DEPRESSIONS AND FINANCIAL PANICS* 92-93 (1968).

217. R. MCGRANE, *supra* note 212, at 9-13, 19-24, 30-35, 112-14, 128-30.

218. *Id.* at 96-112; B. BERG, *supra* note 2, at 40-42.

219. HAMMOND, *supra* note 214, at 467-77. Cotton prices fell steadily from the late 1830's to the middle of the 1840's. G. WRIGHT, *THE POLITICAL ECONOMY OF THE COTTON SOUTH* 96 (1978). P. GATES, *supra* note 214, at 177-78.

220. R. MCGRANE, *supra* note 212, at 116-18.

221. See *supra* notes 212-20 (literature discussing the Panic of 1837).

222. For a short but information-laden summary of the history of federal bankruptcy legislation, see P. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900* 16-30 (1974). Coleman is also a rich bibliographic source.

arose for federal bankruptcy legislation. An act was adopted in 1841, and thousands of debtors found relief under its terms.²²³ Though the act was quickly repealed, it did serve to relieve some of the immediate pressures on debtors. Not until the Panic of 1857, and the economic dislocations caused by the Civil War, did pressure again build for the adoption of national bankruptcy legislation.²²⁴ Although the short-lived federal provisions of 1841 had relieved much of the need for state bankruptcy laws, a few states also adopted or modified bankruptcy laws in this period.²²⁵ The federal government also took steps to protect merchants who were defaulting on bonds posted to cover customs charges.²²⁶

Although most states did not adopt bankruptcy laws during the 1840's,²²⁷ many did enact legislation protecting debtors and eliminating abuses in banking.²²⁸ These enactments frequently included provisions requiring that property sold at the behest of creditors be appraised and bring a minimum price,²²⁹ extending the types and value of property exempt from execution to pay debts,²³⁰ exempting homesteads from attachment both during life and at death,²³¹ abolishing imprisonment for debt,²³² and, of course, insulating married women's property from the debts of their husbands.

The first wave of married women's acts meshes very nicely with this statutory reform movement. Laws exempting assets from attachment had existed in some form for decades and were simply extended in the 1840's. The married women's acts operated much like exemption laws. If the new model of family

223. S. REZNECK, *supra* note 216, at 96. In New York alone, 8000 debtors filed for relief under the federal act. P. COLEMAN, *supra* note 222, at 128-29.

224. P. COLEMAN, *supra* note 222, at 24.

225. Massachusetts, Connecticut, and Maryland passed such statutes. *See id.* at 50-51, 84, 171-75. Other states, such as New York and South Carolina, had long-standing insolvency relief systems. *Id.* at 105-29, 179-90.

226. S. REZNECK, *supra* note 216, at 91-92.

227. Part of the reason for the hesitancy of the states to enter the field was a fear that states could not constitutionally legislate on bankruptcy. A series of early 19th-century Supreme Court decisions had raised concern in this area. *See* P. COLEMAN, *supra* note 222, at 31-36.

228. R. McGRANE, *supra* note 212, at 121-22; S. REZNECK, *supra* note 216, at 94-95.

229. J. McMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES FROM THE REVOLUTION TO THE CIVIL WAR 45-46 (1906). *See generally* P. COLEMAN, *supra* note 222 (discussing each state).

230. The vast number of bills enacted in this period makes short summaries difficult. Rather than try, it makes more sense to simply refer readers to a few sources in which this material is described. The best I have found is P. COLEMAN, *supra* note 222. The author provides a state-by-state survey of laws adopted in each jurisdiction during a period of more than 200 years. This survey describes in detail the content of bankruptcy laws, appraisal and minimum value laws, exemption statutes, and imprisonment for debt reforms. *See also* R. McGRANE, *supra* note 212, at 91-144; S. REZNECK, *supra* note 216, at 85-96; 7 J. McMASTER, *supra* note 229, at 45-49, 153, 183; H. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 150-52 (1938).

231. Homestead acts are thought to have appeared for the first time in this period. 2 A. CASNER, AMERICAN LAW OF PROPERTY 810-11 (1954), discusses the Texas act of 1839. Development after 1840 was quite widespread. *See* Dillon, *The Homestead Exemption*, 10 AM. L. REG. 641 (1862); Note, *State Homestead Exemption Laws*, 46 YALE L. J. 1023 (1937). P. COLEMAN, *supra* note 222, also reviews homestead laws.

232. The movement to abolish imprisonment for debt began long before the Panic of 1837. The final phase of this movement, however, occurred in the decade of the 1840's. A number of states abolished debtor imprisonment in this period. Among them were New Hampshire, Vermont, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Delaware, North Carolina, and Georgia. P. COLEMAN, *supra* note 222, at 62, 68, 78, 119, 139, 149-51, 177, 210, 224, 235. The system of imprisonment no longer made sense in an era when commercial interests relied more and more on secured transactions, commercial paper, property attachments, and garnishment. *Id.* at 261-64.

finance appearing in the first half of the nineteenth century called for men to undertake financial risks for the benefit of their families, then setting aside wives' property simply provided another body of exempt assets when the risk taking went sour. The statutes themselves reflected this reality. Almost without exception, women's acts which insulated only slaves or land from attachment appeared in agricultural and Southern states, while the more urban areas adopted broader laws protecting property generally.²³³ Since women generally had less property than their husbands, it was logical that legislators would see wives' property as a safe way of adding to the pool of assets insulated from attachment. While these acts may also be justified because they preserved inherited property from rapacious husbands²³⁴ or provided married women with some independent means of support, they also provided some husbands and families with continued access to assets despite bad economic times.²³⁵

While the connection between the first wave of married women's acts and

233. The correlation between the degree of urbanization in 1850 and the content of the first wave of married women's acts is really quite remarkable. Below is a table presenting urbanization values derived from STATISTICAL HISTORY, *supra* note 6, at 24-37. Of those states adopting debt statutes protecting only slaves or real property, only Maryland was heavily urbanized. The Maryland legislation did, however, contain general statements regarding married women's separate equitable estates. Of the fourteen states passing more general legislation, only Alabama, Florida, Michigan, and Wisconsin had less than 10% of their population living in urban areas. Wisconsin was more urbanized than most of the states that passed limited statutes and Florida's act may be explained by Florida's civil law background. *See supra* note 200 (discussing Florida). *See also supra* notes 204-09 (listing state statutes).

Type of Debt Statute

State	Slave	Real Property	Property generally	% Urban in 1850
Alabama			x	4.5
Arkansas	x			0
Kentucky	x	x		7.5
Maryland	x	x		32.5
Mississippi	x			1.8
Iowa		x		5.2
Indiana		x		4.5
N. Carolina		x		2.4
Tennessee		x		5.2
Vermont		x		1.9
Connecticut			x	15.9
Florida			x	0
Maine			x	13.6
Massachusetts			x	50.7
Michigan			x	7.3
Missouri			x	11.9
New Hampshire			x	17.0
New Jersey			x	17.6
New York			x	28.2
Ohio			x	12.2
Pennsylvania			x	23.6
Rhode Island			x	55.8
Wisconsin			x	9.5

Alabama's first statute does not fit well into any particular model, since it dealt only with property held before marriage.

234. Such motivation was certainly part of the debate over some married women's acts passed later in the decade. *See* P. RABKIN, *supra* note 2, at 91-98.

235. The earliest statutes did not alter the husbands' management and control of property and a number of the later debt statutes were construed consistently with this view. *See supra* note 211 and accompanying text (describing limitations of acts).

the Panic of 1837 is impossible to dismiss,²³⁶ other factors also must have been at work. The country had seen bad economic times before 1840, while married women's acts were a new legislative response. The fact that many of the acts had general statements adopting the notion of a separate estate for married women's property also suggests a broader purpose. The acts must therefore have been part of a larger evolution in the treatment of women by the law.²³⁷

2. Statutory Precursors to the Married Women's Acts

A very substantial body of legislation affecting women appeared before 1840. Probate laws were modified, abandoned wives gained greater economic protection, imprisonment of women for debt was largely abolished, and federal land grant policy displayed some desire to protect widows. By 1840 most of the obvious ways of increasing married women's access to property without altering the traditional coverture rules had been exhausted. If further reform was to occur, married women's acts would have to appear.

As previously mentioned, colonial and early territorial and state governments had dramatically simplified conveyancing law and had eliminated primogeniture.²³⁸ Dower rules were swept up in this process, leading many jurisdictions to permit married women to waive dower by deed and separate examination and some jurisdictions to permit dower only in lands actually owned by the husband at death. One might hypothesize that as more women lost access to dower, inheritance rules would change to provide widows greater access to their deceased husbands' personal estates. Such a movement would still give first priority to creditors in distributing the assets of an estate, but it would also increase the likelihood that widows of solvent husbands would emerge with some assets. Probate codes adopted in many states in the first third of the nineteenth century extended the late eighteenth-century reforms in intestacy law. The new codes permitted widows to reject their husbands' wills in favor of the share of the estate mandated by law.²³⁹ The well-known eight-

236. The connection has even been discussed in litigation. *See Kleinert v. Lefkowitz*, 271 Mich. 79, 259 N.W. 871 (1935). Some scholars have picked up the connection as well. *See E. Warbasse, supra* note 2, at 146-59, 202-05.

237. In fact, a good argument can be made that the 1840's was a decade of reform in a wide array of areas important to women. In addition to the emergence of married women's acts, changes appeared in divorce, child custody, and abortion laws. State statutes that significantly altered the English rule that abortions before quickening were lawful began to appear for the first time in the 1840's. *See generally Zainaldin, supra* note 2; J. MOHR, *supra* note 2. Both property reform and restrictions on abortion were consistent with the emerging special sphere of 19th-century women.

238. *See supra* notes 157-82 and accompanying text.

239. E. Warbasse, *supra* note 2, at 72, examines developments in New York, Pennsylvania, and Mississippi. But the changes were far more extensive than that. I have found a number of statutes that gave widows access to a share of their deceased husband's personal estate. Alabama: Act of Dec. 22, 1812, ch. 1, 1812 Ala. Acts 259; Indiana: Act of Jan. 29, 1831, ch. XXIX, 1830 Ind. Acts 209 (1831); Maine: Act of Mar. 23, 1835, ch. 180, 1835 Me. Acts 280; Maryland: Act of Jan. 20, 1798, ch. 13, 1798 Md. Laws (no page); Massachusetts: Act of Feb. 18, 1833, ch. XL, 1833 Mass. Act 547; Michigan: Act of Mar. 30, § 1, 1825 Mich. Terr. Acts 8 (statute providing for extension of debtor exemption statute to estates of husbands); Mississippi: Act of Feb. 9, 1839, ch. 24, 1839 Miss. Laws 33 (statute providing for extension of debtor exemption statute to estates of husbands); New Hampshire: Act of July 2, 1822, ch. XXXXI, 1822 N.H. Laws 30; Ohio: Act of Mar. 23, 1840, § 46, 1839 Ohio Laws 126 (1840); Pennsylvania: Act of Apr. 8, 1833, No. 143, 1832 Pa. Laws 316 (1833) (provides generally for widow's election of dower, but grants elective share of personal estate only when husband's will was drafted before marriage); Act of Apr. 11, 1848, No. 372, 1848 Pa. Laws 537 (full election); Vermont: Act of

eenth-century practice of permitting widows to reject their husbands' wills in favor of dower²⁴⁰ was expanded to include access to a share of the personal estate. The entitlement was generally the same as the amount provided by intestate succession statutes. Many of these statutes also provided widows with some priority over creditors.²⁴¹ The new probate codes did not alter the traditional rules that gave a husband the right to manage his wife's real estate and the right to own outright the personal property the wife brought to the marriage. If all went well financially during the marriage, however, the probate reforms of the early nineteenth century entitled widows to receive a segment of their husbands' personal estates, perhaps regaining some of what they had lost upon marriage. Without directly attacking the coverture rules, probate reform was an avenue for altering slightly the economic impact of the common law.²⁴²

Early nineteenth-century legislation also eroded some of the other economic consequences of the coverture rules. Abandoned or deserted wives, left by the general content of the common law without either feme-sole status or property, were granted some relief by changes in the divorce statutes²⁴³ or by acts specif-

Nov. 15, 1821, ch. 3, 1821 Vt. Acts 55. In addition, case law suggests that other states had long-standing practices of providing widows an elective share of the personal estate. See Illinois: *McMurphy v. Boyles*, 49 Ill. 110 (1868); Kentucky: *Trigg's Adm'r v. Daniel*, 5 Ky. (2 Bibb) 301 (1811); *Tibbs v. Tibbs' Ex'r*, 46 Ky. (7 B. Mon.) 112 (1846); Maine: *Brown v. Hodgson*, 31 Me. 65 (1849); Massachusetts: *Crane v. Crane*, 34 Mass. (17 Pick.) 422 (1835) (by a progression of statutes starting in 1783, with the final stages in 1816 and 1833); Missouri: *Davis v. Davis*, 5 Mo. 111 (1838) (by statute adopted in 1825). See also 2 C. SCRIBNER, *supra* note 162, at 257-60 (describing long-standing practice in South Carolina, and statutes in Missouri, Georgia, Pennsylvania, Massachusetts, and Vermont). Other material on this issue may be found in M. SALMON, *supra* note 2, at 264-73; 1 C. SCRIBNER, *supra* note 162, at 23-57; Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 141 (1936); J. SCHOULER, *DOMESTIC RELATIONS*, *supra* note 44, at 279. Friedman erroneously writes that forced share statutes did not appear until the middle of the 19th century. Friedman, *The Law of the Living, The Law of the Dead: Property, Succession and Society*, 1966 WISC. L. REV. 340, 361.

240. See M. SALMON, *supra* note 2, at 257-63. Increased ability to gain access to personal property and to obtain cash in lieu of dower also appeared by 1800. *Id.* at 264-73, 298-319.

241. The statutes 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 bases for their statutes, and New Hampshire and Vermont gave the courts authority to make an allowance for a widow from an insolvent estate.

242. These statutes would obviously have limited impact where husbands disposed of their estates by gift before death, or dissipated the assets. But these problems could only be attacked by directly confronting the doctrines of coverture. In addition, there is some evidence that the statutes reflected fairly closely the habits of even the least generous husbands in writing their wills. There are few reported cases in which wives exercised their options to renounce the wills of their husbands. Studies of wills suggest that there was usually no reason to do so. Gundersen & Gampel, *supra* note 143, at 121-24. The wills of men in the Baltimore study generally confirm this, because wives were a frequent primary beneficiary. See *supra* Table 10. Nonetheless, the Dukes County wills also suggest the potential importance of the rules for widows who rejected estates. Petitions for widows' allowances that requested control over some or all of the personal estates were almost always granted. Eight out of the 10 petitions read were granted *in toto*, one in part, and the other result is not known. Though the requested amounts were usually small, they sometimes involved assets of great importance to a struggling widow. One case gave a widow furniture and both family cows; another all the furniture. Some of the decisions involved substantial amounts, such as over \$1,200 in personal property in one case and a ship in another. The practice is discussed in *Crane v. Crane*, 34 Mass. (17 Pick.) 422 (1835).

243. There was a significant rise in the number of divorces in the first third of the 19th century. L. FRIEDMAN, *supra* note 22, at 181-84. While this did not necessarily indicate any increase in domestic dissatisfaction, see C. DEGLER, *supra* note 2, at 166, there is little doubt that significant changes occurred in divorce law and practice during the opening decades of the century. Desertion was among the grounds that began to find favor in this period. R. RIEGEL, *AMERICAN WOMEN: A STORY OF SOCIAL CHANGE* 127 (1970); N. BLAKE, *supra* note 2, at 48-63. A number of states shortened the period of desertion required to obtain a divorce. For example Alabama, which adopted a five year desertion

ically granting them some economic rights against their departed husbands.²⁴⁴ This trend is demonstrated nicely by a string of Alabama private bills granting deserted wives feme-sole status.²⁴⁵ The bills emerged in the mid-1820's and disappeared in the 1840's with the passage of general legislation for the benefit of deserted wives. Those husbands not fulfilling the expected obligation to provide their spouses with support began to find that the coverture rules no longer came to their aid. The reforms were not dramatic. They did little more than redefine the meaning of coverture to exclude some husbands who were not providing support for their families. But during the 1840's there was little room left for enhancing the economic status of mistreated wives unless the coverture rules themselves were altered.

The slow development of protections granted to abandoned, deserted, and divorced women in the first decades of the nineteenth century provides a context in which one would expect to find alterations in child custody and support obligations. Indeed, the case law suggests that women gained greater custodial rights during the first third of the century and that the modern "best interests of the child" test emerged more fully in the decade of the 1840's.²⁴⁶ The change evident in the reported case law finds even more vivid confirmation in the records of one state, Maryland, in which private bill divorces providing for custody by women began to appear after 1820.²⁴⁷

Other statutes also singled women out for special treatment.²⁴⁸ During the

statute on March 10, 1803, shortened the period to two years by legislation passed on December 21, 1820. Blake notes that by 1850, Pennsylvania, Connecticut, New Hampshire, Vermont, Rhode Island, Tennessee, Ohio, Kentucky, and Georgia had adopted legislation providing for divorce on the ground of desertion for a time shorter than the seven year presumptive death period. Numerous private divorce bills also were passed. N. BLAKE, *supra* note 2, at 48-56.

The development of Maryland divorce law is quite revealing. A student author discovered 535 private legislative divorces between 1790 and 1850. Three divorces occurred between 1790 and 1800, 30 between 1801 and 1810, 28 between 1811 and 1820, 95 between 1821 and 1830, 295 between 1831 and 1840, and 84 between 1841 and 1849. Maryland adopted a divorce statute on March 1, 1842, displacing much of the demand for private bills. Gilpatrick, *Marital Infidelity in Nineteenth Century Maryland* 10 n.61 (1982) (unpublished paper) (copy on file at *Georgetown Law Journal*).

244. Other than Alabama, a number of states adopted legislation protecting abandoned married women. Iowa: Act of Jan. 17, 1840, ch. 81, 1839 Iowa Terr. Laws 152 (1840); Kentucky: Act of Feb. 7, 1843, ch. 103, 1842 Ky. Laws 19 (1843); Maine: Act of Feb. 2, 1828, ch. 380, 1828 Me. Acts 1148; Massachusetts: Act of Mar. 16, 1833, ch. 127, 1833 Mass. Laws 693; New Hampshire: Act of Dec. 24, 1840, ch. 573, 1840 N.H. Laws 488; Act of July 2, 1841, ch. 607, 1841 N.H. Laws 533; North Carolina: Ch. 44, 1828 N.C. Laws 25; Ch. 28, 1829 N.C. Laws 27; Rhode Island: Act of June 2, 1841, 1841 R.I. Laws 43; Tennessee: Act of Oct. 18, 1825, ch. 10, 1825 Tenn. Laws 8; Vermont: Act of Nov. 2, 1846, No. 128, 1846 Vt. Pub. Acts 34. *See also* 1 J. BISHOP, *supra* note 27, at 11, 140-42; R. TYLER, *supra* note 204, at 484-86. The statutes were not all designed to adapt to new family roles. Enactments indicating antipathy to early 19th-century Christian communist celibate groups also appeared. *See* Ohio: Act of Jan. 11, 1811, ch. 8, 1810 Ohio Laws 13 (1811) (act provided that a court could grant a woman a share of the estate of a man who joined "himself to any sect whose rules and doctrines require a renunciation of the marriage covenant, or forbid a man and woman to dwell and cohabit together in the conjugal relation"). These trends apparently had their American roots in disputes arising over the legal rights of women deserted during the Revolutionary War. M. SALMON, *supra* note 2, at 132-43.

245. *See supra* note 46 (listing private bills).

246. Zainaldin, *supra* note 2, at 1052-74. This is one of the most interesting and important legal history articles on women and children before 1850.

247. Private bills for divorce in Maryland began awarding custody of children to wives in the 1820's. Between 1823 and 1846, 21% of private divorce bills granted mothers custody of their children. Gilpatrick, *supra* note 243, at 18.

248. The variety of statutes is amazing. Arkansas enacted a tax exemption statute for poor widows. Act of Nov. 21, 1829, 1829 Ark. Terr. Laws 102. Connecticut provided for the support of widows pending the resolution of probate. Act of May 21, 1825, ch. 10, 1825 Conn. Laws 72. This was a fairly

1820's a number of states prohibited the imprisonment of women debtors.²⁴⁹ Abolition of the practice for men generally did not occur until later.²⁵⁰ A number of reforms in debt imprisonment were adopted throughout the late eighteenth and early nineteenth centuries.²⁵¹ Use of debtor oaths, extension of prison bounds to include fairly large areas beyond the jail walls, prohibition of imprisonment for petty debts, and release of debtors when creditors declined to pay the cost of imprisonment had significantly reduced the importance of debtors' prisons by the 1820's.²⁵² Nonetheless some women continued to be imprisoned until the practice was prohibited.²⁵³ All these reforms may have been only symbolic, because poorhouses were growing in popularity during the same period.²⁵⁴ There are some indications, however, that the abolition of debt imprisonment for women may have been related to the early nineteenth-century tendency 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. During the first third of the nineteenth century, abandoned and widowed women were more likely to be isolated from extended families or friends than in the previous century. The growth of industrial cities and the opening of the Western territories provided ample occasion for husbands to leave their families or for widows to find themselves without means of support. As the nineteenth century progressed, changes in poor laws dealt with these developments, at least in one jurisdiction, by pro-

common reform showing up in many state codes. Some states provided that wives of husbands under guardianship could join in suits for the partition of land. *See* Maine: Act of Feb. 1, 1831, ch. 485, 1831 Me. Acts 1269; Massachusetts: Act of Feb. 21, 1831, ch. 54, 1831 Mass. Laws 569. Many states adopted statutes permitting husbands to join suits previously being pursued by their wives when they were unmarried in order to avoid abatement of the action. *See* Michigan: Act of Mar. 27, 1835, 1834 Mich. Terr. Laws 180 (1835). A number of states also adopted acts permitting wives to insure the lives of their husbands. *See* Maryland: Act of Feb. 23, 1841, ch. 212, 1840 Md. Laws (no page) (1841). Other states provided that certain portions of a husband's estate would be exempt from creditors. *See* New York: Act of Feb. 16, 1824, ch. 44, 1824 N.Y. Laws 32.

249. Coleman provides a great mass of detail on changes in imprisonment for debt legislation. Women were freed of the possibility of debt imprisonment in Connecticut (1826), Georgia (1847), Maryland (1824), Massachusetts (1831), New Hampshire (1831), New Jersey (1818), New York (1828), North Carolina (1823), Pennsylvania (1819), and Vermont (1834). P. COLEMAN, *supra* note 222, at 77-78, 235, 177, 45, 62, 138, 119, 224, 149, 68 (respectively). Georgia was a bit late, but that state had adopted other reforms in the 1820's that virtually removed imprisonment from the list of available creditor remedies. *Id.* at 235.

250. Connecticut (1842), Delaware (1841), Georgia (1858), Maryland (1830), Massachusetts (1857), New Hampshire (1840), New Jersey (1842), New York (1831), North Carolina (1844), Pennsylvania (1842), and Vermont (1838). *See* P. COLEMAN, *supra* note 222, at 78, 210, 235, 177, 52, 62, 139, 119, 224, 151, 68 (respectively). The abolition movement was primarily a Northern enterprise, since Southern states had adopted very effective debtors' oath provisions earlier in the century. Available data suggests that by the time the reform movement got rolling, many more people were being imprisoned for debt in the North than in the South. *See* FIFTH ANNUAL REPORT OF THE BOSTON PRISON DISCIPLINE SOCIETY (1830) (2,742 debt imprisonments in the North and only 35 in the South in 1829).

251. *See* P. COLEMAN, *supra* note 222, at 9-15, 249-68.

252. Randall, *Imprisonment for Debt in America: Fact and Fiction*, 39 MISS. VALLEY HIST. REV. 89 (1952).

253. The SIXTH ANNUAL REPORT OF THE BOSTON PRISON DISCIPLINE SOCIETY 443-447 (1831) reports on a survey of jailers in Massachusetts. Although there were a number of women reported to have been jailed in Boston, a much smaller number had been jailed in other counties. The report's findings are logical as cities were likely to contain more "disconnected" women. These findings are comparable to the findings of a study of poor laws in Maryland. The Maryland study found that outpensions for widowed or deserted women were most common in Baltimore. *See infra* note 255.

254. L. FRIEDMAN, *supra* note 22, at 190-92.

viding outpensions to increasingly large numbers of such women.²⁵⁵ This development is consistent with other legal developments occurring in the same period. Even in places where divorce for desertion was available, the imposition of substantial waiting periods meant long delays before women could obtain relief. Moreover, statutes like Alabama's, which provided feme-sole status to abandoned wives, would not take care of everyone. It is likely that some deserted women who were unable to work were given poor relief if their husbands left no property behind.

Finally, widows and women who headed families also appeared as something of a protected class in federal land grant policy. While some early land provisions explicitly provided benefits for white males only,²⁵⁶ other legislation for the benefit of widows of deceased land claimants appeared in the early decades of the century.²⁵⁷ By the 1840's land grant legislation routinely provided grants for heads of families²⁵⁸ in addition to widows. Although federal land grant law never fully absorbed the married women's property move-

255. C. McKenna, *Women, Welfare, and Work in Maryland: A Historical Survey of the First Two Hundred Years 25-29* (1982) (unpublished paper) (copy on file with author). McKenna found a significant increase in the number of women receiving outpensions in the first few decades of the 19th century, particularly in the cities. In addition, a number of private bills were also adopted. The pensions and private bills frequently benefitted women with children.

256. *See* Ordinance of 1785, 28 J. CONT. CONG. 375 (1785); An Act Authorizing the Grant and Conveyance of Certain Lands to the Ohio Company of Associates, 1 Stat. 257 (1792). Much early legislation was gender neutral in terminology, speaking only of "purchasers" or "settlers." It is not presently known whether women, even single women, were able to make use of such provisions. *See* An Act Providing for the Sale of the Lands of the United States, in the Territory Northwest of the River Ohio and Above the Mouth of Kentucky River, 1 Stat. 464 (1796); An Act Making Provision for the Disposal of the Public Lands in the Indiana Territory and for Other Purposes, 2 Stat. 277 (1804). This sort of legislation was sometimes amended to take care of widows and heads of families. *See* An Act to Grant Pre-emption Rights to Settlers on Public Lands, 5 Stat. 251 (1838) (amending earlier pre-emption act passed in 1830). The variety of terminology in the early land acts is staggering. It is fair to suggest that the notion of "family head" grew in prominence as the century unfolded and that early on women unaccompanied by living husbands became eligible to hold the status of "family head."

257. *See* An Act for the Relief of the Refugees From the British Provinces of Canada and Nova Scotia, 1 Stat. 547 (1798); An Act Making Provision for Certain Persons Claiming Lands Under the Several Acts for the Relief of the Refugees From the British Provinces of Canada and Nova Scotia, 2 Stat. 712 (1812) (private bill granting land to a widow and a remarried widow). By 1830 many states had statutes providing that widows would be heirs to their deceased husbands and federal land rode piggyback on these provisions. *See* An Act to Authorize the Investigation of Alleged Frauds Under the Pre-emption Laws and for Other Purposes, 5 Stat. 619 (1843); *Johnson v. Collins*, 12 Ala. 322 (1847). *See also* 2 J. GALES & W. SEATON, *PUBLIC ACTS OF CONGRESS RESPECTING THE SALE AND DISPOSITION OF THE PUBLIC LANDS* 548, 557 (1838) (discussing two Commissioner of General Land Office decisions issued in 1831 holding that Pre-emption Act of 1830, 4 Stat. 420, permits widow to act as a settler and to perfect her deceased husband's claim).

258. *See, e.g.*, An Act for Granting Lands to the Inhabitants and Settlers at Vincennes and the Illinois County, 1 Stat. 221 (1791); An Act Regulating the Grants of Land, and Providing for the Disposal of the Lands of the United States, South of the State of Tennessee, 2 Stat. 229 (1803); An Act Giving the Right of Pre-emption, in the Purchase of Lands, to Certain Settlers in the States of Alabama, Mississippi, and Territory of Florida, 4 Stat. 154 (1826); An Act to Grant Pre-emption Rights to Settlers on Public Lands, 5 Stat. 251 (1838). By the 1840's the term "head of family" was used in federal land laws. *See* An Act to Appropriate the Proceeds of the Sales of Public Lands and to Grant Pre-emption Rights, 5 Stat. 453 (1841). This Act was routinely administered to include female heads of families within its ambit. *See* 1 W. LESTER, *LAND LAWS, REGULATIONS, AND DECISIONS* 360-65 (1860) (Circular to Registers and Receivers of the United States Land Offices issued Sept. 15, 1841, construing Pre-emption Act of 1841 and making it clear that widows and female heads of families included within its terms). In the 1850's married women were still precluded from purchasing most federal lands unless state or territorial law permitted them to do so. *See id.* at 466.

ment,²⁵⁹ it did reflect the early nineteenth-century trend to provide special treatment for female heads of families and widows.

3. Married Women's Acts, Separate Estate Trust Deeds, and a Glance at Later Developments

Legal developments between 1800 and 1840 tended to protect married women by adjusting the impacts of coverture without altering the central features of married women's status. By 1840 there was a somewhat greater likelihood that legal institutions would attempt to assist a married woman in distress because of death, abandonment, poverty, or divorce. The increase in such legal responses suggests a change in attitude toward those women who fell off the edge of the separate domestic sphere. Whether the cause of the fall was extrinsic to the marital relationship or a rupture of the marriage, recognition began to be given to the particular problems confronting some married women.

While these legislative changes were emerging, the separate equitable estate became more widely understood, and, if the Baltimore will and trust deed study reflects general trends, more widely used.²⁶⁰ By 1850 the legal strands began to merge. The separate estate, even before it was converted from an equitable contrivance to a statutory entitlement, was often set aside as a special class of property immune from the husband's debts and thus available to sustain the family in troubled times. Because the documents creating separate estates had long been used to insulate property from creditors,²⁶¹ thus causing courts of equity to require that husbands in debt seeking access to their wives' separate estates set aside an equity to a settlement to protect a portion of their spouses' wealth.²⁶² Women had long been the subject of special legislative attention, so that the earliest of the married women's acts could hardly have been perceived as radical. But they were important. Like trust instruments, they generally did not give married women control over the disposition of their separate estates, but they did set the stage for later legislation and judicial decisions that loosened the dispositional constraints.²⁶³

259. The closest federal land law came to a married women's act was the Oregon Donation Act, 9 Stat. 496 (1850), which explicitly granted land to married women. This is the only such piece of legislation I have found. It is interesting to speculate on why federal land law did not reflect the developments on the state level after 1850. It is likely that once state law developed to permit married women to contract, there was little need for federal law to change. Even if married women could not purchase land directly, they could gain title by deed after the federal patent was issued. Many, if not most, of the purchases of land by persons moving to the frontier territories were not directly from the government but from others who had already obtained title to the land. By the time state law had fully developed to permit women to control their own earnings, most of the good federal lands open for private settlement had already been sold. For background and history of federal land sales, see generally Cole, *Cyclical and Sectional Variations in the Sale of Public Lands, 1816-1860*, 9 REV. ECON. STATISTICS 41 (1927); Danhof, *Farm-Making Costs and the "Safety Valve": 1850-1860*, 49 J. POL. ECON. 317 (1941); Gates, *The Role of the Land Speculator in Western Development*, 66 PA. MAG. HIST. & BIOG. 314 (1942).

260. See *supra* notes 59-92 and accompanying text (archival study).

261. L. FRIEDMAN, *supra* note 22, at 220-22. The trust deed study confirms the same fact. See *supra* Tables 12, 13, and 14 and accompanying text.

262. Equity to a settlement had a strong tradition in England in the 17th century. 5 W. HOLDSWORTH, *supra* note 106, at 314; 6 W. HOLDSWORTH, *supra* note 108, at 645. The tradition continued here. See N. BASCH, *supra* note 1, at 89-96; 1 J. BISHOP, *supra* note 27, at 449-516; 2 J. STORY, *supra* note 34, at 630-50.

263. Legislation creating a separate estate for married women appeared over a wide range of years beginning in the 1840's and ending after the Civil War. Most of this legislation was enacted before the

If in 1850 there was still debate over whether women could own property without the intervention of a trustee,²⁶⁴ trustees became unnecessary by 1860 in the North and 1870 in the South. If equity was a changing and sometimes uncertain means for legitimizing married women's control of property, then a legal estate created by statute could substitute nicely. If previously only wealthy men and women could afford to create the documents needed to formalize a separate estate, permit women to retain title to their personal property, insulate married women's property from creditors, and provide for its disposition at death, there was eventually room for language in a simple deed or transfer agreement to automatically serve all these and other ends. Thus, the fact that the early married women's acts fit into a network of mild reforms from 1800 on should not blind us to the significance of their arrival. They were, after all, the earliest examples of a long stream of statutes focusing specifically on the economic consequences of women's property ownership during marriage. The fact that many of the statutes adopted after the mid-1840's contained provisions that may have been intended to do more than insulate married women's property from a husband's debts gave the blossoming feminist movement reason to hope that further reforms would occur.

Despite the well-known connection between legislative petitioning and lobbying by a few women in the late 1840's and the passage of a few of the married women's acts,²⁶⁵ most of the early acts, modest and conservative in tone, were compatible with prior and contemporary legislation of the most ordinary sort. Even the New York act of 1848,²⁶⁶ the best known of all the early statutes, was extremely narrow in scope. The first two sections of the act insulated a married woman's property from her husband's debts and also declared that the property "shall continue her sole and separate property, as if she were a single female."²⁶⁷ The third section provided that property coming to married

war. Mississippi, Maryland, Arkansas, Alabama, Michigan, Maine, Massachusetts, Iowa, New York, and Pennsylvania each adopted debt statutes with separate estate provisions. *See supra* notes 207, 209. These acts were passed between 1839 and 1852. Another batch of separate estate statutes was adopted in the following decade in the newly burgeoning territories, and after the war in the Southern states. The states adopting such acts included Michigan: Act of Feb. 13, 1855, No. 168, 1855 Mich. Laws 420; Illinois: Act of Feb. 21, 1861, 1861 Ill. Laws 143; Ohio: Act of Apr. 3, 1861, 1861 Ohio Laws 54; Delaware: Act of Mar. 17, 1865, ch. 572, 1865 Del. Laws 663; Georgia: Act of Dec. 13, 1866, No. 204, 1866 Ga. Laws 146; Vermont: Act of Nov. 21, 1867, No. 21, 1867 Vt. Acts 29; Tennessee: Act of Mar. 2, 1870, ch. 99, 1869 Tenn. Laws 113. These statutes, especially the early ones, did not, on their face, remove the need for a trustee. Sometimes this was accomplished by later statutes, *see* Maryland: Act of May 24, 1853, ch. 245, 1853 Md. Laws 323; statutes cited *infra* note 361; and by court decision. *Harris v. Harris*, 42 N.C. (7 Ired. Eq.) 111 (1850); *Gibson v. Walker*, 20 N.Y. 476 (1859); *Harding v. Cobb*, 47 Miss. 599 (1873); *Blood v. Humphrey*, 17 Barb. 660 (N.Y. 1854); *Burnett v. Hawpe's Ex'r*, 25 Gratt. 481 (Va. 1874); *Radford v. Carwile*, 13 W. Va. 572 (1879); *Maiben v. Bobe*, 6 Fla. 381 (1855).

264. In New York, there was a 20-year debate over the relationship between equity and married women's estates. *See* P. RABKIN, *supra* note 2, at 61-105. Since equitable language was so often used in the statutes, it was reasonably common for courts to call upon equity precedent to construe the new statute. *See id.* at 125-38.

265. *See* E. Warbasse, *supra* note 2, at 205-36; P. RABKIN, *supra* note 2, at 106-17.

266. Act of Apr. 7, 1848, ch. 200, 1848 N.Y. Laws 307.

267. The act reads in full:

AN ACT for the more effectual protection of the property of married women.

Passed April 7, 1848.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

§ 1. The real and personal property of any female who may hereafter marry, and which she

women in the future "from any persons other than her husband" shall be held "to her sole and separate use, as if she were a single female."²⁶⁸ It is this "sole and separate use" phrase which later generations have pointed to as breakthrough language.²⁶⁹

The similarity of the statute's sale and separate use phraseology to typical language in equitable instruments and its presence in sections dealing with debt made narrow construction almost inevitable. Equity courts frequently had construed trust instruments containing sole and separate use language but lacking explicit grants of dispositional authority to deny married women the right to contract about or will separate estate assets. The statute only prohibited "disposal" of a separate estate by husbands, leaving intact the range of other restrictions, providing husbands with management authority, and preventing unilateral contractual or testamentary disposal by wives. The statute's primary effect was to create a new category of exempt assets for family use. The special sphere of married women was thus largely confirmed. Assets belonging to married women were to be set aside and insulated from the harsh realities of the commercial world. Married women's property, like married women themselves, was to be specially treated and protected. Indeed, the statute underscores the limited sphere of women by providing that assets received by a wife directly from her husband would not be free from her husband's debts.²⁷⁰ A married woman was not easily going to become a device for insulating a husband's assets from commercial liability. These were the features of the early married women's act that finally persuaded conservative New York legislators to support the 1848 bill.²⁷¹ Neither substantial harm to creditors nor great risks of family divisiveness were likely to result from this sort of legislation.

The growing use of equitable separate estates confirms the same trends. Property management was a fairly new adventure for most married women.

shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

§ 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, nor 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.

268. *Id.* § 3.

269. Other states used similar language before New York. See *supra* notes 204-09. Section 1 of Mississippi's 1839 act provided that married women become "seized and possessed of any property, real or personal, . . . in her own name, and as of her own property." Maine's 1844 statute mirrors the Mississippi language. Michigan's 1844 statute provides that after marriage, property shall be the "estate of such female after marriage to the same extent as before marriage." Despite the fact that Massachusetts was the scene of much early female agitation on both women's and slavery issues, its first married women's act was very narrow in content. It basically permitted the establishment of trusts through ante-nuptial agreements and limited the husband's control of the trust assets.

270. This provision in section 3 was judicially expanded to void conveyances made by wives directly to their husbands. *White v. Wager*, 25 N.Y. 328 (1862).

271. See E. Warbasse, *supra* note 2, at 218-29.

From receipt of inheritances in the eighteenth century, through development of income by unmarried women, to management of middle class family incomes by some married women by the middle of the century, the domestic sphere and the separate equitable estate were stretched to accommodate the presence of money and women's new role in the family. But the stretch was narrow. Independent commercial endeavors by married women were not included on the mid-century reform agenda. Married women were singled out for special treatment, their assets were subject to dispositional constraints established by others, and their property was largely controlled for the benefit of their families. The appearance of both married women's acts and separate estate instruments suggests that a married woman's property was largely viewed as a family resource or as a safeguard for a wife upon her husband's death or departure, not as mercantile or speculative wealth. Married women were still homemakers, and the gradual emergence of dispositional authority over separate property reflects women's greater activity in the home economy more than their widespread entry into the business world.

But the statutes and separate estates also reflect myriad contradictions. The very device used to confirm women's special sphere—the separate estate insulated from the husband's debts—created a wedge in the coverture bastion, and confirmed for women a small degree of independence from their marriage partners. Indeed, the contradictions go deeper. Despite the prohibition on debt exemption for property coming to a wife from her husband, the New York statute, and others as well, created an incentive for husbands to use their wives' new insulation from creditors to hide assets. While a conveyance to a third party was necessary to avoid the restrictions on intramarital exchanges, extramarital property coming to a married woman was not so constrained. Those with wealth were certainly going to take the bait²⁷² by using straw party exchanges or causing extramarital property to be held in their wives' names. The separate equitable estate was available for similar use. The statutes and separate estates themselves contained the sorts of contradictions that would lead later reformers to urge more similar treatment of men's and women's property by refining the definitions of property owned by husbands and wives and equalizing the availability of these assets to creditors.²⁷³

III. THE HISTORICAL BLANKET

In her address "The Wrongs of Woman" before the 1850 Salem, Ohio, Women's Convention, J. Elizabeth Jones, like speakers at earlier gatherings, spent much of her time on law and Blackstone.²⁷⁴ Jones noted that many women had conflicting feelings about their position. Some, she said, do not know they

272. See P. RABKIN, *supra* note 2, at 126-37; S. Breed, *Conflicts of Interest: The Evolution of Married Women's Property Rights in Nineteenth Century New Hampshire* (1982) (unpublished paper) (copy on file with author).

273. Breed's paper on women's property rights in New Hampshire, *supra* note 272, lays out this story in wonderful detail. Disputes over use of the marital property exemption eventually led to more equitable treatment and creditor access. This was the pattern followed nationally as the century unfolded. For later married women's acts, see *infra* note 361.

274. THE SALEM, OHIO 1850 WOMEN'S RIGHTS CONVENTION PROCEEDINGS 52-62 (R. Audretsch ed. 1976) [hereinafter OHIO 1850 WOMEN'S RIGHTS CONVENTION].

are "robbed of [their] rights," others feel "weak and dependent."²⁷⁵ Others fear "to expose their own situation" or "dread of seeming to be out of their sphere" and therefore masculine.²⁷⁶ Still others "have no sense of injury" because "all their wants have been duly supplied" or "labor for a mere pittance because they are women."²⁷⁷ After making a lengthy critique of the inequities of the common law and contending that women should obtain the right of suffrage at the impending Ohio Constitutional Convention, Jones concluded:

We but ask that our equality in point of rights be acknowledged; we ask that none shall strive to obliterate or deface the image and superscription our Creator stamped upon our souls. I am aware that the great mass of women in this country have no sympathy with the views I have expressed. I wish it were otherwise. I wish they could be led to see their true position, and be made to understand that the gallantry and devotion of man is offered them in lieu of a recognition of their rights, and that it is only in a few rare cases he approaches and converses with them as equals, as being as fully rational, intelligent and morally accountable as himself, endowed with the same rights and clothed with the same duties.

But I will not further extend my remarks. I have already said enough to secure the disapprobation which is always bestowed upon a woman who thinks and speaks for herself. I have said *more* than enough for those women who are contented with their rose-covered chains and gilded prison-bars; and I could hope that I have said something to encourage to earnest action those of my sex who feel that no length of legislation can sanction and sanctify the wrongs that have been inflicted upon them; that no social usages, however time-honored, can justify the oppressions they have been compelled to endure; that no religious creed, however sanctimonious its supporters, can find the least excuse for the inequality in the church.²⁷⁸

This statement is a remarkable indication of the social pressures felt by one of the more radical of mid-nineteenth-century women.²⁷⁹ Why would a public

275. *Id.* at 54.

276. *Id.*

277. *Id.*

278. *Id.* at 62 (emphasis in original).

279. Jones' speech also roundly condemned slavery and applauded by name many of the prominent feminists of her time. After 1840 she consistently turned up at important gatherings of feminists and abolitionists. Jones lobbied for the adoption of the 1861 Ohio married women's property act, lectured on health and hygiene (common interests of the feminists of her era), and for a time edited the *Anti-Slavery Bugle* with her husband. 2 E. JAMES, *NOTABLE AMERICAN WOMEN 1607-1950*, at 285-86 (J. James & P. Boyer eds. 1971).

At one point in her speech, Jones noted that she may choose not to

exercise my right so to [vote], after it is accorded to me; indeed all who know my sentiments in relation to Constitutions and government, and you, Madam President, may not, and all whom I address may not; but that is no reason why others should judge for us, of the propriety and expediency of our so doing; *that* is a right I insist upon exercising for myself, and these 'Daniels' who have 'come to judgment' have me-thinks, assumed an air of wisdom, as foreign to their own characters as it is derogatory to us.

OHIO 1850 WOMEN'S RIGHTS CONVENTION, *supra* note 274, at 58 (emphasis in original). At first blush, this seems to be a statement that Jones would not vote because of social constraints on the role of

woman of 1850 castigate limitations on her social role while confessing to the unwillingness of most women to follow her lead?

A brief examination of the historical literature on women in the first half of the nineteenth century reveals a series of changes relevant to the mid-century emergence of married women's acts. By 1800 the importance of married women as active participants in the family was more widely recognized. Symptoms of the changes surfaced in a number of ways. Women became more involved in religious and social service activities, more literate, and more deeply involved in raising and educating their children. At the same time that married women were assuming greater importance in the family and in family-related social organizations, single women were beginning to leave home for reasons other than apprenticeship or marriage. Employment opportunities beckoned in teaching, domestic service, and the mills. As the nineteenth century unfolded, these trends accelerated, creating very substantial differences in the roles of single and married women. For many women an active unmarried life was followed by marital domesticity. Married women's acts reflected this situation. The significant features of the acts did not reject married women's separate domestic sphere, but recognized the importance of women as caretakers of children and family resources.

A. THE POST-REVOLUTIONARY WAR ERA

J. Elizabeth Jones did not invent women's conflict over public and private spheres. Recent literature suggests such tension appeared at least as early as the Revolutionary War era. Both Norton and Kerber contend that the Revolutionary War was a catalyst for some redefinition of women's social position. They note that the pre-Revolutionary War domestic role of women took on a different content by the end of the eighteenth century²⁸⁰ due to participation of women in the Revolutionary War political scene through economic boycotts,²⁸¹ home production,²⁸² and political correspondence and discussion.²⁸³ By coping with the inevitable disruptions caused by conflict, political disagreements, and absent spouses, women sensed they were participating in important cultural developments.²⁸⁴ Kerber finds that at the core of cultural values "a consensus developed around the idea that a mother, committed to the service of her family and to the state, might serve a political purpose."²⁸⁵ Norton agrees, writing that the "war necessarily broke down the barrier which seemed to insulate women from the realm of politics, for they, no less than men, were caught up in the turmoil that enveloped the entire populace."²⁸⁶ While Norton states that domesticity was no longer denigrated and the feminine sphere

women. It is probably, however, a statement typical of the radical Garrisonian wing of the Abolitionists, who perferred withdrawal from participation in a union with slavery to creation of an anti-slavery political party or to work with the existing parties. For a history of the Garrisonians, see W. WIECEK, *SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* 228-48 (1977).

280. M. NORTON, *supra* note 2, at 155-299; L. KERBER, *supra* note 2, at 157-288.

281. M. NORTON, *supra* note 2, at 157-63; L. KERBER, *supra* note 2, at 35-39.

282. M. NORTON, *supra* note 2, at 163-70; L. KERBER, *supra* note 2, at 41-45.

283. M. NORTON, *supra* note 2, at 170-77; L. KERBER, *supra* note 2, at 73-85.

284. M. NORTON, *supra* note 2, at 195-227; L. KERBER, *supra* note 2, at 455-67.

285. L. KERBER, *supra* note 2, at 283.

286. M. NORTON, *supra* note 2, at 297.

no longer subordinate,²⁸⁷ Kerber prefers a less egalitarian portrayal of Republican Motherhood as a "concept that legitimized a minimum of political sophistication and interest, and only of a most generalized sort."²⁸⁸ Both writers agree, however, that in contrast to the subservient role of women before 1770, the Revolutionary War era provided women with a new egalitarian vocabulary, a few well-known, if ridiculed, radical figures,²⁸⁹ and a potential for limited participation in public events. The stage was set for a cultural redefinition of the married women's separate sphere.²⁹⁰

Evidence of conflict over the relationship between a married woman's public and private life appeared in a number of ways in the years just before 1800. Since public debate by women was still the extraordinary exception,²⁹¹ the evidence is largely confined to other areas. Kerber and Norton both investigated private correspondence and diaries in their efforts to sort out the effects of the Revolutionary War.²⁹² Just as women in the nineteenth-century tended to correspond with other women in intimate, supportive ways,²⁹³ literate women of the eighteenth-century have left us a historical record of their friendships.²⁹⁴ Female friendships and correspondence were symbolic of the larger possibilities for group female activity,²⁹⁵ and consistent with the already noted tendency of women (and men) to will property to other women.²⁹⁶

Despite the basically private nature of the separate sphere, women began to participate in some worldly activities before the eighteenth-century was complete. Petitioning, particularly by widows, arose.²⁹⁷ Female societies and auxiliaries to male voluntary groups appeared during the war to organize home production, nursing, and fund-drives.²⁹⁸ These groups continued in a different guise after the war. Female religious, reform, and service societies proliferated in the last two decades of the century.²⁹⁹ Although most female societies dealt with matters closely related to the domestic sphere³⁰⁰ or religious concerns,³⁰¹ the societies inevitably led women to make public choices. The economic panics in the late eighteenth century³⁰² and the appearance of impoverished wo-

287. *Id.* at 298.

288. L. KERBER, *supra* note 2, at 285.

289. For a description of public reaction to Mary Wollstonecraft's *VINDICATION OF THE RIGHTS OF WOMEN* (1792), see L. KERBER, *supra* note 2, at 224-25, and M. NORTON, *supra* note 2, at 251-52.

290. See M. NORTON, *supra* note 2, at 228-55 (discussing emergence of the "reverence of self" during post-war period); L. KERBER, *supra* note 2, at 73-113 (discussing women's emerging role outside the home both during and after war). See also C. DEGLER, *supra* note 2, at 191-92 (attributing women's separate sphere in 18th century to society's new emphasis on freedom and individualism).

291. But see L. KERBER, *supra* note 2, at 99-110 (describing women's campaign to raise funds for troops during war, commonly referred to as "Philadelphia Project").

292. M. NORTON, *supra* note 2, at 309-14; L. KERBER, *supra* note 2, at 289-93.

293. C. DEGLER, *supra* note 2, at 144-50.

294. N. COTT, *supra* note 2, at 185-99.

295. M. NORTON, *supra* note 2, at 105-09.

296. See *supra* Tables 9 and 10.

297. L. KERBER, *supra* note 2, at 85-99 (petitions included requests to cross enemy lines to join husbands and claims for property left behind).

298. *Id.* at 99-105.

299. *Id.* at 111-13.

300. *Id.* at 111. Women and children in distress were of particular concern.

301. *Id.*

302. See P. COLEMAN, *supra* note 222, at 18-19 (economic problems even led to adoption of short-lived national bankruptcy act in 1800).

men and children, prostitution, town slums, and alcohol abuse created opportunities for many groups of middle and upper class women to become involved with social concerns.³⁰³

The subtle post-war changes in attitudes toward domesticity are also revealed by improvements in female literacy and education.³⁰⁴ If, as both Kerber and Norton suggest, the post-war family was assigned a substantial new role in the education of children in appropriate civic virtues, then women themselves had to be literate.³⁰⁵ There is no doubt that girls continued to receive lesser educations than boys long after 1800 and that expressions of support for gender equality in education met with strong disapproval.³⁰⁶ Yet female academies emerged after the war and flourished with the growing public education movement after the turn of the century.³⁰⁷ Literacy rates for women increased after 1780 until the first literacy census, taken in 1850, showed little difference between literacy rates for men and women.³⁰⁸ Reading and writing by women exploded around the turn of the nineteenth century.³⁰⁹ Ladies magazines, as well as fictional and religious reading and writing, became an important part of many women's lives, though histories and the like were

303. J. FURNAS, *THE AMERICANS: A SOCIAL HISTORY OF THE UNITED STATES, 1587-1914* 313-17 (1969).

304. L. KERBER, *supra* note 2, at 198-99.

305. *Id.* at 199-200; M. NORTON, *supra* note 2, at 256-57. Norton adds that the exigencies of the just-completed war also suggested the need for educated women on the homefront. M. NORTON, *supra* note 2, at 256.

306. L. KERBER, *supra* note 2, at 193-221; M. NORTON, *supra* note 2, at 263-72.

307. L. KERBER, *supra* note 2, at 198-205.

308. *Id.* at 193. School enrollment among whites age 5-19 also displayed little difference by gender in 1850. About 59% of boys and 53% of girls were in school. STATISTICAL HISTORY, *supra* note 6, at 369-70. Very little work on female literacy rates in the early 19th century has been done, but what has been done suggests that vast changes occurred between 1800 and 1850. While the proportion of women signing wills in the 18th century was fairly stable at about 40%, K. LOCKRIDGE, *supra* note 28, at 38-41, men's signature rates were substantially higher. Lockridge found some evidence for literacy increases among females in the decades just before 1800. *Id.* at 38. But by 1850 differences between men and women appear to have virtually vanished. L. SOLTOW & E. STEVENS, *THE RISE OF LITERACY AND THE COMMON SCHOOL IN THE UNITED STATES 157-58* (1981). See also GOODSSELL, *PIONEERS OF WOMEN'S EDUCATION IN THE UNITED STATES 1-12* (1931); 1 T. WOODY, *supra* note 9, at 159-60 (during colonial period percentage of illiteracy was greater among women than men).

309. It is perhaps not accidental that women's wills began to appear in greater numbers after women became more literate. The will studies produced some additional data on literacy. The recorded Baltimore wills noted whether wills were signed or marked. Similar notations in the Dukes County recorded wills were found to be unreliable. All the wills were probated in 1810 or later, so one would expect fairly high signature rates. The small size of the sample makes hard conclusions difficult, but over 60% of women's wills were signed. Surprisingly, no significant change appeared over time.

Women's Will Literacy (Baltimore)

Probate Year	Signed	Marked	Not Known
1810	3	5	5
1825	14	5	0
1840	23	16	4
1846	34	13	1

If the 1810 and 1825 data are merged, 63% (17/27) of the wills where information was available were signed. Similarly, 66% (57/86) of the 1840 and 1846 wills were signed. The signature rate for males among the wills read from all four of the sample years was 83% (20/24) with nine unknown. These results are compatible with the very high (90%) literacy rates of an 1860 sample of married women, L. SOLTOW & E. STEVENS, *supra* note 308, at 156, and the lower literacy rates (less than 50%) found among female will writers in the late 18th century. K. LOCKRIDGE, *supra* note 28, at 38-39.

still thought of as men's fare.³¹⁰ The movement to literacy was not without opponents fearful of introducing worldly concerns into women's lives or causing impure desires among the ladies.³¹¹ These concerns were particularly important in an era that witnessed a substantial increase in courting freedoms and premarital pregnancy rates.³¹² But female novel reading also found philosophical support in the contemporaneous rise of romanticism.³¹³

With all this activity in reading, writing, and education, women began to enter teaching in new ways. The jump from household tutoring of one's own offspring to the education by unmarried women of a group of children was made by some, opposed by others, but reasonably steady in its growth.³¹⁴ By the end of the century, a middle or upper class married woman was more likely than her mother to be literate, a participant in a voluntary society or religious group, and aware of a link between her own role and the larger political culture.³¹⁵ And her female offspring were more likely to be teachers.³¹⁶

Another link between women's domestic role and larger social activities was found in religion. The domesticity of women was linked to morality and virtue long before the Revolutionary War.³¹⁷ Women outnumbered men in churches from very early colonial days, and this trend became very noticeable by the turn of the nineteenth century.³¹⁸ Although teaching and eventually mill work provided avenues for unmarried women to leave the home, religion provided that opportunity for their mothers. Some religious groups, particularly the Quakers, provided opportunities for substantial female participation and even for religious travel.³¹⁹ Nineteenth-century revivals and camp meetings, religious fervor, religiously-based social service groups, and the Second Great Awakening had their roots in the late eighteenth century.³²⁰ The conflicts in women's domestic role that emerged in the nineteenth-century egalitarian religious and communal movements were largely defined by the stresses

310. See L. KERBER, *supra* note 2, at 235-64 (explaining importance of reading fiction to women in the early republic); N. COTT, *supra* note 2, at 64-74 (tracing common theme of domesticity in literary works appealing to women).

311. L. KERBER, *supra* note 2, at 239.

312. C. DEGLER, *supra* note 2, at 20; L. KERBER, *supra* note 2, at 245; M. NORTON, *supra* note 2, at 51-60; Smith, *Dating the American Sexual Revolution: Evidence and Interpretation*, in *THE AMERICAN FAMILY IN SOCIAL-HISTORICAL PERSPECTIVE* 321 (M. Gordon ed. 1973). Smith found that premarital pregnancy rates peaked in the later 18th century and troughed in the later 19th. *Id.* at 321-22.

313. See N. COTT, *supra* note 2, at 76-83 (romanticism conveyed in literature influenced women to wish for ideal mate); K. MELDER, *supra* note 2, at 34-47.

314. M. NORTON, *supra* note 2, at 290-94; C. KAESTLE & M. VINOVSIS, *EDUCATION AND SOCIAL CHANGE IN NINETEENTH CENTURY MASSACHUSETTS* 26-27 (1980); W. BUTTS & S. CREMINS, *A HISTORY OF EDUCATION IN AMERICAN CULTURE* 246-47 (1953) [hereinafter BUTTS & CREMINS].

315. M. NORTON, *supra* note 2, at 289. Norton has compiled some fascinating data on education trends over time, suggesting that among notable women, the proportion with some advanced education jumped from 18% for those born before 1770 to 65% for those born after 1770. *Id.* at 288-90.

316. *Id.*

317. See C. DEGLER, *supra* note 2, at 289-303 (women organized as the Social Purist to control sexuality and became involved in religion and churches).

318. N. COTT, *supra* note 2, at 126-28.

319. C. DEGLER, *supra* note 2, at 302; K. MELDER, *supra* note 2, at 77-92; M. NORTON, *supra* note 2, at 126-32.

320. See C. DEGLER, *supra* note 2, at 298-305 (during second awakening most converts were women and women played active role in reform organizations, religious groups, and antislavery movement); J. FURNAS, *supra* note 303, at 327-32 (discussing tactics of the leaders of the Great Awakening and camp meetings); W. McLOUGHLIN, *REVIVALS, AWAKENINGS, AND REFORM* 98-140 (1978).

of the post-war era. The use of special sphere ideology to permit movement of women into religious activities related to, but outside, the home suggested both the potential for larger change and the role limitations that undoubtedly guided most married women's lives.³²¹

But for most married women the combination of agricultural stability and the late eighteenth century concern over teaching young children appropriate social behavior led to concentration on child rearing rather than on activities outside the home.³²² It is, in hindsight, not surprising that the turn of the nineteenth century would see the blossoming of the domestic sphere in all of its contradictions.³²³ Even though modern notions of child rearing and new techniques of manufacturing were emerging, families were still confronted with a child-rearing experience vastly different from our own. Fertility rates were extraordinarily high, with live births numbering more than twenty-five percent of the child-rearing age population.³²⁴ The rates peaked around the turn of the century and declined thereafter.³²⁵ The average household size was over five and one-half persons, and did not fall below five until the end of the nineteenth century.³²⁶ Despite the large households, infant mortality rates were

321. See C. DEGLER, *supra* note 2, at 298-327 (discussing emergence of "separate sphere" for women in 19th century; protection of home and preservation of its moral character justified women's active role in outside world).

322. N. COTT, *supra* note 2, at 84-98.

323. Cott's use of the title "Bonds of Womanhood," which she explains on the first page of her book, *supra* note 2, is an appropriate signal of the potential for domesticity to be both an uplifting and binding experience.

324. Miscarriages, still births, and abortions are excluded from this high figure. It is plausible to suggest that during 1800 over one-third of the white women ages 15-44 became pregnant. Birth rates declined throughout the 19th century, with substantial declines starting after 1810. Data from STATISTICAL HISTORY, *supra* note 6, at 49, fills this table:

Year	Birth Rate for White Women 15-44 (Live births/1000 population)
1800	278
1810	274
1820	260
1830	240
1840	222
1850	194
1860	184
1870	167
1880	155
1890	137
1900	130
1930	87.1
1960	113.2
1970	84.1

325. W. GRABILL, C. KISER & P. WHELPTON, THE FERTILITY OF WOMEN IN AMERICA 1-24 (1958).

326. Household size is now well under three. Putting together material from the STATISTICAL ABSTRACT, *supra* note 13, at 45, and STATISTICAL HISTORY, *supra* note 6, at 41, yields the following table:

high, perhaps averaging fifteen percent.³²⁷ Maternal mortality was also high.³²⁸ The high birth rate and its attendant risks made the occurrence of pregnancy, the completion of childbirth, and the process of child rearing the focus of an enormous amount of attention. These events caused awe and fear, delight and depression with much greater frequency than today. The possibilities for tragedy were remarkably greater than we can imagine. Cott put it mildly when she wrote that "the arrival of another child posed anxieties."³²⁹

B. THE EARLY NINETEENTH-CENTURY

Such anxieties produced a rich variety of responses as the nineteenth century unfolded. Reproductive rates declined more noticeably after the turn of the century.³³⁰ There seems to be little doubt that some form of birth control operated to produce the substantial decline in fertility between 1800 and 1850.³³¹

Year	Average Household Size
1790	5.79
1850	5.55
1860	5.28
1870	5.09
1880	5.04
1890	4.93
1900	4.76
1930	4.11
1970	3.14
1979	2.78

327. Data from Massachusetts suggests that from 1850 until after 1900, about 15% of newborns died. Earlier rates were presumably of a similar magnitude. The somewhat lower mortality rates for the 1850's, however, suggest the possibility that rates rose contemporaneously with the decline of midwifery. There is need to explore the relationship between death rates and male entry into the birth process. Were midwives more sanitary? STATISTICAL HISTORY, *supra* note 6, at 57:

Infant Mortality For Massachusetts 1851-1970 (per 1000 live births)

Time	Rate
1851-54	131.1
1855-59	122.9
1860-64	142.5
1865-69	146.3
1870-74	170.3
1875-79	156.3
1880-84	161.3
1885-89	158.5
1890-94	163.2
1895-99	153.2
1900-04	141.4
1905-09	134.3
1910-14	116.7
1915-19	100.2
1920-24	78.7
1925-29	67.6
1970	16.8

328. Even in 1915 the rate was over 60 per 10,000 live births. The rate did not begin to fall until after 1930. Presumably 19th-century death rates were at least as high. STATISTICAL HISTORY, *supra* note 6, at 57.

329. N. COTT, *supra* note 2, at 91.

330. See *supra* notes 324 and 325 and accompanying text.

331. C. DEGLER, *supra* note 2, at 181-96, 210-16. The decline in birth rates was also attributed to improving economic status, while the primary method of birth control was probably abstinence.

Abortion appears to have been a common practice of the middle class by the 1840's when the first antiabortion laws appeared.³³² The variety in early nineteenth-century communal groups probably mirrored the tensions over child-birth present in the larger community. Some sects were celibate,³³³ others openly espoused birth control, and a number adopted communal living patterns and carefully controlled programs of sexual access to handle the problems of childbirth.³³⁴ Some groups, like the Mormons, encouraged childbirth.³³⁵ But whether the community chose celibacy, birth control, abstinence, communal child care, or high reproduction rates, control over family formation and fertility was central to each group's self-image.

Such control is a major theme in Degler's scholarship. He argues that the period from 1780 to 1830 witnessed the emergence of the modern American family characterized by marriage based on affection and respect, greater influence and autonomy for women in the home, child rearing and home maintenance as the wife's primary role, devotion of a larger amount of parental energy and resources to young children, treatment of young children as persons different from adults and needing special treatment, love, and solicitude, and smaller family size.³³⁶ Degler and Cott suggest that the emergence of the modern family both created an opportunity for women to increase their influence within the family and established limitations on the ability of women to work in the public sphere.³³⁷ As the separate domestic sphere grew to define middle class as well as wealthy women's roles,³³⁸ it both legitimated domestically related activity outside the home and created a new standard for defining deviance.³³⁹

332. See J. MOHR, *supra* note 2, at 16-18, 86-118. Abortion probably gained in importance when mechanical means of terminating a pregnancy became preferred over taking of poisons. Abortion frequency apparently rose in the 1840's. *Id.* at 46-85. Use of instruments probably increased during the mid-19th century. *Id.* at 61, 65. In addition, infanticide probably fell off in importance around the turn of the 19th century. See Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. REV. 359, 392-400 (1978). It is also interesting to note that knowledge of fetal development was improving in this period. As early as the 1820's some were writing that quickening did not represent the beginning of vitality but the point where fetal growth permitted movement to be felt. W. BECK, *ELEMENTS OF MEDICAL JURISPRUDENCE* 199-203 (1823). Such knowledge was important to the development of the antiabortion laws. It permitted the emerging professional male doctors to argue that laws permitting abortion until quickening did not comport with either morality or medical knowledge.

333. The group best known to most 20th-century persons is the Shakers, but a number of other celibate groups existed. The most prominent during the 19th century may have been the Harmony Society. See K. ARNDT, *GEORGE RAPP'S HARMONY SOCIETY, 1785-1847* (1971); 1 *WOMEN AND RELIGION IN AMERICA* 47-48, 60-66 (R. Ruether and R. Keller eds. 1981) [hereinafter RUETHER & KELLER].

334. RUETHER & KELLER, *supra* note 333, at 48-50. The Oneida Perfectionists led by John Humphrey Noyes also believed in birth control, and communal sexual access and child rearing. The Owenites, led by Robert Dale Owen and Fanny Wright were also involved in birth control and multiple partners. They were notorious in the 1830's. *Id.* at 49-50, 66-69.

335. *Id.* at 49, 69-70.

336. C. DEGLER, *supra* note 2, at 8-9.

337. *Id.* at 28; N. COTT, *supra* note 2, at 201.

338. Cott suggests that by 1830 many of the attributes of a modern family had affected middle class as well as upper class women. N. COTT, *supra* note 2, at 185. Degler goes further and argues that even lower class women were affected by the ideology of the separate sphere. C. DEGLER, *supra* note 2, at 111-43 (discussing role of Afro-American and immigrant women in 19th century).

339. See C. DEGLER, *supra* note 2, at 298-327 (discussing 19th century women's roles outside the home as justified by duty to act in world in order to protect morality). Degler finds that little opposition to female academies emerged while strong disapproval surfaced to women entering college. *Id.* at 309-11. Degler also describes the gradual evolution in patterns for selection of marriage partners from parental arrangements before the Revolutionary War to romantic selections with parental veto power

The rapidity of change in definitions of domesticity and deviance in the first decades of the nineteenth century is difficult to measure. But there is now little doubt that the definition of women's sphere was under greater strain in 1840 than it was at the turn of the century. The trends of the late eighteenth century in education and social services accelerated, with a large number of female academies opening after 1810.³⁴⁰ Colleges open to women began to appear.³⁴¹ Social and moral reform groups emerged in great profusion, spurred by urban growth, agricultural efficiency, trade and commerce, and economic dislocations and panics.³⁴² Literary societies, religious charitable societies, missionary groups, associations to aid the poor, temperance societies, and societies for reform in education, prisons, and treatment of the insane emerged in greater numbers.³⁴³ Many women found a moral foundation for their work in religion. Although some male religious leaders debated the appropriate scope of women's activities, women often found support among male religious colleagues for activities that neither challenged male leadership nor endangered appropriate feminine decorum.³⁴⁴ The generally accepted notion that the virtue and morality of women was superior to that of men made religious groups a natural milieu in which to develop female leadership.

Many of the prominent women of the early nineteenth century found their power writing or speaking about issues of moral, religious, or ethical significance. Francis Wright came from Great Britain in 1824 with General LaFayette, met with many prominent Americans, helped establish the colony of Nashoba to aid in the emancipation of slaves, and participated with Robert Dale Owen in the New Harmony Community. In 1830 she openly advocated free thinking and infidelity, free public education for all persons, birth control, divorce, and married women's law reform.³⁴⁵ She was a radical, outside the American mainstream of moral and social reform movements. When the abolitionist Grimke sisters³⁴⁶ emerged from their Quaker background to speak in 1836 before women in New York and in 1837 before mixed audiences in Massachusetts, they could already point to Wright's prior speaking tours, as well as the actions of a number of other women, as the real groundbreaking. Harriet Martineau, another English woman, gave abolitionist lectures from 1834 to 1836.³⁴⁷ Mixed prayer meetings occurred in the 1820's,³⁴⁸ and female educators like Emma Willard, Mary Lyon, and Catherine Beecher established fe-

by the end of the 18th century. *Id.* at 9-25. Courtship became much less constrained, and perhaps 10% of women gave birth to children less than nine months after their marriage. *Id.* at 20. Women were acting with fewer constraints during courtship, but using marriage as the escape from social disapproval.

340. N. COTT, *supra* note 2, at 115-25. See BUTTS & CREMIN, *supra* note 314, at 239-51.

341. K. MELDER, *supra* note 2, at 115-18; C. DEGLER, *supra* note 2, at 310-15. After three years of separate treatment, Oberlin permitted women to enroll with men in 1837. C. DEGLER, *supra* note 2, at 310.

342. See generally B. BERG, *supra* note 2.

343. K. MELDER, *supra* note 2, at 77-92, 118-21.

344. *Id.* at 88-94; A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* 17-139 (1977).

345. K. MELDER, *supra* note 2, at 59-61.

346. Sarah Grimke migrated to Philadelphia from South Carolina in 1821 and her sister, Angelina, followed in 1829. K. MELDER, *supra* note 2, at 156, 192. See also G. LERNER, *THE GRIMKE SISTERS FROM SOUTH CAROLINA: PIONEERS FOR WOMEN'S RIGHTS AND ABOLITION* (1971).

347. K. MELDER, *supra* note 2, at 146.

348. *Id.* at 73-75.

male academies, raised funds, and lectured on women's education before 1835.³⁴⁹

The decades of work in female voluntary societies, moral reform groups, and religious activities blossomed into significant participation in the abolitionist movement in the early 1830's. Female antislavery societies emerged by the early 1830's, and women solicited signatures on antislavery petitions beginning in 1835.³⁵⁰ The egalitarian rhetoric of the Revolution, the Enlightenment, and Jacksonian Democracy began to be used publicly by women. The expansion of suffrage opportunities for white men created an opportunity for radical abolitionists and feminists to focus America's attention on the appropriate role of women. Less than a decade after the Grimkes' controversial tour, discussion in mainstream newspapers on the similarity between slavery and the status of married women was possible.³⁵¹

These developments were given added impetus by fairly constant economic developments. Economic historians generally argue that per capita wealth increased very moderately between 1800 and 1840, but none are willing to state that great increases in wealth occurred.³⁵² The incidence of economic contractions beginning in 1792, 1819, and 1839,³⁵³ the fairly constant presence of debtor reform movements and legislative activity,³⁵⁴ the lack of internal sources of capital,³⁵⁵ the reliance on cotton as a major source of external trade,³⁵⁶ and the enormous internal improvement debts of the 1830's suggest a growing but struggling economy, heavily reliant on the world economy for support. While certainty on these issues is not yet possible, it is logical that the collapse of European trade before the 1819 and 1839 panics, the stress of economic dislocations, and the changes in employment patterns, job descriptions, and family roles would occur side-by-side with reform movements, religious and moral revivals, radical agitation, and strong public debates.

It is tempting to conclude that the 1840's blossoming of public debates on slaves and women completely explains the arrival of married women's acts.

349. *Id.* at 107-15. Mary Lyon founded Mount Holyoke College in 1836. *Id.* at 111.

350. *Id.* at 176-82.

351. An anonymous article entitled *Wives and Slaves: A Bone For the Abolitionists to Pick* was published in 17 DEMOCRATIC REV. 264 (1845) and reprinted in other papers. See N. C. Standard, Oct. 22, 1845, at 8, col. 1.

352. For literature on the 19th-century economy see P. TEMIN, *supra* note 213; Gallman, *Gross National Product in the United States, 1834-1909*, in OUTPUT, EMPLOYMENT AND PRODUCTIVITY IN THE UNITED STATES AFTER 1800 3 (National Bureau of Economic Research ed. 1966); Lebergott, *Labor Force and Employment, 1800-1960*, in OUTPUT, EMPLOYMENT AND PRODUCTIVITY IN THE UNITED STATES AFTER 1800 117 (National Bureau of Economic Research ed. 1966); Parker & Whartenby, *supra* note 6; Goldsmith, *The Growth of Reproducible Wealth for the United States of America From 1805 to 1950*, in INCOME AND WEALTH OF THE UNITED STATES: TRENDS AND STRUCTURE 247 (S. Kuznets ed. 1952); Andreano, *Trends and Variations in Economic Welfare in the United States Before the Civil War*, in NEW VIEW ON AMERICAN ECONOMIC DEVELOPMENT 131 (Andreano ed. 1965); A. JONES, *supra* note 14.

353. P. COLEMAN, *supra* note 222, at 19; S. REZNECK, *supra* note 216, at 51-100; P. McGRANE, *supra* note 212, at 1-42.

354. Coleman's book on debtors and creditors exhaustively catalogues the developments. *Supra* note 222.

355. Large captial inflows from overseas funded much of the 1830's boom. See North, *The United States Balance of Payments 1790-1860*, in TRENDS IN THE AMERICAN ECONOMY IN THE NINETEENTH CENTURY 573, 585-87 (National Bureau of Economic Research ed. 1960).

356. See P. TEMIN, *supra* note 213, at 152.

Indeed, there is some truth in the causal link because women actively petitioned for the married women's acts adopted in New York and Pennsylvania during the later years of the decade.³⁵⁷ But as we now know, the story of women's property acts is much more complex than a simple tale about progressive ideals winning out over blind forces of reaction. As Degler forcefully reminds us:

[t]he women's movement throughout the 19th century left untouched the great mass of women, married and unmarried. At no time were more than a few thousand women actively involved in the feminist or suffrage causes. The great preponderance of women either had nothing to do with feminism, or actually scorned it as unnecessary and wrongheaded.³⁵⁸

The public exposure of contradictions in separate sphere ideology by communal groups, abolitionists, and feminists led many women to fight rather than accommodate change. The generally middle class nature of the reform movements³⁵⁹ spoke peripherally to working class women, many of whom preferred the ideal image of a comfortable separate sphere at home to the potentially deviant life of a radical and frequently unmarried feminist. The tracing of reform movements therefore should not blind us to the obstacles the reformers confronted. Rather, one must hypothesize that shifts in the nation's economy, job map, family structure, agricultural productivity, banking practices, and trade structures would be mirrored by piecemeal, one step to the left, one step to the right, reforms in legal norms, and that changes would reflect generally held perceptions about women's appropriate sphere of influence.

CONCLUSION

And, of course, that is exactly what my archival and legal research suggests. Though by 1850 married women performed new legal roles within the family, property law still singled them out for special treatment and confirmed their primary role as family participants. Developments in non-property areas also confirm the patterns Degler and Cott describe. The culture's growing concentration on wifely domesticity suggests that family law reform should have been vigorous by mid-century. Indeed, by the 1840's divorce, custody, and adoption law were conforming to new notions of family and childhood development. Divorce was more prevalent and easier to obtain, women gained custody of children more frequently than in 1800, and adoption was becoming an accepted practice. Similarly, the arrival of the first antiabortion statutes in the 1840's signaled the importance attributed to married women's maternal

357. E. Warbasse, *supra* note 2, at 205-37. Later acts, such as those in Ohio and Massachusetts, were also supported by women. *Id.* at 265-71.

358. C. DEGLER, *supra* note 2, at 306. Degler provides an insightful chapter on why it took so long to gain women's suffrage. He discusses the reasons why suffrage was perceived as a radical step, including women's wide acceptance of the separate sphere, the perception that voting and politics threatened the family, and the substantial opposition to the amendment by women. *Id.* at 328-61. Cott also reminds us that the separate sphere was for many an acceptable level of accomplishment. N. COTT, *supra* note 2, at 197.

359. See C. DEGLER, *supra* note 2, at 341 (some radicals realized that giving women the vote would give middle-class women more influence but would do little to help lower class women).

role.³⁶⁰ While the coexistence of married women's property acts and antiabortion laws seems strange to modern feminists, they were compatible developments in a reform era accepting domesticity as a primary ideology for rationalizing changes in legal norms.

Although organized women's groups certainly had more influence on property law after 1850, the domestic role model also gained additional authority by the Victorian era. The appearance of narrow married women's acts and abortion restrictions in the 1840's was mimicked in the 1870's by the virtually simultaneous adoption of legislation protecting married women's earnings³⁶¹ and imposing severe restrictions on the dissemination of birth control information and devices.³⁶² Even women's suffrage was not achievable without the aid of moral reformers, protective labor supporters, and an ideology lauding the capacity of women to make finer moral judgments than men.³⁶³ Not until very recent times has the legal system taken seriously the notion that equality norms rather than special treatment norms should govern the outcomes of gender-based disputes. The basic thrust of Thomas Herttell's 1837 argument³⁶⁴ in favor of an early version of the New York married women's act can be substituted for arguments made decades later in favor of protective labor legislation and women's suffrage:

But have not women as much prudence and judgement to save and manage their property, after as before marriage? Has marriage deprived them of their senses and their wits, as well as of their rights of property which they possessed before marriage? With the additional incitement of maternal solicitude for the well-being of her children, has not a married woman even more inducement to the discreet appropriation of her property to their maintenance, than an unmarried woman, who has no such immediate motive for the prudent and due exercise of the right to possess and dispose of her property as she may please, and as by law she is authorized to do? And with such additional, natural, and maternal obligations, is not the discreet use of her property by a married woman, for the maintenance of her children,

360. See *supra* notes 330-35 and accompanying text (discussing abortion, birth control, and the maternal role).

361. The 1870's saw the arrival of statutes protecting earnings of married women in a number of states. Earnings statutes appeared first in the 1850's, but most of the acts were passed later. Among the states adopting earnings acts were Massachusetts: May 5, 1855; Kansas: Feb. 11, 1858 (Territorial Legislation); New York: Mar. 20, 1860; Alabama: Dec. 31, 1868 (free trader statute); Illinois: Mar. 24, 1869; Iowa: Apr. 14, 1870; Ohio: Mar. 30, 1871; Pennsylvania: Apr. 3, 1872; Delaware: Apr. 9, 1873; Kentucky: Apr. 11, 1873; Arkansas: Apr. 28, 1873; Indiana: Mar. 25, 1879. A few states also adopted limited earnings statutes, which only protected married women who were no longer living with their husbands. Pennsylvania: May 4, 1855; Minnesota: Ch. 49 (1860); Iowa: Mar. 12, 1866; Vermont: Nov. 19, 1866; Delaware: Mar. 28, 1871; New Jersey: Apr. 5, 1878. Bishop also discusses codes adopted in the 1860's and 1870's containing earnings provisions in California, Georgia, Illinois, Maine, Maryland, Massachusetts, and Mississippi. 2 J. BISHOP, *supra* note 27, at 490-91, 507, 512, 520, 524, 530, 536-37.

362. See generally C. DIENES, *supra* note 2.

363. Indeed, moral reformers and supporters of special workplace legislation for women, not equality minded feminists, were the major backers of women's suffrage. See C. DEGLER, *supra* note 2, 328-61. After the Suffrage Amendment was adopted, the Women's Party quickly became a radical fringe, a model to be picked up later in the century. See E. FLEXNER, *supra* note 1, 271-345 (1959).

364. Thomas Herttell, along with John Neal and Elisha Hurlbutt, was among the major male figures urging reform of women's law in New York from 1835 on.

as much more to be relied on, than that of her husband, as maternal is more strong, constant, and unconquerable, than paternal affection? Are not the cases rare in which unmarried women waste their property? And are not the instances numerous in which men spend their fortunes in riot, intemperance, extravagance, and every species of irregularity and dissipation? And when their pecuniary resources are exhausted or impaired, is it not a common practice for men to endeavour, by marriage, to obtain the property of young, inexperienced, unsuspecting, and credulous females, with a view to the means by which to gratify their avarice, or to continue their dissolute habits of life? Does not the existing law hold out inducements to mercenary marriages, by furnishing the means by which worthless fortune-hunters are enabled to effect their iniquitous purpose? Is not the alleged law, therefore, the source of the vicious and immoral practices to which it prompts; and the cause of all the injustice and misery to which married women become the devoted victims? And is not that law justly characterized by the vice, immorality, injustice, and misery consequent on its existence and operation?

That the affirmative are the true answers to the above questions, is as certain as that such answers prove conclusively, that married women's property would be safer in their own hands, and more certainly applied to family maintenance, than it now is, when given indiscriminately to good and bad husbands, to be disposed of as they please, or as their good or bad habits may happen to direct.³⁶⁵

The property reforms of the 1840's should not be perceived as an attack on coverture law. Though the seeds of later reforms were planted by the first wave of married women's property acts, married women's separate domestic sphere was not seriously challenged by their adoption. The legal changes of the mid-nineteenth century recognized that the women's role within the family had changed to encompass greater control over the raising of children and the disposition of family wealth. But not until this century would such increased participation in the family lead to broad participation in the political and economic fortunes of the culture at large.

365. Herttell, Remarks Comprising in Substance Judge Herttell's Argument in the House of Assembly of the State of New York in the Session of 1837 in Support of the Bill to Restore to Married Women the Right of Property as Guaranteed by the Constitution of this State, at 57-58 (1839) (copy on file at *Georgetown Law Journal*).

