

# Article

## **In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State**

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## I. INTRODUCTION: WIDOWS AND THE LEGAL REGULATION OF SINGLE WOMEN

To many lawmakers, female poverty resoundingly signals the failure of marriage. In fact, one strand of twenty-first-century “welfare reform” identifies weaknesses in the institution of marriage as a root cause of women’s poverty and, thus, proposes to fix marriage as a public policy solution to the problems faced by poor women.<sup>1</sup> If only more women could be brought within marriage’s protective domain, politicians reason—both by getting more women to marry, and also by strengthening the core meaning of marriage as a life-long social and, especially, economic commitment—fewer women would live in poverty. Critics of government programs promoting marriage, by contrast, denounce this logic. Government policies, they posit, must tackle directly the crisis of female poverty, locating both its causes and its potential solutions in, for example, education and labor policies, rather than deflecting discussions of women’s financial needs into the private family.<sup>2</sup>

Implicitly, competing descriptive and normative visions of the meaning and function of marriage drive this debate. These differing visions emerge from clashing conceptions of the proper relationship among women, the family, and the state. Proponents of marriage-promotion policies presume that the institution of marriage, if properly constructed, would do a

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1. The welfare legislation passed by the House of Representatives on May 16, 2002, for example, points to “promoting healthy marriage” as a “very important Government interest[,]” and appropriates one hundred million dollars for each of the next five years to federal grants for state welfare programs designed to promote healthy marriages. Personal Responsibility, Work, and Family Promotion Act of 2002, H.R. 4737, 107th Cong. §§ 4(4), 103(b)(2)(C) (2002); see also Robin Toner, *Welfare Chief Is Hoping To Promote Marriage*, N.Y. TIMES, Feb. 19, 2002, at A1. In general, contemporary politicians talk differently about male poverty, framing their discussions not in terms of marriage and the family, but rather by focusing on the labor market, the economy, and the educational system. See, e.g., William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 710-11 (2000) (offering historical context for the relationship between antipoverty and employment agendas); Eva Feder Kittay, *Welfare, Dependency, and a Public Ethic of Care*, in WHOSE WELFARE? 189 (Gwendolyn Mink ed., 1999) (analyzing the gendered underpinnings of welfare-reform strategies).

2. See, e.g., *Welfare and Marriage—a Bad Relationship*, IN BRIEF, June 2002, at [http://www.nowldef.org/html/news/ib/02\\_june/bad.shtml](http://www.nowldef.org/html/news/ib/02_june/bad.shtml); Martha Fineman et al., No Promotion of Marriage in TANF!, at <http://falcon.arts.cornell.edu/ams3/npmposition.html> (last visited Mar. 29, 2003); see also Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1718-19 (2001) (criticizing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 for its marriage-promotion policies); Robert Pear, *Human Services Nominee’s Focus on Married Fatherhood Draws Both Praise and Fire*, N.Y. TIMES, June 7, 2001, at A24 (describing opposition to marriage-promotion policies). Kathy Rodgers, the president of the NOW Legal Defense and Education Fund, has argued that, if lawmakers are concerned about female poverty, monies invested in marriage promotion would be better used for job training and educational programs. Kathy Rodgers, Letter to the Editor, *Can Marriage Ease Child Poverty?*, N.Y. TIMES, Feb. 24, 2002, § 4 (Week in Review), at 12.

prodigious amount of economic work: Marriage could and would provide for women's economic needs within the family unit. If more women would get married and stay married, the logic runs, individual men—newly cast in their proper husbandly roles—would provide for the financial needs of their wives, as well as those of their wives' children. Good husbands, therefore, would play a mediating role between women's material needs and the state's limited economic resources by privatizing wives' needs within the family.<sup>3</sup> Opponents of marriage-promotion policies, on the other hand, resist a vision of women's citizenship that is mediated through marriage. In so doing, they dispute both marriage's ability to guarantee that women's economic needs are sufficiently met, as well as the normative appeal of a vision of governance premised on a gendered model of male providers and female dependents within the nuclear family.

Beyond signaling the contested nature of contemporary welfare policies, the terms of the debate over marriage-promotion policies point to the complex relationship between marriage and unmarried women. To the extent that discussions over marriage-promotion policies turn on competing understandings of marriage, those understandings are being forged through discussions of the social and economic status of women living outside of marriage. Lawmakers apparently presume that the ultimate test of marriage's robustness lies in its ability or inability to act as a prescriptive solution to the problems facing even women inhabiting the world outside of its formal borders. After all, the proper role for marriage in welfare policy turns on what functions marriage—as a social, political, legal, and economic institution—can be expected to perform for those who legislators hope will enter into its domain in the future. Single women thus constitute the sociopolitical terrain on which lawmakers craft their descriptive and aspirational visions of marriage proper.

This Article uses history to analyze and critique both the expansive model of marriage that underlies marriage's viability as the policy solution to female poverty, as well as the relationship between this expansive model and the legal regulation of single women. Contemporary legal debates about the normative significance of female financial dependency—not only those conducted by legislators, but also those unfolding in writings by feminist theorists—largely eschew a historical perspective. Thus, they treat marriage's public economic role and its political ramifications as a peculiarly modern phenomenon.<sup>4</sup> The notion that marriage offers a solution

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3. On marriage as a contemporary site for the privatization of female dependency, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 161-62 (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*]; and Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995) [hereinafter Fineman, *Masking Dependency*].

4. See, e.g., FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3; Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57 (2002); Martha Albertson Fineman, *Contract and Care*, 76

to female poverty, however, has a substantial history, embedded in a still larger history of marriage as a tool of public policy.<sup>5</sup> In this Article, I mobilize one strand of this history to tell two stories about the relationship between formal marriage and women inhabiting the vast social and legal terrain outside of its borders.

First, I tell the story of how the ideological functions of marriage—particularly, its imagined role in solving the problem of female economic dependency—have been extended to define and regulate the rights of unmarried women and their relationship to the state. While scholars have long recognized the ways in which marriage has mediated the relationship between wives and the state, this Article argues that attention to the history of political discussions of female dependency makes visible another fundamental and, yet, overlooked feature of marriage’s vast strength as a tool of public policy: Historically, marriage has functioned as a gnomon, the central pillar of a sundial, casting shadows outward and covering even women not formally under the law of coverture—the common-law system of husband-wife relations that “covered” a married woman’s legal identity with her husband’s identity—or more modernized forms of marital status law.<sup>6</sup> If marriage has formally governed the legal rights and status of some

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CHI.-KENT L. REV. 1403 (2001); Fineman, *Masking Dependency*, *supra* note 3; Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541 (2001); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) [hereinafter Franke, *Theorizing Yes*].

5. See, e.g., NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000); LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999); see also Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998) (arguing that legal descriptions of marriage as a contract over the course of the nineteenth century allowed lawmakers to frame marriage as a consensual, private relationship, thereby masking its public use as a site for containing female poverty).

6. As I will suggest, marriage law governed men as surely as it governed women, demanding particular modes of both husbandly and wifely behavior. See *infra* Subsections III.B.1-2 (discussing the ways in which marriage, broadly defined, constructed the meaning of masculinity and husbandliness); see also HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 136-66 (2000) (analyzing the ways in which the law defined and demanded certain forms of husbandly behavior on the part of married men); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 987-88 (2000) (arguing that the doctrine of common-law marriage, which relied on inchoate legal understandings of what it meant socially to “act married,” defined certain forms of male behavior as husbandly). This Article, however, focuses on how marriage constructed the legal rights and gender roles of *women* living outside marriage, in particular. This choice reflects the differences between the social and legal positions of single men and single women, making women living outside of marriage a greater challenge to the dominant sociolegal order.

Generally, lawmakers perceived unmarried women as a threat to an orderly polity in a way that they did not perceive unmarried men. This threat was both practical and symbolic. Practically, in an economy premised on male wage earners and female dependents, unmarried women signified likely poverty and, thus, represented a potential threat to the public fisc. See, e.g., ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 34 (2001); KARIN WULF, *NOT ALL WIVES: WOMEN OF COLONIAL PHILADELPHIA* 156-65 (2000) (discussing the reasons behind the disproportionate

women, other women have lived in *the shadow of marriage*, regulated by marriage's normative framework even as they have inhabited terrain outside of its formal boundaries.<sup>7</sup>

Second, conversely, I tell the story of how—much as they do today in the welfare context—lawmakers have consistently forged the meaning of marriage proper within the peripheral terrain of its shadow. The legal regulation of unmarried women, in other words, has played a constitutive and contested role in legal constructions of the meaning of marriage, of women's rights within the family, and of the relationship between the family and the state. Hendrik Hartog has argued that “[i]t is through separations, through close examination of struggles at the margins of marital life and marital identities, that we come to a historical understanding of core legal concepts: of wife, of husband, of unity.”<sup>8</sup> This Article argues that understanding the meaning of marriage requires a still

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presence of single women among seekers of poor relief); Dubler, *supra* note 5, at 1894 (discussing settlement cases involving claims of common-law marriage, in which whether a woman was married determined which town would be responsible for her poor relief). Symbolically, unmarried women challenged the cultural and political conflation of women with wives. *See, e.g.*, WULF, *supra*, at 1-2, 5 (arguing that “gender, rooted in assumptions about women’s positions as wives, came to apply to all women regardless of their marital status” and, thus, that single women “posed a significant cultural contradiction”). This cultural conflation had its most visible manifestation in the nineteenth- and early twentieth-century “virtual representation” argument against woman suffrage, which posited that women did not need the vote because their husbands voted for them. *See, e.g.*, AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, at 24 (1965); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981-87 (2002). Query where single women fit into this image of the democratic polity.

7. In this sense, while clearly invoking their language, I mean to imply a dynamic that is more explicitly regulatory than the dynamic explored by Robert Mnookin and Lewis Kornhauser in their canonical article on divorce and the “shadow of the law.” Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979) (arguing that “the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom”). As I discuss later in this Article, however, marriage has also exerted a less regulatory “shadow” over the social imagination of even critics of the family. *See infra* Subsection III.D.3. This second type of shadow is more analogous to the dynamic analyzed by Mnookin and Kornhauser, and to the vast body of scholarship on the relationship between legal rules and social norms. *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339-50 (1997) (reviewing the legal literature on social norms); *see also* MICHAEL GROSSBERG, *A JUDGMENT FOR SOLOMON 2* (1996) (using Alexis de Tocqueville’s observation that Americans defer to the authority of even “the mere shadow of the law” as a framework for analyzing the experience of one family’s child-custody battle).

Marriage is not the only institution that—historically or today—has maintained a hold on the identity of individuals who are no longer within its formal aegis. Various forms of postemployment regulation, for instance, could be said to construct retirees “in the shadow of their employment”—that is, to allocate to individuals various economic and legal rights by virtue of their terminated employment status. The methodological choice to understand a legal institution by analyzing the satellite areas around its borders, therefore, could usefully be applied to other contexts as well.

8. HARTOG, *supra* note 6, at 1.

further foray, beyond marriage's margins and into the territory outside of its formal borders.

The terrain of marriage's shadow is vast, and different groups of single women have inhabited disparate parts of it, by chance and by choice, for reasons ranging from the practical to the ideological.<sup>9</sup> In this Article, I focus on one group of women living outside of marriage: widows. I analyze the shifting construction of widows' legal rights—particularly, the move away from dower, a widow's common-law inheritance right to a life estate in one-third of her deceased husband's real property—as a way to pin down for inspection marriage's often elusive shadow. The legal treatment of widows thus serves as a case study of the relationship between marriage's sociolegal core and its remote periphery.

Widows have long resided squarely in marriage's shadow, both socially and legally. By definition, widows have existed formally *outside* of the marriage relationship: Their husbands have died and their marriages have, indisputably, ended. Even under coverture, a widow was indisputably a single woman in the eyes of the law. In coverture's terms, she reassumed the status of *feme sole* as opposed to a *feme covert*.<sup>10</sup> Yet, discursively, the very appellation of "widow" has neatly tethered a woman semantically and ideologically to her deceased husband, thereby preserving her social and cultural wifely identity.<sup>11</sup> Likewise, as I will discuss below, a widow's legal

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9. See, e.g., LEE VIRGINIA CHAMBERS-SCHILLER, *LIBERTY, A BETTER HUSBAND: SINGLE WOMEN IN AMERICA: THE GENERATIONS OF 1780-1840* (1984) (analyzing the lives of women in postrevolutionary America who rejected marriage in pursuit of autonomy); AN EVENING WHEN ALONE: FOUR JOURNALS OF SINGLE WOMEN IN THE SOUTH, 1827-67 (Michael O'Brien ed., 1993) (recounting the experiences of four unmarried women at different stages of their lives); MARTHA VICINUS, *INDEPENDENT WOMEN: WORK AND COMMUNITY FOR SINGLE WOMEN, 1850-1920* (1985) (analyzing the lives of single women in colonial Philadelphia); WULF, *supra* note 6 (analyzing the work and lives of middle-class single women); Zsuzsa Berend, "The Best or None!" *Spinsterhood in Nineteenth-Century New England*, 33 J. SOC. HIST. 935 (2000) (arguing that an idealized sense of marriage's potential led some women not to marry).

In addition, in the antebellum era, slave women were legally excluded from marriage. See *infra* text accompanying notes 30-31.

10. On the widow as *feme sole*, see, for example, WULF, *supra* note 6, at 3-4; and Linda E. Speth, *More than Her "Thirds": Wives and Widows in Colonial Virginia*, in LINDA E. SPETH & ALISON DUNCAN HIRSCH, *WOMEN, FAMILY, AND COMMUNITY IN COLONIAL AMERICA: TWO PERSPECTIVES* 5, 24-35 (1983).

11. CAROL F. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* 75 (1987). In his analysis of the Salem witch trials, Karlsen points to this tension within widows' social and cultural position. On the one hand, Karlsen observes, society treated widows like wives. Thus, "unlike young, single women, *once accused* [widows] could expect to be treated much as married women were." *Id.* at 72. On the other hand, like all single women, widows were more at risk of being accused since "the absence of a protector... made women alone more susceptible than married women to witchcraft prosecutions." *Id.* at 75.

Even in analyzing the complicated position of widows, Karlsen reproduces the academic assumption that widows are not single women in his own typology. Karlsen notes that "[s]ingle, married, and widowed women are all found in significant numbers among accused witches in early New England." *Id.* at 71; see also VICINUS, *supra* note 9, at 6 (excluding widows from her

identity has long remained linked to her status as the (former) wife of her (deceased) husband.

As a point of historical entry into marriage's legal shadow, widows hold a peculiar appeal. Widows are like many groups of single women in that, time and again, they have forced judges and legislators to confront the problem of female poverty.<sup>12</sup> In so doing, they—like other groups of unmarried women in dire financial straits—have drawn lawmakers into the project of defining the reach of marriage's shadow as lawmakers have struggled to find ways to tie these single women's economic claims to the resources of particular men. Unlike other women living outside of marriage, however, widows have never been understood simply as "single women" with the cultural connotations of exclusion from, or rejection of, marriage.<sup>13</sup> They did, after all, once marry.<sup>14</sup> Therefore, even as politicians' and lawmakers' reactions to most single women have ranged from anxiety to scorn, they generally have sympathized with widows, seeking to aid them through their legislative efforts.<sup>15</sup>

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study of single women, arguing that "[t]heir unique economic and social status deserves a separate study").

12. Cf. WULF, *supra* note 6, at 8-9 ("Within the parameters of their individual class, religion, and specific historical and geographical context, unmarried women were poorer than married women."); see also *id.* at 156-65 (discussing the prevalence of unmarried women among the poor in colonial Philadelphia).

13. See Alexander Keyssar, *Widowhood in Eighteenth-Century Massachusetts*, 8 PERSP. AM. HIST. 83, 118 (1974) ("Women were expected to marry, but women whose husbands had died occupied a legitimate station in society.").

14. Widows shared this characteristic with divorced women, of whom there were many fewer in the nineteenth century in light of generally restrictive divorce laws. See, e.g., NORMA BASCH, *FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS* (1999) (tracking the history of divorce from the late eighteenth to late nineteenth centuries). Whereas widows elicited sympathy from lawmakers, however, divorced women elicited suspicion and disdain. By choosing to exit marriage formally and irrevocably, divorced women more effectively took themselves out of marriage's regulatory reach—both its benefits and its ideological constraints.

15. Historically and in our own day, widows represent to lawmakers the most sympathetic female citizens and lobbyists: women who married only to meet with their husbands' deaths. Their situation, presumably, is doubly sympathetic. Their marriages signify—in broad-stroke cultural shorthand—that these women followed traditional societal expectations and gender norms. In other words, from the perspective of most policymakers, they played by the rules. Their loss further designates widows as victims and innocents, signaling that the rules failed to protect them from the whims of fate.

Lawmakers have thus tended to pay attention to widows' economic, political, or legal needs, even as these same lawmakers have often turned a deaf (or even hostile) ear to the entreaties of other groups of women. See, e.g., W.D. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 3 (1960) (noting that protective legislation for widows "is a popular mandate. It caters to the needs of the widows. The policy is wholesome."). A few quick examples—historical and contemporary—make the general point across time and context. In the latter half of the nineteenth century, in the aftermath of the Civil War, the "sorrow-stricken women made widows by the late war" and left without husbands to represent their views at the ballot box constituted one argument for granting women the vote. CONG. GLOBE, 40th Cong., 3d Sess. 862 (1869) (statement of Sen. Warner). Thereafter, lawmakers' sympathies for widows—left husbandless and poor by the tragedies of the industrialized workplace—motivated them to enact workmen's compensation statutes. See JOHN WITT, *THE ACCIDENTAL REPUBLIC* (forthcoming 2003) (manuscript on file with author). Almost

Widows' evolving rights thus provide a novel prism through which to view lawmakers' efforts to extend the far reaches of marriage's legal powers, subtly defining and redefining marriage as an institution capable of enveloping even formally unmarried women. Focusing on the abolition of dower in New York in 1929, I argue that, when confronted repeatedly with the specter of widows in dire financial straits, lawmakers have refashioned marriage's shadow, hoping to return widows to their proper places as dependents within families with responsible (albeit dead) male providers.<sup>16</sup> In so doing, legislators have both defined widows' rights in marriage's shadow and defined the meaning of marriage itself—as both a set of relations between men and women, and as a mediating institution between individuals and the state—in the terrain beyond marriage's formal borders.<sup>17</sup> Likewise, as the abolition of dower in New York demonstrates, within the murky terrain beyond marriage proper, politicians and activists have confronted the disparate rights of men and women within marriage and, thus, the relationship between marriage as a regulatory system and deeply contested notions of sex equality.

Until now, *wives*, not widows or any women living outside of marriage, have been cast in the central, starring role in scholarly accounts of the relationship among marriage, the family, the state, and evolving norms of sex equality. Both historians and legal scholars have looked to the legal regulation of the husband-wife relationship as the key to understanding the development of family law, women's claims to rights within the family and the larger polity, and the changing relationship between the family and the

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a century and a half later, after the terrorist attacks of September 11, 2001, the widows of the attacks constituted the “group that no city official want[ed] to offend” and, thus, the leading “political voice” shaping the rebuilding agenda. Dan Barry, *As Sept. 11 Widows Unite, Grief Finds Political Voice*, N.Y. TIMES, Nov. 25, 2001, at A1.

16. Although the language of New York's new law was explicitly gender-neutral, lawmakers worried specifically about the social and economic position of widows, not widowers, because of the gender-specific associations between life outside marriage and poverty. See *supra* note 6. These concerns about women drove their legal reforms. See, e.g., *infra* Part IV. The New York inheritance law, therefore, fits into a larger history of legislators' gender-specific concerns for widows. See, e.g., WITT, *supra* note 15 (manuscript at ch. 5) (discussing the gender asymmetry of early workmen's compensation statutes, which allowed widows but not widowers to recover); John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717 (2000) (analyzing the gender-specific nature of nineteenth-century wrongful death statutes, which permitted widows to recover for their husbands' deaths but not widowers for their wives' deaths).

17. Cf. SUSAN STAVES, *MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833*, at 28 (1990) (pointing, in the British context, to connections between the history of dower and “the contemporary ideology of marriage and the family”). This connection, and the broader link between the history of private inheritance law and public constructions of marriage, is virtually absent in American legal historiography. Although Alexander Keyssar gestured at the possible connection between women's rights and widowhood in the brief conclusion to his 1974 article on widows in colonial Massachusetts, scholars have largely failed to explore this nexus. See Keyssar, *supra* note 13, at 118-19.

state.<sup>18</sup> Since widows sit outside of the formal law of marriage and the social history of married women, however, the history of dower and inheritance law has been largely overlooked as a site of contestation over gender-differentiated family roles and the meaning of marriage.<sup>19</sup> Conversely, the standard tale of dower's demise in America pays little, if any, attention to the relationship between inheritance and legal constructions of the family. Instead, classic historical accounts of dower's decline have focused on changing meanings of property rather than the family, positing that dower—which limited the alienability of married men's land by preserving a widow's one-third interest in real property transferred to a new owner—declined as a natural result of shifting understandings of real property in an expanding and increasingly productive national economy.<sup>20</sup>

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18. See, e.g., COTT, *supra* note 5; MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); HARTOG, *supra* note 6; Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) [hereinafter Siegel, *Home as Work*]; Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, *Rule of Love*]. Legally minded historians have analyzed the effects of coverture and women's struggles for equality within the family and the larger polity by examining, among other things, the passage of married women's property acts and earning statutes, see, e.g., NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, 82 GEO. L.J. 2127 (1994) [hereinafter Siegel, *Modernization*], the rise of divorce law, see, e.g., BASCH, *supra* note 14; Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95 (1991), the forms of contestation surrounding marital rape, see, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000); Siegel, *Rule of Love, supra*, the evolution of maternal child-custody norms, see, e.g., GROSSBERG, *supra* note 7, and the fight for suffrage, see, e.g., ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869 (1978); Siegel, *supra* note 6. A noteworthy exception to this historiographical focus on married women is WULF, *supra* note 6. Wulf explicitly "engages the historical problem of detangling the history of women from the history of women in marriage." *Id.* at 6.

19. From a more social or demographic perspective, a number of historians have examined widows and inheritance law in early America. These studies have tended to focus on widows who inherited by will, rather than claimed dower rights, because of the richness of wills for social historians. See, e.g., TOBY DITZ, PROPERTY AND KINSHIP: INHERITANCE IN EARLY CONNECTICUT, 1750-1820 (1986); Lois Green Carr, *Inheritance in Colonial Chesapeake, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION* 155 (Ronald Hoffman & Peter J. Albert eds., 1989); Gloria L. Main, *Widows in Rural Massachusetts on the Eve of the Revolution, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION, supra*, at 67; David E. Narrett, *Men's Wills and Women's Property Rights in Colonial New York, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION, supra*, at 91; Daniel Scott Smith, *Inheritance and the Social History of Early American Women, in WOMEN IN THE AGE OF THE AMERICAN REVOLUTION, supra*, at 45. As one scholar observed, wills offer a precious view into people's intimate lives, as they "capture the decisions of individuals," as well as "the flavor of family life." Smith, *supra*, at 46, 47. For such scholars, in other words, wills offer a much-coveted window into individual men's values, lives, and attitudes toward their wives. This Article, by contrast, looks to inheritance law first and foremost to understand the law's ideological premises vis-à-vis the family.

20. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 430-31 (2d ed. 1985) (discussing the limitations of dower in the nineteenth-century economy); MORTON J.

In Part II, before turning to the history of dower, I provide a general map of marriage's shadow in the nineteenth century, pointing to the ways in which, historically, marriage has provided a normative model for the legal regulation of women living outside marriage. In so doing, I explicate the ideological stakes of extending marriage's reach to provide for the economic needs of some groups of unmarried women. Then, in Part III, I turn to the history of dower and its demise, locating the regulation of widows' rights within the legal history of marriage and the family. The traditional, whiggish story of dower's demise—with its focus on the natural decline of antidevelopment forms of property regulation—obscures the ideological purposes served by dower, which played a critical role in defining the meaning and the reach of marriage, as well as the meaning of masculinity and femininity within the family. The standard story of the shift away from dower also ignores a robust history of contestation over inheritance law based not on shifting understandings of property, but rather on evolving gender-conscious visions of marriage and the family. Although their efforts in this area have been largely forgotten, members of the nineteenth-century woman's rights movement<sup>21</sup> fought for dower reform, recognizing something that more recent scholarship has overlooked: the ideological role of dower in shaping the female-dependent/male-provider model of the family, as well as women's second-class citizenship rights. I argue that nineteenth-century woman's rights activists shaped their attack on dower in gender-salient terms that foreshadowed later discussions of dower reform in New York in the 1920s, using a vocabulary that at once radically demanded sex equality within the family and, simultaneously, bolstered the traditional, class- and gender-salient model of the private, male-headed family with a dependent wife.

In Part IV, I analyze the statutory abolition of dower in New York in 1929, the culmination of a lengthy legislative reform effort that garnered widespread attention and resulted in a constitutional challenge in the U.S.

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HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 56-58 (1977) (discussing the need for a nineteenth-century judicial determination of how to measure the value of land for purposes of calculating dower). *But see* MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 141-84 (1986) (analyzing dower in the context of women's economic needs and legal rights). Perhaps, in this respect, contemporary historians have only followed the lead of legal academics before them. In his 1931 treatise of domestic relations, for example, Joseph W. Madden included only a cursory discussion of dower, noting that "[t]he subject of dower is discussed in treatises on Real Property." JOSEPH W. MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* 121 n.51 (1931).

21. I refer to the nineteenth-century women's movement, as they referred to themselves, as the "woman's rights movement." *See* NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 3 (1987) ("Nineteenth-century women's consistent usage of the singular *woman* symbolized, in a word, the unity of the female sex."). By contrast, when talking about twentieth-century feminists, I talk about "women's rights activists." *See id.* ("The appearance of Feminism in the 1910s signaled a new phase in the debate and agitation about women's rights and freedoms that had flared for hundreds of years.").

Supreme Court. I depict the lawmaking process as a conversation among lawmakers, feminist activists, and social observers about the various contested meanings of sex equality and marriage, as well as the proper relationship between women and the state.

In replacing dower with a facially sex-neutral elective share, which guaranteed to a widow or widower a certain share of her or his deceased spouse's real and personal property, New York's lawmakers understood themselves to be legislating what they explicitly termed "equality between men and women."<sup>22</sup> The complex meaning of sex equality in this context points to both the radical potential of inheritance law reform to disrupt traditional gendered understandings of marriage, as well as the conservative potential of inheritance law reform to fortify the traditional, private family and reinforce the law's ability to define women's rights within the framework of marriage. That is, even as widows gained important rights with the demise of dower, the law held tight to dower's ideological as well as economic functions. In fact, when a constitutional challenge to New York's elective share statute reached the U.S. Supreme Court in 1942, the Court confirmed that, even after dower, marriage was a social and economic institution that necessarily extended beyond a husband's death even if he wished otherwise.<sup>23</sup> In so doing, the Court both legally anchored widows in marriage's shadow, and also issued a powerful blow to cultural understandings of absolute male prerogative and property rights.

Part V argues that the model of marriage embraced by dower reform represented not only a rethinking of women's status within the family, but also an aspirational vision of the relationship between the family and the state.<sup>24</sup> While contemporary critics of marriage often assume that women's material needs were once—in the good old days—effectively privatized within the family, the history of dower suggests otherwise.<sup>25</sup> Dower, like coverture, sought to ensure a woman's economic reliance on a particular

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22. REPORT OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES 14 (1928) [hereinafter REPORT I]. On the elective share system, see Charles H. Whitebread, *The Uniform Probate Code's Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 PROB. L.J. 125 (1992).

23. See *Irving Trust Co. v. Day*, 314 U.S. 556, 563 (1942).

24. Cf. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (arguing that, while most scholars have focused on the ways in which public law has defined the meaning of race, the private law of inheritance has been critical to legal definitions of race and gender).

25. Martha Fineman, for instance, has argued that the privatization model of marriage "is failing in contemporary society. Marriage is no longer able to serve its historic role as the repository for dependency." Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 540, 542 (1998); see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 3, at 165 ("[T]he private-natural family is no longer viable as the sole, or even primary, institutional response to dependency."). This Article, however, refutes any notion of a golden age in which, unlike today, marriage effectively played this public role.

man. In so doing, it bolstered the assumption that the state had no responsibility for her financial needs. Over time, however, as poor widows provided graphic evidence of dower's failure to fulfill its imagined provider function, lawmakers turned to inheritance law reform to reconstruct marriage according to their vision of marriage's posthumous power and its ability to coerce private economic support even for women living outside of marriage.

In evaluating this aspect of dower reform, I theorize the relationship between private-law and public-law models of female support by juxtaposing the history of dower, the private solution to some widows' economic needs, with the history of mothers' pensions, the public solution to other widows' economic needs. This constitutes a comparison of legislative approaches to two very different groups of women: Dower's failings implicated primarily middle-class and wealthy women, whereas mothers' pensions addressed the needs of some of the most impoverished women. I reason across these groups not to minimize their class differences or their different levels of economic need and privilege, but rather to make visible a story about the relationship among women, marriage, and the state that transcends class differences.<sup>26</sup> By focusing on the economic plight of middle- and upper-class widows, dower reform unintentionally exposed as false the implicit premise of early twentieth-century discussions of mothers' pensions: that only *certain* widows—that is, poor women whose husbands had died in especially bad economic straits—needed more support than the family and private inheritance law provided. The failure of dower thus implicated a much deeper critique of marriage as a viable model for women's support and exposed a fundamental tension within a model of the family that simultaneously embraced female support and male control as bedrock values. Lawmakers therefore turned to inheritance law reform to counter the destabilizing potential of critiques of dower by reproducing a fortified version of the traditional private family with widows at its core.

Finally, in Part VI, I offer a brief account of the ways in which the abolition of dower constituted the beginning of a general revision of the shape of marriage's shadow in New York. I conclude with a contemporary perspective on the ways in which, although the reach of marriage's regulatory shadow has changed since the early twentieth century, courts continue to use marriage as the normative framework for evaluating the legal worthiness of nonmarital relationships and, thus, for determining the legal rights of women living outside of marriage.

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26. Notably, too, this discussion of dependency does not frame women as mothers, as most discussions of female dependency tend to do. See Franke, *Theorizing Yes*, *supra* note 4, at 183 (criticizing feminist legal theory for conflating women and mothers in discussions of dependency).

Moreover, even as the contemporary law of nonmarital relations allows women to seek legal rights without situating themselves within the shadow of marriage proper, lawmakers still look to marriage as a public policy tool capable of privatizing women's economic dependency. Thus, policymakers continue to imagine marriage as a mediating institution between women and the state. Once again, by drawing links between historical discussions of dower and contemporary discussions of welfare reform, I seek not to minimize the class and race specificity of today's political discussions of female poverty, but rather to point to the ways in which marriage constitutes a regulatory system that seeks to reach women—married and unmarried—across boundaries of race and class.

I conclude with these contemporary observations to point to the ways in which the history of dower and its demise constituted part of a story of both continuity and change with respect to unmarried women's relationships to the family and the state. I therefore offer the history of dower reform in order to initiate a conversation about the ways in which marriage continues to regulate the legal rights and citizenship of unmarried women, as well as legal and social understandings of equal citizenship. I ground that conversation in the history uncovered in this Article—the history not only of dower's demise, but also, more broadly, of evolving forms of status regulation, feminist activism, and legislative and judicial approaches to the family roles of male provider and female dependent. This history provides a new framework within which to analyze the contemporary legal and political links between marriage and economic dependency, as well as the limits on sex equality imposed by a model of the relationship between the family and the state premised on marriage's ability to privatize women's material needs. Ultimately, history should make us skeptical of contemporary claims, made by proponents of welfare policies promoting marriage, that marriage can serve as an effective policy tool to eliminate women's poverty.

## II. MAPPING MARRIAGE'S SHADOW

When legal scholars and historians analyze the power of marriage as a regulatory institution that defines women's rights within the family and the state, they generally consider married women. The law of the family, especially the common law of coverture, seems to demand that focus explicitly: Coverture's categories of *feme covert* and *feme sole* seemingly erected a clear dividing line between married women and unmarried women, figuratively covering only the former with a stunning array of status-defining legal restrictions. Thus, coverture restricted only a married woman's ability to convey or devise property, enter into contracts, or file lawsuits. Since her legal identity was "covered" by that of her husband, the

law presumed that he could perform those legal roles on her behalf if he so chose.

Even with coverture's gradual demise, married women remained a logical focus of analyses of the complex and often mediated relationship between women and the state. Long after the passage of married women's property acts beginning in the 1840s and the passage of married women's earnings statutes later in the nineteenth century, married women's legal and political identities continued to be defined and limited by their marital status.<sup>27</sup> A married woman's legal rights thus remained deeply intertwined with her status as a wife, creating deep tensions between family law and evolving notions of sex equality.

Complicating the relationship among women, marriage, and the state were deep tensions between notions of subordination and protection. Despite the obvious disabilities thrust upon wives, many of the legal restrictions defining the status of a married woman were couched in the language, not of restriction, but rather of marital protection. Marriage, in the eyes of the law, entailed a particular bargain (albeit one the terms of which a woman was powerless to alter): In exchange for giving up certain rights, the law protected a married woman by requiring her husband to represent her legally and politically and to support her economically. From the point of view of nineteenth-century lawmakers, married women—that is, the white, middle-class married women whom lawmakers considered—got the better of this bargain, gaining both the social status of marriage and the legal protections of coverture.

At the level of doctrine, unmarried women had no place in this peculiar bargain. Thus, the *feme sole's* legal identity was seemingly unconstrained by coverture's strictures; the *feme sole*, after all, lived outside of marriage and, therefore, from a doctrinal perspective, outside of the regulatory framework of marriage law. Likewise, as the bases of coverture shifted and evolved, formally uncovering the *feme covert* in various ways—for example, by allowing her to own property and to keep her earnings—subsequent incarnations of marital status law explicitly defined the rights and responsibilities of married women, while purporting to be silent on the legal status of unmarried women. Working within this framework, legal historians of the family have generally paid scant attention to unmarried women, implicitly treating them as exceptional and assuming that they stood outside of the bounds of legal regulation.

Despite the explicit boundaries between the legal rights of married and unmarried women, the law understood and constructed the social and legal

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27. See, e.g., COTT, *supra* note 5, at 156-79; Siegel, *Home as Work*, *supra* note 18, at 1084-85. In fact, as Hendrik Hartog has observed, even in the middle of the twentieth century, "much of the nineteenth-century law of husband and wife remained," extending the "very long nineteenth century" way beyond its temporal borders. HARTOG, *supra* note 6, at 306, 309.

status of many unmarried women in relation to marriage. In other words, even as they marked single women as outside the protective auspices of marriage, lawmakers and judges defined many unmarried women's legal rights by organizing them into intelligible, proximate relationships with the institution of marriage. In so doing, they created the legal rules that constituted the muddled terrain of marriage's shadow: The doctrinal sites at which the law—its imagination bounded by marriage's normative paradigm of both private heterosexual relations and relations between women and the state—defined an unmarried woman's legal status, in one way or another, by virtue of her contiguous relationship to marriage.

Lawmakers thus clung to the normative model of marriage as a template for defining the legal identities of some women who were explicitly outside of the formal and carefully demarcated boundaries of legal marriage. Three areas of the law, the details of which varied from jurisdiction to jurisdiction, exemplified the contours of marriage's shadow in the nineteenth and early twentieth centuries: the so-called "heartbalm actions" of breach of promise to marry and seduction, common-law marriage, and dower. Each of these three legal sites brought a different group of unmarried women within marriage's normative framework. In so doing, the law deemed particular unmarried women's relationships worthy of legal recognition and thus allowed them to make financial claims on particular men's resources.

Understanding these different doctrinal sites as comprising a coherent regulatory scheme—rather than an unrelated assortment of common-law relics—is particularly important for making sense of the legal position of widows as unmarried women. Because, unlike other single women, widows were once wives, it is tempting to see dower, and inheritance law more generally, as simply just acknowledgments of widows' former status and their former formal relationship to marriage. When viewed in the context of other common-law rules, however, a larger picture begins to emerge in which the legal regulation of widows resonates in a different register. Even if their social status as formerly married women differentiated widows from other women living outside marriage, the law constructed the parameters of widows' legal rights based on the same concerns and preoccupations that shaped the legal treatment of other single women.

The heartbalm tort actions of breach of promise to marry and seduction, for instance, allowed a single woman to sue a man who terminated their romantic relationship prior to an expected marriage ceremony.<sup>28</sup> These

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28. At common law, the right of action belonged to the woman's father for loss of his daughter's services. Many states codified these actions around the turn of the century, and a number of those gave the woman herself the right to sue. See M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. 33, 61 n.211 (1987). On the history of these heartbalm actions, see GROSSBERG, *supra* note 18, at 34-63; Jane E. Larson, "Women Understand So Little,

actions thus subtly transformed *nonmarital*, dating relationships into legally recognized *premarriage* relationships. By framing these relationships as necessarily on the way to marriage—and thus within the general social framework of marital relations, as opposed to any potentially subversive world outside of that framework—these actions entitled a single woman to claim monetary damages if her beau ended the relationship prior to the anticipated marriage.

Common-law marriage similarly defined formally nonmarital relationships as within the legal and social world of marriage. As I have explored elsewhere, the doctrine of common-law marriage transformed long-term, heterosexual, intimate, nonmarital relationships that “looked like marriages” into legal marriages.<sup>29</sup> In so doing, it bestowed the legal rights of married partners on couples who had never married by judging their nonmarital relationships against the normative model of marriage. Finally, as I will analyze in the next Parts of this Article, dower and subsequent legal approaches to widows’ inheritance rights sought to prolong widows’ legal identities as internal to the institution of marriage despite the absence of their deceased husbands. Inheritance rights thus sought to define widows as wives, despite both their husbands’ obvious absence and their formal legal status as unmarried women.

These doctrinal sites—the heartbalm actions of seduction and breach of promise to marry, common-law marriage, and dower—benefited many women by granting them an impressive set of powerful rights and entitlements precisely by positioning them into legally recognized relationships to marriage. In a legal system characterized by male privilege and prerogative, each of these doctrinal areas offered women powerful tools to acquire individual men’s financial resources. In the antebellum era, after all, the very right to marry, or plausibly to make a legal claim to marriage’s shadow, marked white women as citizens in sharp contradistinction to slave women, who were explicitly excluded from the privileges and protections of marriage law.<sup>30</sup> After the Civil War, the right to marry constituted a core component of freedpeople’s newly acquired citizenship.<sup>31</sup> The ability to situate oneself in marriage’s shadow therefore constituted a formidable entitlement.

Moreover, by bringing women within marriage’s normative domain, the assumptions about women’s intimate identities underlying heartbalm

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*They Call My Good Nature ‘Deceit’’: A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 381-412 (1993); and Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 867-97 (1996).

29. See Dubler, *supra* note 6.

30. See, e.g., LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* (1997); BRENDA E. STEVENSON, *LIFE IN BLACK AND WHITE: FAMILY AND COMMUNITY IN THE SLAVE SOUTH* (1996); Franke, *supra* note 5.

31. See Franke, *supra* note 5, at 277.

actions, common-law marriage, and dower undoubtedly vindicated the subjective experiences of many unmarried women. No doubt, many women longed to live in marriage's emotional, social, and ideological shadow. Some women who brought actions for breach of promise to marry had truly thought of themselves as wives-to-be, and felt entitled to compensation for their lost expectations and dreams. Similarly, some women who brought common-law marriage claims genuinely considered themselves wives within traditional marriages and were shocked—upon the death or disappearance of their husbands—to learn that their relationships were not legally recognized. And, without question, some widows continued to identify themselves, emotionally and socially, as the wives of their deceased husbands.

Just as surely, though, other women had conceived of their intimate lives in radically different terms, deliberately choosing not to marry or feeling liberated by their release from wifhood. Regardless of women's particular subjective experiences, by bringing single women within marriage's normative framework, the laws anchoring marriage's shadow performed substantial ideological work that served the interests of a legal system committed to marriage's ability to define all forms of intimate identity and gender relations. First, these doctrinal areas bolstered the view that only marital relationships—now broadly defined to include both formal marriages and many other marriage-like relationships—were worthy of legal recognition. This message had powerful consequences for women seeking financial support, the group that made up the plaintiff class in these actions. In order to gain legal rights as a member of a relationship, these legal doctrines implicitly told women that they had to present their nonmarital relationship as marriage-like.

Second, by narrowing the field of plausible legal claims, these areas of the law rendered legally invisible a woman's decision to live completely outside of marriage's normative structure, implicitly denying the possibility that couples wished to conduct their intimate relations in a social world completely apart from marriage. At the very least, these laws precluded women from acknowledging any such intent if they wanted to invoke the protections of the law. Through these legal rules, therefore, the law pulled single women into the confines of marriage, at least if they wanted the law to recognize them as rights-bearing members of intimate relationships. These actions, in other words, defined the boundaries of the law's concept of intimacy as coterminous with marriage's boundaries. In so doing, they denied the possibility of women's unbounded intimate imaginations, and thus their diverse intimate identities.

Finally, the legal rules responsible for casting broadly the reach of marriage's shadow played a critical role that was at once economic and ideological: They sought to contain the economic dependencies of many

unmarried women within the conventional framework of marriage. As Martha Fineman has analyzed, legislators have long imagined that marriage serves the critical social and political function of attaching dependent women to provider men, thereby creating “the mechanism through which we can avoid assuming collective (or state-assumed) responsibility for dependent members of our society.”<sup>32</sup> Bolstered by a work force structured around notions of the family wage, policymakers thus have confidently presumed that married women will be supported by their husbands’ earnings, not public funds.<sup>33</sup>

The ideological genius of the laws constructing marriage’s shadow consisted of their ability simultaneously to capture a vast range of women’s intimate identities within marriage and to privatize the economic needs of unmarried women by constructing their financial claims as internal to marriage’s structure broadly defined. Thus, formally unmarried women could make claims on the financial resources of particular men only by legally situating their relationships within marriage’s shadow. Moreover, through these legal doctrines, the law strengthened and expanded the core meaning of marriage with its gender-specific provider/dependent roles, defining it as a powerful social and legal institution capable of bringing within its confines even couples on its remote periphery.<sup>34</sup>

As the remainder of this Article explores, the legal history of widows’ rights exemplifies this dynamic relationship between marriage’s core and its periphery. No longer formally internal to marriage, widows nonetheless derived their social and legal status from what lawmakers perceived to be their proximate relationship to marriage. In defining and redefining widows’ rights, judges and legislators ossified the link between this group of unmarried women and the institution of marriage, stretching the meaning of marriage as well as its regulatory powers in ways that fortified

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32. Stake et al., *supra* note 25, at 541-42.

33. As John Witt has argued, beginning in the mid-nineteenth century, wrongful death statutes powerfully reinforced this model of the family and the economy by creating asymmetrical regimes within which women could recover for the wrongful deaths of their husbands, but men could not bring parallel actions for the wrongful deaths of their wives. See Witt, *supra* note 16, at 736-46. Even after a man’s death, the law perpetuated the idea that he would provide for his dependent wife. Furthermore, in the early twentieth century, similar gender asymmetries in workmen’s compensation legislation carried into the late twentieth century this vision of the family wage structured around male providers and female dependents. See WITT, *supra* note 15 (manuscript at ch. 5).

34. Karin Wulf has argued that, in colonial Philadelphia,

[d]espite the fact that most women who needed poor relief were unmarried, and were not dependent [on] an individual man, officials still looked for indications of dependence or traits associated with dependence, such as subordination and submissiveness. Thus, officials were unwilling to see many men in the position of social dependence, but they were committed to seeing women in that role.

WULF, *supra* note 6, at 168-69.

marriage's dominion over not only widows, but also other groups of women living outside of formal marriage.

### III. DOWER AND ITS CRITICS

#### A. *The Legal Rights of Widows*

Dower constituted “the core of the wife’s entitlement under the old common law system.”<sup>35</sup> Incorporated into early American law, albeit with variations from colony to colony (and, later, state to state), dower generally guaranteed a widow a fixed entitlement to her deceased husband’s estate: a life interest in one-third of all the real, not personal, property of which he was seized during their marriage.<sup>36</sup> On the whole, this constituted a rather modest financial entitlement. A woman’s dower rights were deemed inchoate while her husband was alive, and, even after his death, her life estate precluded her from selling her interest in her share of her husband’s land or even, in many states, improving the land in productive ways lest she run afoul of the common-law doctrine of waste.<sup>37</sup>

Moreover, upon her husband’s death, although a widow’s dower rights became “consummate,” she had “no seisin in law, nor ha[d] she any right of entry, nor c[ould] she exercise any act of ownership over the lands upon which her right ha[d] attached.”<sup>38</sup> Instead, she had to wait until her husband’s estate was assessed and her share was assigned, either voluntarily by her husband’s heirs or through legal proceedings at her initiation.<sup>39</sup> This placed a widow in a uniquely uncomfortable position that was “governed by its own particular circumstances, neither borrowing nor affording any analogies.”<sup>40</sup> Although at common law a widow had a “quarantine” right to remain in her deceased husband’s home for forty days after his death, thereafter the legal heirs of her husband’s property had the right to expel her, leaving her with only the right to sue for dower.<sup>41</sup>

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35. See STAVES, *supra* note 17, at 5.

36. TAPPING REEVE, *THE LAW OF BARON AND FEMME* 102-03 (photo. reprint 1970) (Albany, William Gould 3d ed. 1862); see also 1 CHARLES H. SCRIBNER, *A TREATISE ON THE LAW OF DOWER* 1 (Phila., T. & J.W. Johnson & Co. 2d ed. 1883). On the early development of dower, see George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948). On regional variations in early American inheritance law, see SALMON, *supra* note 20, at 147-84. As Salmon notes, colonial Maryland and Virginia granted a widow dower rights in real and personal property. *Id.* at 149-56.

37. See HORWITZ, *supra* note 20, at 56-58; SALMON, *supra* note 20, at 143.

38. 2 SCRIBNER, *supra* note 36, at 27.

39. See 2 *id.* at 30 n.1 (citing cases). Further legal procedures existed if a widow sought dower rights in land that had been conveyed by her husband. See 2 *id.* at 91-204.

40. 2 *id.* at 27.

41. See 2 *id.* at 53-69. These legal conditions led to the crises for widows that nineteenth-century woman’s rights leaders so strongly decried. See *infra* Subsection III.D.3 (describing the dual tragedy faced by a widow who lost both her husband and her home). As a leading nineteenth-

Just as a widow possessed dower rights, a widower had a right to curtesy, the common-law analogue to dower. At common law, a husband acquired a right to the rents, profits, use, and enjoyment of any of his wife's property.<sup>42</sup> Once the marriage produced a child, a husband also acquired an inheritable life estate in his wife's land, known as his "curtesy."<sup>43</sup> Despite their relatively analogous forms,<sup>44</sup> the radical disparity between men's and women's real-property holdings, wealth, and earning potential rendered dower of far greater social and legal importance than curtesy.<sup>45</sup> A marked gender asymmetry, in other words, characterized the nature of familial financial dependencies both before and after the death of one spouse. Women generally depended on their husbands for financial support during marriage to a far greater extent than men depended on their wives. Likewise, widows depended on their deceased husbands' property for support in a way that widowers, in general, did not depend on their deceased wives' estates.<sup>46</sup> Dower thus had far greater practical consequences than curtesy for the reconstruction of a family's lives after the death of one spouse.

In addition to dower, a widow was entitled at common law to her "paraphernalia," that is "her beds and clothing, suitable to her condition in life."<sup>47</sup> The widow could claim such items even before creditors took their

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century treatise on dower noted, however, many judges were unmoved by widows' woes in these cases. As one jurist remarked, "If the law be so, we cannot determine to the contrary upon inconvenience or the hardship of the law." 2 SCRIBNER, *supra* note 36, at 68. Some states, however, abrogated this rule, allowing widows to remain in their homes until the assignment of dower. See 2 *id.* at 68-69.

42. See George L. Haskins, *Curtsey in the United States*, 100 U. PA. L. REV. 196, 196 (1951).

43. See GLENN C. BEECHLER, *ELECTION AGAINST WILLS: SECTION 18 DECEDENT ESTATE LAW OF NEW YORK* 3 (1940); Haskins, *supra* note 42, at 196. Linda Kerber also noted:

Although a husband gained direct control over his wife's personal property at marriage, he assumed the status of "tenant by courtesy" over her real estate only after the birth of a child. . . . Thus one effect of coverture was to freeze possession of the lands that a woman brought into marriage until they could be passed to her heirs.

LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 144 (1980).

44. On the differences between dower and curtesy, see Haskins, *supra* note 42, at 197.

45. Hartog noted:

In the real world, a world where men ordinarily (although not always) managed their wives' property, curtesy was just a fact of life, not of particular interest legally. . . . Dower, on the other hand, was an important and problematic right that intervened into the everyday (male) ownership and use of land.

HARTOG, *supra* note 6, at 145. On the role of inheritance law in reinforcing gender disparity in property holding in the Northeast in the early nineteenth century, see Toby L. Ditz, *Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750-1820*, 47 WM. & MARY Q. 235, 257 (1990) ("[L]aw and practice greatly limited women's possession of and control over land.").

46. See SALMON, *supra* note 20, at 183; Davis, *supra* note 24, at 232 n.28; Haskins, *supra* note 42, at 220. Even as late as 1960, W.D. MacDonald observed that the law needed to recognize the persistent gender disparity between the financial needs of widows and widowers. See MACDONALD, *supra* note 15, at 26-28.

47. REEVE, *supra* note 36, at 99.

share of a man's estate because a widow's paraphernalia could not, "with propriety, be considered as [the husband's] estate."<sup>48</sup> By statute, some states expanded the list of so-called "exempted items"—exempted, that is, from the initial reach of creditors—to include certain basic household goods. In New York, for example, a widow was entitled to possess items seemingly considered constitutive of a woman's place in the home, including, for example, spinning wheels, weaving looms, stoves, the family Bible, family pictures, beds, silverware, and one teapot.<sup>49</sup> Many states also statutorily granted a widow a share in her deceased husband's personal property, but only after creditors had claimed their due (often leaving nothing for her to claim).<sup>50</sup>

A widow's legal entitlements to dower and her paraphernalia, although framed by the law as protective measures and hailed by legal commentators as greatly favored, did little systematically to alleviate her often precarious financial state after her husband's death.<sup>51</sup> For one thing, many men simply ignored their wives' dower rights in real property, transferring land without their wives' consent and then searching for legal loopholes if they were caught later.<sup>52</sup> Even when dower rights exerted their authority, dower guaranteed little tangible financial security to many widows.<sup>53</sup> Thus, as studies of widows in eighteenth- and early nineteenth-century America have shown, a husband's death often precipitated "a time of serious economic deprivation" for a widow.<sup>54</sup>

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48. *Id.* A second category of paraphernalia—a widow's "ornaments and trinkets, such as her bracelets, jewels, her watch, rich laces, and the like"—generally went to the widow, but could be taken to pay the estate's debts. *Id.*; see also SALMON, *supra* note 20, at 141.

49. See 1 HISTORY OF WOMAN SUFFRAGE 670 (photo. reprint 1985) (Elizabeth Cady Stanton et al. eds., New York, Fowler & Wells 1881) (quoting the New York statute). Connecticut likewise awarded widows their "necessaries"—for example, in one case, "[t]he bed, two spinning wheels, Bible, miscellaneous kitchen equipment, furniture, and the several barrels, hoes, ax, and a hatchet"—even when "debts threatened to consume the entire personal estate." DITZ, *supra* note 19, at 126. For examples of other such statutes, see REEVE, *supra* note 36, at 99-100; and Keyssar, *supra* note 13, at 101.

50. REEVE, *supra* note 36, at 98-99; see also Keyssar, *supra* note 13, at 100 (discussing a widow's rights to personal property in colonial Massachusetts).

51. See SALMON, *supra* note 20, at 144-45; Harry H. Schneider & Bertram M. Landesman, "Life, Liberty—and Dower" Disherison of the Spouse in New York, 19 N.Y.U. L.Q. REV. 343, 344 (1941) (attributing to Lord Coke the view that "[t]here be three things highly favored in law: life, liberty, and dower").

52. See HARTOG, *supra* note 6, at 145.

53. As Keyssar notes, men's wills indicated that "the legal right to the use of lands was not considered a sufficient source of support for widows." Keyssar, *supra* note 13, at 106.

54. Speth, *supra* note 10, at 31; see also SALMON, *supra* note 20, at 183-84. As one study of widows has pointed out, many impoverished widows were also relatively poor while they were married, a situation only exacerbated by their widowhood. See LISA WILSON, LIFE AFTER DEATH: WIDOWS IN PENNSYLVANIA, 1750-1850, at 59 (1992). Of course, as Linda Speth notes, some widows inherited generous estates and, newly reequipped with a feme sole's legal rights, even pursued independent economic activities. See Speth, *supra* note 10, at 29-30. While an earlier historiography stressed the economic power of widows and their usual path of remarriage, this view was persuasively questioned by Keyssar, *supra* note 13. For a more contemporary

The common law of inheritance, of course, did not render this situation inevitable in situations where there was considerable family wealth. Dower, after all, constituted a floor, not a ceiling. As he saw fit, a man with means could always provide for his widow more generously by will.<sup>55</sup> Dower rights thus became significant in two situations: when a married man died intestate, or when he died testate but excluded his wife from his will. In either case, under the common law, a widow was entitled to claim her dower rights.<sup>56</sup>

### B. *The Effects of Dower*

If dower often guaranteed a woman little concrete financial protection upon her husband's death, a wife's inchoate dower rights nonetheless had three significant effects, each of which contributed to the legal construction of men's and women's distinct roles within marriage, as well as the ideological foundations of the private family within the public order:<sup>57</sup>

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perspective on the impoverishing effects of widowhood, see KAREN C. HOLDEN ET AL., *THE TIMING OF FALLS INTO POVERTY AFTER RETIREMENT AND WIDOWHOOD* (1988).

55. As discussed below, members of the nineteenth-century woman's rights movement recognized that bad husbands conspired with bad laws to leave many widows in their poor financial condition. See *infra* Subsection III.D.4.

For one account of the factors influencing whether husbands in colonial Virginia left their wives more than their dower rights, see Speth, *supra* note 10, at 20-21. See also Keyssar, *supra* note 13, at 105 (discussing wills leaving women more than their dower rights in colonial Massachusetts). On the other hand, as Keyssar discusses, a man could also limit by will a widow's rights to his real property to the "term of her widowhood." See *id.* at 106. In such cases, a widow's land rights passed to her deceased husband's heirs if she remarried. See *id.* Equitable jointures provided another alternative to dower. See STAVES, *supra* note 17, at 95-130.

At common law, a wife could not leave a legal will—a disability remedied by the passage of Married Women's Property Acts. See 1 *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: IN THE SCHOOL OF ANTI-SLAVERY, 1840 TO 1866*, at 258 n.21 (Ann D. Gordon ed., 1997) [hereinafter *STANTON-ANTHONY PAPERS*].

56. A different property and inheritance system applied in the eight community-property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 *CASE W. RES. L. REV.* 83, 94 (1994). Community property "rests upon a notion that husband and wife are a marital partnership (a 'community') and should share accordingly." JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 416 (3d ed. 1984). While community property offered a patina of greater gender egalitarianism, historically, the husband retained significant control as the sole manager of the joint property. See Sophonisba P. Breckinridge, *Interpretation of the Program of the Legal Status Committee 3* (Sept. 1929) (League of Women Voters Papers, Reel 18, Box 11-161, on file with the Manuscript Division, Library of Congress); see also HARRIET SPILLER DAGGETT, *THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 19-20* (1945) (describing the "Powers of Husband as Head and Master of Community"). As Breckinridge noted, "The chief difference between the Community Property Law and the Common Law of Coverture was in the distribution of the community property on the death of one or the other [spouse] . . ." Breckinridge, *supra*, at 3; see also GEORGE MCKAY, *A TREATISE ON THE LAW OF COMMUNITY PROPERTY* 886-953 (2d ed. 1925).

57. On the ideological nature of common-law principles governing the family, see STAVES, *supra* note 17, at 6. Staves usefully defines ideology in this context as

people's various "articulated forms of social self-consciousness," the explicit public ideas they have about human relationships, especially those ideas that serve to justify

Dower altered the value of a husband's real property during his lifetime; limited a husband's testamentary freedom; and stretched coverture's sociolegal framework so that it reached women living outside of marriage, that is, widows.

1. *Dower, Land Transfers, and the Blurring of Separate Spheres*

Dower had its most easily recognizable impact on land values and transferability. By attaching to all real property that a man owned at any time during his marriage, even land that he sold, dower had the potential to diminish greatly the attractiveness of a married man's property to potential buyers.<sup>58</sup> Since a husband could not defeat his wife's dower rights by selling his real property during his lifetime, unless he could secure her consent to renounce her dower rights, she retained a lifetime claim to a portion of any lands that he sold.<sup>59</sup> As a result, unless a wife's consent was procured, behind any land transfer loomed the specter of a widow knocking at a buyer's door many years later to claim her dower rights to a long-ago-sold piece of property.<sup>60</sup> Not surprisingly, men exhibited considerable reluctance at the prospect of purchasing land burdened in this unpredictable, potentially long-term manner.<sup>61</sup> Dower thus constituted a formidable burden on land sales.<sup>62</sup>

Beyond its economic impact, which was mitigated by men's persistent insistence on ignoring women's dower rights, dower's restraint on land transfers during the lifetime of a married man constituted a subtle but powerful ideological challenge to traditional "separate-spheres" constructions of the gendered, white, middle-class family.<sup>63</sup> As a rich

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the power relationships between people, and to explain why it is right and good that different people should have different roles and different entitlements to power, wealth, and other social goods.

*Id.*

58. Connecticut's dower law was an exception to the general rule that dower attached to all lands that a husband owned during the entire duration of his marriage. In Connecticut, dower rights only applied to the "estate held at death." DITZ, *supra* note 19, at 126. Ditz's extensive study of Connecticut's inheritance law notes that she found no clear "motive for Connecticut's early and significant departure from" the general rule of dower. *Id.*

59. A "private examination" was required to be sure that a wife had voluntarily relinquished her dower rights. 2 SCRIBNER, *supra* note 36, at 137; *see also* HARTOG, *supra* note 6, at 146 (describing "separate examination").

60. *See* SALMON, *supra* note 20, at 145.

61. *See id.*

62. *See* LEMUEL H. FOSTER, *THE LEGAL RIGHTS OF WOMEN* 76 (1913).

63. Nineteenth-century racialized expectations concerning women's work, of course, were most pronounced before the Civil War, when many African-American women were slaves. Even post-emancipation, however, as Amy Dru Stanley argues, social expectations about women and work varied dramatically according to women's race. As Stanley demonstrates, white Northerners during Reconstruction denounced the entrance of white women into the commercial market, while they insisted that freedwomen work. Thus, "the equanimity of northerners in insisting that the

historiography has demonstrated, the dominant ideology of white American middle- and upper-class culture in the nineteenth century constructed the home as the private, female sphere, and the market as the public, male sphere.<sup>64</sup> This gender-differentiated public-private divide was never absolute, nor did it necessarily relegate women to positions of complete social powerlessness.<sup>65</sup> Nonetheless, throughout the nineteenth century, the dominant, white, middle-class culture policed the line between the home and the market, positioning women as wives and mothers in the former realm and men as husbands and fathers in the latter realm.

By constraining the transferability of men's land, however, dower reflected the deep contradictions inherent in separate-spheres ideology, as well as the blurry, permeable boundary between the so-called private and public spheres. On the one hand, a wife's inchoate dower rights bolstered her conventional position as a dependent of her husband's economic largess, offering her little significant compensation for the vast loss of property and economic rights she experienced upon entering a marriage and, thus, the legal framework of coverture. On the other hand, a wife's inchoate dower rights necessarily inserted her into her husband's market

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wives of freedmen toil as field hands made all the more notable their troubled response to the [white] wives who worked as cigar makers, scrub women, and sweated seamstresses on their own home ground." STANLEY, *supra* note 18, at 187-88. Linda Kerber has similarly argued that "[u]nlike middle-class white women, freedwomen could not enhance their femininity by displaying the flexibility of their work lives and by removing themselves from the workforce. Like poor men, poor women were expected to display their subjectivity as workers." KERBER, *supra* note 5, at 65-66.

64. See, e.g., MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865*, at 189 (1981).

65. Historians have offered two distinct critiques of the separate-spheres framework. First, scholars have pointed out that women and men repudiated separate-spheres ideology by overtly and explicitly assuming roles traditionally associated with the other gender. Some women, for instance, actively engaged in the public world of work and politics; some men stayed at home. Such evidence of boundary crossing can still presume the dominance and accuracy of the separate-spheres categories while quarreling with their descriptive precision. See, e.g., E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993) (analyzing the social position of men who retreated into the private sphere of the home, while maintaining the basic separate-spheres framework); RYAN, *supra* note 64, at 204-17 (examining women who assumed traditionally male roles).

A second, and more radical, critique of the separate-spheres account points to ways in which the family was necessarily and inherently public or political. In making this argument, therefore, historians have revealed the underlying weakness of the very public/private divide that undergirded the notion of separate spheres. If, after all, the family and women's roles as wives and mothers emerge as politically salient and significant, or as inextricably intertwined with public life, then the very essence of the distinction between public and private, between the world of women and the world of men, begins to dissolve. See, e.g., VICTORIA E. BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH* (1992) (positing the subversive potential of a strong female sphere, noting that the very ideals of Southern womanhood unwittingly encouraged a form of female unruliness in the form of opposition to the Civil War effort when family loyalty conflicted with state loyalty); KAREN LYSTRA, *SEARCHING THE HEART: WOMEN, MEN, AND ROMANTIC LOVE IN NINETEENTH-CENTURY AMERICA* (1989) (exploring the political significance of women's roles as lovers and wives); RYAN, *supra* note 64, at 200-03 (analyzing the economic and political significance of women's lives within the home).

dealings over his real property, and even granted her some considerable potential ability to thwart his desired sales.<sup>66</sup> Despite his legal supremacy within his family and his role as head of the household, a married man could therefore find himself unable to sell a piece of land, or at least unable to sell it at the price he desired, if his wife refused to relinquish her dower rights. In this respect, through dower, the common law itself—the origin of coverture, the core legal instantiation of separate spheres—imported wives into the public sphere of the marketplace and made them necessary players in men’s economic transactions.

Moreover, even as dower undercut husbands’ claims to the public/market side of the archetypal separate-spheres dichotomy, it simultaneously undermined the imagined indelible link between wives and the private sphere of the home. In practice, after all, dower’s doctrinal machinations threatened to separate a woman from her home by force if her dower rights were not settled by the time her so-called quarantine period ended.<sup>67</sup> The home, then, began to look more like an economic asset similar to any other commodity, and less like a feminine refuge set apart from the harsh realities of the impersonal economy. Dower therefore undermined the basic tenets of separate-spheres ideology by suggesting that the “woman’s sphere” of the home was as thoroughly interlaced with men’s economic rights as the “men’s sphere” of the market was entangled with women’s family roles.

## 2. *Dower and Testamentary Freedom*

If dower’s effects on land sales challenged a husband’s absolute economic control of his family’s interactions with the market, dower’s limiting effects on a husband’s testamentary freedom constituted yet a further incursion into cultural understandings of white, middle-class masculinity.<sup>68</sup> Just as a husband could not defeat his wife’s inchoate dower rights by selling his land, so too he could not defeat them by bequest. In this respect, dower again played a role that was at once economic and ideological by simultaneously constraining a married man’s concrete ability to dispose of his property and also by circumscribing male freedom and

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66. See HARTOG, *supra* note 6, at 146-47 (noting that dower required that “[h]usbands who wanted to deal with family property, to represent their families in the world of commerce and trade, had to come to terms, one way or another, with their wives”).

67. See *supra* text accompanying note 41. As discussed below, nineteenth-century woman’s rights activists recognized this aspect of dower as an assault on the privacy of the white, middle-class home. See *infra* Subsection III.D.3.

68. On the cultural construction of white masculinity and challenges to its dominant forms, see generally GAIL BEDERMAN, *MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917* (1995); and ROTUNDO, *supra* note 65.

property rights in light of the relationship between the private family and the state.

By guaranteeing even a modest amount to widows, dower constituted a formal check on husbands' absolute testamentary freedom.<sup>69</sup> Despite the rather minimal nature of the limit, its very existence represented a powerful statement about the social and legal import of family relations in the face of absolute notions of property rights.<sup>70</sup> Freedom of testation, after all, is part and parcel of ownership: "It continues after death the market right[] of an owner. . . . The power of disposition is felt psychologically to constitute an essential element of power over property."<sup>71</sup>

Yet while men possessed almost absolute testamentary freedom, dower prohibited them from leaving nothing to their wives. Even if a man wrote his wife out of his will, dower wrote her back into his estate. As such, dower marked the nexus where competing visions of masculinity collided: the head of household as unconstrained master of his property, on the one hand, and the head of household as the (compelled) provider for his dependent wife, on the other. When these male roles came into conflict—that is, when female support clashed with male control—dower powerfully dictated which role would triumph. The law guaranteed men would provide for their dependent women even if it limited their generally unconstrained decisional autonomy over their property and matters of resource allocation within their families.

### 3. *Dower and Marriage's Shadow*

If a wife's inchoate inheritance rights during her husband's lifetime contributed to the complex sociolegal construction of white, middle-class masculinity as at once powerful and constrained within marriage, a widow's dower rights played an additional ideological role as well, thereby defining femininity as surely as they defined masculinity. Dower extended the normative structure of coverture beyond the end of a marriage. By perpetuating the wifely synthesis of protection and dependency, dower preserved a woman's socioeconomic and cultural status as a wife even beyond her husband's death.<sup>72</sup> Much as coverture required a husband to support his wife and demanded a wife's reciprocal dependence, dower granted to a widow a seemingly powerful protective right to financial

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69. See Edmond N. Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 139-40 (1936); see also Joseph Laufer, *Flexible Restraints on Testamentary Freedom—a Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 278 (1955).

70. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 358-59.

71. *Id.* at 355.

72. See Keyssar, *supra* note 13, at 118 ("An adult woman, whose husband had died, was constrained as well as sheltered.").

resources from her deceased husband, and simultaneously virtually ensured that those resources would not render her financially independent.<sup>73</sup> Dower thus “aimed at the sustenance, rather than the economic freedom, of widows.”<sup>74</sup> As such, it reproduced the basic gendered tenets of the law of marriage and extended them beyond marriage: Even after a woman was no longer a feme covert because her husband had died, the law preserved the illusion of the male role of provider and the female role of dependent.<sup>75</sup>

Like marriage, this ideological aspect of dower served an important public, economic purpose from the point of view of lawmakers. Just as marriage, at least in theory, privatized women’s economic needs within the family, so too dower, in theory, provided for a widow’s dependencies within that very same marriage framework. Dower, in other words, sought to protect the public fisc from widows’ financial demands just as coverture aimed to protect the public from wives’ financial demands.<sup>76</sup>

Unlike coverture, of course, conspicuously absent from dower’s picture of wifely protection and dependency was a live man to play the role of the husband and provider. Therefore, even as the law sought to preserve her wifely identity, a widow clearly constituted a feme sole, that is, a “woman alone.” In the husband’s absence, however, dower sought to guarantee that the law would step in to keep a widow in a wifely role even once she had formally emerged from under the law of coverture. As such, the law of dower both constructed and reinforced the larger social identity of a widow as a wife—a woman internal to the institution of marriage as opposed to a single woman outside of that privileged relation—despite the fact that, like other single women, a widow had no husband. Dower thus located widows in the legal shadow of marriage, creating the expectation—one generally accepted as common sense—that a widow’s legal rights would be defined in relation to her no-longer-existent marriage to her deceased husband and that her financial demands would be met by him.

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73. See SALMON, *supra* note 20, at 143.

74. Keyssar, *supra* note 13, at 103.

75. See, e.g., DITZ, *supra* note 19, at 127 (“The statutes protecting the dower right against creditors’ claims or defeat by testament . . . were part of a family of statutes that made care for dependent kin matters of enforceable public policy.”). Speth also noted:

The legislators [in colonial Virginia] transplanted English common-law dower because dower reduced the chance that the widow would become a public expense and drain colonial tax revenues. . . . By preserving and guarding common-law dower, the Virginia Burgesses placed the burden of supporting a widow squarely on the shoulders of her husband.

Speth, *supra* note 10, at 10; see also Keyssar, *supra* note 13, at 102-03 (arguing that inheritance laws in colonial Massachusetts “recognized a social obligation to provide for widows, but, perhaps to limit the responsibility of the larger community, they sought to compel the family to fulfill that obligation”).

76. When a widow’s needs could not be privatized, towns or the local church tried to find ways to give her support in exchange for her services in public welfare activities. See Keyssar, *supra* note 13, at 112; Speth, *supra* note 10, at 31-32. When all else failed, towns provided financial support. See Keyssar, *supra* note 13, at 116.

*C. The Standard Story of Dower's Demise*

Dower's dominance as the legal framework for widow's rights receded gradually over the course of the nineteenth century. As Linda Kerber has shown, immediately after the Revolution, some states began "free[ing] women's dower claims from their traditional protections."<sup>77</sup> In fact, in Kerber's view, "[t]he erosion of dower rights was the most important legal development directly affecting the women of the early Republic."<sup>78</sup> Thus, even as the common-law rule of dower remained the dominant legal rule in states throughout the early nineteenth century, a shift was well under way.<sup>79</sup>

By the time of the publication of Chester Vernier's multivolume treatise on American family law in 1935, few states retained a woman's traditional dower right in its pure form. Despite this clear trend away from dower, surveying the array of reforms implemented by different states, Vernier noted his "feeling of disgust for the slipshod methods of lawmakers" confronted with the project of dower reform.<sup>80</sup> As Vernier bemoaned, "The statutes are filled with ancient matter which, coupled with piecemeal innovations, forms an inconsistent, ambiguous hodgepodge. In no field is there more evidence of haphazard, fragmentary legislation."<sup>81</sup> Moreover, Vernier concluded that it was virtually impossible even to categorize states into clear dower/nondower categories, since "[m]any jurisdictions have declared that dower is abolished, but have failed to do away with it completely; the result is a new system couched in dower terms and confused by dower rules."<sup>82</sup>

If the state-by-state trajectory of dower's decline cannot be charted easily, however, it is nonetheless clear that, over time, dower's most concrete economic effect—its imposed limitation on the transferability of married men's real property—prompted widespread criticism from legal commentators and spurred lawmakers toward reform. As Blackstone and many others after him bemoaned, "[T]he claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations."<sup>83</sup> In light of its perceived constraints on land alienation, dower inspired not only criticism from legal observers, but also systematic creativity on the part of husbands intent on circumventing the doctrine's constraining effects.<sup>84</sup> Faced with dower's intertwined burdens on property

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77. KERBER, *supra* note 43, at 146.

78. *Id.* at 147.

79. *Id.*

80. 3 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 346-47 (1935).

81. 3 *id.* at 347.

82. 3 *id.*

83. 2 WILLIAM BLACKSTONE, COMMENTARIES \*136.

84. On men's approaches to circumventing dower in seventeenth- and eighteenth-century England, see STAVES, *supra* note 17, at 56-94.

alienability and testamentary freedom, property-owning men sought ways to defeat dower, ultimately finding a serviceable solution in the corporate form.<sup>85</sup> By holding property in corporate shares, wealthy men guaranteed that their real property, to which dower rights would have attached, would be treated as personal property—that is, shares not land—to which no dower rights attached.<sup>86</sup> Dower thus became virtually insignificant in the real lives of many widows: Most men with landholdings of great financial significance were savvy enough to hold that land in corporate form. In New York, for example, between 1923 and 1927—the years leading up to dower’s demise—a total of only nine actions were brought to admeasure dower.<sup>87</sup> Even if dower had ceased to play a critical functional role by the time of its abolition, however, as Susan Staves has noted in the English context, “[t]he changes in the law of dower are nevertheless worth study because they reveal much about the contemporary ideology of marriage and the family.”<sup>88</sup>

Blackstone’s complaint and, generally, the effects of dower on the alienability of land lie at the heart of the standard historical account of dower’s decline.<sup>89</sup> The traditional story of its demise focuses on changing understandings of property and an ever-increasing social and legal frustration with systematic legal constraints on the development and alienation of land.<sup>90</sup> Dower, the story goes, constituted just one of the “legal doctrines formulated in an agrarian economy” that seemed ill-suited to the nineteenth century’s ideal of “[t]he productive development of land and natural resources.”<sup>91</sup> Thus, nineteenth-century courts increasingly

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85. As Staves notes in her study of dower in England, “Wealthy men today, like men in the early modern period, are also capable of seeing to it that their assets are dealt with in ways that keep their wives and widows from ‘wasting’ them, accumulating ‘too much,’ or spending them on some other man.” *Id.* at 37. Thus, “[w]hile the legal profession devoted considerable thought to the development of the law of dower between 1660 and 1833, an important object of its activity was to ensure that at least among the classes who married only after taking good legal advice, women could not claim dower.” *Id.* at 28. In eighteenth-century England, men held their land in trust in order to defeat their wives’ dower rights. *See id.* at 37-49.

86. *See* BEECHLER, *supra* note 43, at 2-3.

87. *See* Joseph A. Cox, *The Right of Election*, 32 ST. JOHN’S L. REV. 164, 165 (1958). Dower lost its practical importance to women in England by the early nineteenth century, by which time “women no longer married with expectations of enjoying dower rights.” STAVES, *supra* note 17, at 28.

88. STAVES, *supra* note 17, at 28.

89. Even states that retained inchoate dower supplemented it with a forced share in personal property. *See* MACDONALD, *supra* note 15, at 3.

90. As Staves notes, this whiggish story has dominated legal history accounts of dower in England as well. Staves, writing about the demise of dower in England, labels the “liberal story” in which “[a] world of stable, landed property gives way to a world in which land is a commodity like others.” STAVES, *supra* note 17, at 32. On this “evolutionary functionalis[t]” approach to legal history with its premise that, with the help of the legal system, society naturally evolves toward liberal capitalism, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984).

91. HORWITZ, *supra* note 20, at 31; *see also* FRIEDMAN, *supra* note 20, at 431; Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an*

disfavored dower, viewing widows' inchoate rights to transferred lands as impediments to those lands' improvement.<sup>92</sup> The "real fly in the ointment" leading to dower's decline, the story goes, was the specter that "[l]ong years after a transaction was over, the widow of some previous owner might rise up to haunt a buyer in good faith."<sup>93</sup>

Although this standard legal history tale, in its varied particulars, occasionally acknowledges that the decline of dower had legal and financial consequences for widows,<sup>94</sup> women appear at the periphery of the story: as the incidental victims or beneficiaries of changes to the common-law inheritance system, not as active participants in its transformation or even as significant factors in its evolution. According to the traditional story, land and economic development, not widows, captured the attention of commentators concerned with dower. Legal change occurred, in this account, because men wanted to develop their land, not because women contested dower's effects or its construction of the marriage relationship and the private family. It is thus generally assumed that dower's abolition both wrought and reflected a dramatic transformation in the legal and social regulation of property, but not in the meaning of widowhood or women's place within the family. As one scholar has observed, perfectly capturing the moral of the standard tale of dower, "Dower was abolished because it was a clog on transactions and was replaced largely by rights against the deceased husband's will. Consequently, it did not have the same powerful redistributive and status-changing significance as did the married women's property acts."<sup>95</sup>

#### D. *Woman's Rights Activists' Attack on Dower*

A more robust story, however, can be told about dower's demise. This story broadens its focus to include not only altered social and legal conceptions of property, but also contested understandings of widowhood, marriage, and equality between the sexes.<sup>96</sup> Telling this story of dower's demise demands attention not only to the history of the economic development of land—no doubt a part of what led to dower's decline—but

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*Equitable Elective Share*, 62 IOWA L. REV. 981, 987 (1977); Marie Falsey, Comment, *Spousal Disinheritance: The New York Solution—a Critique of Forced Share Legislation*, 7 W. NEW ENG. L. REV. 881 (1985).

92. See HORWITZ, *supra* note 20, at 56-58.

93. FRIEDMAN, *supra* note 20, at 431.

94. See, e.g., *id.* (noting that an absolute share system benefited widows).

95. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1448 n.75 (1993).

96. For a brief and general discussion of the relationship between inheritance laws and changing family patterns and fertility rates, see CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 4-9 (1987).

also to the history of the private family as well as women's activism concerning their familial roles and their legal rights as wives and widows.

A quick preview of dower's demise in New York<sup>97</sup>—specifically, a brief glimpse ahead to the ceremony marking its legal end—immediately suggests that women's activism and debates about sex equality, absent as they are from the current legal history of dower, must constitute a part of any full account of dower's decline. Witness the following scene: On April 1, 1929, New York Governor Franklin Delano Roosevelt signed into law the so-called "Fearon Bill," named after New York state senator George R. Fearon, thereby revising New York's inheritance law.<sup>98</sup> The new law, among other things, abolished dower and curtesy. In their place, section 18 of New York's new law replaced these common-law relics with the predominant modern inheritance legal regime: a gender-neutral "elective" or "forced" share. Under such a law, a wife who is left out of her husband's will can "elect" to inherit a fixed portion of his estate as though he had died intestate, thereby "forcing" him to provide posthumously for her support.<sup>99</sup> In conjunction with the forced-share provision, the revised New York inheritance law also increased a widow's intestate share, abolished any distinction between real and personal property, and transformed a widow's share from a life estate to an estate in fee.<sup>100</sup>

In signing the bill into law, Roosevelt proudly hailed the passage of a "new charter of rights for women."<sup>101</sup> He did so amidst some considerable fanfare. As members of the press and photographers crowded around him, Roosevelt suspended a hearing in progress on another legislative matter to affix ceremoniously his signature to this so-called "new charter."<sup>102</sup> Behind Roosevelt crowded a group of the bill's main supporters, a group comprised not only of judges and lawmakers, but also of prominent women's rights activists: Agnes Leach, the state chairwoman of the League of Women Voters, and Dorothy Kenyon, chairwoman of the League of Women Voters's committee on the legal status of women voters, stood beside the

97. For a full analysis of the demise of dower in New York, see *infra* Part IV.

98. See Act of Apr. 1, 1929, ch. 229, 1929 N.Y. Laws 499; see also Herbert Barry, *Modernizing the Law of Decedents' Estates*, 16 VA. L. REV. 107, 108 (1929); *Estate Bill Signed by the Governor*, N.Y. TIMES, Apr. 2, 1929, at 20.

99. See BEECHLER, *supra* note 43, at 82-83. Section 83 of the Decedent Estate law governed property distribution in cases of intestacy. As Beechler stressed, with respect to the new section 18, the intestacy provisions of the New York law served only as a "measuring stick" for the purpose of defining the quantum of the surviving spouse's share." *Id.* at 85. Specifically, the law stipulated that, under section 18, a disinherited spouse's elective share could never "exceed one-half of the net estate of the deceased spouse." *Id.* at 83. In addition, the right to claim an elective share did not exist if, by will, a spouse "provides for such survivor the intestate share outright or its statutory substitute, in the form of a trust, life estate, annuity, or other form of income payable to the survivor for life." *Id.* at 82.

100. See REPORT I, *supra* note 22, at 6.

101. *Estate Bill Signed by the Governor*, *supra* note 98.

102. See Barry, *supra* note 98, at 108.

Governor, publicly acknowledging the new law as a critical piece of sex-equality legislation.

To understand how Roosevelt, Leach, and Kenyon all came to see the abolition of dower as a part of an emerging women's rights legislative agenda requires a foray into the history of the nineteenth-century woman's rights movement and its now-forgotten assault on dower and the common law of inheritance. In turn, the history of nineteenth-century woman's rights activists' critiques of dower frames the critical questions that we should ask of the twentieth-century legislation: What is the meaning of sex equality within marriage, and how do laws regulating the rights of women outside of formal marriage define legal notions of equality within the family, as well as the relationship between the family and the state?

### 1. *Dower and the Suffrage Movement*

Surprisingly, social and legal historians of the American family have paid scant attention to dower and the ways in which inheritance law has governed women's lives, family choices, and relationships to marriage and the state. But like laws regulating courtship, marriage, divorce, contraception, abortion, and child custody—all subjects that have received extensive attention in the last two decades from legally minded historians—dower and inheritance law have been critical legal sites for defining the institution of marriage, as well as women's social roles and legal rights within and outside the family.<sup>103</sup>

If contemporary scholars have been relatively slow in coming to this realization, however, women whose lives were affected or potentially affected by the constraining effects of dower were not. A revitalized account of dower and its demise thus must begin with the recognition that Blackstone and other like-minded legal commentators were not alone in critiquing the institution of dower; nineteenth-century woman's rights activists also offered their own distinct critiques of the common-law inheritance system.

The extent of these women reformers' critiques of dower and dower's role in the legal agenda of the nineteenth-century woman's rights movement should not be exaggerated. Dower hardly constituted the primary target of these reformers' efforts. As participants in the woman suffrage movement, these activists sought, first and foremost, women's formal political inclusion in public life through the franchise. As historians have documented, though, suffrage activists understood marital status laws and family law generally as key parts of the political and legal system that

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103. Cf. STAVES, *supra* note 17, at 5-6, 28-29 (analyzing dower's demise in England in these terms).

constituted them as less than full citizens.<sup>104</sup> Part of this understanding concerned the relationships among dower, the architecture of the legal family, and pervasive sociolegal forms of sex inequality.<sup>105</sup> In this Section, therefore, I bring together scattered pieces of a much larger conversation: woman's rights activists' intermittent arguments about dower, made over the course of decades of agitation for a much broader legal reform agenda. I offer these argument fragments not to prove that dower in and of itself constituted a core grievance of the nineteenth-century woman's rights movement, but rather as the conceptual and intellectual antecedents for the later debates over the abolition of dower in New York and, particularly, for later feminist efforts to reform dower and the underlying structure of inheritance law in the pursuit of sex equality.

Leaders of the woman's rights movement, of course, approached dower—as they approached all issues—from their position of relative class and race privilege.<sup>106</sup> As predominantly white, middle- or upper-class women, members of the woman's rights movement no doubt perceived their meager inheritance rights—much as they perceived their minimal rights to marital assets—as insulting their natural entitlements to certain forms of wealth, property, and general economic stability. Recognizing their privilege and its attendant notions of entitlement and self-interest, however, should not obscure the perspicacity with which these reformers built a sex-equality agenda that included a critique of dower and inheritance law, marshaling evidence of widows' economic needs as support for their equal rights platform.

As their somewhat sporadic discussions of inheritance law reveal, nineteenth-century woman's rights activists offered two principal arguments against dower, both related to their larger critiques of marital status law, and both grounded in the recognition that inheritance law constructed the family and family roles. First, woman's rights activists offered a formal sex-equality argument based on the doctrinal differences between dower and curtesy, and, second, they argued that the common law of inheritance functioned as an orchestrated assault on the private family and, especially, on the family home. Read alongside one another, these

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104. See, e.g., BASCH, *supra* note 14, at 162-99; Siegel, *Home as Work*, *supra* note 18; Siegel, *Modernization*, *supra* note 18.

105. It is not the case, therefore—as one of the only articles on probate reform within the woman's rights movement has argued—that Marietta Stow, certainly the most vociferous critic of dower, was “the only woman's rights reformer to pursue an agenda in the area of probate law.” Donna C. Schuele, *In Her Own Way: Marietta Stow's Crusade for Probate Law Reform Within the Nineteenth-Century Women's Rights Movement*, 7 YALE J.L. & FEMINISM 279, 279 (1995). For a discussion of Stow's critique of dower, see *infra* text accompanying notes 108-112.

106. As others have analyzed, tensions over the race and class privilege of leaders of the suffrage movement emerged particularly strongly around the passage of the Fifteenth Amendment, when—to the great outrage of many women suffragists—African-American men got the vote before white women. See, e.g., DUBOIS, *supra* note 18, at 93-99.

arguments reveal a deep tension within woman's rights activists' reformist vision of the relationship between the law and the family, as well as a significant ambiguity in the meaning of equality within marriage. Their critiques of dower suggest that these reformers at once envisioned a dramatic transformation of the family—in which principles of sex equality would be imported into the marriage relationship—and simultaneously clung to a traditional vision of the private family and of women's entitlements within a family shielded from the law's intrusion. As Part IV will demonstrate, this uneasy synthesis foreshadowed the tensions inherent in the approach that New York's lawmakers would eventually adopt in choosing the broad language of sex equality to abolish the formal inequality of dower and curtesy while simultaneously protecting the fundamental structure of the private family with its traditional, gendered understandings of dependency. Understanding dower reform in New York, however—especially its feminist component—first requires a look back to the pre-“feminist” days of the second half of the nineteenth century when suffragists created the first organized American movement for sex equality and, in so doing, challenged basic understandings of the relationship among women, the family, and the state.<sup>107</sup>

## 2. *The Equality Argument Against Dower*

No nineteenth-century woman reformer offered a fiercer argument for sex equality within inheritance law than Marietta Stow, perhaps the lone woman's rights activist who focused more intently on inheritance law than on suffrage. In 1877, Stow self-published *Probate Confiscation: Unjust Laws Which Govern Woman*, a 370-page diatribe based on her own experience of widowhood. Stow publicly shared her tale—or, as she called it, her “casus belli”—in print and in numerous speeches across the country.<sup>108</sup> Her story, in brief, was as follows: While Stow was traveling in Europe, her husband, a California businessman, fell ill and died. Before his death, however, and in her absence, he was forced through undue influence to appoint as executors of his estate men who drove the estate into insolvency, thereby cheating Stow of substantial amounts of money.<sup>109</sup>

Because California, her home state, was a community-property state, Stow's attack did not specifically target dower, a common-law institution.<sup>110</sup> Her basic argument, however, was simple and applicable to

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107. On the origins of the term “feminism” in the 1910s, see COTT, *supra* note 21, at 3.

108. MRS. J.W. STOW, *PROBATE CONFISCATION: UNJUST LAWS WHICH GOVERN WOMAN* 5 (Boston, Rand, Avery & Co. 2d ed. 1877). On Stow's campaign, see Schuele, *supra* note 105.

109. See STOW, *supra* note 108, at 56-63.

110. Although community property was based on a principle of equal ownership, in practice, husbands still functioned as the sole managers of the property. See Brashier, *supra* note 56, at 96.

inheritance law regimes in all the states: “Equality,” she wrote, “must commence at the hearthstone,” and that demanded equality in inheritance law.<sup>111</sup> In framing her attack, Stow recognized that the sex-based inequalities of inheritance law both reflected and reinforced the unequal nature of the marriage relationship. She grounded her critique of inheritance law, therefore, on the broader argument that “[w]omen should have the same protection in marriage as men.”<sup>112</sup> Inheritance law, Stow realized, constituted a key tool for redefining marriage generally.

Like Stow, leading members of the nineteenth-century woman’s rights movement—including, for example, such prominent suffrage activists as Lucy Stone and Elizabeth Cady Stanton—understood a critique of dower as integrally related to their larger critique of marriage’s role in preserving women’s unequal status. They understood, in other words, the reach and import of marriage’s shadow, as well as the ways in which marriage’s periphery defined its core: that the law’s regrettable treatment of widows reflected the basic framework of marriage law and, moreover, that inheritance law reform had the potential to reform the institution of marriage itself.

When Lucy Stone and Henry Blackwell married in 1855, for example, they famously signed a contract denouncing the traditional male prerogatives and female disabilities that attached to legal marriage. Among the core offenses inherent in coverture, Stone and Blackwell decried the “laws which give to the widower so much larger and more permanent an interest in the property of his deceased wife, than they give to the widow in that of the deceased husband.”<sup>113</sup> Some years later, at the 1872 meeting of the American Woman Suffrage Association, Stone again focused on inheritance law as one of but a few core grievances with respect to the law’s treatment of women, explicitly locating her argument for dower reform in a classic equality paradigm. In her very brief comments closing the woman’s rights convention, Stone singled out only three quintessential examples of “distinctions which are made on account of sex [that] are so utterly without reason, that a mere statement of them ought to be sufficient to secure their immediate correction.”<sup>114</sup> She pointed to women’s exclusion from educational institutions, wives’ loss of property rights, and the discrepancy between dower and curtesy.<sup>115</sup> Stone identified the essential harm of dower as its sex-based form of differentiation, querying: “[C]an any one give a good reason why there should be such a difference between the rights of the

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111. STOW, *supra* note 108, at 27.

112. *Id.* at 78.

113. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 49, at 261.

114. 2 *id.* at 827.

115. *See* 2 *id.* at 827-28.

widow and the widower? Or why woman as a student, a wife, a mother, a widow, and a citizen, should be held at such a disadvantage?"<sup>116</sup>

Stone thus linked women's unequal status within the family—witness the differential rights of widows and widowers—to women's unequal status as *citizens*. In so doing, she explicitly called into question the boundary between the so-called private world of the family and the so-called public world of politics and the state. Women's second-class citizenship rights, she recognized, were rooted in their subordinate family roles, particularly their role within marriage.

Similarly, Elizabeth Cady Stanton framed her critique of dower within a formal equality paradigm, recognizing that sex-differentiated inheritance rights were inextricably linked to larger structures of sex inequality and women's subordination. At an 1854 New York woman's rights convention, in a speech subsequently sent to the New York state legislature,<sup>117</sup> Stanton offered a lengthy description of the plight of widows left only with dower. Pointing to the formal sex-based differentiation as the core affront of the common-law system of inheritance rights, Stanton challenged her audience: "How, I ask you, can that be called justice, which makes such a distinction as this between man and woman?"<sup>118</sup> Years later, following this tradition, Mary Stewart, a suffrage advocate from Delaware who testified before the Senate Judiciary Committee in 1880, articulated a similar equality argument for dower reform with the same stark simplicity. Men whose wives died, she argued, "ought to have the rental value of one-third of the woman's maiden property or real-estate, and it ought to be called the widower's dower. It would be just as fair for one as for the other. All that I want is equality."<sup>119</sup>

Like equality-based critiques of the system of coverture as a whole, equality-based critiques of dower rested, implicitly or explicitly, on the rather radical notion that equality norms could apply not just to relations between the sexes—a radical enough concept in and of itself—but, more notably, to *family* relations between the sexes. In crafting sex-equality-based critiques, therefore, woman's rights activists dared to imagine a social and legal world different in kind from the common-law world of coverture. Coverture—even as modified by married women's property acts and, later, married women's earning statutes<sup>120</sup>—sought to craft separate legal worlds for men and women with sex-specific privileges and responsibilities. In the imagined world of woman's rights activists, by

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116. 2 *id.* at 828.

117. See Elizabeth Cady Stanton, Address by ECS to the Legislature of New York (Feb. 14, 1854), in 1 STANTON-ANTHONY PAPERS, *supra* note 55, at 240.

118. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 49, at 601.

119. 3 *id.* at 159.

120. See generally Siegel, *Modernization*, *supra* note 18.

contrast, even within the deeply hierarchical legal and social framework of the family, men and women—husbands and wives, fathers and mothers, and widows and widowers—would be entitled to the same legal status and rights.

A radical vision of equal rights within a reconstructed, nonhierarchical legal family thus lay at the core of the woman's rights movement's equality agenda and its equality-based critique of dower. As Stanton argued, while many women said they possessed "all the rights I want," that was "entirely false."<sup>121</sup> Widows, Stanton noted, constituted a class of women who belied women's claims to possess adequate rights:

Go ask the poor widow, childless and alone, driven out from the beautiful home which she had helped to build and decorate, why strangers dwell at her hearthstone, enjoy the shade of trees planted by her hand, drink in the fragrance of her flowers, whilst she must seek some bare and humbler home? Will she tell you she has "all the rights she wants," as she points you to our statute laws, which allow the childless widow to retain a life interest merely in "one-third the landed estate, and one-half the personal property of her husband?"<sup>122</sup>

### 3. *The Family Privacy Argument Against Dower*

This version of Stanton's rights argument points to the second dominant rationale that woman's rights activists used to attack dower. Dower, they argued, initiated an invasive assault on the private family home. In addition to losing her husband, reformers observed, a widow's paltry legal rights under the common law meant that she usually lost her home as well. A widow had the right to remain in the family home for a short period of time after her husband's death; after that, however, her husband's heir had the right to evict her.<sup>123</sup> As Stanton made clear, a widow's loss of her home offended any joint-property claim within marriage, belying the notion that a woman had a right to her home by virtue of the labor she had put into its creation.<sup>124</sup>

More often than they adverted to the idiom of joint property as an indictment of dower's inadequate provisions, however, woman's rights activists opposed dower based on a traditional vision of the private family and its relationship to the state—that is, they reasoned within the basic

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121. See ELIZABETH CADY STANTON, *I HAVE ALL THE RIGHTS I WANT* (1859), reprinted in 1 STANTON-ANTHONY PAPERS, *supra* note 55, at 402, 404.

122. *Id.*

123. See *supra* text accompanying notes 41, 67; see also SALMON, *supra* note 20, at 142-43.

124. On the joint property claim, see Siegel, *Home as Work*, *supra* note 18, at 1112-46.

normative commitment to the privatization of women's economic dependency inherent in both the legal structure of coverture as well as the dominant social norms of white, middle-class society. While it is hardly surprising that these elite women's imaginations remained somewhat bounded by the norms of their time, the conservative premises of their arguments based on the sanctity of women's place within the home contrast sharply with the prescient rhetoric of their equality platform. Even as their equality agenda forced them to envision a radically restructured relationship between the sexes, woman's rights activists simultaneously marshaled arguments that reasoned from the existing normative model of the white, middle-class family: a model in which a particular man was responsible for a woman's financial support, even after his death, within the structure of marriage. Their critique of private inheritance law, in other words, embraced the basic female-dependent/male-provider model of the private family and, like dower, extended this ideological model beyond the death of the husband.

Working within this conventional idiom, women reformers argued that dower offended the fundamental social and legal tenets that the family existed as a sacred, private space shielded from the invasive reach of the state. Thus, while the sex-equality critique of dower attacked the most basic ideological and doctrinal elements of coverture, this second strand of attack actually fortified the basic structure of the private family and its traditional relationship to the state by denouncing dower's invasion of the private family home after a husband's death as destructive of the core of women's gender-specific place within the family. Within the woman's rights movement's critique of dower, therefore, a vision of sex equality coexisted with a vision of the home as women's protected sphere and the proper site of their entitled dependency.

Woman's rights activists combined equality arguments and privacy arguments in ways that ignored their conflicting underlying premises. At an 1852 woman's rights convention in West Chester, Pennsylvania, for example, Ann Preston framed her formal demand for "equality before the law"<sup>125</sup> as follows:

When a woman dies, leaving behind her a husband and children, no appraisers come into the desolated home to examine the effects; the father is the guardian of his offspring; *the family relation is not invaded by law*. But when a man dies the case is entirely different; in the hour of the widow's deep distress strangers come into the house to take an inventory of the effects . . . and her

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125. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 49, at 361.

interest in the estate is coolly designated as the “widow’s incumbrance!”<sup>126</sup>

Preston, in other words, objected to the state-sanctioned incursion into the private sphere of the family. A woman, she posited, was entitled to retain her traditional family role even after her husband’s death.

Stanton likewise embraced this same combination of arguments, combining a vision of equality with a commitment to the private family and, thus, a reform agenda premised at once on radical change and the status quo. While she demanded that the law erase sex-based distinctions in inheritance law, Stanton also offered a plea for the sanctity of the family and the family home, as well as the incompatibility of that sanctity with dower. Of the newly widowed, Stanton said:

In this dark hour of grief, the coarse minions of the law gather round the widow’s hearth-stone, and, in the name of justice, outrage *all natural sense of right*; mock at the sacredness of human love, and with cold familiarity proceed to place a moneyed value on the old arm-chair, in which, but a few brief hours since, she closed the eyes that had ever beamed on her with kindness and affection; on the solemn clock in the corner, that told the hour he passed away; on every garment with which his form and presence were associated, and on every article of comfort and convenience that the house contained, even down to the knives and forks and spoons—and the widow saw it all—and when the work was done, she gathered up what the law allowed her and went forth to seek another home! This is the much-talked-of widow’s dower. . . . Had she died first, the house and land would all have been the husband’s still. *No one would have dared to intrude upon the privacy of his home, or to molest him in his sacred retreat of sorrow.*<sup>127</sup>

For Stanton, then, a woman had a right to her place in the private family. Dower violated that right in two ways: First, it provided insufficient economic means to preserve a woman as a dependent within the family structure, and, second, it allowed the state to intervene in the private sphere of the family. Thus, as the editors of *History of Woman Suffrage* bemoaned, dower and the common-law rules of inheritance set into motion a series of events “generally resulting in the breaking up of the home.”<sup>128</sup>

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126. 1 *id.* (emphasis added).

127. 1 *id.* at 601 (emphasis added).

128. 4 HISTORY OF WOMAN SUFFRAGE 458 (Susan B. Anthony & Ida Husted Harper eds., Arno & The New York Times 1969) (1902). In a letter to her cousin Gerrit Smith, Stanton noted the distinction between a widow’s legal dependence and, often, her social independence. Widowers, she noted, fared poorly socially when their wives died. “What father of a family,” she asked, “at the loss of his wife, has ever been able to meet his responsibilities as woman has

In their discussions of dower, therefore, woman's rights activists combined two distinct visions of the family into a composite argument for inheritance law reform: one of a radically reconfigured family structure with principles of equality at its core, and the other of a profoundly traditional family model with the private family shielded from the state and women maintained by their (deceased) husbands' finances. Synthesizing these potentially competing visions, they argued that the law ought to treat men and women in an equal manner, and that a woman was entitled to preserve her wifely, dependent role within the private home after her husband's death, just as a man retained his familial role as the head of the household when his wife predeceased him. Women, in other words, had an equal right to maintain the traditional family and family home after their husbands' deaths. The law of inheritance, these activists argued—intermingling their visions of equality and dependency—deprived widows of this right.

#### 4. *Bad Laws and Bad Husbands*

Further complicating their ambivalent vision of the family and women's equality, woman's rights activists did not blame the impersonal structure of inheritance law alone for the woes of widows. To be sure, their account pointed primarily to lawmakers and judges as members of the heartless male establishment that continued to impose the cruel institution of dower on helpless widows. Thus, "the cruel inequality of the laws" played a recurring role in woman's rights activists' critiques of dower.<sup>129</sup> Often, however, evil wore a less disembodied face. As Matilda Joslyn Gage pointed out, the law did not act alone; rather, it "allow[ed] a husband . . . along with his power to determine the lot of his wife while he is alive, also to control her when he is dead."<sup>130</sup> And this power was often used cruelly. As one report on woman suffrage concluded with respect to the plight of widows, "the will of the husband is sometimes even worse than the law itself."<sup>131</sup>

From this perspective, therefore, woman's rights activists challenged not only the legal construction of marriage and widowhood but also the

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done?" Letter from Elizabeth Cady Stanton to Gerrit Smith (Dec. 21, 1855), in 1 STANTON-ANTHONY PAPERS, *supra* note 55, at 305, 310. By contrast, Stanton challenged:

Go to those aged widows, who have reared large families of children, unaided and alone, who have kept them all together under one roof, watched and nursed them in health and sickness through all their infant years, clothed and educated them, and made them all respectable men and women, ask them on whom they depended. They will tell you on their own hands.

*Id.*

129. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 49, at 875.

130. 1 *id.* at 563.

131. 1 *id.* at 877.

underlying social reality presumed by the law. Husbands, they pointed out, did not always act in “husbandly” ways, neglecting to offer their wives (and, later, their widows) financial support. Many widows thus needed protection not only from the impersonal rules of the law, but also from the very personal harms of their deceased husbands.<sup>132</sup>

In fact, woman’s rights leaders were quick to point out that individual husbands—against the backdrop of legal rules that facilitated, perhaps even encouraged, their cruelty—were often most responsible for widows’ poverty. Stanton, for example, reported:

The cases are without number where women, who have lived in ease and elegance, at the death of their husbands have, by will, been reduced to the bare necessities of life. The man who leaves his wife the sole guardian of his property and children is an exception to the general rule.<sup>133</sup>

Likewise, the Report of the Select Committee of the Ohio Senate on woman suffrage observed that “[i]t is said the husband can, by will, provide against these cases of hardship and injustice. True, he can, if he will, but does he? The number is few.”<sup>134</sup> In critiquing dower, therefore, nineteenth-century women reformers offered yet another challenge to the traditional image of marriage and family roles by suggesting that many men failed to conform to the husbandly ideals expected of them by underlying legal rules and social norms.

#### IV. THE DEMISE OF DOWER IN NEW YORK

Having considered the nineteenth-century woman’s rights movement’s critique of dower, reconsider the scene on April 1, 1929, a decade after suffrage activists finally won their long battle for the vote with the passage of the Nineteenth Amendment, when New York’s Governor Roosevelt signed the bill abolishing dower.<sup>135</sup> With Agnes Leach and Dorothy Kenyon by his side, both prominent members of the League of Women Voters, Governor Roosevelt praised the abolition of dower and its replacement with a forced share as a “new charter of rights for women.”<sup>136</sup>

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132. Stow, who fervently denied that her husband intended to disinherit her (claiming that he was cruelly manipulated by his executors), nonetheless noted that the probate judge told her that “I should not have left *my* wife thus; but Mr. Stow had a perfect right to leave *you* thus.” STOW, *supra* note 108, at 59.

133. 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 49, at 602.

134. 1 *id.* at 877.

135. See *supra* text accompanying notes 97-102.

136. *Estate Bill Signed by the Governor*, *supra* note 98.

At the time of its passage, observers understood New York's reform as "a significant advance in succession law."<sup>137</sup> While other states had formally abolished dower prior to the passage of New York's revised decedent estate law, often those reforms "incorporate[d] many of the features of the common law."<sup>138</sup> By contrast, New York's 1929 law embraced a scheme radically different than dower: one that treated men and women as formally equal, and real and personal property as fully interchangeable for the purpose of determining a surviving spouse's inheritance rights in cases of intestacy and disinheritance.<sup>139</sup>

In addition, New York offers a rich legal and cultural backdrop for analyzing shifting gender norms and family constructions in the early decades of the twentieth century. As Hendrik Hartog has observed, from the early nineteenth century through the mid-twentieth century, New York, "the most populous and most diverse state in the Union, played a crucial role—symbolically and practically—in the production of an American law of marriage."<sup>140</sup> Moreover, a rich body of scholarship has offered diverse perspectives on public discussions of the relationship among gender, class, and sexuality in New York over the course of the nineteenth and early twentieth centuries.<sup>141</sup> In particular, by the early twentieth century, women living outside of marriage constituted a visible community in New York, particularly in New York City.<sup>142</sup> Within this cultural context, as I discuss below, the New York legislature undertook a radical overhaul of the laws governing single women's intimate identities. Between 1930 and 1935, lawmakers abolished dower, common-law marriage, and heartbalm actions—that is, they rethought the basic parameters of marriage's shadow. The abolition of dower constituted the first step in this revisionary project.

In this Part, I analyze the process of dower reform in New York as a multiparty conversation about the legal, social, and political meaning of

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137. MACDONALD, *supra* note 15, at 74. On the importance of New York, generally, as a key twentieth-century legal leader, see WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, at 1-8 (2001). On the early history of dower in New York, see Narrett, *supra* note 19, at 91-133. See also WULF, *supra* note 6, at 188-89 (describing dower in eighteenth-century New York).

138. 3 VERNIER, *supra* note 80, at 352. Writing in 1960, W.D. MacDonald noted that "[a] surprising number of states still retain inchoate dower; but even these states supplement it with a 'forced' share of personalty." MACDONALD, *supra* note 15, at 3.

139. See 3 VERNIER, *supra* note 80, at 348.

140. HARTOG, *supra* note 6, at 15.

141. See, e.g., GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* (1994); TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790-1920* (1992); HELEN LEFKOWITZ HOROWITZ, *REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA* (2002); RYAN, *supra* note 64; CHRISTINE STANSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860* (1987); Kathy Peiss, "Charity Girls" and City Pleasures: Historical Notes on Working-Class Sexuality, 1880-1920, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 74, 74-87 (Ann Snitow et al. eds., 1983).

142. See Peiss, *supra* note 141, at 75-76.

marriage and the family. I argue that, like nineteenth-century woman's rights activists, early twentieth-century legislators and feminists approached dower reform with the dual goals of advancing sex equality and preserving the private family with its gender-specific markers of white, middle-class society. Lawmakers and women activists thus embraced dower reform and sex-equality language as the means to reinforce a fundamentally traditional model of marriage structured around the male provider and the female dependent—a model whose practical power was being challenged by the proliferation of widows left financially unstable by dower's meager provisions. Legislators and feminists, in other words, sought to return widows to their rightful place in the shadow of a reinvigorated form of marriage and, thus, sought to privatize successfully their economic dependency.

A. *The Reform Process*

1. *Inheritance Law and the Meaning of Marriage*

Governor Roosevelt's public signing of New York's revised inheritance law marked the end of a lengthy investigative process spearheaded by Surrogate James A. Foley of the New York Surrogate's Court. Three years prior to the law's passage, at a meeting of the New York City Bar Association, Foley had given a speech on the pressing need for New York to reform its decedent estate law.<sup>143</sup> The following year, in 1927, the New York legislature passed an act creating the Estates Commission to investigate defects in the law of estates and to "recommend as to the advisability of a revision of the real property law, the personal property law, [and] the decedent estate law."<sup>144</sup> The legislature charged the fifteen male members of the Estates Commission—chaired by Foley and composed of surrogates, state senators, assemblymen, and members of the state bar—with the goal of "modernizing and simplifying the law" of decedent estates.<sup>145</sup>

In its first report to the legislature, the Estates Commission offered a lengthy and scathing review of dower, recommending that an elective share system replace dower as the means of supporting widows. Dower, the

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143. See Barry, *supra* note 98, at 111.

144. Act of Mar. 31, 1927, ch. 519, § 3, 1927 N.Y. Laws 1235, 1235; see also REPORT I, *supra* note 22, at 5.

145. REPORT I, *supra* note 22, at 5. Fearon and Foley were also leading forces behind the abolition of common-law marriage in New York in 1933. See Dubler, *supra* note 6, at 1000-01 (connecting these two pieces of legislation).

report argued, “is, in most cases, an illusion and deception.”<sup>146</sup> Either a widow received an amount insufficient for her support or she received nothing if her husband held his real property—often, the Commission pointed out, even their home—in a corporate form.<sup>147</sup> “In most estates of wealthy men, or those who have been familiar with modern business methods,” the Estates Commission reported, “dower in real estate does not exist.”<sup>148</sup> Retaining dower thus perpetuated the fiction of a legally mandated system of support to widows. In fact, dower simply allowed the law to “mock[] the widow with a mere polite phrase without any substantial benefit to her.”<sup>149</sup>

Like nineteenth-century woman’s rights activists, members of the Estates Commission recognized that dower did not act alone. Instead, it created a legal floor so low that stingy husbands could easily fail to provide for their wives’ future needs. The Estates Commission thus expressed particular concern about women whose husbands deliberately sought to avoid providing for them by will. The Commission’s perception that a not insignificant number of husbands regularly disinherited their wives drove its understanding of the necessity for an alternative legal mechanism to protect widows. As the *New York Times* reported in an editorial praising the Commission’s work, cases of men disinheriting their wives “are not uncommon. . . . That posthumous cruelty is to be stopped.”<sup>150</sup>

The image of men deliberately refusing to provide for their wives’ future economic needs as widows constituted a motivating factor in the Estates Commission’s reform agenda because any legal rule that allowed a man, effectively, to provide nothing for his wife upon his death offended the Commission’s understanding of the very core meaning of marriage. Underlying the Commission’s report was the tacit understanding that marriage constituted the central institution for the accumulation and distribution of private property. Therefore, as the report explained in terms that would be repeated again and again in discussions of dower’s detriments, “[t]here is a glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death.”<sup>151</sup> Marriage, in the Commission’s view, required a husband to support his wife forever—even when he was dead (and, thus, she was no longer formally his wife). Impoverished widows offered empirical evidence that dower constituted an offense against one of

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146. REPORT I, *supra* note 22, at 9. This represented the generally accepted view of dower. See, e.g., Editorial, *An Improved Law of Estates*, N.Y. TIMES, Apr. 3, 1929, at 28 (“The right to dower, so venerable and so pompous in sound, is in fact an irony and a fraud.”).

147. REPORT I, *supra* note 22, at 9.

148. *Id.*

149. *Id.* at 10.

150. *An Improved Law of Estates*, *supra* note 146.

151. REPORT I, *supra* note 22, at 12.

the most fundamental ideological tenets of the white, middle-class, private family: that independent men were to provide economic support to dependent women, thereby shielding the state from any potential responsibility for women's financial needs.

The Estates Commission's report thus makes evident the strange legal and cultural path that dower traversed over the course of the nineteenth and early twentieth centuries. Dower, after all, had its origins in the perpetuation of a marriage-based, provider-dependent framework beyond the husband's grave.<sup>152</sup> Over time, however, dower came to be seen as antithetical to this very image of marriage. In proposing an alternative to dower, then, the Estates Commission sought to replace dower with a more modern legal mechanism that would ensure that the law supported a more traditional conception of marriage and gender relations.

Dower's replacement, in other words, was meant to reinstate fixed notions of husbandly and wifely behavior that hearkened back to the days of coverture. Behind New York's dower reform lay a deeply traditional, gendered vision of men's and women's respective roles within marriage. A husband, in the Estates Commission's view, constituted a provider, a role that he had to play even after his death. A wife, by contrast, constituted a dependent, relying on a particular man to support her even once that man was dead. Moreover, that provider-dependent relationship entailed certain types of behavior. Thus, for instance, the Commission stressed that only "the faithful wife" deserved her husband's continued posthumous support.<sup>153</sup> In the proposed legislation, a wife who abandoned her husband lost her right of election.<sup>154</sup> To be supported as a dependent, in other words, a wife had to display fidelity. The Commission likewise constructed a husbandly role that synthesized faithfulness and support. Accordingly, a husband who "neglected or refused to provide for his wife, or . . . abandoned her" lost his right of election.<sup>155</sup>

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152. See *supra* Subsection III.B.3.

153. See REPORT I, *supra* note 22, at 14.

154. Act of Apr. 1, 1929, ch. 229, § 4, 1929 N.Y. Laws 499, 502.

155. *Id.* One observer criticized the Commission's embrace of these gendered distinctions, claiming that it discriminated against men. In a letter to the *New York Times*, J.R. Lex argued:

It is conceivable that if the husband elects to take under the intestate provisions of the statute, the issue as to whether he had "neglected" his wife is sure to be troublesome and long in settlement. Did he smoke in the parlor, throw the newspapers on the floor, consort with the boys at Dinty's, &c., will vex the courts, relatives and neighbors. The husband can, therefore, only share in the estate of the wife provided he has been very good, generous, and obedient. On the other hand, the wife can share provided she has not "abandoned her husband." However, she can be as neglectful as desired and still cannot be deprived of a large share of her husband's estate.

J.R. Lex, Letter to the Editor, *Inequalities in the Law*, N.Y. TIMES, April 20, 1929, at 18.

## 2. *Marriage and Sex Equality*

Like members of the nineteenth-century woman's rights movement, however, the Estates Commission embraced a radical vision of the family and of relations between men and women even as it aspired to bolster the traditional, gendered, provider-dependent model of marriage. In terms reminiscent of the language used by Stanton and Stone, the Commission advocated using dower reform as a way to reconstruct marriage within a boldly generalized sex-equality paradigm. Looking beyond the specific problems confronting widows, the Estates Commission concluded that New York needed inheritance law reform in order to avoid "unfair discrimination."<sup>156</sup> Not content to leave its antidiscrimination message vague or ambiguous, after its lengthy critique of dower, the Estates Commission boldly entitled the next section of its report "Equality Between Men and Women."<sup>157</sup> The section in full reads as follows:

In harmony with the policy of equality between men and women urged upon and recognized by the Legislature in recent years, the rights of the husband and the wife should be made uniform and reciprocal as to inheritance, succession and right of election to take against the will, and the Commission has so proposed.<sup>158</sup>

Even on its most narrow reading, this statement represents a stunning aspiration toward formal legal sex equality from a group of early twentieth-century lawmakers—a statement that, unlike the common-law rights of dower and curtesy, women's and men's inheritance rights should be completely equal and disentangled from sex-based distinctions. The Estates Commission's language, however, suggests an even deeper commitment to the disruption of entrenched gender norms. In crafting its statement of sex equality, the Estates Commission implicitly advocated a dramatic rethinking not only of the common law of inheritance, but also of the basic common-law structure of marriage. Since the Founding, after all, the American law of the family had been deeply antithetical to any generalized notion of sex equality, premised as it was on differentiated understandings of men's and women's familial roles.<sup>159</sup> By framing the abolition of dower and curtesy in equality terms, the Estates Commission embraced not only a legal commitment to sex equality, but also, more stunningly, the view that the *family* should be a site for defining principles of sex equality generally.

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156. REPORT I, *supra* note 22, at 13.

157. *Id.* at 14.

158. *Id.*

159. *See, e.g.,* KERBER, *supra* note 43.

The Estates Commission's broad label, "equality between men and women"—not between "widowers and widows" or even "husbands and wives"—suggested that general legal norms of sex equality could be forged within the family.

As Surrogate George A. Slater, a member of the Estates Commission, argued before the New York State Bar Association in 1929 (in a speech that the Commission subsequently submitted to the legislature), New York's reform approach and its commitment to sex equality reflected changing times and, in particular, the changing social and legal position of women.<sup>160</sup> Since the last revisions to the decedent estate law were enacted in 1830, he explained, "a revolution has been quietly, steadily, going on—a revolution in the law itself. It has been the process of evolution of law."<sup>161</sup> In particular, Slater singled out the changing legal and social position of women as a critical piece of the background to dower reform. "A decade ago," Slater argued, "the people of this State and of the Nation gave womankind the right of suffrage, bringing with it the principle of equality."<sup>162</sup>

Like members of the nineteenth-century woman's rights movement, Slater understood women's political equality as intimately connected with the necessity for equality within the family.<sup>163</sup> He further understood inheritance law as constitutive of the legal and social meaning of the private family. Thus, foreshadowing Roosevelt's remarks at the law's passage, Slater declared that "[t]he scheme of the law is entirely new in this State and will be a new charter for woman."<sup>164</sup> Slater went so far as to suggest that the opponents of the New York reform opposed women's equality. The mere fact that Slater understood such a line of attack as politically useful strongly signals women's altered social and legal position in the postsuffrage era. People opposed to the Commission's approach, Slater argued, included

[t]hose who believe womankind belong to an age that is past and should have little or no rights and privileges, and that the daughter should be bequeathed "the four-poster bed and quilts, with the use of the northeast bedroom," and the son be given the major inheritance; [and] those who are unwilling to trust their wives to

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160. See George A. Slater, Reforms in the New York Law of Property, Address to the New York State Bar Association (Jan. 18, 1928), in COMBINED REPORTS OF THE DECEDENT ESTATE COMMISSION, 1928-1933, at 279, 282 (1933).

161. *Id.*

162. *Id.*; see also Frank H. Twyeffort, *The New Decedent Estate Law of New York*, 6 N.Y.U. L. REV. 377, 378 (1929) (arguing that woman suffrage, among other things, necessitated inheritance law reform).

163. On the passage of the Nineteenth Amendment as a collective statement of shifting understandings of marriage, see Siegel, *supra* note 6.

164. Slater, *supra* note 160, at 283.

preserve the estate, after perhaps having had a hand in its accumulation.<sup>165</sup>

Not all opponents of the Commission's agenda, however, concurred in Slater's assessment of the relationship between the proposed inheritance law and the legal path to women's equality. In fact, some opponents of the Fearon Bill challenged the view that sex-neutral language constituted the best route to equal rights for women. Mirroring contemporaneous feminist debates about whether women should be granted special legal protections different from those granted men,<sup>166</sup> and foreshadowing late-twentieth-century feminist debates over whether sex-neutral language benefits or harms women, some observers of the New York reform process argued that the Commission's approach would actually disadvantage widows by ignoring the ways in which women were positioned differently than men around questions of inheritance law and, generally, economic dependency inside and outside of marriage.

Critics of the Commission's adoption of a sex-neutral approach reasoned that inheritance law reform would not alter, in and of itself, the gendered nature of the family and, thus, that sex-neutral language would only mask women's sex-specific needs. Dower, in this view, offered women the sex-specific protections that they needed in their sex-specific roles as mothers, as wives, and, ultimately, as widows. As one observer noted, "The economic dependence of married women on the whole renders indispensable the security of the right of dower."<sup>167</sup> Similarly, a critic of New York's revised inheritance law argued that the law should recognize that women were generally socially and legally disadvantaged within the family and thus should not be compelled to provide for their husbands. "[I]t is neither equitable . . . nor for the public good," this critic maintained, "that a woman be required to set apart out of her hard-earned savings one-half thereof for her good-for-nothing husband, who has neglected her for years and from whom she cannot secure a divorce under the laws of the State of New York."<sup>168</sup>

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165. *Id.*

166. See Nancy F. Cott, *Equal Rights and Economic Roles: The Conflict over the Equal Rights Amendment in the 1920s*, in *WOMEN'S AMERICA: REFOCUSING THE PAST* 355, 356-68 (Linda K. Kerber & Jane Sherron DeHart eds., 1995); see also *infra* Subsection IV.B.1 (discussing the political divide between the National Woman's Party and the League of Women Voters over the question of protective labor legislation).

167. Current Legislation, *Equalizing the Legal Status of the Sexes*, 21 COLUM. L. REV. 712, 714 (1921).

168. Wilber F. Earp, Letter to the Editor, *Changes Needed in Law*, N.Y. TIMES, Apr. 8, 1929, at 24; see also H., Letter to the Editor, *Husbands, Wives, and Wills*, N.Y. TIMES, Aug. 25, 1930, at 16 (arguing that the new law had downsides for women).

## B. *The Feminist Fight for Dower Reform*

### 1. *Reform in the Postsuffrage Decade*

Although scattered commentators criticized the Commission's approach and its understanding of what constituted an advancement for women's rights, feminist activists from different parts of the organized movement for women's rights embraced the New York reform project. Like Slater, feminist activists understood that dower reform in New York was unfolding in a critical postsuffrage moment, during which women were exerting and defining their new powers of full political citizenship. Strikingly, unlike their nineteenth-century predecessors in the woman's rights movement, 1920s feminists and women activists entered the legal debates about dower reform newly armed with the vote and lobbied vigorously for the equality agenda ultimately embraced by the Estates Commission.

Despite their relatively new formal political powers, however, the postsuffrage decade was also a precarious time for women's rights advocates, who struggled to define their social and legal agendas in the absence of the organizing force of the fight for the vote. In fact, as others have analyzed, in the wake of the Nineteenth Amendment's passage—and presaging later divides between “equality” and “difference” feminists—a fundamental split emerged between two factions of women activists over the goals of future women's rights activism. One camp, represented most prominently by the National Woman's Party (NWP), advocated a quest for absolute, formal sex equality. In the two most prominent areas of contentious feminist debate, therefore, the NWP campaigned actively for an Equal Rights Amendment and opposed all sex-based forms of protective labor legislation. By contrast, a competing feminist wing, represented most prominently by the League of Women Voters (LWV), argued that women needed different forms of protection than men in order to achieve equal status. The LWV thus opposed a blanket Equal Rights Amendment, and fought for the passage of protective labor legislation for women workers.<sup>169</sup>

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169. On the politics and internal struggles in the postsuffrage women's movement, see COTT, *supra* note 21, at 117-42; and Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923*, 78 J. AM. HIST. 188 (1991).

Commentators differed on the question of whether the passage of an ERA would necessarily abrogate dower and curtesy. See Ernst Freund, *Legislative Problems and Solutions*, 7 A.B.A. J. 656, 658 (1921) (criticizing the proposed Equal Rights Amendment for potentially rendering unconstitutional the distinction between dower and curtesy without making clear which regime would apply to men and women alike); *Women's Equality Legislation in Wisconsin*, 2 WIS. L. REV. 350, 357 (1924) (suggesting that state equality legislation would not automatically undermine dower).

Despite their conflicting political goals and ideologies, members of both the NWP and the LWV embraced the project of dower reform in New York, playing an active part in shaping the legislative agenda, as well as the ultimate legislative product. Feminist activists formally intervened in the New York reform effort in different ways. For example, in December 1927, Jane Norman Smith, the chairperson of the NWP's National Council, testified before the Estates Commission and urged its members to craft a law that applied equally to men and women.<sup>170</sup> Through such activism, women reformers forged a collective voice powerful enough to prompt the Estates Commission to note explicitly the role of "[t]he various women's organizations of New York State" in shaping its agenda and proposals.<sup>171</sup> The LWV's Committee on the Legal Status of Women likewise noted Surrogate Foley's "grateful recognition" for the Committee's "brilliant co-operation" in the legislative process.<sup>172</sup>

2. *Dorothy Kenyon's Agenda: Sex Equality and the Reconstruction of the Traditional Private Family*

Dorothy Kenyon, who would later stand alongside Governor Roosevelt as he signed the New York bill into law, emerged as one of the most visible feminist champions of the new law, and as a key feminist voice for inheritance law reform generally.<sup>173</sup> Kenyon graduated from Smith College in 1908, just in time to join the final stages of the woman suffrage movement.<sup>174</sup> She earned a law degree from New York University in 1917, quickly became a leader in the LWV, and began her life-long career as a lawyer and feminist activist.<sup>175</sup> Most well-known for her later work at the ACLU and on the UN Commission on the Status of Women, Kenyon is seldom remembered for her advocacy in the area of inheritance law reform. But Kenyon understood inheritance law to be a critical site for negotiating women's equal legal rights, and, thus, she embraced dower reform as an important part of her feminist agenda.

In particular, Kenyon targeted dower as creating a host of legal problems for both men and women.<sup>176</sup> Wealthy men engaged in real-estate

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170. See New Decedent Estate Law Passed in New York 245 (1930) (National Woman's Party Papers, Reel 120, on file with the Manuscript Division, Library of Congress).

171. REPORT I, *supra* note 22, at 10.

172. See Report of the Committee on the Legal Status of Women 2 (1929) (League of Women Voters Papers, Reel 18, Box 11-161, on file with the Manuscript Division, Library of Congress).

173. On Kenyon, see SUSAN M. HARTMANN, *THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT* 53-91 (1998); and KERBER, *supra* note 5, at 169-70.

174. See HARTMANN, *supra* note 173, at 58.

175. See *id.*

176. Grace Turner, *Has Your Husband Made a Will? According to an Approved Interview with Dorothy Kenyon*, WOMAN CITIZEN, Jan. 1927, at 43.

deals, she explained to one writer in 1927, could be tremendously disadvantaged by a real-property regime founded on dower rights.<sup>177</sup> For Kenyon, however, this property story did not exhaust dower's disabilities. Dower, she understood, constituted a problem not just for property-holding men, but also for women, and the postsuffrage moment presented an opportune time for this aspect of the problem to come to the fore.<sup>178</sup> In the area of inheritance law, the LWV recognized that reform would succeed "with more women in our public offices, more women legislators, more women judges, and increased interest among women in our political life."<sup>179</sup>

Like other women's-rights-oriented critics of dower, as well as the members of the Estates Commission, Kenyon recognized that many women's misfortunes emanated from the multiple ways in which husbands exploited the impersonal rules created by the law. Kenyon expressed conflicted views on the relative responsibilities of the law and of husbands for insufficient support afforded to widows. On the one hand, Kenyon sought to attribute the best motives to most husbands. While she recognized that a man could disinherit his wife through his will, leaving her with no more than her meager dower rights, she posited that "[s]eldom, nowadays, do men or women use wills as spite-weapons."<sup>180</sup> On the other hand, while the Fearon Bill was pending in Albany, Kenyon seemed less confident of men's good nature. Speaking on February 14, 1929, Kenyon noted that a man could totally disinherit his children by will, and could disinherit his wife of everything but her dower rights.<sup>181</sup> This phenomenon explicitly influenced Kenyon's support of the New York bill and, particularly, of its elimination of the sex-based distinction between dower and curtesy.

Beyond the particular effects of New York's reform law, however, Kenyon recognized that inheritance law worked to define the meaning of marriage and the family.<sup>182</sup> Thus, while Kenyon supported the sex-equality approach adopted by the Estates Commission, like her predecessors in the nineteenth-century woman's rights movement, Kenyon also had another agenda: She hoped that the revised law would "knit the household closer together as a social-economic unit."<sup>183</sup> In Kenyon's view, the New York

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177. *Id.*

178. *See id.* at 44 (reporting that Kenyon believed that inheritance law reform "could and should be brought about by the intelligent action of women voters").

179. Committee on Uniform Laws Concerning Women 6 (1923) (League of Women Voters Papers, Reel 11, Box 11-102, on file with the Manuscript Division, Library of Congress).

180. Turner, *supra* note 176, at 43.

181. Dorothy Kenyon, The Household (Feb. 14, 1929) (Dorothy Kenyon Papers, on file with the Sophia Smith Collection, Smith College).

182. In her speech on February 14, 1929, Kenyon explicitly noted the ways in which inheritance law defined the meaning of family. The New York bill, she argued, had the potential to "profoundly affect the household." *Id.* at 15.

183. *Id.*

law not only offered widows much-needed legal protections, but it also strengthened the family, traditionally defined—both before and after a husband’s death. Like nineteenth-century woman’s rights activists, then, Kenyon’s vision of inheritance law reform was at once profoundly radical and deeply conservative. Kenyon simultaneously embraced the goal of gender equality within the family and also sought to strengthen the traditional private family model as the basic infrastructure for privatized female financial support. Along with New York’s lawmakers, she hoped to strengthen widows’ legal position in the shadow of a renewed model of marriage.

In fact, Kenyon understood the passage of New York’s revised decedent estate law as confirmation of her belief that inheritance law could fortify the traditional private family as a social and legal institution. The new law, she opined—making clear her own priorities through her interpretation of the Commission’s work—“is based on the premise that it is important to society to have the home held together after the death of the principal breadwinner. The emphasis is on the home rather than on the individual.”<sup>184</sup> The new law, she concluded, “constitute[d] a long step forward in protection of the home.”<sup>185</sup> Like the members of the Estates Commission, in other words, Kenyon understood dower—ironically, a relic of coverture—as a threat to the traditional protector-dependent structure of the private family, and, like the Estates Commission, she looked to dower reform as a route back to that basic gendered model of marriage.

One particular, and relatively controversial, part of the New York law offered Kenyon a novel argument concerning the revised law’s reconstruction of the traditional family. As early commentators on the New York law (including Kenyon herself) observed, the Estates Commission’s approach failed to remedy a particular shortcoming in the state’s inheritance law: Even under the new law, critics observed, a parent could disinherit his or her children entirely, and no equivalent to the elective share guaranteed children any legal protection in such instances.<sup>186</sup> Although Kenyon expressed her hope that children would eventually gain greater legal protections, she also understood the New York legislature’s choice as a powerful statement that “the wife instead of the children is taken as the

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184. DOROTHY KENYON, N.Y. LEAGUE OF WOMEN VOTERS, OUR NEW INHERITANCE LAW 1 (1929).

185. *Id.* at 4.

186. See, e.g., BEECHLER, *supra* note 43, at 5; Barry, *supra* note 98, at 126; Herbert D. Laube, *The Revision of the New York Law of Estates*, 14 CORNELL L.Q. 461, 463 (1929); Herbert D. Laube, *The Right of a Testator To Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559 (1928); Dorothy Kenyon, Letter to the Editor, *The Inheritance Law*, N.Y. TIMES, May 2, 1929, at 26.

symbol of the family.”<sup>187</sup> Wives, in Kenyon’s view, deserved primary legal protection as dependents (who could, in turn, protect their children). The spousal right of election, therefore, created a revitalized system for “the protection of dependents and the preservation of the home.”<sup>188</sup> Once again, widows constituted the key female figures—the imagined “wives”—at the center of this vision of the reinvigorated traditional family and the family home.

### C. *The Forced Share Goes to the Supreme Court*

In order to protect dependents and preserve the traditional home, New York’s elective share created a substantial legal check on a husband’s ability to dispose of his property—real and personal—as he saw fit. As discussed above, dower had also constituted a formal legal check on men’s testamentary freedom, albeit a far more modest one.<sup>189</sup> Thus, attempting to sell the public on the new law, Kenyon was quick to point out that it was “not such a radical innovation” since the law “introduces no new principle. It merely enlarges the scope of the rule and gives to it for the first time genuine force and effectiveness.”<sup>190</sup>

Nonetheless, section 18 worked a considerable change in New York law, a change that—like dower—had both practical and ideological significance. As even Kenyon had to concede, despite her best efforts to downplay the law’s radical nature, the new forced-share provision in section 18 of the revised decedent estate law went far beyond dower in the protections it offered widows and, thus, in the limits it set on men’s testamentary freedom.<sup>191</sup>

Twelve years after the revised Decedent Estate Law took effect, the Supreme Court upheld the law’s elective share provision, rejecting the argument that, by overriding preexisting agreements between spouses, section 18 constituted an unconstitutional violation of the Contracts Clause.<sup>192</sup> In so holding, the Court not only reached a narrow and case-specific constitutional issue, but also ratified the traditional views of widowhood, husbandliness, and marriage embedded in the New York law.

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187. Dorothy Kenyon, *A Married Woman Makes a Will* 17 (Apr. 14, 1934) (Dorothy Kenyon Papers, on file with the Sophia Smith Collection, Smith College).

188. *Id.* at 18.

189. *See supra* Subsection III.B.2.

190. Kenyon, *supra* note 186.

191. As discussed below, *see infra* Section V.D, in practice, husbands (and their lawyers) found ways to circumvent the strictures of the elective share law as well, through *inter vivos* conveyances, *see Schneider & Landesman, supra* note 51, at 344-53. In the decade following the passage of section 18, the New York courts struggled to find ways to protect widows despite husbands’ best efforts to thwart the law’s intentions. *See, e.g., Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1937) (setting aside a husband’s conveyance as illusory).

192. *See Irving Trust Co. v. Day*, 314 U.S. 556 (1942).

In fact, as *Irving Trust Co. v. Day* wended its way to the Supreme Court, the question of whether Helena Day Snyder could claim her elective share of John Joseph McGlone's estate provided an opportunity for four different courts to puzzle over the fundamental questions addressed by the Estates Commission: the meaning of widowhood, the meaning of equality within marriage, and the balance between male freedom and female dependency. Ultimately, the Supreme Court, like the Estates Commission before it, privileged female dependency over male freedom, thereby granting a powerful legal imprimatur to widows' position in marriage's social and economic shadow.

### 1. *The Origins of the McGlone Case*

On February 4, 1922, McGlone and Snyder, two American citizens living abroad, married in a Roman Catholic ceremony in England.<sup>193</sup> At the time, McGlone, the vice president of the International Mercantile Marine Company, was forty-seven years old and had never previously married.<sup>194</sup> Snyder represented herself as forty-five years old, entering that age on the couple's marriage license; in fact, she was sixty-two when she wed McGlone.<sup>195</sup> Snyder had married twice previously, but had no children from either marriage.<sup>196</sup>

Two days before their wedding, on February 2, 1922, Snyder signed a note written by someone else on stationery from the London Savoy Hotel, where McGlone resided on the eve of their marriage.<sup>197</sup> The note read as follows:

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or

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193. Record on Appeal to the Supreme Court of the United States at 22A, *Irving Trust Co.* (No. 51) [hereinafter Record on Appeal].

194. *In re McGlone's Will*, 17 N.Y.S.2d 316, 319 (App. Div.), *rev'd*, 32 N.E.2d 539 (N.Y. 1940), *aff'd sub nom. Irving Trust Co.*, 314 U.S. 556; Record on Appeal, *supra* note 193, at 22A.

195. *In re McGlone's Will*, 17 N.Y.S.2d at 319; Record on Appeal, *supra* note 193, at 22A.

196. See *In re McGlone's Will*, 17 N.Y.S.2d at 319.

197. Record on Appeal, *supra* note 193, at 16A, 22A.

personal, of which my said husband to be, John J. McGlone, might die seized.<sup>198</sup>

Almost eight years later, McGlone—now back in the United States and living in Brooklyn, New York—made his will. In the document, he recognized in writing that his “dear wife . . . being in possession of ample funds of her own” had “waived all claim of dower or participation in any part of my estate.”<sup>199</sup> Nonetheless, he left his wife two thousand dollars (or authorized his executors to purchase her jewelry of her choosing worth that amount) “as a slight token of my love and affection for her and admiration of her noble and high traits of character.”<sup>200</sup> McGlone executed his will on August 21, 1930, eleven days before New York’s new inheritance law, including its elective share provision, went into effect. On July 6, 1934, McGlone added a codicil to his will, which left untouched his testament to his wife.<sup>201</sup> By adding a codicil after August 31, 1930, however, he brought the entire document under the revised law.<sup>202</sup>

McGlone died in New York on February 22, 1937.<sup>203</sup> Shortly after his death, McGlone’s will was admitted to probate and—dismayed that she was left with a bequest of only \$2000 when her deceased husband’s estate was valued at \$236,852.74—Snyder filed a notice of election under section 18.<sup>204</sup> The executors of the estate petitioned the Surrogate’s Court, asking the court to decree that Snyder was not entitled to an elective share. They contended that, in light of Snyder’s signed statement renouncing her inheritance rights,<sup>205</sup> the application of section 18 to invalidate McGlone’s

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198. *In re McGlone’s Will*, 13 N.Y.S.2d 76, 80 (Sur. Ct. 1939), *rev’d*, 17 N.Y.S.2d 316 (App. Div.), *rev’d*, 32 N.E.2d 539 (N.Y. 1940), *aff’d sub nom. Irving Trust Co.*, 314 U.S. 556; Record on Appeal, *supra* note 193, at 16A (statement of Helena Day Snyder).

199. Brief of Appellants at 4, *Irving Trust Co.* (No. 51) [hereinafter Appellants’ Brief].

200. *Id.*

201. *Id.*

202. *See In re McGlone’s Will*, 13 N.Y.S.2d at 80; *see also In re Greenberg’s Estate*, 185 N.E. 704 (N.Y. 1933) (finding that a will is reexecuted as of the date of the last codicil and subject to laws at that time). As the Supreme Court would note many years later, all parties to the case “assumed, but for reasons that are not revealed, that the law of New York governs these questions.” *Irving Trust Co.*, 314 U.S. at 561. Having so noted its underlying skepticism, the Court reached the question of the New York statute’s constitutionality without paying further attention to the matter.

203. *See In re McGlone’s Will*, 13 N.Y.S.2d at 80.

204. *See In re McGlone’s Will*, 17 N.Y.S.2d 316, 319 (App. Div.), *rev’d*, 32 N.E.2d 539 (N.Y. 1940), *aff’d sub nom. Irving Trust Co.*, 314 U.S. 556. Snyder filed the case under her married name of Helena Day McGlone. To distinguish between the parties, however, I will use her maiden name.

205. Section 18 allowed a spouse to renounce his or her right to an elective share “by an instrument subscribed and duly acknowledged . . . [or] in an agreement . . . so executed, made before or after marriage.” Act of Apr. 1, 1929, ch. 229, § 4, 1929 N.Y. Laws 499, 502.

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will would constitute an unconstitutional impairment of the Contracts Clause.<sup>206</sup>

2. *Judicial Approaches to Husbands' Freedom and Widows' Protection*

Surrogate Wingate, a member of the original Estates Commission, rejected these arguments made by the executors of McGlone's estate. Wingate held that the note signed by Snyder did not constitute a valid contract, and, thus, that there was no constitutional question at all. Wingate noted that, under New York law, no per se presumption of inequality arises when a married couple contracts with one another; however, "when it appears prima facie that the parties have been dealing with each other under circumstances of inequality, then a presumption arises as against the husband, especially if the transaction has resulted in detriment to the wife."<sup>207</sup> In the case of Snyder and McGlone, Wingate observed, the facts offered "sufficient indication of inequality and overreaching on the part of the prospective husband":

Here the prospective wife, on the eve of her marriage, was induced to sign a document, not prepared by her, knowledge of the nature, terms, and effect of which she denies, the effect of which is to deprive her, utterly without any intimation or semblance of consideration of rights of inheritance . . . .<sup>208</sup>

If McGlone's heirs' argument were to succeed, Wingate concluded, the purpose of section 18 would be defeated, and it would be "possible for a designing spouse . . . to nullify the entire beneficent purpose of the enactment with virtual impunity."<sup>209</sup> He thus exhibited nothing but disdain for "[t]hose seeking to profit at the expense of the widow."<sup>210</sup>

In so holding, Wingate relied on a particular view of marriage, a view that one would expect from a member of the Estates Commission. The opinion presumes that traditional marriage—and the traditional gender roles within marriage—constituted likely sites of gender inequality. Legal reform and vigilant judicial enforcement of that reform were therefore necessary if principles of equality were to enter the marriage relationship. Moreover, consistent with his understanding of the gendered inequality of marriage,

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206. See U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); Appellants' Brief, *supra* note 199, at 29-31.

207. *In re McGlone's Will*, 13 N.Y.S.2d at 87 (quoting *In re Roger's Will*, 293 N.Y.S. 626, 630 (App. Div. 1937)).

208. *Id.*

209. *Id.*

210. *Id.*

Wingate exhibited a fundamental distrust of men's motives within marriage (or upon entering marriage). A man constituted his imagined "designing spouse," scheming to "induce[]" a woman, his prospective wife, to compromise her legal rights.<sup>211</sup> Women, by contrast—wives and widows—were in positions of relative powerlessness and vulnerability. Legal reforms thus constituted critical checks on male power and freedom, as well as critical forms of protection for women.

While Wingate's opinion reflected the spirit of New York's legal reform—as well as Roosevelt's view that the revised law constituted a smashing victory for women's rights—a completely opposite understanding of marriage and gender relations guided the opinion of New York's intermediate appellate court. In reversing Wingate and holding the relevant part of section 18 unconstitutional, the court subscribed to a model of gender relations within which women—as prospective wives and widows—were to be distrusted, and men were the likely victims of women's marriage schemes.<sup>212</sup> Thus, in the appellate court's view, if any gender conventions explained the case, they were the opposite of those invoked by the Surrogate's Court. Snyder and McGlone's relationship, the court suggested, unfolded within a world of feminine deceit and male innocence. Unlike Surrogate Wingate, the appellate court exhibited no sympathy for Snyder, only condemnation.<sup>213</sup>

Far from depicting her as the innocent victim of a conniving husband-to-be, the court instead described her as the crafty, unchaste girlfriend, tricking her trusting, younger partner into marriage by appearing to renounce his estate. As the court damningly observed:

She gave her age as forty-five, when the fact is that she was sixty-two years of age when she married McGlone, who was then forty-seven years of age. This fact, and the further fact that it was her third marriage, give rise to implications that she was not lacking in experience or suffering from inequality. These facts also carry the further implication that the instrument was signed to induce the marriage.<sup>214</sup>

And if that was not bad enough, in the appellate court's view, the New York law further harmed poor McGlone by violating his contract rights.<sup>215</sup>

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211. *Id.*

212. For an extended analysis of this view, see Dubler, *supra* note 6, at 999-1006.

213. By the time of this appeal, Snyder had died, leaving the executor of her estate to continue the litigation. See *In re McGlone's Will*, 17 N.Y.S.2d 316, 318 (App. Div.), *rev'd*, 32 N.E.2d 539 (N.Y. 1940), *aff'd sub nom. Irving Trust Co. v. Day*, 314 U.S. 556 (1942).

214. *Id.* at 321.

215. *Id.* at 322.

Moreover, in the appellate court's view, there were no inherent gender inequalities in marriage, certainly not a power imbalance that disfavored women. If anything, the court suggested, marriage was an institution that allowed women to get the better of men by luring them into permanent relationships of support. Thus, the court concluded with respect to the couple's alleged agreement that Snyder "dealt with McGlone under circumstances that were free from inequality and unfairness."<sup>216</sup> Marriage, in other words, did not create an unequal contract relationship. In the view of the appellate court, in fact, no larger universe of sex inequality was relevant to understanding Snyder's alleged prewedding renunciation.

The New York Court of Appeals reversed. Section 18, Chief Judge Lehman reasoned, could not violate McGlone's contract rights because "[w]hatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate."<sup>217</sup> Any inheritance rights that Snyder had and, conversely, any bequest rights that McGlone had were "created by the laws of the State of New York, not by contract. . . . Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights."<sup>218</sup> Lest the gendered import of these observations be missed, the Court of Appeals noted that "[t]he Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his property should pass at his death."<sup>219</sup>

The Supreme Court agreed. Men had no natural right to control the disposition of their property after their death. "Rights of succession to the property of a deceased," Justice Jackson wrote, "whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance."<sup>220</sup> Moreover, the Court observed, McGlone "unwittingly or intentionally" brought his will within the constraints of section 18 by adding a codicil after the law's effective date.<sup>221</sup> The New York legislature, therefore, in no way ran afoul of the Constitution by enacting its forced-share legislation. In fact, in the Court's view, the legislation served a critical purpose in defining a husband's rights and responsibilities: The effect of section 18, the Supreme Court concluded, praising the law, "was to continue as obligations of [the husband's] estate social responsibilities which he had assumed during life."<sup>222</sup> The Court thus quoted with approval the New York Court of Appeals's denunciation of the "inconsistency in our

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216. *Id.* at 321.

217. *In re McGlone's Will*, 32 N.E.2d at 541.

218. *Id.* at 541-42.

219. *Id.* at 542.

220. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

221. *Id.* at 563.

222. *Id.*

old law which compelled a man to support his wife during his lifetime and permitted him to cut her off with a dollar at his death.”<sup>223</sup>

By embracing this reasoning, the Supreme Court affixed its imprimatur to the model of marriage carefully constructed by architects of dower reform including Fearon, Kenyon, and the Estates Commission, a model in which the law forcibly extended the obligations of marriage beyond a husband’s death. If dower had embodied the similar goal of extending the basic ideological framework of coverture beyond the formal end of a marriage, the prevalence of impoverished widows testified to the doctrine’s failure. With the arrival of the forced share, however, lawmakers and judges perceived themselves to have fixed the problem of female poverty—at least insofar as it manifested itself in the plights of poor widows—by fixing the institution of marriage. Marriage, they posited, would thereafter function as a truly effective means to privatize female dependency by forcing men to provide for women even after their deaths.

#### V. WIDOWS AND THE STATE: PRIVATE AND PUBLIC APPROACHES TO FEMALE DEPENDENCY

##### A. *Framing the Problem of Poor Widows*

While dower reform used the self-consciously modern language of sex equality, it took as its core goal the reconstruction of a traditional model of marriage and the family with their corresponding gender roles—the very model of marriage with a male provider and a female dependent that dower was supposed to preserve, but, in fact, was failing to protect. In this respect, the project of replacing dower, even if deliberately implemented in gender-neutral terms, implicitly proceeded from the gender-specific first principle that women—in their roles as wives or widows—were entitled to private support from particular men within the framework of marriage. Thus, the logic ran, if the legal mechanism intended to guarantee that support had ceased to function—as dower clearly had as a practical matter—a new mechanism needed to be created. In other words, critics of dower sought to create a system that would better compel men posthumously to support their wives within the framework of the traditional family. Such a bolstered system, they reasoned, would check the problematic proliferation of impoverished widows by strengthening marriage; it would return widows, in other words, to the protective shadow of marriage.

Faced with evidence of widows in dire financial straits, in other words, no one engaged in the project of dower reform questioned the basic family model of support with marriage as its core. They sought to fix that model,

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223. *Id.* at 563 n.4 (quoting *In re Greenberg*, 185 N.E. 704, 705 (N.Y. 1933)).

not to replace it. The very parameters of their respective projects point to the generally bounded imagination with which both feminist and legal actors approached the questions posed by dower's clear failure. Perhaps this is not surprising. Most women's rights activists, after all, sought not utopian solutions, but rather practical ways to better women's lived experiences within an existing set of social relations. If, empirically, women depended on men for support, improving those support channels constituted a plausible and credible reform agenda.<sup>224</sup> Compared to activists, lawmakers strategized from an even more explicitly constrained position vis-à-vis the status quo. The Estates Commission, for instance, was charged with the task of remedying certain specific defects in inheritance law, not with overhauling the whole of domestic relations or family structures. It is hardly shocking, therefore, that they framed their project in narrow terms; they simply performed the task they were asked to complete.

Lest we assume that the historical context within which early-twentieth-century activists and politicians framed their reform agendas necessarily limited their vision, however, we should note that others before them, faced with other forms of female poverty, had experimented with broader solutions and thus had acknowledged (at least implicitly) the possibility of alternative models of the family, as well as alternative relationships among women, the family, and the state. As a rich body of scholarship has documented, reformers in the 1910s pushed almost every state, including New York, to enact mothers' pension statutes to respond to the problem of poor, widowed mothers.<sup>225</sup> My goal in this Part is neither to review this literature nor to consider the relationship between mothers' pensions and later incarnations of the modern welfare state, as the existing historical and sociological literature has done. Instead, thinking across public- and private-law categories, I argue that the history of mothers' pensions should be understood as conceptually intertwined not only with the later public-law history of the welfare state, but also with the private-law history of dower reform. In this respect, the story of mothers' pensions offers a cautionary tale to those who would assume that no one in the early twentieth century could have possibly reasoned about female poverty outside of the

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224. John Witt has noticed a similar phenomenon in his analysis of the role that Crystal Eastman, a radical feminist activist in the 1910s, played in advocating workmen's compensation legislation. As Witt observes, "Eastman, to be sure, was an unlikely proponent of ameliorative social reform to secure women's dependence on their husbands' wages. . . . Nonetheless, Eastman's work on behalf of workmen's compensation was less about transforming the family wage than about shoring up its increasingly unstable structure." WITT, *supra* note 15 (manuscript at ch. 5).

225. See, e.g., LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935* (1994); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 424-79 (1992).

framework of the traditional family's gender-specific model of support and dependence embraced by reformers of dower.

Although both mothers' pensions and dower reform constituted legislative responses to the needs of widows, the two approaches focused on vastly different groups of women. These profound differences should be neither overlooked nor minimized. Reformers advocating mothers' pensions responded to the needs and deprivations of poor women with few, if any, financial resources. As Linda Gordon has analyzed, the female reformers who crafted state mothers' pension programs approached these poor women with a maternalistic sense of pity, advocating public support for only the worthy among them—that is, impoverished, white mothers whose husbands had died.<sup>226</sup> By contrast, as discussed above with reference to nineteenth-century suffragists' critiques of dower, when activists and lawmakers approached dower reform, they saw before them a class of women similar to themselves who were being deprived of property that was rightfully theirs.<sup>227</sup> These, then, were women who—to use Gordon's language—were *entitled* to certain forms of legal protection and to a certain model of familial support.

No doubt, the radically different social and class positions of these two groups of widows account for why historians and legal scholars have never seen the history of mothers' pensions as usefully related to the history of dower. The former, it is thought, constitutes the prehistory of the welfare state—that is, the story of the second-class status and government control associated with state provisions for the poorest of women. The latter, by contrast, takes its place in the history of middle-class property succession—that is, in a world in which relatively privileged women are supported by their husbands' earnings and resources.

Although these distinctions between mothers' pensions and dower reform are critical markers of the class-salient manner in which our political and legal systems have allocated entitlements and resources, it is nonetheless a mistake to overlook the ways in which these different legislative approaches also share a common feature. Mothers' pensions and dower reform constituted two possible solutions—the former, a public-law solution, the latter, a private-law solution—to the problem of impoverished widows—that is, to one version of the problem of female dependency. These two divergent approaches, moreover, embodied two different notions of the meaning of marriage, as well as of the relationship between marriage and the state.<sup>228</sup> Thus, comparing the ways that two different New York

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226. See GORDON, *supra* note 225, at 24-35.

227. See *supra* text accompanying note 106 (discussing the privileged class and race position of woman's rights activists).

228. On the willingness of the state to intervene in poor families despite the general view that the family is a private haven away from government intervention, see Jill Elaine Hasday,

State commissions—one leading to the enactment of mothers' pension legislation and the other leading to statutory dower reform—framed the “widow problem” reveals the limits of marriage's ability successfully to privatize female dependency, and, simultaneously, the persistent ideological insistence of lawmakers that marriage should be able to play that role.

B. *Mothers' Pensions in New York: The Commission of Relief for Widowed Mothers*

In 1913, fourteen years before it created a commission to investigate defects in the state's decedent estate law, the New York legislature created the Commission on Relief for Widowed Mothers (the Widowed Mothers Commission).<sup>229</sup> Like the later Estates Commission, the Widowed Mothers Commission focused its attention on “the problem of widowhood.”<sup>230</sup> In addressing this problem, however, the Widowed Mothers Commission constructed widows not as wives, as we have seen the Estates Commission would later do, but as mothers.<sup>231</sup> In so doing, the Widowed Mothers Commission defined the problem of widowhood as a problem primarily affecting children, not women. Moreover, it defined the parent-child relationship, not the husband-wife relationship, as the key family unit.<sup>232</sup>

The Widowed Mothers Commission focused its attention on the effects of widowhood and, particularly, its attendant poverty on widows' children. In so doing, the Commission explicitly defined its subject—children and their economic needs—as a public, not a private, problem. “The normal development of childhood,” the Widowed Mothers Commission stated in the opening sentence of its report, “is one of the main functions of government.”<sup>233</sup> As such, the report continued, “it thereby becomes the duty

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*Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

229. See REPORT OF THE NEW YORK STATE COMMISSION ON RELIEF FOR WIDOWED MOTHERS 1 (1914) [hereinafter WIDOWED MOTHERS REPORT].

230. See *id.* at 4.

231. Cf. MARY E. RICHMOND & FRED S. HALL, A STUDY OF NINE HUNDRED AND EIGHTY-FIVE WIDOWS KNOWN TO CERTAIN CHARITY ORGANIZATION SOCIETIES IN 1910, at 7 (photo. reprint 1974) (1913) (defining the scope of a Russell Sage Foundation study of widows to include only widows with “at least one child under fourteen years of age”).

232. In this context, then, the sexualized husband-wife relationship did not constitute the core of the family. Cf. FINEMAN, THE NEUTERED MOTHER, *supra* note 3, at 145-66 (critiquing the centrality of the sexualized, heterosexual relationship as the core of the family).

233. WIDOWED MOTHERS REPORT, *supra* note 229, at 3. Thus, the authors of a comprehensive history of welfare in New York, writing in 1941, concluded that the term “mothers' pensions” was, of course, a misnomer, since in all cases it was proposed that the relief be given purely on the basis of need. It should be emphasized that the allowances were not intended as relief to mothers but to their dependent children.” DAVID M. SCHNEIDER & ALBERT DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE, 1867-1940, at 185 (1941).

of the State to conserve the home as its most valuable asset.”<sup>234</sup> From the outset, then, the Commission looked to the state, rather than to private actors (be they individual husbands or private charities), to solve the “widow problem.” Viewed from this perspective, a clear solution grabbed the Widowed Mothers Commission: the “immediate enactment into law of the principle of State aid to the dependent children of widowed mothers.”<sup>235</sup>

In fact, from the Commission’s perspective, no solution to the problem of poor widows other than state legislation and support could possibly succeed. Private charity, these reformers concluded, was both insufficient and inappropriate.<sup>236</sup> In the Commission’s words, “[T]he worthy widow who is left to assume the burden of the care of her fatherless children has a unique claim upon the community that transcends ordinary charity and lifts her above the other classes of dependents.”<sup>237</sup> Moreover, other potential solutions, those typically advocated and tried, only inflicted greater harm on widows’ already imperiled families. Thus, work within the home, work outside the home, the commitment of children to other families’ homes, and private charities’ placement of aids in widows’ homes all offered a widow minimal assistance at the further expense of her children’s well-being.<sup>238</sup>

In crafting a state-sponsored solution to the poverty of widows’ children, the Widowed Mothers Commission understood itself to be serving the needs of worthy women and, thus, constructed poor widows as blameless with respect to their plight.<sup>239</sup> Likewise, the Commission relieved these widows’ deceased husbands of primary blame for widows’ ills, attributing no agency to either the women or men in creating their substantial misfortune. The Commission spoke of these widows’ deceased husbands with a tone of committed resignation, rather than condemnation. With an air of deliberate descriptive neutrality, the Commission pointed to the inevitability of a certain impoverished population. Its report observed that

[a]lthough workmen’s compensation, and the like, will do much to prolong the life of the worker and protect the interests of those dependent upon him, there will always be until the millennium a class of men who, through inefficiency, illness or depravity, will be

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234. WIDOWED MOTHERS REPORT, *supra* note 229, at 3; *see also id.* at 7 (“Normal family life is the foundation of the State, and its conservation an inherent duty of government.”). This rhetoric invoked a long history of viewing the family and the home as a building block of the state. *See, e.g.*, KERBER, *supra* note 43, at 269-88.

235. WIDOWED MOTHERS REPORT, *supra* note 229, at 9.

236. For one overview of private charity approaches to widows in this period, *see* RICHMOND & HALL, *supra* note 231 (collecting data on widows receiving relief from charity organizations).

237. WIDOWED MOTHERS REPORT, *supra* note 229, at 17.

238. *See id.* at 27-157.

239. *See* GORDON, *supra* note 225, at 27.

unable to leave at their death enough for the proper maintenance of their family.<sup>240</sup>

Thus, even as these reformers acknowledged that a particular man's deliberate ill behavior—his “inefficiency” or “depravity”—might have caused a particular widow's misfortune, the Widowed Mothers Commission advocated public aid as the solution to that misfortune, eschewing any extended focus on male culpability or responsibility.

Moreover, the Commission's brief discussion of the deceased husbands of widows played another important role in framing the widow problem. Implicitly, the Commission suggested that these husbands—a particular “class of men”—were exceptional, deviating, through no fault of their own, from the norms of husbandly behavior. Most men, the report implied, provided for their widowed wives and, thus, kept them from positions of abject poverty. Only an unfortunate subgroup of men—those afflicted with particularly unfortunate social disabilities—would be “unable to leave at their death enough for the proper maintenance of their families.” The “widow problem,” then, was not endemic to society, nor did it impugn the basic marriage-based structure of familial support. Rather, the widow problem pointed to a subcategory of families whose husbands failed, for one reason or another, to play their proper roles within marriage and the family, thereby leaving a certain category of women without the material resources necessary to support themselves and their children.

### C. *Mothers' Pensions and Dower Reform: Two Models of Marriage and the State*

The New York Widowed Mothers Commission's view of widows comported with a national discourse in the 1910s on female poverty and, thus, was part of a national state-by-state movement for mothers' pensions.<sup>241</sup> The members of the Commission, like other like-minded reformers, had not lost all faith in marriage as a functional structure for the financial support of the family. For most women, they posited, marriage constituted a guarantee of economic security, both while their husbands were alive and after their deaths. Nonetheless, even as the Widowed Mothers Commission clung to this model of marriage and the family, it simultaneously focused on children as a justification for public intervention into the private family. Focusing on a particular class of worthy, white, poor widows, in other words, the Commission fashioned an alternative vision of the relationship between the family and the state: one in which the

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240. See WIDOWED MOTHERS REPORT, *supra* note 229, at 158.

241. See GORDON, *supra* note 225, at 37-64.

government played an active role in providing some women with economic support when their husbands and families had failed to do so.

Analyzing this particular moment in the history of welfare policy, Linda Gordon has noted that “[t]he social concern with single mothers dwindled after the Progressive Era.”<sup>242</sup> As New York’s push for dower reform suggests, however, the widow problem—albeit a problem understood in different terms and with different widows at its core—did not disappear with the demise of the mothers’ pension movement. In fact, the Metropolitan Life Insurance Company reported in 1936 that based on “mortality tables relating to the white population as a whole, . . . [t]he chances of a wife becoming widowed are actually greater today than they were 10 years ago, even though the average length of life has steadily increased.”<sup>243</sup>

When the Estates Commission was convened more than a decade after the Widowed Mothers Commission, a new legislative discourse emerged surrounding the “widow problem” and its potential solutions. Children no longer inhabited the heart of the legislature’s imagined family. In fact, under the Estates Commission’s proposal—much to the dismay of many social reformers—children gained no legal protection from disinheritance at all.<sup>244</sup> Instead, surveying the more socially privileged women left outside the protective reaches of their husbands’ estates, the Estates Commission identified widows themselves as the key victims of the widow problem. Moreover, confronted with the financial problems of middle- and upper-class women, the Estates Commission’s report implicitly suggested that *any* woman could find herself a poor widow by virtue of the law’s outdated commitment to dower or by virtue of her husband’s cruelty. The problem, then, was not—as the Widowed Mothers Commission’s report suggested—the inevitable social failing of a particular, discrete, unfortunate class of men; rather, the problem resided within the very structure of marriage, and the role the family was supposed to play in the economy.

The Estates Commission’s report thus tacitly pointed to a much larger problem with the fundamental relationship between the family and the state than the Widowed Mothers Commission’s report. Furthermore, the problem suggested by the Estates Commission had much broader implications for the viability of marriage—or, at least, the form of marriage confronting the Commission—as a general strategy for the containment of female dependency. After all, if the Widowed Mothers Commission’s report suggested a class problem—that is, that *poor* widows could not subsist on resources left to them by their deceased husbands—the Estates

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242. *Id.* at 33.

243. *The Increasing Chances of Widowhood*, STAT. BULL. METROPOLITAN LIFE INS. COMPANY, June 1936, at 5, 5.

244. *See supra* text accompanying notes 186-188.

Commission's report suggested a problem with the marriage model generally: *Many widows*, from different classes and with all kinds of deceased husbands, could not subsist on resources left to them by will. Framed in this manner, the "widow problem" threatened to expose the basic instability of the longstanding relationship between the family and the state, as well as the ineffectiveness of the traditional, gendered provider-dependent model of marriage.

In fact, as feminist activist Alice Beal Parsons argued just a year before the Estates Commission was convened, the provider-dependent model of marriage was doomed even for families with a living husband and wife by the insufficiency of men's wages and, thus, their inadequacy as a "family wage." Industrial society, she posited, had created the "dependent family," a phenomenon recognized by the types of public-support legislation passed by other countries faced with the problem of poor families.<sup>245</sup>

Even as the Estates Commission's report implicitly supported this radical critique of marriage's basic economic powers, the Commission's proposed solution to the problem of poor widows—unlike that of the Widowed Mothers Commission before it—remained entirely committed to maintaining marriage as the basis for privatizing women's economic needs. No doubt, among other factors, this reflected a host of class biases that facilitated state intervention in poor families and prohibited state intervention in middle- and upper-class families, the focus of dower reform.<sup>246</sup> Nonetheless, the Estates Commission's approach embraced dower reform as the solution to all widows' ills, never contemplating (at least in any recorded form) the possibility that a private remedy might prove insufficient. The more marriage seemed to be systematically failing to privatize female dependency, in other words, the more lawmakers clung to the normative ideal of marriage's power to do so.<sup>247</sup>

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245. ALICE BEAL PARSONS, *WOMAN'S DILEMMA* 197 (photo. reprint 1974) (1926). On Parsons, see COTT, *supra* note 21, at 191-92.

246. See, e.g., Hasday, *supra* note 228, at 300.

247. Dower reform did not end experimentation with more public solutions. A decade later, the 1939 amendments to the Social Security Act entitled a widow to benefits earned by her husband. See Social Security Act Amendments of 1939, ch. 666, sec. 201, § 202(d)-(e), 53 Stat. 1360, 1365. As Alice Kessler-Harris has argued, however, "No charitable impulse toward women motivated this act; no concern for their poverty inspired it. Rather, Congress added dependent wives and aged widows in order to shore up the legitimacy of a system in trouble." Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in *U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS* 87, 91-92 (Linda K. Kerber et al. eds., 1995). Payments to widows represented a solution to the problem of "ballooning reserves." *Id.* at 93.

*D. After Dower*

In the aftermath of dower's demise, husbands in New York continued to demonstrate the difficulty of legislating the privatization of women's economic dependency through marriage. Faced with a new legal regime, the greater threat of losing control over a lifetime's wealth again prompted ingenuity: Just as wealthy men had found ways to skirt the burdens imposed by dower, so too savvy men faced with New York's revised inheritance law found legal loopholes that allowed them to carry their property rights beyond their graves—rights to which they felt entitled even if the Supreme Court would not recognize them. Thus, a decade after the Estates Commission's reforms went into effect, two New York lawyers bemoaned that, particularly with respect to the problem of disinheritance, “[u]nfortunately, the results of these still recent enactments have not come up to all expectations.”<sup>248</sup>

These two legal observers expressed particular dismay about the lingering problem of fraudulent inter vivos transfers: conveyances of property made prior to marriage, usually by the prospective husband, with the goal of preventing his future wife from gaining any rights to the assets.<sup>249</sup> It was “surprising,” they observed, “to find that the Legislature had omitted to deal with such fraudulent transfers, and consequently apparent that the courts had been left with all the problems which might arise upon the suit of one spouse to set aside a disinheriting transfer of property by the other.”<sup>250</sup>

Thirty years after the law's passage, W.D. MacDonald, an academic focused on comparative legislative approaches to inheritance law, criticized the modern elective share for failing to provide adequate protection to widows against fraudulent inter vivos gifts.<sup>251</sup> “[T]he beauty of the forced share,” MacDonald opined, “is only skin deep; protection is announced, but it is not given.”<sup>252</sup> MacDonald looked to English law for a solution, advocating the adoption of family-maintenance legislation, which allowed a court to reassess family members' entitlements to a decedent's estate in cases where the decedent failed to leave adequate resources.<sup>253</sup>

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248. Schneider & Landesman, *supra* note 51, at 344. The New York law offered men with means one particular loophole that other state reforms had closed. Under the revised New York law, a testator could defeat his spouse's right of election if he left her the financial equivalent of her elective share in the form of a trust. See BEECHLER, *supra* note 43, at 46.

249. Schneider & Landesman, *supra* note 51, at 345.

250. *Id.* (citation omitted). On the New York courts' response to inter vivos transfers in the years following the new law's passage, see BEECHLER, *supra* note 43, at 489-544.

251. See MACDONALD, *supra* note 15, at 3-19.

252. See *id.* at 3.

253. See *id.* at 299-327.

Thus, when New York's next state commission on inheritance reform was convened in 1963, shortly after the publication of MacDonald's study, it found itself facing the same set of questions as its predecessor commission more than thirty years before. Despite the changes in the law precipitated by the abolition of dower and subsequent judicial interpretations of section 18, the 1963 commission sought proposals that could finally "fulfill the intention of the Foley Commission in enacting Section 18, which was to end 'the glaring inconsistency in our law which compels a man to support his wife during her lifetime and permits him to leave her practically penniless at his death.'"<sup>254</sup> Again faced with the problem of poor widows, beginning in the 1960s, states moved to the concept of the augmented estate as a solution to the problem of inter vivos transfers.<sup>255</sup>

#### VI. CONCLUSION: REMAPPING MARRIAGE'S SHADOW

In New York, as was the case across the nation, the demise of dower constituted just one part of a major reshaping of marriage's regulatory shadow. In fact, between 1929 and 1935, New York lawmakers abrogated all three of the laws that I have identified as essential nineteenth-century anchors of marriage's shadow—dower, common-law marriage, and the heartbalm actions of breach of promise to marry and seduction. The abolition of dower began this process. Following on the heels of their experiment with inheritance law reform, New York legislators abolished common-law marriage in 1933.<sup>256</sup> Just two years later, they abrogated the heartbalm actions of seduction and breach of promise to marry.<sup>257</sup> In so

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254. Christopher C. McGrath & Elmer L. Fingar, Temp. State Comm'n on Estates, Research Outline Analysis Section 2.323: Right of the Surviving Spouse of an Intestate Decedent with Reference to Non-Testamentary Transfers 9 (1963) (on file with author) (quoting COMM'N TO INVESTIGATE DEFECTS IN THE LAW OF ESTATES, COMBINED REPORTS OF THE DECEDENT ESTATE COMMISSION 18 (n.d.)). Likewise, in 1974, one commentator pointed to the connection between inheritance law and sex equality as though no one before her had noted their relationship. Mary Moers Wenig, *Sex, Property and Probate*, 9 REAL PROP. PROB. & TR. J. 642, 642 (1974) ("That the Real Property, Probate and Trust Law Section should have established a Committee on Equal Rights calls for some explanation.").

255. This was the approach adopted by the Uniform Probate Code in 1969. *See generally* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

256. *See* Act of Apr. 29, 1933, ch. 606, 1933 N.Y. Laws 1268; *see also Common Law Marriage Abolished*, 3 BROOK. L. REV. 155 (1933); Dubler, *supra* note 6; George R. Fearon, *Common Law Marriage Abolished*, N.Y. ST. B.A. BULL., June 1993, at 302. As I have argued elsewhere, lawmakers understood the abolition of common-law marriage to be related to the abolition of dower since the increased inheritance available to women under the new elective share system encouraged conniving women to claim—when their long-term partners died—that they had been in common-law marriages and, thus, were entitled to inherit under section 18. *See* Dubler, *supra* note 6, at 1001.

257. *See* Act of Mar. 29, 1935, ch. 263, § 1, 1935 N.Y. Laws 732, 732-33; *see also* Larson, *supra* note 28. Again, there are conceptual links between these legislative actions: Like common-

doing, the New York legislature joined national trends away from all of these common-law doctrines. In states across the nation, lawmakers in the first half of the twentieth century repudiated the legal anchors of marriage's shadow, branding them relics of a prior age, ill-suited to modern times and, especially, to the changing social status and political power of women.<sup>258</sup>

Today, then, many of the nineteenth-century doctrinal markers of marriage's regulatory shadow have vanished. In their place, a modern body of nonmarital cohabitation, domestic relations, and joint property law signals the significant ways in which the legal position of women living outside of marriage has changed since the days of the Estates Commission. One hundred years ago, the law explicitly refused to recognize the reciprocal legal rights of unmarried partners or the financial claims of women whose intimate relationships were not marital or, at least, marriage-like, forcing women to frame their claims—regardless of how they inhabited their domestic relationships or understood their intimate identities—as internal to marriage. By contrast, women living outside marriage today can present themselves to courts as such and still make claims of legal rights and financial entitlement. Alongside traditional marital status law, the law of contract facilitates various forms of private ordering, allowing women and men to organize the financial and material repercussions of their intimate lives, as well as the consequences of their deaths, outside of marriage proper.<sup>259</sup>

And yet, despite the rise of contract as a basis for nonmarital forms of domestic ordering, both marriage and marriage's shadow have proven resilient. Despite rumors of marriage's untimely demise as the dominant form of domestic ordering—witness, anxious commentators note, soaring divorce rates and the prevalence of “blended families”—our contemporary social landscape of intimate relations is remarkably similar to the comparable social terrain at the turn of the last century. The extent of the similarities, of course, should not be overstated, nor should we ignore the critical changes that have occurred: No doubt, more people live proudly and

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law marriage, the heartbalm actions came to be seen as doctrinal traps in which conniving women could snare unsuspecting, innocent, wealthy men (or, as was often the case, their estates). See Dubler, *supra* note 6, at 994-1010; Sinclair, *supra* note 28, at 72-98.

258. On the relationship between these legal changes and changing understandings of women's social and political nature, see Ariela R. Dubler, “*Exceptions to the General Rule*”: *Unmarried Women and the “Constitution of the Family,”* 4 THEORETICAL INQUIRIES L. (forthcoming 2003); and Dubler, *supra* note 6, at 999-1010.

259. See, e.g., Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503 (1998); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Public Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443. See generally Stake et al., *supra* note 25.

publicly outside of marriage than in the early twentieth century.<sup>260</sup> Perhaps most significantly, same-sex couples are certainly more visible in today's social landscape than they were in the early twentieth century.<sup>261</sup>

Nonetheless, given the dramatic ways in which the laws governing marriage and nonmarriage have changed over the course of the last century, it is all the more extraordinary that marriage—with its model of two-partner, sexualized, domestic relations—remains such a powerful and predominant social and legal norm.<sup>262</sup> Thus, strikingly, while many politicians bemoan the rise of alternative family structures, alternatives posed in the nineteenth century by individuals and communities committed to challenging marriage's hegemony appear as extraordinary and radical today as they did in their own time.<sup>263</sup> Deviations from the norm of monogamous marriage within the female-dependent/male-provider framework—such as Charlotte Perkins Gilman's vision of collective housekeeping,<sup>264</sup> or Mormon polygamy,<sup>265</sup> or utopian communities like the

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260. The increased public prevalence of extramarital cohabitation, however, should not blind us to the fact that—as testified to by the vast number of common-law marriage cases throughout the nineteenth and early twentieth centuries—many people have always lived outside of formal marriage, even if they did so more quietly. See Dubler, *supra* note 6, at 960-62.

261. On the public visibility of gay culture in the early twentieth century, see CHAUNCEY, *supra* note 141. See also WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 42-44 (1996).

262. For contemporary proposals of alternative models, see, for example, David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, a Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348 (2001) (proposing the creation of a “designated friend” legal status to formalize the mutual responsibilities of any two people, even those in a nonsexual relationship); and Martha M. Ertman, *The ALL Principles' Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107, 114-15 (2001) (advocating the legal recognition of the increasing social prevalence of polyamory, that is, intimate relations—not necessarily sexual in nature—between more than two adults). Both Hawaii and Vermont have passed reciprocal beneficiary laws that allow close-blood relatives to assume legal responsibility for one another. See HAW. REV. STAT. ANN. § 572-1 (Michie 1999); VT. STAT. ANN. tit. 15, § 1202 (2002). As David Chambers has noted, however, “Neither Hawaii nor Vermont . . . intended to give couples a choice of two or more officially recognized relationships.” Chambers, *supra*, at 1352. Thus, he argues that we still need “to explore the utility of a state-sanctioned status other than marriage that would be available to any unmarried pair with a close relationship—whether cohabiting or not, whether romantically involved or not, whether same-sex or opposite-sex, whether related by blood or not.” *Id.*

263. This relative social uniformity suggests that marriage casts a less explicitly regulatory shadow over social norms of intimate relations. In this sense, marriage law seemingly limits the social norms of intimate relations even in formally extralegal settings. Cf. Mnookin & Kornhauser, *supra* note 7.

264. See CHARLOTTE PERKINS GILMAN, WOMEN AND ECONOMICS 242-47 (Carl N. Degler ed., Harper & Row 1966) (1898). Gilman grounded her vision in a critique of female dependency: “We are the only animal species,” she wrote,

in which the female depends on the male for food, the only animal species in which the sex-relation is also an economic relation. With us an entire sex lives in a relation of economic dependence upon the other sex, and the economic relation is combined with the sex-relation. The economic status of the human female is relative to the sex-relation.

*Id.* at 5.

one founded by John Humphrey Noyes in Oneida, New York<sup>266</sup>—remain as absent from the dominant contemporary landscape of intimate relations as they were in the late nineteenth century.

Moreover, marriage continues to regulate the terrain outside of its formal borders, preserving its legal and ideological supremacy as a normative model for all intimate relations and as an arbiter of which relationships deserve legal recognition and protection. Much as it functioned historically, marriage's shadow continues to constitute the peripheral territory within which lawmakers constitute and protect what they understand to be the core meaning of marriage proper. To understand the meaning of marriage today, then, still demands attention to the legal regulation of life outside marriage.

Although the nineteenth-century anchors of marriage's shadow—dower, common-law marriage, and the heartbalm actions of seduction and breach of promise to marry—are rarely the grist of contemporary legal battles, courts and legislatures persist in defining the rights of unmarried people by positioning them into proximate relationships with marriage.<sup>267</sup> Some of the ways in which marriage continues to exert its normative power over people living outside marriage are evident at the doctrinal sites that have replaced the nineteenth-century common-law anchors of marriage's shadow.<sup>268</sup> Thus, for example, contemporary inheritance law continues to revolve around a traditional family model, cajoling people into that framework if they want to claim the protections of probate laws.<sup>269</sup> Likewise, although heartbalm actions are obsolete,<sup>270</sup> courts continue to understand nonmarital, romantic relationships as on their way to being marriages, much as they did in seduction and breach-of-promise-to-marry cases. Hence, for instance, Justice Tobriner's celebrated opinion in the

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265. On the history of polygamy, see SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002). On contemporary polygamy prosecutions, see Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES, Feb. 28, 1999, § 6 (Magazine), at 51; and Michael Janofsky, *Conviction of a Polygamist Raises Fears Among Others*, N.Y. TIMES, May 24, 2001, at A14.

266. On nineteenth-century utopian communities and their rejection of the monogamous marriage model of family and community organization, see *WOMEN IN SEARCH OF UTOPIA: MAVERICKS AND MYTHMAKERS* (Ruby Rohrich & Elaine Hoffman Baruch eds., 1984).

267. As Chambers has recently observed, the 2000 census classified unmarried people "in relation to marriage. They are the 'never married,' the 'divorced,' and the 'widowed.'" Chambers, *supra* note 262, at 1347.

268. For one theory of how status regimes reproduce themselves alongside legal change, see Siegel, *Rule of Love*, *supra* note 18, at 2178-80 (describing the dynamic of "preservation through transformation").

269. See, e.g., Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999); see also Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998).

270. Jane Larson has observed a rise in injury cases seeking damages for the same types of injuries that used to undergird heartbalm actions. See Andrew Fegelman, *Husband Turns Hurt into Courtroom Affair*, CHI. TRIB., Feb. 22, 1993, § 2, at 7 (quoting Professor Jane Larson).

landmark palimony case of *Marvin v. Marvin*<sup>271</sup> framed intimate cohabitation as almost necessarily a *premarriage* phenomenon, not as a form of domestic ordering completely apart from marriage. As Tobriner noted:

We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties.<sup>272</sup>

Finally, although very few states recognize common-law marriages, courts continue to recognize only certain intimate relationships as worthy of legal protection. In sorting the worthy from the unworthy, courts continue to evaluate relationships in terms of what jurists perceive to be the relationships' marriage-like characteristics. Thus, as I have analyzed elsewhere, in the area of nonmarital cohabitation, marriage remains the normative framework against which intimate relationships are evaluated. And even in non-common-law marriage states, "acting married" remains the surest route to securing legal rights, at least for heterosexual couples.<sup>273</sup>

The primacy of marriage as a normative legal model for all intimate relations continues, as it did historically, to play a role that is at once ideological and economic: Marriage's shadow, even in its modern doctrinal variations, continues to mark the loci of public confrontations with female dependency, and marriage continues to function as a preferred public policy approach to privatization of women's economic needs.<sup>274</sup> Thus, for instance, the basic logic underlying dower reform resurfaces—albeit in a vastly different racially charged context and in discussions concerning a very different group of women—in contemporary welfare policy. Lawmakers still presume that fixing marriage by strengthening its core

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271. 557 P.2d 106 (Cal. 1976).

272. *Id.* at 122 (footnote omitted). As Milton Regan has recently noted, however, "[R]esearch suggests that cohabitation has become less of an 'engagement' that serves as a prelude to marriage and more of an intimate arrangement that may serve as an alternative to it." Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1435 (2001).

273. See Dubler, *supra* note 6. For same-sex couples, acting married has more ambiguous legal effects. In some instances, courts have granted rights to same-sex couples based on their marriage-like behavior. See *id.* at 1015-21 (analyzing *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989)). In other instances, by contrast, a same-sex couple's marriage-like behavior has formed the basis for their court-sanctioned discriminatory treatment. See, e.g., *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (holding that the state Attorney General can withdraw a job offer upon learning of the prospective employee's involvement in a same-sex "marriage" ceremony); see also *Jones v. Daly*, 176 Cal. Rptr. 130, 131 (Ct. App. 1981) (holding unenforceable a cohabitators' agreement that stated that, among other things, the couple would act as "cohabiting mates").

274. See Siegel, *supra* note 6, at 981-87.

meaning as a permanent provider-dependent relationship and by bringing more women within its ostensibly protective confines will provide a powerful check on female poverty. Operating within this logic, it makes perfect sense to allocate hundreds of millions of dollars of federal welfare money to state programs designed to promote marriage.

The history of dower reform, however, suggests that—even when applied to women toward whom lawmakers feel tremendous sympathy and concern, that is, middle- and upper-class widows, as opposed to modern-day welfare recipients—this logic is flawed at its core. Much as lawmakers try to bolster marriage's powers as a site for the privatization of dependency, it has proven persistently incapable of effectively serving that public, economic function. Moreover, the history of dower and its demise suggests that marriage's shadow functions not as an effective legal cure for female poverty, but rather as the ideological terrain upon which the legal meaning of marriage proper is forged. Pointing to women living outside marriage offers legislators the opportunity to define marriage—that is, the imagined place where these women could improve their status—as a permanent, economic, gender-specific, provider-dependent relationship. In fact, unmarried women carry with them none of the empirical challenges to marriage's power that married couples inevitably reveal in the form of marital poverty, abuse, and divorce. Even as the doctrinal terrain around marriage shifts, therefore, situating women in marriage's shadow allows lawmakers to preserve the illusion of a core, transhistorical, deeply gendered definition of marriage as a permanent union between an economically dependent woman and an economically independent man.

Of course, not all marriages today conform to this traditional gendered model; nor did they in the past. Furthermore, the legal meaning of marriage has changed in enormous and profound ways since the days when Elizabeth Cady Stanton and other members of the suffrage movement levied their attack on dower, charging the common-law institution with bolstering and perpetuating a pervasive system of sex inequality with marriage as a key site of women's subordination. Coverture, after all, is now a subject for legal historians.

Nonetheless, recognizing marriage's shadow as an ideological construct makes visible the ways in which marriage continues to play a mediating role between women and the state. We long ago abandoned the most transparent legal manifestation of this relationship: Prior to the passage of the Nineteenth Amendment, our political system was fundamentally premised on the view that women did not need the vote because they were “virtually represented” by their husbands.<sup>275</sup> The basic definition of white

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275. See, e.g., Dubler, *supra* note 258; Siegel, *supra* note 6, at 980-87.

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women's citizenship, therefore, routed political representation through marriage.

While women today confront the state directly as citizens in myriad ways, the persistent resort to marriage as a perceived solution to female poverty suggests that marriage's role as a mediating institution between women and the state is not entirely a relic of the past. After all, politicians still look to marriage, broadly defined, as a solution to female dependency, pointing to the family as the proper providing institution for women's material needs, and, thus, designating husbands as the proper providers for female citizens. As members of the nineteenth-century woman's rights movement recognized, as long as marriage plays this mediating role in the collective imagination of lawmakers, it remains incompatible with a robust notion of sex equality and female citizenship.