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Multiple Orders in Multiple Venues:
The Reform of Married Women's Property Rights, 1839-1920

By

Sara Nell Chatfield

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Political Science

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Eric Schickler, Chair

Professor Paul Pierson

Professor Sean Farhang

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Abstract

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Doctor of Philosophy in Political Science

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Beginning in 1839 and continuing through the early twentieth century, the American states passed increasingly liberal laws expanding married women's property rights. These Married Women's Property Laws extended to married women a range of new economic rights, including rights to own property, take out mortgages, sign and enforce contracts, and appear in court under their own name. In almost every state, these significant legal changes took place before women had the right to vote, and they were largely driven by male constitutional convention delegates, legislators, and judges. These male actors, working in a range of political venues, pushed for reforms for reasons rooted in the political orders of liberalism and gender hierarchy. This episode of rights expansion helps us understand both the possible pathways for rights reform when the group in question does not have the vote, and the ways in which an indirect reform process can lead to incomplete liberalization of rights. I analyze the passage of MWPAs from a variety of perspectives, incorporating analyses of political change in multiple venues (state legislatures, state courts, and state constitutional conventions), four case studies from different regions, and quantitative analyses using data on all 48 states. I then examine the longer-term impact of these laws in a discussion of protective labor legislation during the Progressive Era.

*For my grandfather,
Clayton Clark Hoskins,
who inspired my passion for learning, law, and politics*

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Introduction: Married Women's Economic Rights Reform, 1839-1920

At the turn of the nineteenth century, married women in the United States faced a legal system that was almost wholly illiberal with regard to their rights, both economic and civic. With limited exceptions, their economic rights were governed by common law courts that saw women as legally dead the moment they spoke their marriage vows. By 1920, this legal environment had been significantly liberalized through the passage of Married Women's Property Acts (MWPAs) at the state level. While some illiberal restrictions remained, in most states the law acknowledged a separate legal identity for women and allowed them to hold property and make contracts as if single. These reforms occurred despite the fact that women had the right to vote in few states and the political system as a whole was relatively hostile to women's economic and political equality.

Specifically, many of the U.S. states passed MWPAs from roughly the 1840s through the 1920s. The earliest of these laws codified rights that had always been available to wealthy women through equity courts, but had not been more generally available outside of costly court procedures. These laws granted married women the right to separate estates, and were passed in many states with virtually no input from women's rights organizations. They were largely seen as a form of debt relief in difficult economic times (among other strategies used by lawmakers to the same effect). Next came laws that gave married women more power to sell, mortgage, and otherwise use their separate property in various ways typically not envisioned by the first set of laws, that is, beyond simply holding titles that were then inaccessible to creditors. Although some lawmakers had feminist motivations, they were also responding to legal confusion caused by the first wave of laws, as well as a continued desire to protect family assets from creditors and to protect married women from irresponsible husbands. Finally, a third group of laws focused on married women's rights to wages, which had traditionally been seen as distinct from real property, and belonging exclusively to the husband. Despite these dramatic changes in property law, women still faced a legal environment with meaningful illiberal elements that enforced a male-female hierarchy within the marriage relationship and limited women's ability to fully participate in the market, including *de jure* and *de facto* limitations on entry into various careers and a lack of legal recognition for the economic value of work performed in the home.

In this introduction, I outline the major legal changes that took place during this period in greater detail. I then review literature on the importance and impact of MWPAs. I conclude with a roadmap of the dissertation.

I. Married Women's Property Acts, 1839-1840

Prior to the 1840s, married women's property rights and their legal and economic identities more broadly were governed by a legal doctrine known as *coverture*. This doctrine was adopted by all of the colonies, and eventually by most states.¹ Linda Kerber

¹ See Marlene Stein Wortman, *Women in American Law: From Colonial Times to the New Deal* (New York: Holmes & Meier, 1985), 14. A few states adopted civil law approaches to marriage from Spanish or French traditions. Scholars have differed on whether the community property laws adopted by these states had a meaningful impact on either the experiences of women under this system or the pace of reforms. I

describes coverture as being “based on the assumption that married women had neither independent minds nor independent power.”² Accordingly, upon saying her marriage vows, a woman’s legal identity was completely subsumed into her husband’s; she ceased to have an independent identity under the common law. Coverture entailed a whole host of legal disabilities, many of which related to married women’s economic rights. Married women could not own property, had no right to their wages, and could not write wills, sign legal contracts, or take out mortgages or other loans.³

Although the common law was strict in theory, exceptions abounded. For instance, in some states married women could run businesses (and engage in activities like contract-writing or loans as part of those businesses), at least under certain circumstances. Called *feme sole traders*, these women might be permitted to engage in market economic activity if, for example, her husband provided written permission, if her husband abandoned her or otherwise failed to provide for her, or if the woman sought a special exemption from the state legislature or a local court.⁴ These exceptions to the common law varied dramatically among states, and of course did not apply more generally to all married women, but rather to those who fit specific qualifications and had the resources to avail themselves of these laws. Further, although women who qualified under these statutes had some measure of independence in running their businesses and making independent legal decisions, their profits ultimately still belonged to their husbands.⁵ A woman who was abandoned by her husband might be able to run a business in his absence in order to support herself and her children, but she faced the potential of losing any economic gains from this business if he chose to return.

Another major exception to coverture was the use of equity courts to make special arrangements outside of common law rules. Originally based in appeals to the king’s chancellor, chancery or equity courts developed in Britain as a way to “offer[] special remedies when none were available at [common] law;” they were based “in the concept of fairness as opposed to legal strictness.”⁶ Not every state adopted equity courts, but those that did allowed married women to make use of legal instruments that would not have been available to them in common law courts, where they had no independent legal identity. Before marriage, women (or their families) could negotiate marriage settlements that altered the common law of coverture in a variety of ways. For example, the wife’s separate property might be set aside so that it was not accessible to the husband, but instead was managed by a third-party trustee, often a male family member like a father or brother. Other women negotiated more autonomy, in which the married woman could make independent decisions with regard to her separate property, as if she were single.⁷

examine community property laws more closely in Chapter 3, and find that they did not have a significant impact of the timing of MWPA passage.

² Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980), 152.

³ Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 15.

⁴ *Ibid.*, 44-56.

⁵ *Ibid.*, 57.

⁶ Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982), 20.

⁷ *Ibid.*, 75-79.

However, even to the extent that these antenuptial agreements did provide women with relatively expansive powers, equity courts had their limitations. They were only available in states that had such courts, and many states either never established equity courts or eliminated them at some point. Particularly in Northeastern colonies, equity courts were often seen as costly and slow, as well as having an unsavory “association with the prerogative powers of king or governor.”⁸ Additionally, even where equity courts existed, they were expensive and required legal expertise (or access to legal representation) to take advantage of, and so only wealthier women could utilize them in practice.⁹

Starting in the late 1830s, states began to codify married women’s economic rights in ways that both extended some of the exceptions to coverture, making them more widely available to married women from a broader cross-section of society; and liberalized married women’s economic rights more broadly, for example, by giving them ownership over wages, which had never been available prior to this period. Although each state dealt with MWPAs in different ways, some broad patterns emerge.

First, despite a lack of federal intervention, these laws were commonplace by the 1870s and near-universal by 1920. Every state passed some form of MWPA by 1920, and all but two passed laws that went beyond token property rights and provided meaningful rights expansions for married women.¹⁰ Although these laws were certainly not an end to women’s struggle for economic equality, they did represent a significant liberalization of their place in the economic world as compared to coverture. Laws spread among states in a variety of ways: some states copied language from MWPA passed elsewhere, others passed these laws in an attempt to stay competitive, and still others may have adopted MWPA because they faced similar economic conditions. Regardless, these laws became widespread without a federal standard or coercion from Congress or the Supreme Court.

Second, the content of MWPA varied, ranging from laws that gave married women the title to land and other property, but nothing more, to laws that granted broad rights to own, sell, and mortgage property, including wages, as well as to sign contracts and appear in court. In any given state, these laws tended to be expanded and liberalized over time. Mississippi’s MWPA, discussed in further detail in Chapter 2, are a good example of a typical way in which these laws were passed. A debt relief law was passed in 1839 that set aside married women’s property, especially slaves, as being exempt from her husband’s debts, but married women were granted no additional economic rights. Over the next forty years, married women incrementally gained additional economic rights, such as the ability to take out a mortgage for certain purposes and the ability to make contracts concerning their separate property. In 1880, Mississippi’s legislature

⁸ Salmon, *Women and the Law of Property*: 11.

⁹ Peter Winthrop Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, Studies in Legal History (Chapel Hill: University of North Carolina Press, 1995), 31-32. See also Norma Basch, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," in *Women and the American Legal Order*, ed. Karen J. Maschke (New York: Garland Pub., 1997), 44-45.

¹⁰ R. Richard Geddes and Sharon Tennyson, "Passage of the Married Women's Property Acts and Earnings Acts in the United States: 1850 to 1920," *Research in Economic History* 29(2013). Joan Hoff, *Law, Gender, and Injustice* (New York: NYU Press, 1991). Florida and Alabama were the two states that had more limited laws in 1920.

passed a law that stated: “The common law, as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated,” and in 1890, these rights were enshrined in Mississippi’s state constitution.¹¹

Third, while the motivations behind these laws varied, almost all ultimately linked back to the interests of male legislators and constitutional convention delegates, who did not need to respond to the female vote in a period before women’s suffrage. In periods of economic crisis, MWPAs were often passed to provide debt relief to families, often with other debt relief measures that were unrelated to women’s rights. Wealthy and middle class fathers hoped to protect family money, inherited by or gifted to daughters, from imprudent, lazy, or careless husbands. Business interests pushed for clearer, simpler property rules that would not impede the flow of capital or disincentivize investment, borrowing, and market labor. And finally, men in western states in particular had to compete for female migrants and attempt to attract them to their region.

Finally, multiple state-level venues were important for shaping the path of MWPAs. Married women’s economic rights were contested not only in state legislatures, but also at state constitutional conventions and in state courts. Constitutional conventions were an important site for the consideration of rights expansions by delegates, as I explore further in Chapter 3. Some conventions included pre-existing statutes as state constitutional provisions, increasing the level of protection for these rights but not necessarily expanding them; others actively liberalized married women’s economic rights, including new provisions that had not previously been passed through state legislatures. State courts were also a significant venue for activity around MWPAs. MWPAs themselves were typically short (sometimes a few paragraphs, but often just one or two sentences), and state courts were left to fill in the details. For the most part, state courts interpreted these laws narrowly, with an eye toward protecting married women. This led to a complex legal environment in which the status of loans and contracts involving married women was unclear and unsettled, encouraging further legislative activity.

II. The Impact of Married Women’s Economic Rights Reform

The consequences of MWPAs had a meaningful impact on women and women’s organizations. Scholars have identified positive impacts on women’s socioeconomic status, as well as effects on the organization of the growing women’s rights movement. However, other work argues that some key property rights remained out of reach for married women, even after the passage of MWPAs in most states. Overall, the effects of these laws were significant and meaningful, but limited, which is not surprising considering the origins and goals behind the acts.

Despite the limitations of MWPAs, these laws did have important downstream effects, both on the economic conditions of women and on their organizational efforts. Early debt relief laws likely did little to directly impact married women’s economic

¹¹ *An Act for the protection and preservation of the rights and property of Married Women*, Mississippi Laws (1839); *Revised Code of the Statute Laws of the State of Mississippi*, Section V, On the Separate Property of Married Women, Articles 23-26 (1857); *Revised Code of the Statute Laws of the State of Mississippi*, Chapter 23, Article V. Property of the Wife (1871); *Revised Code of the Statute Laws of the State of Mississippi*, Chapter 42 (1880); *Constitution of Mississippi*, Article III, Sec. 94 (1890).

rights, since they involved ownership rights only, but not the right to control separate property or broader economic rights such as the right to contract, the right to sue, or the right to be sued. Later laws that expanded the rights of married women to match those of *femes soles*, or single women, extended these crucial economic rights to all women. However, many scholars have suggested that the consequences of MWPAs went beyond the direct impact of granting specific economic rights listed in the acts.

Scholars have presented suggestive evidence that organization around property laws and expanded economic opportunities for women stemming from the statutes encouraged the formation of women's suffrage groups. Peggy Rabkin discusses both causes and consequences of MWPAs, and argues that these acts "triggered the demand for female suffrage and not vice versa."¹² In her study of the passage of a series of MWPAs in New York, she argues that few female activists even knew about, much less agitated in favor of, the earliest laws in that state. Rather, the passage of MWPAs encouraged women to organize and demand further liberalization of their legal status, both in the area of property and otherwise.¹³ However, she argues that, especially after women gained initial property rights, their focus was more on suffrage rather than expanding and clarifying property rights through all-male legislatures.¹⁴

Rick Geddes and Sharon Tennyson also argue that MWPAs influenced the creation of women's suffrage organizations in at least some states, possibly through "altering the role of women due to increased decision autonomy and greater bargaining power within the household."¹⁵ They examine forty-two states for which they were able to obtain dates for both MWPAs and the formation of women's suffrage organizations, and find that laws granting married women economic rights predate suffrage organizations in most of these states.¹⁶

Beyond their impact on the women's movement, scholars have also examined the impact of MWPAs on educational and economic opportunities for women. Geddes and Tennyson discuss the relationship of MWPAs to compulsory education for girls, and find that compulsory education laws for girls also tended to post-date MWPAs.¹⁷ Geddes, Lueck, and Tennyson also examine girls' schooling at ages just past those covered by compulsory schooling laws, and find that after the passage of MWPAs, parents increased their investment in girls' education above and beyond what was required by law.¹⁸ Similarly, Evan Roberts finds that the passage of an MWPA in a state led to increased school attendance among children and to young women choosing to delay marriage. Although the effects on labor force participation were not immediate, Roberts views both

¹² Peggy A. Rabkin, *Fathers to Daughters: The Legal Foundations of Female Emancipation* (Westport, Conn.: Greenwood Press, 1980), 12.

¹³ *Ibid.*, 109-11.

¹⁴ *Ibid.*, 156.

¹⁵ Geddes and Tennyson, "Passage of the Married Women's Property Acts," 168.

¹⁶ *Ibid.*, 166.

¹⁷ *Ibid.*; *ibid.*

¹⁸ Rick Geddes, Dean Lueck, and Sharon Tennyson, "Human Capital Accumulation and the Expansion of Women's Economic Rights," *Journal of Law and Economics* 55, no. 4 (2012).

trends as increased investment in the human capital of girls and women, which then went on to influence increased female labor-force participation in the early twentieth century.¹⁹

B. Zorina Khan studies the economic activity of women before and after the passage of MWPAs. She finds that women recognized and took advantage of the new rights afforded them by MWPAs through an examination of patent records. Patents filed by women jumped in the years after reforms were passed that allowed married women to own the profits flowing from their patents and to defend those patents in court.²⁰ Carole Shammas also examines economic activity by women, by analyzing data on women's participation in probate activity. She finds that after MWPAs were passed, women were more likely to be included in wills as heirs, and the amount of wealth they willed to others upon death increased.²¹

While economic relations between married women and third parties were unquestionably altered by the MWPAs, the transformation to the husband-wife relationship is much less clear. Indeed, many of the legal cases from this period did not involve disputes between husband and wife, but rather cases in which spouses joined together in court in disputes against creditors, or in which judges determined which spouse could legally claim damages from a third party. Reva Siegel has also noted that the economic impact on married women was limited and did not encompass all the goals envisioned by feminist activists for the transformation of economic relations between husband and wife.²² Particularly before the Civil War, feminist organizations that advocated around married women's property rights argued for joint property arrangements that would have acknowledged the value of women's unpaid work in the home and given wives joint ownership over family assets as a result.²³

MWPAs typically did not address work women did for their families, and when they did, specifically exempted this type of work from the laws, under the doctrine of marital service, which stated that women owed domestic service to their husbands as part of the marriage contract.²⁴ This principle continues to be applied even in the modern day, as in a 1993 case, *Borelli v. Brusseau*. In *Borelli*, a California court nullified an agreement between a husband and wife for her to provide care for him during an illness in exchange for an increased inheritance, writing that "[such] negotiations are antithetical to the institution of marriage...even if few things are left that cannot command a price, marital support remains one of them."²⁵

The doctrine of marital service reached outside the home as well, limiting the degree to which wives could work for their husbands outside the home and still retain a

¹⁹ Evan Roberts, "Women's Rights and Women's Labor: Married Women's Property Law Reform and Labor Force Participation, 1870-1900," in *Population Association of America 2008 Annual Meeting* (New Orleans 2007), 103-04.

²⁰ B. Zorina Khan, "Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790-1895," *Journal of Economic History* 56, no. 2 (1996).

²¹ Carole Shammas, "Re-Assessing the Married Women's Property Acts," *Journal of Women's History* 6, no. 1 (1994): 21.

²² Reva B. Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earning, 1860-1930," *Georgetown Law Journal* 82(1994).

²³ ———, "Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880," *Yale Law Journal* 103, no. 5 (1994).

²⁴ ———, "Modernization of Marital Status Law."

²⁵ *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (1993). Cited in Joan C. Williams, "Do Wives Own Half? Winning for Wives After Wendt," *Connecticut Law Review* 32(1999): 257-58.

right to their earnings. For example, a New York court found in the late 1920s that a husband could not hire his wife to work in his business for a salary, because she owed him this work as part of the marriage relationship.²⁶ More generally, married women in the workforce (or hoping to enter the workforce) were at the mercy of administrative policies on the part of employers, due to a lack of legal protection against gender discrimination. Even where single women might be hired, married women were often at a disadvantage. Mary Smith examined public school policies on the hiring and retention of married women, and found that, in 1929, a majority of school districts in cities would not hire married women and forced women who got married to resign either immediately or at the end of the school year.²⁷ Similar policies were common among other employers. Thus, MWPAs ultimately had wide-ranging, significant impacts on women, but with limited bounds.

III. Dissertation Roadmap

In this dissertation, I analyze the reform process that led to the liberalization of married women's economic rights. Chapter 1 outlines my theoretical argument. I make three related but distinct claims about the path of reform that led to the passage of MWPAs. First, I argue that rights reform was not the result of a simple process of liberalization. Rather, multiple political traditions interacted to produce meaningful but incomplete reform. Scholars have identified various illiberal traditions or political orders that have had a meaningful influence on American politics, two of which are particularly relevant to married women's economic rights reform.²⁸ Feudalism provides the backdrop of rights reform during this period; the doctrine of *coverture* had feudal origins and was adopted into American law with few changes, even as the economy was changing dramatically and growing increasingly commercial. The disconnect between the idealized husband-wife economic unity envisioned by *coverture* and the economic reality of the 1800s created liberalizing forces. Political elites passed laws that used an expansion of married women's economic rights to provide relief for struggling families in times of economic hardship, as well as laws that aimed to simplify and clarify legal rules to provide a better fit with a growing commercial economy. At the same time, strongly-held beliefs about gender hierarchy influenced the form of MWPAs and limited their reach. Legislators, convention delegates, and judges typically took a paternalistic view toward women in crafting MWPAs, focusing on the protective aspects of the legislation. Many proponents of the bills were fathers who sought to protect their daughters (and especially family wealth that daughters might inherit). Ultimately, these three traditions – feudalism, liberalism, and gender hierarchy – shaped the way in which MWPAs were written and interpreted, resulting in a path of development of greater (but not complete) liberalization over the 1800s and early 1900s.

²⁶ Mary Phlegar Smith, "Legal and Administrative Restrictions Affecting the Rights of Married Women to Work," *Annals of the American Academy of Political and Social Science* 143(1929): 259.

²⁷ *Ibid.*, 261.

²⁸ See Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991). See also Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

Second, I argue that reform was decentralized, diffuse, and dominated primarily by the interests of male actors. Major periods of rights expansions or liberalization often involve a significant component of group mobilization, with strategic, coordinated activity on one or both sides of the issue at hand. For instance, it would be difficult to analyze the development of labor legislation in the early 20th century without referencing the labor movement and organization by business interests, as well as the importance of women's voluntary organizations, as I discuss further in Chapter 4. In the case of MWPAs, however, women's organizations played a relatively minor role. Although they did sometimes petition state legislatures and constitutional conventions, women's organizations were often more focused on suffrage at the state or national level. Women's groups during this period typically "[believed] the vote the essential political instrument by which women could improve their status," and thus other issues were often secondary to the fight over suffrage.²⁹ Further, many MWPAs were passed before the formation of state-level suffrage organizations. Ultimately, because feminist groups were either unorganized or focused primarily on other issues, and because women were unable to vote and provide pressure at the ballot box, men's interests were the best represented in debates over the expansion of married women's economic rights. In this light, it is interesting that these reforms were passed at all.

The lack of an organized, national campaign for (or against) the liberalization of married women's economic rights also influenced the decentralized nature of these reforms. Not only were MWPAs not the focus of national organizing, but the national government was uninvolved in setting a nation-wide standard for MWPAs. Congress did pass an MWPA for women living in Washington, D.C. in 1869, but never passed a nationally-applicable federal law on this topic that applied to the states.³⁰ Instead of policies spreading through a top-down process, MWPAs spread through policy diffusion: copying, borrowing, learning, and competing. This decentralized process meant that states passed MWPAs at different times and the comprehensiveness of these policies varied.

Finally, I explore the role of courts in shaping the path of married women's economic rights reform. Courts during this period are typically viewed as being in highly conflictual relationships with elected bodies, largely over labor legislation. Court-legislature dynamics were much more cooperative when it came to married women's economic rights, with both venues tending to make incremental changes. Courts typically interpreted MWPAs narrowly, with an eye toward accepting the new legislation but also leaving in place core components of gender hierarchy, in particular a paternalistic attitude toward women that legislatures largely shared. Despite the deferential nature of their rulings, courts still played an important role in influencing how reform played out in each state. Rulings that provided married women with partial rights and attempted to protect them from negative market outcomes often produced highly complex and confusing legal rules that often left creditors on the hook for debts that they appeared to have made in good faith. Thus, a narrow approach to interpretation ultimately led elected bodies to push for broader, more liberal reforms.

²⁹ Jean H. Baker, *Women and the U.S. Constitution, 1776-1920*, ed. Robert B. Townsend and Liz Townsend, *New Essays on American Constitutional History* (Washington, D.C.: American Historical Association, 2009), 38.

³⁰ *Ibid.*, 22.

In Chapter 2, I expand on these theoretical underpinnings with a series of case studies. I selected four states to examine in greater depth: New York, Mississippi, South Carolina, and California. These states provide a good cross-section of the experience of U.S. states, encompassing states from the North, South, and West; states that passed their first MWPAs in state legislatures and those that did so in constitutional conventions; states that passed MWPAs earlier and later, and finally states with both conservative and liberal political cultures. These case studies illustrate the multiple pathways by which states came to pass initial MWPAs and liberalize them over time.

New York is an important case because it is probably the state with the most organized feminist activity; certainly it was central for women's organizations. Still, while individual women and women's groups sometimes did speak about or present petitions on married women's property rights, male interests were nonetheless central to rights reform. In New York, major issues were fathers' concern for protecting family property, the protection of women from irresponsible husbands, and simplifying and bringing marital property law more in line with a less land-based and more commercial economy.

At the other end of the ideological spectrum were Mississippi and South Carolina, where there was little to no women's organizing around property issues, and where other types of policies concerning women (such as divorce) typically lagged behind the rest of the country in terms of liberalism. Despite this seemingly unfriendly cultural environment, Mississippi was actually the first state to pass an MWPA, almost entirely for debt relief purposes. South Carolina's came later, after the Civil War, at its Reconstruction constitutional convention. This provision, as well, was largely focused on providing debt relief and protecting women who were otherwise seen as helpless. Nonetheless, both states ultimately expanded married women's property rights significantly despite these inauspicious beginnings.

Finally, California represents a Western state where the gender ratio was unbalanced, and politicians were concerned about attracting women to the state. As a former Spanish colony, delegates at California's first constitutional convention also had to consider not only how British (and now a significant number of years of American) common law and reforms to the common law treated married women's economic rights, but also how Spanish civil law dealt with these issues. While California dealt with many of the same issues as other states – particularly, a paternalistic desire to protect women and the goal of less complex and easier-to-understand legal rules around property—it did so in a markedly different context.

In Chapter 3, I take a broader look at MWPAs in the states with an analysis of the 48 states that were part of the Union during the period of the study. In this chapter, I examine three hypotheses related to the timing of MWPA passage: state-level partisanship, constitutional conventions, and policy diffusion. I find that both parties were willing to push for expanded married women's property rights; various measures of state-level partisanship have no effect on whether MWPAs were passed early or late. Further, I take a closer look at Southern Constitutions after the Civil War, and find that both Reconstruction and Redemption constitutional conventions – otherwise at opposite ends of the political spectrum – both included roughly equivalent MWPAs in state constitutions. I find that constitutional conventions in general were important sites for rights reform; MWPAs were more likely to be passed in years when a new constitution

was ratified. Finally, I explore the spread of MWPAs through the states, and find that states tended to pass these laws sooner when neighboring states had previously passed them. Along with qualitative evidence presented in this chapter, these results suggest a pattern of policy diffusion in which state officials adopted these new policies at least in part based on the experiences of other states.

In Chapter 4 I examine the longer-term impact of the MWPA reform process on later, related but distinct reform efforts, specifically efforts to pass protective labor legislation concerning female workers in the 1880s through 1937. These reform efforts differed from MWPAs in that they were driven by strategic, active interest groups, often led by women reformers. However, the legacy of MWPAs remained important, both in providing an important pre-condition for the terms of the debate – the idea that women had a right to contract at all, and that it might be comparable to men’s right to contract – and in providing gender-specific justifications for protective laws, often rooted in paternalism and gender hierarchy. I examine both legislative strategies and court rulings, and argue that the protection-based arguments developed in defense of MWPAs cast a long shadow on legislative and judicial treatment of working women well into the twentieth century.

Chapter One: Married Women's Property Acts: Multiple Orders in Multiple Venues

Scholars of American Political Development have written extensively on the role of liberalism in American political culture. A major piece of this story is the idea that Americans were not, after all, 'born liberal,' and instead the process of liberalization and the limits of liberalism are crucial for understanding political development in the United States. However, the liberalization of married women's economic rights in the mid-1800s and early 1900s has received less attention in these studies. This early period of development is particularly important for understanding the processes of liberalization and rights expansions in the United States because these reforms took a different trajectory than both labor and race reforms, each of which has received more attention from scholars of APD.

We often think of rights reforms as being the result of strategic actors battling it out in political or judicial arenas; for example, in the case of liberalization in the areas of both labor and race, group mobilization is a major piece of the story. However, this type of explanation does not fit well with the reforms envisioned by MWPA. In only two states (Utah and Idaho) did full women's suffrage precede the passage of the first MWPA in that state. Feminist organizations did sometimes organize around property issues, but their efforts were largely focused on suffrage demands in the post-bellum period. Further, these laws were often passed by legislatures and constitutional conventions that were otherwise hostile to women's rights and were generally anti-reform on a whole host of other issues. The driver of reform was not group mobilization in the traditional sense, but rather male legislators and judges whose motivations were often anything but feminist, instead being focused on a variety of economic and paternalistic goals. These legislators pursued expansions of married women's property rights in a piecemeal fashion, granting additional rights as early laws proved unworkable or inefficient, but not necessarily with an end goal of freeing women from all the disabilities of the feudal doctrine of *coverture*. And, unsurprisingly, though the reforms that happened during this period meaningfully changed the economic position of married women, they did not completely eliminate these disabilities.

The reform of married women's economic rights can also help us re-think the role of courts in the mid-1800s through the early 1900s. The typical view of courts during this period is one of unabashed conservatism, often in serious conflict with legislatures over issues of labor reform and other progressive reforms. In contrast, legislatures and courts worked more cooperatively when it came to the reform of married women's property rights, with courts largely approaching MWPA from a position of deference to legislatures. Early laws provided for limited new rights for married women, which courts tended to interpret narrowly and in line with the intentions of legislators. However, the creation of limited economic rights led to a confusing legal environment that prompted legislators to pass new laws expanding married women's economic rights further.

In this chapter, I develop a theory of rights reform that is motivated by the clash of multiple political orders in multiple venues and the demands of actors outside the group receiving new rights. First, I review literature relevant to the study of liberalism in American political development and outline a theory of how liberal and illiberal elements interacted during the reform process of married women's economic rights. In particular,

I discuss how these elements interacted in a federal system full of multiple venues for policy-making (state constitutional conventions, state legislatures, and state courts). I argue that married women's economic rights reform was much more diffuse and decentralized than our typical narratives of liberalization and rights expansion, because group mobilization was not the main driver of reforms and because these reforms occurred almost entirely at the state level. I argue that this episode of rights expansion helps us understand both the possible pathways for rights reform when the group in question does not have the vote, and the ways in which an indirect reform process can lead to incomplete liberalization of rights. I further argue that this case helps flesh out our picture of courts in the Gilded Age, with important implications for understanding how the interactions of legislative and judicial bodies shape reform.

I. Liberalism and Its Critics

Scholars of American political development and political culture have traditionally viewed American political culture as liberal at its core. Most prominently, drawing on the work of Alexis de Tocqueville, Louis Hartz has argued that because America had neither a feudal history nor a true revolution, it took liberal ideals and made them dogma. He writes of "a people 'born equal'"³¹ trapped by a liberal mindset: all mainstream discourse begins and ends with Locke.³² Other scholars have echoed the theme of a liberal consensus in different forms. Samuel Huntington argues that an "American Creed" based in large part on themes of liberalism and individualism has been broadly supported in American society for at least two hundred years.³³ Theodore Lowi describes two distinct types of liberalism predominant in different periods of American history, but nonetheless agrees that Hartz's older-style liberalism was dominant until the 1930s.³⁴

Various scholars have disputed the idea of a liberal consensus in American political culture. J. David Greenstone challenges Hartz's model of a consensual liberal culture, arguing that while America's political culture has been largely liberal, it has been anything but consensual – while liberalism may provide a sort of "boundary condition" for American political thought, the conflictual nature of this process is key to understanding it.³⁵ Other scholars have highlighted alternate cultural models that co-existed alongside liberalism either at particular moments or throughout American history. Rogers Smith, for instance, argues that civic republicanism and ascriptive hierarchies have both been important alternate cultural norms in the United States, at times more dominant than liberal ideals.³⁶ James Morone argues that reform movements in particular have often been guided by non-liberal thinking – instead, these movements have been guided by a 'democratic myth' that the country's citizens are capable of uniting behind

³¹ Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, Inc., 1955), 309.

³² *Ibid.*

³³ Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge, Mass.: Belknap Press, 1981).

³⁴ Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York, : Norton, 1969).

³⁵ J. David Greenstone, "Against Simplicity: The Cultural Dimensions of the Constitution," *University of Chicago Law Review* 55(1988).

³⁶ Smith, *Civic Ideals*.

one common goal for the good of the community.³⁷ And Karen Orren has written about the persistence of a feudal order in labor relations that impacted employers and employees until the early 20th century.³⁸ Some of these scholars highlight in particular the persistence of illiberal policies that have had negative effects on women: Orren notes briefly that marriage was another unusual area where feudal orders persisted, while Smith spends considerably more time discussing the role of ascriptive hierarchies in structuring gender-based hierarchies.

Illiberal Orders: Feudalism and Ascriptive Hierarchies

Two of the illiberal orders highlighted by critics of Hartz are particularly relevant to my study of the reform of married women's economic rights. These illiberal orders interacted with a growing pressure for liberalization to create incomplete reform. One of the most prominent departures from the liberal consensus model is Orren's *Belated Feudalism*. She argues that, contrary to traditional liberal accounts of American political culture feudalism had a stronghold in American law and government that lasted well into the twentieth century: "a state within a state - dividing public power, limiting the reach of legislation, setting the bounds of collective action."³⁹ Specifically the common law principle of master and servant clearly delineated a hierarchical status between employer and employee. Orren argues that this arrangement was uniquely insulated from electoral pressures because the law of master and servant was adjudicated solely in courts of law. Labor law was effectively cut off from democratic politics, administered by the courts and remarkably resistant to change from democratic, liberal institutions. It was not until *NLRB v. Jones and Laughlin Steel* (1937) that the U.S. Supreme Court abandoned its use of feudal principles to govern labor and liberal governance emerged. With this watershed case, legislatures, and in particular Congress, were able to gain control over labor law and apply liberal principles to this area of law.

Smith also presents a distinctive view of an illiberal America in *Civic Ideals*, focusing on inegalitarian ascriptive hierarchies through the lens of what it has meant to be a citizen in America. Ascriptive hierarchies are based on "assign[ing] people to places in hereditary hierarchical orders...on the basis of such ascribed characteristics as race, gender, and the usually unaltered nationality and religion into which people were born."⁴⁰ Like Orren, Smith critiques accounts of American politics based on the premise that liberalism has been the prevalent and dominant political culture throughout U.S. history. He argues that scholars following in the footsteps of Tocqueville and Hartz have tended to minimize the importance of inegalitarian ascriptive hierarchies in shaping American politics and law. These scholars often characterize racism, sexism, and other 'isms' as hypocritical afterthoughts to the central liberal culture rather than core cultural principles that have been central to shaping political systems and public policies.

³⁷ James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government* (New York: Basic Books, 1990).

³⁸ Orren, *Belated Feudalism*.

³⁹ *Ibid.*, 3.

⁴⁰ Smith, *Civic Ideals*: 3. Smith also addresses civic republicanism as an additional alternative tradition to liberalism.

Smith's multiple traditions argument "holds that American political actors have always promoted civic ideologies that blend liberal, democratic republican, and inegalitarian ascriptive elements in various combinations designed to be politically popular."⁴¹ With regard to gender specifically, Smith notes that even as American colonists and revolutionaries rejected aristocratic hierarchies from the British, the new American society embraced gender hierarchies. The economic realities of a frontier economy sometimes afforded American women limited economic opportunities not available to their British counterparts, but these options were often closed off as the population grew and in any case did not meaningfully change their legal status as a group.⁴² Smith briefly discusses MWPAs specifically, noting that "although these acts had liberalizing effects, they did not reveal any major ideological shift toward egalitarian gender views."⁴³ Motivated by economic and paternalistic concerns that were more politically palatable than the views of feminists, these acts liberalized property law without eliminating ascriptive hierarchies; rather these two orders existed side by side.

Similarly, although her work is not specifically a critique of liberalism, Linda Kerber notes the anti-republican elements of *coverture*, the legal doctrine of marital unity that gave a husband control over his wife's legal identity and property upon marriage. She writes that "[c]overture was based on the assumption that married women had neither independent minds nor independent power," an assumption that separated women from politics and the civic community more generally.⁴⁴ For instance, after the Revolutionary War, many judges insisted that the wives and widows of British loyalists should not be punished alongside their husbands, because they had no independent capacity to decide upon their political loyalties.⁴⁵

II. Multiple Orders and Married Women's Economic Rights Reform

The reform of women's economic rights in the 1800s and early 1900s involved the interaction of at least three different political orders or political traditions. At the start of this period, women's economic rights were governed by a feudal, common law doctrine, *coverture*, that viewed married women as civically and legally 'dead' after marriage – as far as the legal system was concerned, a husband and wife were united into one legal identity, one governed by the husband. With limited exceptions, married women could not own property, make contracts, sue, or be sued.

As a capitalist economy grew and developed, this feudal order began to clash with a liberal order in which economic actors increasingly saw a need to free up capital from complicated rules and incorporate women more fully into the economy. Early laws were often seen as a form of debt relief in difficult economic times, among other strategies used by lawmakers to the same effect. These early laws also sought to protect women from the economic misfortunes and misadventures of their husbands. As conflicts stemming from this first wave of laws entered the court system, courts tended to interpret these laws narrowly, typically with an attitude of deference to legislatures. However,

⁴¹ Ibid., 6.

⁴² Ibid., 68-69, 110.

⁴³ Ibid., 233.

⁴⁴ Kerber, *Women of the Republic*: 152-53.

⁴⁵ Ibid., 136.

partial rights for married women presented serious problems to a growing commercial economy. It was difficult for creditors to determine when married women would be liable for debts they had contracted, and capital could be tied up in the court system rather than used productively. The legal confusion from the first wave of laws led to new reforms that gave married women more power to sell, mortgage, and otherwise use their separate property in various ways typically not envisioned by the first set of laws, that is, beyond simply holding titles that were then inaccessible to creditors.

At the same time, an order of gender hierarchy that was related to but distinct from the feudal order of coverture colored the policy decisions of political actors. A strict hierarchical relationship between husband and wife was clearly an important part of feudalism, and this tradition persisted in both legislative and judicial venues even after major components of the feudal order were dismantled. In addition to concerns about liberalizing property rights in a changing economy, rights reforms were also motivated by paternalistic concerns. The paternalistic view of wives viewed the sexes as fundamentally unequal, but in a way that was distinct from a feudal vision of husband and wife as one unit. Male legislators and judges attempted to leave unchanged the husband-wife relationship to the extent possible, and to protect married women, who were often viewed as helpless and in need of government protection.

Despite the dramatic changes in property law that took place during this period, the reform of women's economic rights remained incomplete: women still faced a legal environment with meaningful illiberal elements based on an enduring order of gender hierarchy. These illiberal elements enforced a male-female hierarchy within the marriage relationship and limited women's ability to fully participate in the market. They included conservative divorce laws in many states that gave the economic advantage to men, laws barring women from certain occupations, and a lack of legal protection from discrimination in employment.

Feudalism: Coverture as a Political Order

While Orren focused on feudalism in the arena of labor, feudal remnants were not limited to the law of master and servant. Marriage law, particularly property arrangements between husband and wife, were also transplanted wholesale from England and, like the law of master and servant, were largely administered by courts according to feudal, common law arrangements. In the early 1800s, married women lived in a world in which their economic rights were severely limited by the legal doctrine of coverture.

At the time of the founding, the U.S. states adopted the British common law as a default set of legal rules for courts to follow. Specifically, married women in the early 1800s could expect common law courts to assess their property rights according to the following doctrine:

By marriage, *the husband and wife are one person in law*: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a *feme-covert*; is said to be *covert-baron*, or *under the protection and influence of her husband, her baron, or*

lord; and her condition during her marriage is called her coverture.⁴⁶
[Emphasis added.]

Orren identifies three key aspects of a feudal system: (1) the “reliance of judges upon ancient precedent”, with that precedent coming from feudal sources in British law;⁴⁷ (2) the dominance of courts as opposed to legislatures as the central locus of decision making in a particular area of law;⁴⁸ and (3) an enforced hierarchical relationship based on status as opposed to autonomous individuals entering into a contract – with this relationship being “[incorporated into] the larger moral system of being and acting that was the reason of social existence.”⁴⁹ All three of these feudal elements are apparent in the doctrine of coverture, providing clear evidence of feudalism in the ‘old order’ of married women’s property law. While the first two elements were largely liberalized over the reform period described here, the hierarchical relationship between husband and wife was not fully dismantled.

First, judges relied on the feudal doctrine of coverture as outlined above. For example, in 1819, a New York court ruled that a married woman had no legal ability to make a contract, and thus a contract signed before her husband’s death was void, writing that “[it] is a settled principle of the common law that coverture disqualifies a feme from entering into a contract or covenant, personally binding upon her.”⁵⁰ The doctrine of coverture dated back to the Middle Ages and referred to the husband as a ‘baron,’ imposing a whole host of legal disabilities upon married women. The system originated at least in part in feudal military requirements, which necessitated that all land-holders be capable of fulfilling military duties for their lord or king.⁵¹ Until 1888, the leading American treatise on domestic relations was titled *The Law of Baron and Femme of Parent and Child, Guardian and Ward, Master and Servant, and of the Powers of Courts of Chancery*, at which point the reference to spouses was changed to *Husband and Wife*, though the implication of hierarchy remained.⁵²

Second, governance of women’s economic activity was lodged primarily in the court system. To the extent that married women could escape the strictures of coverture, it was through a parallel system of equity or chancery courts that allowed individual women the ability to petition for special exemptions. Equity courts, modeled on the British system, allowed for special petitions to be brought before judges when the common law was considered to be too strict or harsh. These courts provided some measure of relief, but were largely limited to wealthier women.⁵³ Still, equity courts tended to interpret contracts between husbands and wives narrowly, and with greater

⁴⁶ William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765), 430.

⁴⁷ Orren, *Belated Feudalism*: 15.

⁴⁸ *Ibid.*, 15-19.

⁴⁹ *Ibid.*, 5-9, 72-73.

⁵⁰ *Jackson v. Vanderheyden*, 17 Johns 168 (1819), 168.

⁵¹ Peggy A. Rabkin, "The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and Its Contribution to the Passage of the Early Married Women's Property Acts," *Buffalo Law Review* 24(1975): 688-89.

⁵² Roberts, "Women's Rights and Women's Labor: Married Women's Property Law Reform and Labor Force Participation, 1870-1900," 118.

⁵³ Bardaglio, *Reconstructing the Household*: 31-32.

deference to creditors than to married women or widows, meaning they were no sure guarantee that a woman's property would be protected upon becoming married.⁵⁴ Linda Kerber describes equity rules allowing married women some property rights as "judge-made law, independent of legislative direction, conservative in tone and intent."⁵⁵ In many states these courts did provide a limited way for married women to protect property they brought into a marriage, through trusts, separate estates, antenuptial agreements or other methods.⁵⁶ However, as this property 'ownership' was granted by special petition, each situation was treated in an ad hoc manner and was not linked to broader economic rights such as the right to contract.

Finally, there was a clear hierarchy between husband and wife just as between master and servant under feudal employment law. This hierarchy was based upon a person's status as a married woman, and specifically denied her any legal status separate from her husband. It was also tightly woven into the social fabric. At the 1846 New York Constitutional Convention, where delegates considered and ultimately rejected a MWPA, delegates discussed the potentially disastrous effects of such a change in law at length. One delegate argued that "[it] was not to be tolerated that the social relations of the whole people should be changed, and for the worse—that the married state should be disturbed as it existed under the benign principles of the common law..." while another contended that "[the effect of reform] would be pernicious in the extreme on the social condition of the state, being at war with the very essence of the marriage relation as it existed in the country."⁵⁷ Clearly, this status-based hierarchy played a major role in bolstering support for coverture as a political order. Though legislatures were legally capable of altering the common law to eliminate or alter feudal precedents like coverture, there were also important social and political reasons for legislators and delegates to oppose interfering in this way and to instead support continued court governance of women's economic rights.

However, by the end of this period, various aspects of the feudal order had been dismantled. Legislatures became seen as an appropriate venue to alter and expand married women's property rights, and courts largely cooperated with these efforts rather than striking down MWPA's wholesale. To the extent that, decades later, courts would intervene in economic issues affecting women and strike down legislative statutes regarding women's economic rights, it was largely to enforce liberal values of equal protection under the law rather than the feudal common law, in cases like *Reed v. Reed* (1971) and *Frontiero v. Richardson* (1973).

It is important to note that married women's economic rights were significantly liberalized during this period despite the lack of women's suffrage in most states, meaning that men (as constitutional convention delegates, legislators, judges, and voters) had incentives for making changes to a social and economic hierarchy that benefited them. As I discuss below, these incentives fall into two broad categories: purely economic incentives based on a changing commercial economy, and paternalistic incentives based on a desire to protect women in an inherently hierarchical system.

⁵⁴ Kerber, *Women of the Republic*: 141.

⁵⁵ *Ibid.*, 154.

⁵⁶ Basch, *In the Eyes of the Law*. See also Salmon, *Women and the Law of Property*.

⁵⁷ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (Albany: William G. Bishop and William H. Attree, October 5, 1846): 1060.

Liberalism: Growing Economic Demands

Despite the hierarchical view of the marriage relationship envisioned by coverture, a rapidly changing economy produced countervailing forces in favor of a new role for legislatures in defining the economic rights and responsibilities of married women. Economic upheaval and growing ranks of debtors from an increasingly broad spectrum of the class structure left legislatures searching for ways to protect family assets, which often meant protecting women's assets specifically.⁵⁸ And, with a growing middle class, there was a demand for more standardized procedures for separating and protecting women's property than could effectively be provided by equity courts.⁵⁹ As partial rights expansion came to many states, it created a confusing legal environment that left the rights of creditors and debtors deeply unsettled, leading states to liberalize married women's economic rights even further in a second wave of laws.

In the first wave of laws, legislators provided for limited new rights for married women. Many of the early MWPA's began as debt relief statutes, and were passed amid debate over a variety of debt relief measures, many of which had nothing to do with women. These laws typically guaranteed married women the right to ownership of her property, but not management and control of it. For example, in the case of real estate, "[I]and... could not be sold by the husband, but he could decide what was planted on it, or whether to rent the property, and how much rent would be charged."⁶⁰

In 1839, Mississippi became the first state to pass a MWPA. This act provided that married women could own separate property, including slaves. However, while the act provided that this separate property would be "exempt from any liability for the debts or contracts of the husband," this ownership did not seem to mean much other than exemption from liability for debts. Four of the five sections of the act dealt with ownership of slaves, and specified that even though married women could own slaves, "control and management of all such slaves, the direction of their labor, and the receipt of the productions thereof, shall remain to the husband."⁶¹

Thus, the Mississippi law seems to have been almost exclusively about debt relief, an issue of active concern in the state at the time. For instance, Mississippi would also be one of the first states to adopt a homestead exemption act, in 1841, which shielded a debtor's home from creditors up to a certain value.⁶² Other states to adopt early laws often followed a similar pattern, granting women the right to hold separate property that would be protected from her husband's debtors, but failing to extend significant rights to control this property or otherwise become engaged in the market as a full and equal participant. As in Mississippi, these laws were often passed or debated alongside

⁵⁸ On the diffusion of indebtedness, see Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001).

⁵⁹ Basch, *In the Eyes of the Law*: 37-38.

⁶⁰ Roberts, "Women's Rights and Women's Labor: Married Women's Property Law Reform and Labor Force Participation, 1870-1900," 108.

⁶¹ *Mississippi Laws* (1839) Chapter 46, p. 72.

⁶² *Mississippi Laws* (1841), Chapter 15, p. 113. See also Note, "State Homestead Exemption Laws," *Yale Law Journal* 46, no. 6 (1937): 1026.

homestead acts and other exemptions aimed at debtor protection.⁶³ Further, the litigation resulting from the Mississippi law, as well as that in most other states, largely did not center around women engaged in legal battles with their husbands, but rather around wives and husbands together fighting creditors or suing some other party for damages.⁶⁴

However, debt relief statutes providing for separate property for married women, as well as other early laws that expanded married women's property rights in a similar piecemeal manner, created economic problems of a different sort. While debt relief measures like homestead exemptions set aside a specific amount of property for each family that creditors knew would not be available to repay debts, partial rights to separate property for married women created a much more complex legal situation. States quickly learned that providing married women with the ability to, for example, own property but not mortgage that property, impeded the free flow of capital. Worse, many of the early statutes provided for partial control rights that created unpredictable, unclear contracts. For example, a married woman might be able to mortgage her property for some purposes but not for others. Laws granting partial rights to married women created a large number of legal cases in which creditors acting in good faith were unable to collect on debts because the legal situation surrounding married women's economic rights was so uncertain. The legality of a debt could turn on minute details surrounding the exact nature of the woman's separate property and the purpose and type of the debt contracted, with little way for the average creditor to determine whether the debt could be legally collected ahead of time. This legal confusion led to a classic capitalist concern for predictable, clear rules.

Thus, once states began to provide limited rights to married women, pressure from business and other capitalist interests grew to liberalize their place in the market. This pressure led to new reforms that expanded the rights of married women significantly. Further, as the economy became more commercialized and industrialized, giving women more opportunities to take on work outside the home, coverture created incentives against economic growth. Women who could not claim ownership to wages earned or business profits would have had less incentive to engage in market labor.⁶⁵ A growing middle class, that increasingly had access to property and a desire to protect and grow family wealth, demanded that protections for married women that had sometimes been available to the wealthiest families through equity arrangements be made available to all.⁶⁶ By 1920, all but one state had passed laws granting married women ownership, management, and control rights over real property roughly equivalent to single women, while all but four states had passed earnings acts granting control specifically over wages.⁶⁷ While this reform meaningfully changed the role of women in the economic sphere, reforms were largely limited to be contained as much as possible to the role of married women in interacting with third parties outside the family. Laws and court

⁶³ See Richard H. Chused, "Married Women's Property Law: 1800-1850," *Georgetown Law Journal* 71(1983): 1402. Suzanne D. Lebsack, "Radical Reconstruction and the Property Rights of Southern Women," *The Journal of Southern History* 43, no. 2 (1977): 202. Michael B. Dougan, "The Arkansas Married Woman's Property Law," *The Arkansas Historical Quarterly* 46, no. 1 (1987): 14.

⁶⁴ Smith, *Civic Ideals*: 233.

⁶⁵ Roberts, "Women's Rights and Women's Labor: Married Women's Property Law Reform and Labor Force Participation, 1870-1900," 112-13.

⁶⁶ Basch, *In the Eyes of the Law*: 37-38.

⁶⁷ Geddes and Tennyson, "Passage of the Married Women's Property Acts," 153.

rulings were often specifically written to leave the relationship between husband and wife as unchanged as possible.⁶⁸

Ascriptive Gender Hierarchies: An Enduring Order

Legislators, delegates, and judges during this period typically did not embrace a feminist ideology that demanded reform on the basis of gender equality, though there were certainly exceptions. In addition to legal rules that limited women's economic rights, strong cultural norms and institutional arrangements imposed a hierarchical husband-wife relationship independent of feudalism. This political order of gender hierarchy persisted even after a major reform period in which married women's economic rights were meaningfully liberalized.

One of the major motivations behind the passage of MWPAs was a paternalistic sense of protection on the part of legislators. Debates surrounding this issue are full of language seeking to protect women from husbands who marry only to gain access to women's property, and are subsequently lazy, incompetent, or downright criminal in managing that property. Fathers in particular were concerned with protecting family assets that might be inherited by daughters from sons-in-law who could not necessarily be trusted to protect inherited property.⁶⁹ In the *History of Woman Suffrage*, prominent suffragists wrote in 1881:

The selfishness of man was readily enlisted in securing woman's civil rights, while the same element in his character antagonized her demand for political equality. Fathers who had estates to bequeath to their daughters could see the advantage of securing to woman certain property rights that might limit the legal power of profligate husbands.⁷⁰

The male legislators and delegates writing MWPAs did not usually view women as autonomous individuals in a liberal framework, but rather held them to idealized standards that set them apart from the political and economic sphere. Particularly in the South, "a 'cult of true womanhood' developed...[holding] that women were more virtuous and more inherently noble than men but that because of such traits, they must be sheltered and protected from the world of men."⁷¹ Similarly, throughout the nation, MWPA proponents often espoused a view of women that echoed ideas of republican motherhood, that women were inherently more virtuous than men, so long as they stayed within a domestic sphere and spread republican values to their children through honorable motherhood.⁷² But, to stay in that domestic sphere, mothers needed protection

⁶⁸ For instance, many earnings statutes granted wives a right to wages, but only if they were earned in a business outside the home and not used for general family support. See Siegel, "Home as Work," 1084-5.

⁶⁹ Rabkin, *Fathers to Daughters*. See also Raquel Fernandez, "Women's Rights and Development," *NBER Working Paper* (2009).

⁷⁰ Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, ed. *History of Woman Suffrage*, 2 vols., vol. 1 (New York: Fowler & Wells, 1881), 16.

⁷¹ Joseph A. Ranney, *In the Wake of Slavery: Civil War, Civil Rights, and the Reconstruction of Southern Law* (Westport, CT: Praeger, 2006), 115.

⁷² Linda Kerber, "The Republican Mother: Women and the Enlightenment -- An American Perspective," *American Quarterly* 28, no. 2 (1976): 202.

from their often less virtuous husbands. For example, at New York's 1846 Constitutional Convention, one delegate gave a speech in support of including an MWPA in New York's new constitution:

[The wife] was not exposed to the same temptations [as the husband] — was not as ambitious of worldly distinction, and would not be likely to hazard her property to as great an extent as he would. Her affection for her offspring was more ardent, and her attachment to, and inducements for remaining at home much stronger than his...Nineteen out of every twenty cases, when want has found its way in families, it was through the misfortune or the bad character of the husband; and it would seem but just that, in either event, protection should be afforded to the defenceless [sic] mother and children.⁷³

Even as legislators sought to protect married women, they also carefully wrote reform laws to ensure that the marriage relationship was unsettled as little as was possible to accomplish their paternalist and economic goals. While feminist organizations early in the reform period often demanded joint property rights that would have given married women an equal stake in family assets, legislation and court rulings made it clear that husbands would remain in control of the bulk of family assets with married women gaining control only over property that she alone brought into the marriage and that she specifically elected to keep in a separate account.⁷⁴ Women eventually gained control over wages earned from work done for employers outside the family, but legislators and courts clearly delineated this work from labor performed within the home for the support of the family, which remained under control of the husband.⁷⁵ For instance, a New York woman injured by a train was permitted to sue only for 'pain and suffering' damages, while only her husband was eligible to sue for her inability to perform domestic labor following the injury since she did not work outside the home for a third party.⁷⁶

Similarly, while married women gained a new foothold vis-à-vis third parties in the market, now able to make contracts and appear in court without being joined by their husbands, this new legal status often did not penetrate the marriage relationship itself. The passage of MWPA's was not tied to more liberal divorce laws.⁷⁷ Further, the question of whether husbands and wives were separate legal persons for the purpose of actions against one another (larceny, negligent injury) remained unsettled well into the twentieth century.⁷⁸ Ultimately, the interaction of feudalism, liberalism, and gender hierarchy during this period led to meaningful but limited reform.

III. Decentralized, Diffuse Reform

⁷³ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York*, (Albany: William G. Bishop and William H. Attree, 1846), 1041.

⁷⁴ Siegel, "Home as Work."

⁷⁵ _____, "Modernization of Marital Status Law."

⁷⁶ *Filer v. New York Central Railroad Company*, 49 N.Y. 47 (1872).

⁷⁷ Lebsack, "Radical Reconstruction," 215.

⁷⁸ Rabkin, *Fathers to Daughters*: 150.

The three competing traditions that helped shape the reform of married women's property rights did so through a path that differs from common conceptions of how rights expansion happens. Although there are certainly exceptions to this, there is a tendency to view rights reform as being based in group mobilization or organization, combined with strategic action in one or more venues to secure broader rights. For example, strategic litigation by the NAACP to gradually change legal precedents related to segregation, as well as more recent efforts by gay rights organizations to overturn same-sex marriage bans through strategic action in both courts and state legislatures, fit well with this type of narrative. Although this type of strategic, interest group politics is rarely the only important part of the story, what is common to this type of narrative is that it is fairly clear to everyone involved what the stakes are and what the ultimate goals are of the various interests.

For example, scholars of rights reform in the courts have often emphasized the importance of organized interest groups in strategically utilizing the courts to push for change, through bringing test cases, filing briefs, and other strategies designed to not only affect the outcome of individual cases but also to influence public opinion and change the 'rules of the game.' Charles Epp argues that rights revolutions accomplished through the courts occur only when there is a significant 'support structure' present outside the court, which in the United States has consisted largely of the growth of a professionalized bar and social movements.⁷⁹ Paul Collins argues that interest groups may have multiple goals in choosing to seek reform through the judicial system, including a lack of access in legislative venues and the ability to protect gains won in other venues from future majorities.⁸⁰ Caldeira and Wright assess this literature noting that "scholars have demonstrated over and over again the vigorous, extensive, and continuing efforts on the part of interest groups to lobby the courts."⁸¹ Although scholars have questioned the efficacy of pursuing reforms through the court system, interest groups remain active in pushing for policy changes through this venue, from both sides of the political spectrum.⁸²

Labor demands in the latter part of the period I study also fit the interest group model well. Labor activists and unions were major drivers of reform, mobilizing workers and demanding stronger labor laws in multiple venues.⁸³ Labor reformers worked to elect labor-friendly legislators, lobbied for new legislation, and pushed for state constitutional amendments to protect gains from hostile courts.⁸⁴ Meanwhile, business interests clearly saw the potential danger of such reforms and fought back both in legislative settings and

⁷⁹ Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

⁸⁰ Paul M. Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008), 20-24.

⁸¹ Gregory A. Caldeira and John R. Wright, "Organized Interests and Agenda Setting in the U.S. Supreme Court," *American Political Science Review* 82, no. 4 (1988): 1110.

⁸² Geoffrey C. Hazard, Jr., "Social Justice through Civil Justice," *University of Chicago Law Review* 36, no. 4 (1969). Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991). Steven Michael Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*, Princeton Studies in American Politics (Princeton, N.J.: Princeton University Press, 2008).

⁸³ See, for example, Orren, *Belated Feudalism*.

⁸⁴ Emily Zackin, "'To Change the Fundamental Law of the State': Protective Labor Provisions in U.S. Constitutions," *Studies in American Political Development* 24(2010).

in the courts. Judicial review proved to be a powerful tool for those opposed to labor reforms, as federal courts struck down over sixty labor laws in the 1880s-1890s.⁸⁵ Labor reform during the Gilded Age and Progressive is relatively well-characterized by an interest groups story in which interests on both sides of the issue strategically used the political and legal means available to them to advance those interests.

In contrast to labor reform during this period, the reform of married women's economic rights was more indirect, diffuse, and decentralized. Women's groups were not necessarily the primary groups agitating for change on the issue of married women's property rights, particularly with the earliest sets of laws.⁸⁶ While women's groups in some states did petition state legislatures and may have encouraged swifter passage of MWPA's in a few states, organized feminist activity was absent in many states where these laws were passed.⁸⁷ Furthermore, in states where women did petition legislatures or take other actions to advocate for property law liberalization, these efforts were often individual and local rather than coordinated through broad-based women's organizations.⁸⁸ Both Rabkin and Geddes and Tennyson suggest that the relationship between feminist organizations and MWPA's may in fact have gone in the other direction, with organization around property laws and expanded economic opportunities for women stemming from the statutes encouraging the formation of women's suffrage groups.⁸⁹ Indeed, suffrage organizations tended to form after MWPA's were passed rather than before (see Figure 2 in Chapter 3).

In addition to this chicken-and-egg problem, women's groups may simply have had other concerns. Reva Siegel argues that during the antebellum period, when the earliest reforms were passed, those women's groups that did take action around property rights often had much more radical goals in mind, pressing for joint property reforms that would have given married women equal ownership and control over property held by her husband rather than simply separate ownership of property brought into the marriage independently. After the war, feminists focused their legislative efforts on suffrage. To the extent property reform was part of the agenda of feminist organizations, it was used largely as a recruiting tactic to convince potential members that suffrage was a crucial next step before women could enjoy broader economic rights.⁹⁰ In the legal arena, women's organizations' strategic efforts were also focused on suffrage; in the late 1860s and early 1870s, the National Woman Suffrage Association launched a legal campaign challenging bans on woman's suffrage.⁹¹

This is not to say that women's organizations were completely silent on issues of property rights. They could and did petition state legislatures on these issues, but in most

⁸⁵ Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge ; New York: Cambridge University Press, 2009), 318.

⁸⁶ Chused, "Married Women's Property Law."

⁸⁷ Richard A. Rapaport, *Relationship of the Women's Movement to the Passage of Married Women's Property Acts in the Mid-Nineteenth Century* (Stanford, CA: Stanford Law School, 1973). On petitions and speeches by individual women (as opposed to women's organizations), see also Keith Eugene Melder, *Beginnings of Sisterhood: The American Woman's Rights Movement, 1800-1850*, ed. Gerda Lerner, *Studies in the Life of Women* (New York: Schocken Books, 1977), 143-44.

⁸⁸ ———, *Beginnings of Sisterhood*: 144.

⁸⁹ Rabkin, *Fathers to Daughters*. Geddes and Tennyson, "Passage of the Married Women's Property Acts."

⁹⁰ Siegel, "Home as Work."

⁹¹ Karen O'Connor, *Women's Organizations' Use of the Courts* (Lexington, MA: Lexington Books, 1980).

states they lacked a key resource that was available to labor organizers: the vote. It makes sense that women's groups after the Civil War were so focused on this goal, because without the vote, any reforms that passed had to first and foremost satisfy male legislators and male voters. Although some male politicians and voters undoubtedly did have feminist motivations, paternalistic and economic motivations appear to have been the major drivers behind passing MWPA: populists advocating for debt relief; commercial interests seeking more rational and predictable commercial transactions; and fathers (and other men) hoping to protect women and family assets from reckless husbands. As discussed above, these motivations existed side-by-side with anti-feminist views of gender hierarchy that placed limits on how far reform would proceed. Thus, while growing agitation for stricter labor laws set up the perfect storm of popular labor legislation clashing with conservative, insulated courts, this dynamic was much more muted when it came to reform of married women's economic rights.

The reform of married women's economic rights was also more decentralized because it occurred almost entirely at the state level. Labor issues were nationalized long before women's rights issues, and specifically, labor reform was a significant area of policy-making for national institutions throughout the period. The U.S. Supreme Court ruled on the legality of unions in the 1800s, and both the Supreme Court and Congress were increasingly involved in labor issues in the early 20th century. Major change came only once national institutions got involved in labor issues. *NLRB v. Jones and Laughlin Steel* (1937) marked a watershed moment in which the U.S. Supreme Court fundamentally changed its stance toward labor and adopted a deferential attitude toward legislative choices on labor matters.

In contrast, while there is the occasional case on women's property issues that reaches the Supreme Court during the period I study, there is no major landmark case that seems to be a major game-changer in the states. Similarly, Congress rarely passed legislation affecting married women's economic rights.⁹² Instead, reform of property law occurred along a much different trajectory than that of labor, one that transpired primarily at the state level. It was not until long after Footnote 4 in *Carolene Products* (1938) that the Court began to get involved in women's rights issues. At that point, in the 1970s, the liberalization of married women's property rights had largely already been worked out at the state level.⁹³ It was not until *Frontiero v. Richardson* (1973) that the Supreme Court afforded heightened scrutiny to laws discriminating on the basis of gender, and so it is probably not until this point that the Court would have struck down state policies prohibiting married women from holding separate property or making legal contracts. But, in his opinion, Justice Brennan discusses legal impairments on women's property rights as firmly in the past, alongside slavery and the lack of franchise.⁹⁴

Because there was no major national role in the liberalization of married women's property rights, reform occurred at the state level, with each state taking a different path at constitutional conventions, in the legislature, and in the courthouse. Although

⁹² An important exception was an MWPA concerning women in Washington, D.C., whose property rights were governed by Congress. This law was passed in 1869, but efforts to pass a national MWPA never gained traction. See Baker, *Women and the U.S. Constitution, 1776-1920*: 22.

⁹³ According to Geddes, Lueck, and Tennyson (2012), all but eight states passed laws protecting married women's rights to both separate property and earnings by 1920, and those that did not pass both types of laws did pass at least one by this date. See also Geddes, "Human Capital Accumulation," 841.

⁹⁴ *Frontiero v. Richardson*, 411 U.S. 685 (1973).

ultimately states did liberalize property law as it pertained to married women, the fact that the process did not include a national ‘big bang’ moment was consequential. Motivations for the passage of these laws varied. In states facing economic turmoil, like Mississippi after the Panic of 1837, debt relief was paramount. In contrast, delegates in California, a frontier state, emphasized the need to attract women to the West with progressive property laws.⁹⁵ These laws also spread through the states, with legislatures and constitutional conventions often borrowing language wholesale from out-of-state statutes (as discussed further in Chapter 3). Even without a national standard, every state adopted some form of MWPA by 1920. But, the timing and level of liberalization varied. Southern states tended to pass the most liberal versions of MWPA, those that granted significant management and control rights, later than other regions, with one state being an extreme laggard.⁹⁶ Florida passed a debt relief law in 1845, but took almost 100 years to extend more significant management rights to married women (which it did in 1943).

IV. Multiple Orders in Multiple Venues: Courts as Cooperative

The conflicts between feudalism, liberalism, and gender hierarchy played out not only in state legislatures, but also in state courts and state constitutional conventions. In contrast to the typical story of courts and legislatures as clashing over issues of business and labor in the Gilded Age, these institutions worked more cooperatively when it came to the reform of married women’s property rights. Judicial deference and cooperation on married women’s economic rights is surprising considering the conventional view of courts during this period, which is based largely on conflicts over labor reforms.

Robert Bork called *Lochner v. New York*, the most notorious case of this period, “an abomination,”⁹⁷ and legal scholars have more generally described the Gilded Age as a period in which courts were engaged in extensive conflict with majoritarian bodies. William Forbath writes that the judiciary played a uniquely combative role in blocking labor reforms and shaping the strategies of labor activists: “Nowhere else among industrial nations did the judiciary hold such sway over labor relations as in nineteenth- and early twentieth-century America. Nowhere else did trade unionists contend so constantly for so many decades with judge-made law.”⁹⁸ Courts not only obstructed specific policies, but also fundamentally constrained the ways in which unions and other labor reformers viewed the potential for radical change.⁹⁹ Brian Balogh similarly argues that courts’ influence on labor law, the labor movement, and the development of modern corporations was significant and took power away from democratic majorities, particularly local majorities.¹⁰⁰ He writes that “[l]abor narrowed its demands and techniques [in response to the judiciary]. Experience taught labor leaders both to distrust the state and to demand very little from it.”¹⁰¹

⁹⁵ I discuss state-level motivations in more detail for four cases in Chapter 2.

⁹⁶ I address this topic further in Chapter 3.

⁹⁷ Robert H. Bork, “Judge’s Role in Law and Culture,” *Ave Maria Law Review* 1(2007): 21.

⁹⁸ William E. Forbath, “The Shaping of the American Labor Movement,” *Harvard Law Review* 102, no. 6 (1989): 1114.

⁹⁹ *Ibid.*, 1115-16.

¹⁰⁰ Balogh, *Government Out of Sight*: 312-43.

¹⁰¹ *Ibid.*, 319.

In contrast, this type of serious conflict between courts and legislatures was not present in the area of married women's economic rights reforms. Two key differences between courts and legislatures/conventions are important in considering the path of reform through these institutions: differences in responsiveness to popular pressure and differences in the form of decision-making. Further, the different interests involved in the two types of reforms likely also influenced the relationship between courts and legislatures: while organized labor was a clear opponent of business and commercial interests, women's organizations were less organized around these issues, and MWPA's were instead typically the result of interests that were commonly shared by male legislators, delegates, and judges.

First, elected bodies can be expected to respond at least in part to the demands of voters, while courts tend to be more, though not completely, insulated from popular pressure. Judges in this era, whether elected or appointed, tended to be selected from the elite, upper classes and to identify themselves with the business community and commercial interests.¹⁰² In a study of judges in the Midwest during this period, Kermit Hall finds that party leaders, often lawyers themselves, tended to run candidates for judgeships who were at "the upper end of the social spectrum, with emphasis on the prosperous middle class," and typically had strong kinship connections to other judges and elected officials.¹⁰³ Further, Brian Balogh writes that after Reconstruction, the judicial system was increasingly oriented toward the protection of corporate interests: "As the bar became professional and as prestigious positions were increasingly aligned with law firms that specialized in corporate work, there was no dearth of litigation to protect the interests of large employers and to create and stabilize a predictable national market."¹⁰⁴ Judges could also be expected to have an interest in preserving the common law as much as possible, both from self-interest (common law gave them more power over policy-making as compared to legislatures) and because they were socialized in the legal profession and through kinship ties to other judges.

Meanwhile, elected bodies balanced demands from indebted voters to protect family assets, pressure to rationalize and simplify property law to make commercial transactions more efficient, and a suspicion of woman's suffrage and other demands from feminist organizations. Thus, courts faced a serious conflict with liberalization in the labor arena, where key business and capitalist interests strongly opposed changes to the common law; essentially each dimension that judges might care about pointed toward opposition to reform. In the case of liberalization of women's property rights, however, judges faced a more nuanced situation, with middle class and business interests often supporting reform and the potential for changes to the common law that loosened coverture's restrictions on property ownership without full liberation of married women.

Many court decisions during this period did run counter to the more radical demands of women's groups, but these rulings often fit well with the intentions of legislatures, which often had more modest and moderate goals. Similarly, while the new legislation did threaten to change courts' jurisdiction over family matters in some ways

¹⁰² Forbath, "The Shaping of the American Labor Movement," 1130-31.

¹⁰³ Kermit L. Hall, "Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861-1899," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard Gawalt (Westport, Conn.: Greenwood Press, 1984), 42.

¹⁰⁴ Balogh, *Government Out of Sight*: 318-19.

by altering the common law of coverture, these laws did not simultaneously present a major threat to a core constituency of the courts, business and commercial interests. Indeed, these interests often argued for more liberalization of property law, not less, in the interest of a better functioning commercial economy.

A cooperative, iterative process makes sense when considering that most legislators advocated for MWPAs not for feminist reasons but rather with goals of protecting women, providing for debt relief, and promoting a commercial economy. As Popkin (1999) points out with respect to MWPAs, “It is...not uncommon for statutes to take small steps in changing the law, and a court is not necessarily stretching the boundaries of legitimate judicial practice by asking how far the legislature intended to go.”¹⁰⁵ We can view the liberalization of married women’s economic rights as a dialogue between state courts and state legislative bodies in which courts played a role of balancing feudal common law precedents with more liberal legislative reforms and ascriptive gender hierarchies.

The second key difference between courts and elected bodies is the type of decisions they make. Statutes and constitutional provisions are typically broad rules that cannot hope to cover every contingency or special situation. Meanwhile, courts encounter law on a case-by-case basis, quite literally. In applying the general rules established in MWPAs to the particular cases brought before them, courts had three options: broad, feminist rulings; conservative conflict, or moderate deference and cooperation.

When MWPAs are read in the most progressive, modern light possible, court rulings from this period often do seem to narrow the potential of these acts. Where the provisions even of some early acts could be read broadly to give married women full economic rights to contract, sue, manage their property, etc., courts were often slow to come around to these interpretations, and they often came to it only after multiple iterations of increasingly broad legislation. That said, in looking at the constitutional and legislative debates surrounding the passage of these laws, it seems clear that a broad, feminist interpretation was not what was intended by most delegates and legislators, especially in the early acts. Even by the time acts granting broad rights were passed, motivations still often centered around economic practicality rather than equal rights language. The different types of decision-making can mask some of the inter-branch cooperation that occurred during this period. While many court cases from this period may appear to narrow the radical potential of MWPAs, this may be in fact be just the type of moderate, cautious interpretation that was desired by many legislators and convention delegates.

When courts did push the envelope and interpret MWPAs to grant broad rights, legislatures at least sometimes fought back and passed narrower laws to clarify their intentions. For instance, in 1881, the South Carolina Supreme Court expansively interpreted South Carolina’s 1870 MWPA to allow married women to mortgage their property for the benefit of a third party – in this case, a married woman had gone into debt to support her son’s business, and the court ruled this debt was legal and could be collected.¹⁰⁶ The South Carolina legislature responded quickly, passing a new law in its

¹⁰⁵ William D. Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Durham: Duke University Press, 1999), 109.

¹⁰⁶ *Pelzer v. Campbell*, 15 S.C. 581 (1881).

very next session curtailing married women's general power to contract and limiting it to contracts specifically concerning her separate estate.¹⁰⁷ Thereafter, South Carolina courts fell into line with a more moderate interpretation of married women's economic rights.

It is also possible to envision courts that engaged in conservative constitutional conflict similar to the conflict over labor legislation. While courts frequently invalidated protective labor legislation and pro-union legislation on constitutional grounds, this pattern was almost non-existent when it came to MWPAs. One possible explanation here is that courts were concerned with constitutional issues in the case of labor, while they encountered clashes of statutes with the common law in the case of MWPAs. If this is true, then, it would be expected that statutes would fall in the face of constitutional provisions, while the common law would logically give way to statutes. However, as with most issues that come before courts, it's all a matter of interpretation – the same labor issues that then were struck down as unconstitutional would today easily pass constitutional muster, while women's rights issues today enjoy special constitutional consideration from courts.

Specifically, courts in the 1800s did have a path available to them if they wanted to strike down MWPAs on constitutional grounds, and a few even did so. For instance, as I discuss further in my analysis of New York's reform process (Chapter 2), two New York district courts struck down its first MWPA on constitutional grounds, finding it beyond the state legislature's power to "destroy vested rights to property"; as well as in one case both a violation of the due process clause and the contract clause.¹⁰⁸ However, these cases were rare and had no lasting effect on the path of reform. Hence, I argue that courts could have found a path toward constitutional invalidation of MWPAs had they been so inclined; instead, they simply lacked the will to do so.

By taking a middle path of narrow, cautious interpretations of MWPAs, courts largely deferred to state legislatures in the gradual liberalization of married women's economic rights. The result was that courts could acquiesce to legislative action to liberalize feudal elements of marital property law while also maintaining certain aspects of the ascriptive gender hierarchies that remained popular with male voters and legislators. This reform process provides an important foil for considering the path of labor reform in the United States. In that case, both the influence of common law precedent and the class identifications and ties of judges pointed in the direction of striking down liberalizing labor legislation. In contrast, here these factors run in opposite directions, with common law pointing against the liberalization of married women's economic rights, but business interests positioned either in favor of or indifferent to this liberalization. Without a powerful interest aligned with the courts and against the passage of MWPAs, the common law alone was not sufficient to incentivize courts to battle legislatures on this issue.

VI. Conclusion

Despite the limitations of reforms, by 1920, married women's economic rights had been significantly liberalized with regard to many market interactions: in almost every state, married women now had a right to their market earnings, could

¹⁰⁷ *Code of Civil Procedure of the State of South Carolina* (1882): 93.

¹⁰⁸ *Holmes v. Holmes*, 4 Barbour 295 (1848); *White v. White*, 5 Barbour 474 (1849).

independently make decisions about their separate property (i.e. managing, selling, bequeathing, mortgaging, etc.), could legally sign and enforce contracts, and could sue and be sued in a court of law without being joined with their husbands. The liberalization of married women's economic rights illustrates the importance of viewing major policy reforms as part of an iterative process in which legislatures, courts, and state constitutional conventions are in continuing conversations with one another. Particularly when multiple political orders clash with one another in the reform process, change is unlikely to be neat and tidy and present clear before-after moments. For instance, in studying MWPAs, most scholars have identified either the earliest laws in each state or the first laws that accomplished some specific legislative target.¹⁰⁹ Even where these dating schemes identify multiple types of statutes with different dates, they still fail to capture the legislative-judicial dynamic that proved so important to the evolution of married women's economic rights. Legislators at the beginning of this period wrote general statutes with limited, modest expectations for how much the new laws would empower women. However, as specific cases worked their way through the court system, a piecemeal system of women's economic rights proved unworkable, and legislatures gradually expanded and liberalized these rights.

This process illustrates a more subtle way in which courts are an important part of the policy reform process. In this reform process, state courts took almost the exclusive lead in interpreting MWPAs and there is no national "landmark" case that defines our understanding of courts' posture toward MWPAs. Further, we don't see evidence of strategic litigants intentionally using the legal process to either direct the course of policy or to bring attention to an important issue. Rather, the most common cases surrounding these issues are small stakes claims of spouses being sued to repay a debt or suing to recover damages after an accident. And finally, by and large, courts in this era were deferential and cooperative rather than conflictual when it came to interactions with the legislature over women's rights. Their most common approach was to interpret laws relatively narrowly and modestly, but not to strike them down on constitutional or other grounds or to provide broad interpretations that dramatically departed from the intentions of lawmakers. Rather, all institutions saw some benefits to liberalization and defeudalization, while still aiming to uphold gender hierarchies, particularly within the marriage relationship. Ultimately, through a gradual, iterative process with significant back-and-forth between different state-level government institutions, the feudal order of coverture was meaningfully liberalized while ascriptive hierarchies remained in place.

Importantly, the way in which liberalization was achieved – through the decisions of male legislators, delegates, and judges, and with limited input from feminist organizations – meant that reforms had meaningful limitations. Of course, no reform is "complete" in the sense that groups agitating for change achieve everything on their agenda. The limitations in this case, however, are clearly linked to the incentives of those who had the political power to pass and interpret MWPAs. Laws were written to accomplish specific goals: debt relief for families, freeing capital from complex restrictions, safeguarding family resources that were transferred to daughters, and paternalistic protection of wives and mothers. The laws did not provide as much benefit

¹⁰⁹ See, for example: Geddes and Tennyson, "Passage of the Married Women's Property Acts." Geddes, "Human Capital Accumulation." Khan, "Married Women's Property Laws." Hoff, *Law, Gender, and Injustice*.

for women in areas where there was not a clear incentive for male stakeholders to expand rights, such as employment protections or benefits related to the husband-wife relationship (such as dismantling the doctrine of marital service). This pattern has important implications for other reform efforts where the group on the receiving end of a rights expansion does not have the vote, as with immigration reform today. These findings would suggest that these reforms may be limited to fulfilling the specific goals and incentives of elected officials and voters rather than group members, such as reforming immigration policies only to the extent that reforms seem to provide an economic benefit.

Chapter Two: Married Women's Property Rights in New York, Mississippi, South Carolina, and California: Multiple Pathways of Reform

In this chapter, I present a more detailed look at the development of married women's property rights in four states: New York, Mississippi, South Carolina, and California. These states represent a diverse range of experiences that illustrate the operation of multiple pathways to reform, all of which involved the clash of multiple traditions as reform progressed.

New York represents a Northern state that was on the forefront of reform, passing the first 'effective' MWPA that granted at least some control and management rights over separate property to married women. Its first MWPA was not purely a debt relief statute as in the case of many states, but rather a response to other changes happening in the legal system that inadvertently removed many of the protections wealthy women had previously been able to take advantage of (both in New York and most other states). Debt relief seems to have been at least one motivation behind New York's earliest reforms, but the first law was not as limited as debt relief acts in some states. Additionally, feminist activity in general was obviously higher in New York than in many other states. For this reason, it is interesting to note how important non-feminist interests and motivations were even in a state like New York. That said, the backdrop of higher levels of feminist organization in New York probably explain why New York tended to be a leader in passing more expansive MWPA's.

Mississippi and South Carolina reflect the Southern experience with married women's property reform. Mississippi was the first state to pass an MWPA of any sort (though Arkansas Territory did pass an earlier reform, it did not survive the transition to statehood).¹¹⁰ Its first MWPA was almost exclusively about debt relief for impoverished families, and there was no feminist organization around the bill. But, over time the legal complications stemming from a gradual expansion of rights led to a radical statute in 1880 that dramatically altered married women's relationship to the economy. South Carolina, in contrast, began its involvement in legislating married women's property rights much later, after the Civil War, but ultimately ended its journey in a similar place, and for similar reasons.

Finally, California represents the frontier experience. Western states had a unique experience with gender politics, often passing women's suffrage laws earlier than Eastern and Southern states and providing greater opportunities for women because of the types of work required for survival on the frontier and the gender imbalance in these areas.¹¹¹ As a territory governed largely by Spanish civil law, California also had to incorporate pre-existing notions about married women's relationship to property that diverged sharply from the traditional common law of coverture. Although the new state would adopt the common law as a general rule, delegates at the California constitutional convention differed strongly on whether these rules should be applied to married women. At the same time, as California was writing its first Constitution, it had the experience of other states to inform its decisions in crafting new policies. As California reformed its

¹¹⁰ Dougan, "The Arkansas Married Woman's Property Law."

¹¹¹ Holly J. McCammon et al., "How Movements Win: Gendered Opportunity Structures and U.S. Women's Suffrage Movements, 1866 to 1919," *American Sociological Review* 66, no. 1 (2001): 54.

married women's property law over the years, it drew heavily on reforms in Texas and New York to shape its laws.

What all of these case studies demonstrate is that state legislators and judges pushed for new rights for women for a variety of reasons, largely unrelated to feminism. Some argued for the economic necessity of such laws for protecting the assets of indebted families in the midst of the economic crises of the Panic of 1837, the wake of the Civil War, and rampant land speculation in the West. A paternalistic concern for wives was also a key motivation, with proponents of MWPA's arguing that women needed government protection from lazy or reckless husbands who would otherwise waste their fortunes. As the simple logic of the feudal doctrine of coverture – all property in a marriage belonged to the husband absolutely – gave way to piecemeal reforms that gradually granted married women more control over their property and their place in the business and working world, the logic of liberalism took over. Partial rights led to an exceedingly complicated legal environment and often perverse outcomes in disputes between creditors and debtors. Further, women were increasingly incorporated into the wider economy, meaning that restrictions on economic rights like the ability to sign (and have enforced) legal contracts placed an increasing burden on economic activity.

I. New York: An Early Reformer

New York was the first state to pass an MWPA that granted married women meaningful management and control rights over their separate property. While other states had passed debt relief-oriented MWPA's that granted married women very limited economic rights, New York's first MWPA actually provided a comparatively broad expansion of rights for married women. Over the next half-decade, the state continued to expand married women's economic rights, to include protection for women's wages and increased rights to conduct business and sue in court. Still, despite being a center for feminist activity, New York's story of married women's economic rights reform is one that still had the motivations of male legislators and judges at its core.

Setting the Stage

The constitutional convention activity and statutes passed in New York relevant to married women's economic rights are detailed in Table 1. Statutory changes restructuring the judicial system set the stage for the first of its MWPA's. The Revised Statutes of 1836 significantly limited the use of trusts in courts of equity. The law was not directly aimed at married women's separate equitable estates, but instead was part of a more general effort to simplify the legal code and avoid the common situation of equitable trusts being used to shield land and other assets from creditors. However, the effect on married women was to turn equitable estates (which could be held separately from their husbands) into legal estates (which were the sole property of the husband under the doctrine of coverture).¹¹² In 1846, the New York Constitution completely abolished chancery (equity) courts and combined law and equity into one system, which

¹¹² Rabkin, "Origins of Law Reform," 716-20.

even further limited the ability of married women to obtain some sort of economic protection through the courts.¹¹³

Although a statement on the property rights of married women was not included in the final version of the 1846 Constitution, multiple proposals on this subject were made by delegates to the convention, and their discussions provide a window into the reasons motivating these types of enactments in New York. The suggested amendments ranged from proposals to give married women the right to separate property and making that property liable for debts;¹¹⁴ the right to contract with regard to separate property;¹¹⁵ the right to make wills;¹¹⁶ the right to mortgage property to provide for their children;¹¹⁷ the right to equal treatment between husbands and wives in terms of inheritance;¹¹⁸ the right to equitable support from (but not control over) separate property;¹¹⁹ as well as proposals to create registries of married women's separate property;¹²⁰ to eliminate any co-mingling of property or financial obligation as part of the marriage contract;¹²¹ and to exempt a married woman's separate property from liability for her husband's debts.¹²²

Supporters of these types of provisions compared common law coverture precedents to both feudalism and slavery.¹²³ However, their primary focus was not on a liberal view of women as autonomous individuals, but rather placed them within a system of gender hierarchy in which women were simultaneously held to the unrealistic ideal of republican motherhood while also in desperate need of paternalistic protection. Much of the commentary of supporters focused on the protection of virtuous mothers from husbands who were "ignorant,"¹²⁴ "careless,"¹²⁵ of "bad character,"¹²⁶ or "villains" seeking to steal the property of wealthy women.¹²⁷ Another delegate, Mr. Harris, urged reform "as a father," seeking to protect any property he might will to his daughter.¹²⁸

There are also indications that MWPA provisions were related to other efforts focused on debt relief, thus viewing an allowance for married women to own property more as a way to protect property from creditors than to create new rights for women or to alter their legal status. Though New York ultimately included neither an MWPA nor a homestead exemption in its new constitution, the two did seem to bear a relationship to one another in the minds of delegates. On October 6, Mr. St. John proposed yet another

¹¹³ Third Constitution of New York (1846); Wortman, *Women in American Law*: 119. Under the new constitution, the New York Court of Appeals was the court of last resort. Under this court were eight Supreme Courts, divided into districts based on county lines. The Supreme Courts had power over cases in both law and equity (Article VI, Sections 2-4).

¹¹⁴ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York*. June 10: 80.

¹¹⁵ *Ibid.*, June 25: 156.

¹¹⁶ *Ibid.*, June 25: 156.

¹¹⁷ *Ibid.*, June 25: 156.

¹¹⁸ *Ibid.*, June 25: 156.

¹¹⁹ *Ibid.*, October 5: 1060.

¹²⁰ *Ibid.*, October 2: 1038 and October 5: 1056.

¹²¹ *Ibid.*, October 2: 1039 and October 5: 1060.

¹²² *Ibid.*, October 2: 1041 and October 6: 1064.

¹²³ *Ibid.*, October 2: 1039, 1040, 1060.

¹²⁴ *Ibid.*, October 5: 1058-1059.

¹²⁵ *Ibid.*, October 5: 1058-1059.

¹²⁶ *Ibid.*, October 2: 1041.

¹²⁷ *Ibid.*, October 2: 1040.

¹²⁸ *Ibid.*, October 5: 1060.

section that would have created separate property rights for married women and protected that property from her husband's debts.¹²⁹ Immediately after this provision failed to be taken up, Mr. Townsend offered a homestead exemption proposal that would have exempted family homes from being taken to pay debts.¹³⁰ Townsend argued that "as every proposition tending to favor the principle of allowing the property of women to rest undisturbed by the pecuniary misfortunes of their husbands, had been eventually annulled by the Convention, he hoped the principle shadowed forth in the section now presented would at least meet with favor."¹³¹ This provision fared even worse than the various protections of wives' separate property, garnering only 11 votes.¹³²

Early Laws and Court Interpretations

Despite the objections of delegates at the constitutional convention, with previous methods for wealthy women to protect their property now strictly limited, demand for an alternate statutory arrangement quickly arose. New York passed its first MWPA in 1848, and amended it in 1849. This act allowed women various rights over separate property after marriage, most importantly that married women could now keep property in a separate account "as if she were a single female," and this property would not be liable for her husband's debts (see Table 1).¹³³ A major motivation for the legal changes of 1848 and 1849 seems to have been adapting the legal code to a growing commercial economy. Legislators sought to aid struggling families in an economy subject to significant swings and to remove real estate from a variety of feudal restrictions that made it less liquid.¹³⁴ Legislators also wanted to restore rights to wealthy women that had been undermined by reform to equity courts earlier in the decade and extend these options to middle class women, often for paternalistic reasons. A growing middle class demanded the extension of rights that had been available to wealthier women.¹³⁵ Fathers were particularly concerned with protecting family wealth from potentially irresponsible husbands. In *History of Woman Suffrage*, women's rights activists noted that:

Among the Dutch aristocracy of the [New York] State there was a fast amount of dissipation; and as married women could hold neither property nor children under the common law, solid, thrifty Dutch fathers were daily confronted with the fact that the inheritance of their daughters, carefully accumulated, would at marriage pass into the hands of dissipated, impecunious husbands, reducing them and their children to poverty and dependence.¹³⁶

¹²⁹ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York*, October 6: 1064.

¹³⁰ *Ibid.*, October 6: 1064.

¹³¹ *Ibid.*, October 6: 1064.

¹³² *Ibid.*, October 6: 1065.

¹³³ *New York Married Women's Property Act*, 1948, amended in 1949.

¹³⁴ Basch, *In the Eyes of the Law*: 39. Rabkin, *Fathers to Daughters*: 11.

¹³⁵ Basch, *In the Eyes of the Law*: 37-38.

¹³⁶ Stanton, *History of Woman Suffrage*, 63-64.

Similarly, Geoffrey Geddes, a supporter of the law, later wrote that he supported the 1848 law because “I had a young daughter, who, in the then condition of my health, was quite likely to be left in tender years without a father, and I very much desired to protect her in the little property I might be able to leave.”¹³⁷ Thus, legislators came to support the new reforms from a variety of angles, both economic and paternalistic.

Over the next fifty years, New York’s legislature gradually extended to married women a variety of economic rights, including the right to hold her wages in a separate account, the right to sue and be sued, the right to sell or mortgage property without her husband’s permission, and the right to make contracts (see Table 1). However, this pattern of statutory changes is incomplete without considering the multiple venues that drove policy reform during this period. While the state legislature debated and passed laws concerning married women’s property rights, state courts ultimately decided how these laws would be applied to different cases. As discussed in Chapter 1, state courts had three broad options in interpreting MWPA: broad, feminist rulings; conservative conflict, or moderate cooperation. Courts could theoretically interpret the laws expansively, embracing the potential of greater gender equality that might come with expanded property rights, but this potential was rarely if ever realized in New York courts.

Another option for courts was to fully or partially strike down these laws on various constitutional grounds, defending their turf as arbiters of the feudal common law and yielding no ground to legislators. After the first MWPA was passed in New York, two of the eight judicial districts in New York quickly responded by overturning the new statute, although these cases were not appealed to the Court of Appeals (the highest court in the state) and thus in the state as a whole the law stood. In *Holmes v. Holmes* (1848), the 2nd District Court dealt with a married couple who had separated; the wife was suing to prevent an inheritance bequeathed to her from going to her estranged husband.¹³⁸ The Court ruled that it had the power to assign the property to the woman under equity rules, independent of the existence of a MWPA, and further that the MWPA was unconstitutional for a variety of reasons. Justice Barculo clearly sees the act as a sharp break from past traditions that cannot be tolerated:

The experience of the sages and venerable men who have preceded us, is as nothing, compared to the intuition of the Solons of this 'progressive' age. Legal forms, authorities, precedents, maxims, adjudications, the knowledge of the past, the learning of the present, all fade away and disappear before the dazzling brightness of the new era.¹³⁹

He goes on to strike down the MWPA on no less than three grounds: as beyond the state legislature’s power to “destroy vested rights to property”; as a violation of the state constitution’s due process clause; and as a violation of the federal constitution’s contract clause by impairing the marriage contract of couples who married before the law was passed (as was true for the couple in this case).¹⁴⁰ Note that these grounds mirror

¹³⁷ *Ibid.*, 64.

¹³⁸ *Holmes v. Holmes*, 4 Barbour 295 (1848).

¹³⁹ *Ibid.*, 299.

¹⁴⁰ *Ibid.*, 300-301.

labor cases, in which courts often struck down labor legislation as violating both due process and rights to contract.

The next year, the 6th District ruled the law void as well, on similar grounds that the legislature had no power under the state constitution to interfere with vested property rights without due process.¹⁴¹ *White v. White* is also one of the few cases from this period that involved a husband and wife as adverse parties. The wife in this case inherited real estate from her father, which was willed to her under equity law. She had been living on this real estate, managing it, and receiving profits from it until her husband violently evicted her from the land, causing her to bring a lawsuit against him. From the Court's description, he is exactly the sort of husband that MWPAs aimed to protect married women from: "the defendant was a man of idle habits and addicted to the use of spirituous liquors, to such a degree as to become frequently intoxicated [and] he had been careless and improvident in the management and cultivation of the said farm and had greatly neglected the same."¹⁴² Judge Mason, writing for the Court, carefully considers whether the state legislature has exceeded its constitutional power under the contract clause¹⁴³ in altering the marital contract, but ultimately concludes that the marriage contract is different enough from normal business contracts that the contract clause does not apply. However, he does strike down the law as violating state due process protections against the taking of vested property rights by the legislature. Mason writes that "the people of the state of New-York have never delegated to their legislature the power to divest the vested rights of property legally acquired by any citizen of the state, and transfer them to another, against the will of the owner."¹⁴⁴ By taking property that belonged, by right, to Mr. White and giving it to Mrs. White without a trial, the legislature had exceeded its powers.

One interesting thing to note about both these cases is that they represented less typical conflicts in which husband and wife were adverse parties. The dissolution of a well-functioning marital relationship was indeed one of the major issues raised by opponents of MWPAs, and so it makes sense that these types of conflicts might lead to the most strident response from courts. However, this judicial hold-out was short-lived and ineffectual. The highest court in New York never took up these cases and never struck down an MWPA. Rather, it and most other New York courts took a middle path between broad, feminist interpretation of the MWPAs and all-out resistance.

For instance, in *Switzer v. Valentine* (1854),¹⁴⁵ the Superior Court of New York City interpreted the 1849 MWPA to read that a married woman's separate property was narrowly defined, and that the new statute did not confer any general right to contract, merely a specific one with regard to a married woman's separate estate. In *Switzer*, Caroline Switzer ran a boarding house with her husband's knowledge. She took out a mortgage on the boarding house, and upon failing to pay back the debt, the property was seized. Her husband sued the creditor, arguing that his wife had no legal right to

¹⁴¹ *White v. White*, 5 Barbour 474 (1849).

¹⁴² *Ibid.*, 475.

¹⁴³ "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." Emphasis added. U.S. Const. art. I, §10, cl. 1.

¹⁴⁴ *White v. White*, 5 Barbour 474 (1849), 485.

¹⁴⁵ 10 HOW 109 (N.Y.) (1854).

mortgage the property. The Court agreed, writing that although the boarding house was run by the wife and much of the business was done in her name, the boarding house was not Switzer's separate property and thus the mortgage was void. The creditor, knowing that Switzer was a married woman, should not have agreed to the mortgage in her name without investigating whether the boarding house was in fact property completely separate from her husband's.

This interpretation is important in considering the relationship between the state legislature and state courts. The 1849 act could be read to give married women broad powers to mortgage property "as if she were a single female," but could also be read more narrowly, as giving married women rights specific to property held on a "sole and separate" account rather than general rights to engage in various types of economic activity. As discussed above, while feminists may have desired an expansive reading of the act, the male legislators who enacted it did not necessarily have this goal in mind. Rather, they hoped to restore some of the protection that had been provided by equity courts and shield a portion of family assets from creditors – goals that the court's interpretation of the act accomplished. This case also illustrates how early MWPA's created difficulties for creditors. Despite the fact that Switzer was the boarding house's primary proprietor and did much of the business in her own name, this was still no guarantee that she could legally mortgage the property.

Expanded but Incomplete Reform

From 1848 to 1884, New York courts continued to read its MWPA in a similar narrow fashion. In individual cases, some creditors prevailed and some debtors prevailed, but overall the legal environment was one of confusion and unclear rules.¹⁴⁶ In 1884, the legislature wrote a new MWPA that resolved much of this confusion in cases relating to third parties like creditors or employers. The new act read, in part, that married women had the right to contract "whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary."¹⁴⁷ However, it also specified that the act would not apply to contracts *between* husband and wife, an important qualification when considering the intent of the legislature.

While legislators hoped to liberalize, clarify, and simplify the legal situation surrounding married women's interactions with creditors and other actors in the market, they were much more wary about upending the marital relationship and gender hierarchy within that relationship. Courts in New York again took a largely cooperative stance with regard to balancing the need for clear legal rules with a desire to maintain hierarchy between husband and wife. For instance, in an 1889 case, the New York Court of Appeals voided a contract between a husband and wife, writing that "the disability to deal with her husband, or to make a binding contract with him, remains unchanged. Contracts between husband and wife are invalid as contracts in the eye of a court of law to the same extent now as before the recent legislation."¹⁴⁸ New York's legislature and courts would go through a few more iterations of MWPA's before passing its final MWPA in 1902 (see Table 1), but the ultimate result was that married women's rights with regard to third

¹⁴⁶ Rabkin, *Fathers to Daughters*: 126-35.

¹⁴⁷ Laws of New York (1848), Chapter 381.

¹⁴⁸ *Hendricks v. Isaacs*, 117 N.Y. 411 (1889). Quoted in Rabkin, *Fathers to Daughters*: 148.

parties were meaningfully liberalized, while the law still maintained significant limits on women's rights based on a tradition of gender hierarchy that granted women unequal status both within marriage and in society.

II. Mississippi: From an Early Debt Free Law to “The Most Radical Legislation”

Mississippi has the designation of being the first state in the Union to pass a Married Women's Property Act, in 1839. (Arkansas actually passed an earlier law, in 1835, but as a territory, and records from the territorial legislature are lacking.) Mississippi's early law was born in a time of economic turmoil in the state, and it provided debtor protection by exempting married women's separate property from her husband's debts; management and control of this property, as well as broader rights to contract or sue, were completely lacking. Over the next forty years, Mississippi would pass a series of statutes and constitutional amendments that gradually expanded married women's economic rights under the law, including limited rights to mortgage their property, and make contracts and engage in business as if single, as well as rights to ownership over their earnings.

This development culminated in an 1880 law that was described by the *Chicago Tribune* as “the most radical legislation yet had on the subject.”¹⁴⁹ The 1880 law, which was later raised to the status of a constitutional provision in 1890, provided that “The common law, as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated...”¹⁵⁰ While scholars have explored the history and impact of Mississippi's 1839 MWPA, less attention has been paid to the subsequent expansions of married women's rights in that state (see Table 2 for the full text of these acts). In this section, I discuss the post-1839 statutes, constitutional amendments, constitutional convention debates, and court cases that led to this dramatic shift in Mississippi law. These sources demonstrate a continued interest in debtor protection as well as a desire to protect women that clashed with an increasingly complex and difficult-to-apply legal code.

“An Act for the protection and preservation of the rights and property of Married Women”: *A Story of Debtor Protection*

Mississippi's 1839 law emphasized debtor protection above all else (see Table 2). It specified that slave property in particular was to be “exempt from any liability for the debts or contracts of her husband.”¹⁵¹ Further, “control and management of all such slaves, the direction of their labor, and the receipts for the productions thereof, shall remain to the husband,” and his permission was needed for any sale.¹⁵²

However, Mississippi's history with married women owning property separate from their husbands began two years earlier, in 1837. In that year, the Supreme Court of

¹⁴⁹ “Radical Legal Changes--Married Woman's Rights in Mississippi,” *Chicago Daily Tribune*, Sept. 13 1880.

¹⁵⁰ Revised Code of the Statute Laws of the State of Mississippi (1880), Chapter 42, section 1167.

¹⁵¹ “An Act for the protection and preservation of the rights and property of Married Women” (1839), section 2.

¹⁵² “An Act for the protection and preservation of the rights and property of Married Women” (1839), sections 4-5.

Mississippi heard a case in which a Native American woman argued that a slave she owned should be considered her separate property, not liable for her (white) husband's debts, under Chickasaw tribal law.¹⁵³ The Supreme Court agreed, writing that because the Allens were married in Chickasaw territory, Chickasaw custom superseded common law in this case.¹⁵⁴ Megan Benson suggests that the ruling was motivated more by elected judges satisfying anti-creditor demands in the electorate than a desire to expand the rights of married women.¹⁵⁵ Although there is no specific evidence that legislators considered this case when drafting the 1839 law, this case does suggest that lawmakers there may have been primed to consider the possibility of exempting married women's separate property as a way to provide protection for indebted families. The case also offered a common law precedent for exempting a married woman's property from her debts, which "might otherwise have appeared too innovative."¹⁵⁶

Mississippi's 1839 MWPA was introduced to the Mississippi Senate by Senator Hadley, who introduced two related bills during that session. The first bill was for his personal relief, forgiving a debt he owed to the state of Mississippi.¹⁵⁷ The other was for the protection of married women's separate property.¹⁵⁸ Hadley was apparently in serious financial trouble, and both sought direct debt relief for himself and debt relief more generally through the protection of married women's property.

Sources vary on Hadley's marital status at the time he proposed the bill. Some sources claim he was married to a wealthy woman and sought to protect his wife's considerable assets as the owner of a successful boarding house.¹⁵⁹ In this version of events, Mrs. Hadley's boarding house became a popular meeting place for members of the Mississippi House and Senate during legislative sessions, and she lobbied for the passage of her husband's proposed MWPA to the legislators who came through the boarding house (see a political cartoon to this effect in Appendix 1).¹⁶⁰ Another source claims that Hadley had not yet married, but was romantically involved with a wealthy woman: "[Hadley] was less actuated by admiration for the customs of the Chickasaws, or a sense of justice to women, than by a desire to marry a rich widow and enjoy her property free from liability to his creditors, both of which, it is said, he did soon after his bill became a law."¹⁶¹ In any case, a personal motivation for debt relief, and in particular debt relief through the protection of married women's assets, seems to have played a significant role in the passage of the new statute.

¹⁵³ *Fisher v. Allen*, 3 Miss. 611 (1837).

¹⁵⁴ *Ibid.*, 614.

¹⁵⁵ Megan Benson, "Fisher v. Allen: The Southern Origins of Married Women's Property Acts," *Journal of Southern Legal History* 6(1998): 106. Benson also argues that the ruling left Chickasaw women less protected from exploitation by white land speculators than they might have been under the regime of coverture.

¹⁵⁶ *Ibid.*, 112.

¹⁵⁷ *Ibid.*, 113.

¹⁵⁸ Elizabeth Gaspar Brown, "Husband and Wife: Memorandum on the Mississippi Woman's Law of 1839," *Michigan Law Review* 42, no. 6 (1944): 1113-14.

¹⁵⁹ *Ibid.*, 1114.

¹⁶⁰ Sandra Moncrief, "The Mississippi Married Women's Property Act of 1839," *The Journal of Mississippi History* 47, no. 2 (1985): 115. See also Ranney, *In the Wake*: 116.

¹⁶¹ "Removal of the Disabilities of Married Women in Mississippi," *American Law Review* XXVI(1892): 116.

Opponents of the bill presented a variety of arguments, but many also centered around debates over debt relief. Senator Grayson, for example, argued that if the bill passed, married men would simply transfer the titles of their land over to their wives to fraudulently avoid repaying their debts.¹⁶² Once an amendment to the bill was offered that addressed this issue, providing that property married women obtained from their husbands would not be exempt, the bill passed handily, by a margin of nineteen to nine.¹⁶³ In writing about the passage of the law, Elizabeth Gaspar-Brown notes:

the jurisdiction which adopted this radical innovation was not one of those states where women's higher education later flourished to a noteworthy degree or which became noted for outstanding leaders of women. It was a slave state, deep in the south, and traditionally conservative. Powerful personal forces must have operated to secure the enactment of this law, for it appears highly doubtful that there was the slightest measure of popular demand for it.¹⁶⁴

Gaspar Brown is likely correct that there was little to no popular demand in Mississippi at the time for greater rights for women, but beyond Senator Hadley's personal interest in escaping his own debts, debt relief in many forms was certainly a broader popular concern in the state during this period. Debates from the 1839 statute indicate that while some legislators had at least partially feminist concerns, more made arguments relating to debtor protection or the protection of women from irresponsible husbands.¹⁶⁵

The 1839 MWPA, along with other early MWPA's in the South, were passed "during and in the wake of the panics of the late 1830s and the severe depression that followed."¹⁶⁶ Sandra Moncrief describes Mississippi in the 1830s as a state of rapid political and economic change. In the early years of the decade, the combination of a flood of immigrants, the opening of Native American lands to settlers, and access to easy, largely unsupervised credit led to an economic boom. The economic fortunes of the state quickly shifted with the passage in Congress of both the Coinage Act and the Distributive Act in 1836, and the resulting Panic of 1837.¹⁶⁷ Mississippi was among the hardest hit, and "[by] 1839 extensive plantations were thrown out of cultivation and lying waste for want of hands to till them, the slaves having been seized under execution and carried off by the sheriff."¹⁶⁸ The Panic of 1837 created a recession that lasted until the mid-1840s, and Mississippi lawmakers did not limit debt relief measures to married women's

¹⁶² Gaspar Brown, "Husband and Wife," 1114.

¹⁶³ Ibid., 1116.

¹⁶⁴ Ibid., 1118.

¹⁶⁵ Ranney, *In the Wake*: 116. For example, one proponent of the bill made the argument that women had a "just claim" to property they obtained either by gift, inheritance, or as "the product of their own labor." But, paternalistic and economic motivations seem to have been more prevalent. See Gaspar Brown, "Husband and Wife."

¹⁶⁶ Lebsack, "Radical Reconstruction," 202.

¹⁶⁷ Moncrief, "Mississippi Married Women's Property Act," 111-12.

¹⁶⁸ Reginald Charles McGrane, *The Panic of 1837: Some Financial Problems of the Jacksonian Era* (New York: Russel & Russel, Inc., 1965), 117.

property protection. In 1841, its legislature passed a homestead exemption act that shielded a debtor's home from creditors up to a certain value.¹⁶⁹

In addition to general demands for debt relief, we also see a paternalistic concern for protecting women. Quoting Jackson's *Southern Sun*, Moncrief provides an example of this type of argument:

There should certainly be some legislative enactment to prevent some unscrupulous husbands, from wantonly squandering the estate vested in them by marriage and bring virtuous wives and helpless children from want and wretchedness. There are also such people in the world as 'fortune hunters' – men without morality – without hearts, who are ever prone to deceive and divest women of wealth, that their prodigal hands may be furnished with the pecuniary means of continuing a life of splendid dissipation and degrading indolence. The licentiousness of such men should be checked. They not only disgrace the name of man – they not only sport with the holiest feelings of a woman's heart – but they prey upon their victim and their children, the countless miseries of poverty.¹⁷⁰

Concerns for the protection of married women and the property they brought into marriage were especially important for wealthy fathers. Joseph Ranney discusses the importance of antenuptial agreements in equity courts and later MWPA's throughout the South, writing that these were necessary to "preserve stable property ownership and social order. In the South, daughters of the planter class remained a part of their original families after they married and retention of family land holdings was a key to preserving family wealth and power."¹⁷¹ Thus, the passage of Mississippi's 1839 MWPA seems to have been motivated by a combination of both purely economic concerns for protecting indebted families, as well as paternalistic attitudes that aimed to provide governmental protection for married women and the assets that they received via gift or inheritance from family members.

There are three important implications of Mississippi's 1839 MWPA. First, despite a title claiming "protection and preservation of the rights and property of Married Women," the focus was on protecting debtors. Indebtedness during and after the Panic of 1837 became widespread, not limited to those with little political power. Megan Bensen explains: "A great many legally adroit, masculine, southern minds found that by granting their wives a separate legal identity by law, they could shelter assets--primarily slave property--from hungry creditors."¹⁷² Along with a desire to protect indebted families (sometimes, as in Hadley's case, their own), legislators hoped to protect women from irresponsible husbands, particularly where family assets granted to women from their fathers were at stake. Second, the focus was on slave property, with four of five sections outlining specific rules regarding married women who owned slaves. This implies that legislators may have been especially concerned with wealthier women who would have

¹⁶⁹ *Mississippi Laws* (1841), Chapter 15, p. 113. See also Note, "State Homestead Exemption Laws," 1026.

¹⁷⁰ *Southern Sun* (Jackson, Miss), February 5, 1839. Quoted in Moncrief, "Mississippi Married Women's Property Act," 122.

¹⁷¹ Ranney, *In the Wake*: 114-15.

¹⁷² Bensen, "Fisher v. Allen: Southern Origins," 112.

been more likely to own slaves; in contrast, a law protecting women's wages and earnings from employment outside the home would not come until 1871. Finally, legislators aimed to balance protection for legitimately needy debtors and their wives with a desire to protect creditors from fraud. Section 1 provides that husbands cannot simply transfer property to their wives after marriage in order to shield it from creditors – married women's separate property must instead be truly independent of her husband, coming from sources such as inheritance, gift, or ownership prior to the marriage.¹⁷³

In line with the language of the act, Mississippi's Supreme Court interpreted the law narrowly. In a 1844 case, the Court concluded that a right to "separate property" included ownership of slaves only, and not any profits or income. Sarah Spencer had purchased a carriage with the profits from hiring out slaves she had received from her father, and her husband's creditors attempted to seize the carriage as repayment for his debts. The court ruled that the carriage was not, in fact, Sarah's separate property:

From the whole tenor of the act, it is plainly deducible that it was designed to guard the specific property from any liability for the debts and contracts of the husband. It reaches no further....[U]nder [the law's] provisions, the productions of the slaves in question were the property, and liable for the debts and contracts of the husband.¹⁷⁴

This case indicates that the 1839 act functioned almost entirely as a debtor protection law, exempting a very specific set of property for each family (i.e. a wife's real estate and slaves, brought into the relationship through means outlined in the law) but nothing else (i.e. profits from the wife's separate property). The Supreme Court also found that the 1839 MWPA did not affect married women's broader economic rights in a meaningful way. In *Davis v. Foy*, it found that a married woman was not responsible for a promissory note she signed, writing that the law "has not the effect to extend her power of contracting, or of binding herself or her property."¹⁷⁵

Gradual Rights Expansions and the Legal Response

Between 1839 and 1880, the Mississippi legislature passed a number of laws that increased married women's rights in a piecemeal fashion. In 1846 and 1857, it passed MWPA's that kept in place the debtor protections of the 1839 act while limiting husbands' control over their wives' separate property and giving married women limited rights to contract (see Table 2). For instance, the 1857 act provided that husbands would no longer be able to "[sell], convey[], mortgage[], transfer[], or in any manner encumber[]" their wives' property without their permission, and wives gained the right to purchase and sell property under their own name.¹⁷⁶ Further, married women would now receive the profits and income from their separate property rather than this money going to their

¹⁷³ "An Act for the protection and preservation of the rights and property of Married Women" (1839), section 1.

¹⁷⁴ *Grand Gulf Bank v. Barnes*, 10 Miss. 165 (1844), 186.

¹⁷⁵ *Davis v. Foy*, 15 Miss. 64 (1846), 67.

¹⁷⁶ Revised Code of the Statute Laws of the State of Mississippi (1857), Section V, Articles 23-24.

husbands as under the 1839 act.¹⁷⁷ However, married women's right to mortgage separate property or otherwise take out loans remained limited. Married women could only make these types of contracts for specific purposes, outlined in detail in the laws. The 1846 act allowed wives to mortgage their property for supplies for their slaves and plantation, and the 1857 act enlarged these allowable purposes to include family supplies, clothing, children's education, household furniture, and improvements to their property (see Table 2 for more details).¹⁷⁸

In 1869, in the midst of Reconstruction, delegates met to write a new Constitution for Mississippi. In addition to the significant post-Civil War changes to the document, delegates included a brief provision that gave married women's property rights constitutional protection (see Table 2). The convention's delegates passed this measure as part of the new Bill of Rights by a vote of 39-20.¹⁷⁹ The convention journal records no debates specific to the married women's provision, likely because it was a brief, generic version of laws that had been in existence for quite a few years, and made no substantial changes to these laws.

However, there were significant debates on issues surrounding debtor protection that are relevant to understanding the context of MWPAs. For instance, one delegate, Mr. S. Johnson, argued that almost all exemptions (here referring largely to homestead exemptions) should be eliminated, with the exception of married women's inheritances.¹⁸⁰ Although this provision failed, the proposal indicates two important issues. First, women's separate property rights were at least to some extent still seen as an "exemption" allowed to debtors alongside their right to keep exempt some amount of housing, farming implements, and necessities from their creditors' claims; although some delegates may have seen MWPAs as a proactive extension of women's rights, others classified these alongside other exemptions that were based on family-level protection and unrelated to gender. Johnson's justifications for the proposed provision also give a window into concerns over debtor-creditor politics at the time. He argued that excessive exemptions actually hurt debtors as much as creditors, noting that poor families often could not obtain needed medical treatment on credit because homestead and other exemptions were so generous that it would be too easy to escape repayment.¹⁸¹ While Johnson did not extend this discussion to married women's property, it seems likely that married women would have faced similar issues with obtaining needed credit because of the fact that their right to mortgage and more generally contract was limited in various ways. I discuss several relevant cases below that paint a picture of a legal environment similar to that in New York between 1848 and 1884, where creditors would have a difficult time knowing which debts would ultimately be enforceable in court.

Even as some delegates argued for more creditor-friendly exemption laws, others argued for increased debtor protection. This seems to be at least in part in response to the nationwide trend of a growing number of debtors across the class structure, and in

¹⁷⁷ Revised Code of the Statute Laws of the State of Mississippi (1857), Section V, Article 24.

¹⁷⁸ Revised Code of the Statute Laws of the State of Mississippi (1857), Section V, Article 25.

¹⁷⁹ *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi, 1868*, (Jackson: E. Stafford, 1871), 345.

¹⁸⁰ *Ibid.*, 80-81. At another point, a different delegate proposed a similar provision that would have allowed exemptions only for clothing and property owned by a married woman before marriage; this proposal also failed. See *Ibid.*, 584.

¹⁸¹ *Ibid.*, 80.

particular debtors whose economic problems were seen as beyond their personal control and responsibility. Rather than being seen as personal moral failings, debts became viewed as an integral part of the commercial economy, for which both creditors and debtors had to take on some level of risk.¹⁸² For instance, Mr. Railsback, a delegate to the convention, argued that: “A large portion of the planters and businessmen of the State of Mississippi are grievously oppressed by unliquidated liabilities,” in large part due to the economic devastation of the Civil War.¹⁸³ Although Railsback’s proposed solution, a suspension of all debt collection within the state, was not adopted, these economic circumstances do help explain why the convention incorporated a variety of provisions that benefited debtors. These included a ban on imprisonment for debt, a provision granting the legislature the power to pass homestead laws as well as “any and every act deemed necessary for the relief of debtors,” and an MWPA.¹⁸⁴

Suzanne Lebsack argues that MWPA’s passed by Radical Republicans as part of Reconstruction constitutions, including in Mississippi, “continued an established southern tradition of legislation, a tradition of progressive expansion of the property rights of married women for utterly nonfeminist purposes,” namely the protection of women from irresponsible men, the protection of their children by men who were concerned with passing on property to their grandchildren via their daughters, and the protection of indebted families in a period when debt was a widespread and serious problem.¹⁸⁵ These reasons mirror those we see for Mississippi’s first MWPA and early MWPA’s in other states.

As mentioned above, Mississippi’s Supreme Court heard a series of cases that demonstrate a legal environment that would have been opaque and confusing for the average creditor or debtor. Many of the cases resulted in creditors being unable to collect on debts that were seemingly made in good faith, without evidence that these creditors had attempted to fool or take advantage of the women who now appealed to coverture to escape their debts. For instance, Sarah Pelan and her husband signed two promissory notes. Before they came due, her husband passed away, and Sarah claimed in court that she should not be liable to repay the debt because she had been under coverture when she signed the note. The court concluded that because the contract made no mention of Pelan’s separate property, she was not liable, despite the fact that she was a single woman at the time of the lawsuit. Justice Ellett wrote: “A married woman generally can make no valid contract, and her promises are prima facie void.”¹⁸⁶ Though the MWPA’s had enlarged the ability of married women to make contracts in specific cases, those contracts had to abide by the specific rules and purposes laid out in the statutes.

Whitworth v. Carter (1870) spelled out exactly how those rules might be applied to a specific contract. In that case, Mary Whitworth purchased real estate on credit, and failed to repay the loan. In ruling that Whitworth was not liable to repay the loan, the court wrote:

To hold that she can obligate herself to pay for property bought on credit, by a sealed instrument, or otherwise, where the suit is at law, on the chose

¹⁸² Alexander F. Roehrkasse, "Failure, Fraud, and Force: The Rise and Fall of the Debtor's Prison in New York, 1760-1840" (University of California, Berkeley, 2014), 49.

¹⁸³ *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi, 1868*: 43-44.

¹⁸⁴ Constitution of the State of Mississippi (1868).

¹⁸⁵ Lebsack, "Radical Reconstruction," 197-201.

¹⁸⁶ *Hardin v. Pelan*, 41 Miss. 112 (1866), 114.

in action, would overturn the beneficent policy of the law, and break down the barriers with which the corpus of her estate is hedged around. Whilst she can provide for the maintenance, comfort, and education of herself and family and for the improvement of her property, she is not permitted to embark in the hazards of trade or speculations. For certain enumerated objects, she may spend her entire income, and make liable the property itself. Yet, if she proposes to large her fortune, and add to her property, she can only do so by paying the ready money.¹⁸⁷

The court reasoned that if Whitworth had taken out the loan for an allowable purpose – for example, the education of her children – she would indeed be liable. But a loan for land speculation was a different story; because the justices saw the purpose of the MWPA as protecting married women, they argued that it ought not allow them to take undue risks with their separate property.

Even where married women took out loans with the stated intent to use the funds for allowable purposes, it was incumbent upon the creditor to prove in court that she did, in fact, use the loan for the stated purposes. In an 1874 case, *Viser v. Scruggs*, the court was unsympathetic to a creditor who had a loan document that expressly laid out the way in which the borrower, a married woman, would use the funds:

In making the loan Viser took the risk, that Mrs. Scruggs would use the money for the purposes recited in the note, “of purchasing family supplies and necessaries, and wearing apparel for herself and children.” If the money was not appropriated to exonerate her estate from valid debts, or to improve her property, or to maintain the family, or for some other object for which she could incur liability, there is no obligation resting upon her, or her estate, which can be enforced. The appellant, Viser, has wholly failed to show such use of the money.¹⁸⁸

This case lays out almost an impossible standard for creditors hoping to collect from married women who sought to escape their debts. Obtaining a signed contract that she would use the loan in compliance with the purposes laid out in the MWPA was not sufficient; the creditor was also required to show that the funds were actually used in that manner. Viser did have some recourse in this case; because Mrs. Scruggs had given the money to her husband, the court ruled that debt legally became his, and thus the income from her separate estate could be taken to repay the debt. Still, Viser was unable to seize the property itself, as he would have been if Mrs. Scruggs were a man or single woman.

In cases throughout this period, the Mississippi Supreme Court issued similar rulings that limited the extent to which a married woman’s separate property could be seized for her debts, writing that these limitations were “intended [by the legislature] to secure to the wife the enjoyment of her separate estate against any possible contingency of loss through the fraud, force or undue influence of her husband.”¹⁸⁹ Although these rules limiting married women’s liability may indeed have protected individual women

¹⁸⁷ *Whitworth v. Carter*, 43 Miss. 61 (1870), 72-73.

¹⁸⁸ *Viser v. Scruggs*, 49 Miss. 705 (1874), 711.

¹⁸⁹ *Dibrell v. Carlisle*, 48 Miss. 691, (1873), 706. See also *Foxworth v. Magee*, 44 Miss. 430 (1870).

who would otherwise have lost their property to bad business deals, it is also likely that many other women would have been unable to obtain credit at all because creditors would have been so uncertain about whether these debts would ever be legally enforceable.

The other major legal issue surrounding married women's property during this period was that of their earnings. As in New York and many other states, earnings were seen as fundamentally different from other types of property such as real estate or a gift of funds from a parent. This distinction led to cases that often benefited creditors, to the detriment of women who believed they held separate property that was exempt from their husbands' debts. As with the cases dealing with allowable and non-allowable contracts made by married women, these cases also sometimes led to outcomes that required extensive record-keeping and high standards of evidence that would seemingly be difficult for many litigants to provide.

Henderson and Moore v. Warmack dealt with a woman who purchased a slave with money she had earned sewing clothes, providing medical care to slaves, and performing other tasks on the plantation where her husband worked as an overseer.¹⁹⁰ Sarah Warmack purchased a slave using these earnings, but when her husband went into debt, he sold the slave against her wishes in order to repay the debt. Mrs. Warmack sued Henderson and Moore, who had purchased the slave, demanding that the slave be returned to her as her separate property, which should not have been liable for her husband's debts nor sold without her permission. The Court ruled that because Sarah's earnings belonged to her husband, the slave was never her separate property to begin with, and thus the sale was legal.

In a similar case, *Apple v. Ganong*, the court came to a similar ruling, with results that demonstrate how different rules for earnings and other sorts of property were increasingly problematic.¹⁹¹ As in many of these cases, this dispute concerned land that Louisa Ganong claimed as her separate property, but her husband's creditors claimed they should be able to seize for repayment of his debts. The court determined that Louisa had purchased the land using a combination of funds: money she had in her possession before being married, a gift of cotton from her mother, and income she earned from sewing. Since the first two categories of property could be claimed by married women as separate property, but the last could not, the creditors could claim part but not all of Louisa's claimed separate property.¹⁹²

These types of cases help explain why Mississippi's legislature passed an earnings act in 1871. The new law placed earnings on the same footing as all other types of property, making a thorough investigation into how married women purchased property unnecessary.¹⁹³ The new law also included an important new provision on married women's ability to make contracts, allowing her to make legally enforceable

¹⁹⁰ *Henderson and Moore v. Warmack*, 27 Miss. 830 (1854).

¹⁹¹ *Apple v. Ganong*, 47 Miss. 189 (1872). Note that although this case reached the Supreme Court after the Mississippi legislature had passed an earnings act (in 1871), the purchases and debts in question occurred prior to the passage of the act, so the earnings act was not controlling.

¹⁹² *Apple v. Ganong*, 47 Miss. 189 (1872), 199.

¹⁹³ Revised Code of the Statute Laws of the State of Mississippi (1871), Chapter 23, Article V. Property of the Wife, section 1778.

contracts in order to engage in trade or business.¹⁹⁴ Prominent lawyer Edward Mayes noted that this provision extended the right to contract in the course of business to “more than trade in a commercial sense. It meant any employment which required time, labor and skill.”¹⁹⁵

Throughout this transitional period, we see the Mississippi legislature and Supreme Court gradually expanding married women’s property rights over time, with continued concerns for protecting both indebted families and married women in general. Over time, there was a tension between these protectionist concerns and a desire to prevent fraud and make legal principles more clear. By 1876, the Mississippi Supreme Court had interpreted the ‘free trader’ provisions of the 1871 MWPA broadly, ruling that married women could engage in trade and business just like men and unmarried women, and could make legally enforceable contracts in the course of these business transactions. In a sharp shift from the protectionist stances of earlier cases, the Court in *Netterville v. Barber* wrote that “a married woman, like other persons, must take the chances and risks of her business transactions. The law will not intervene and relieve from all consequences of their mistakes, misfortunes, or follies.”¹⁹⁶

Clearly, this period saw a major expansion of rights, both through legislative acts and court rulings that cooperated with these expansionary statutes. Yet, cases like *Viser* indicate that married women’s property remained a confused area of law with serious consequences for both creditors and married women who hoped to obtain credit. Even the justices in *Netterville*, while announcing a ruling that interpreted married women’s right to contract broadly, still insisted: “Freedom from disability is not complete. She is not able to make every sort of contract... The statute does not authorize a married woman to borrow money... [except for] legitimate purposes.”¹⁹⁷

“Married women are hereby fully emancipated from all disability on account of coverture”: *The Married Women’s Property Act of 1880 and the Redeemer Constitution of 1890*

In 1880, Mississippi’s Democratic-dominated legislature passed an MWPA that the *Chicago Tribune* deemed ““the most radical legislation yet had on the subject.”¹⁹⁸ The new act was sweeping in annulling the common law as it applied to married women’s property rights:

The common law, as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not be held to impose and disability or incapacity on a woman, as to the ownership, acquisition or disposition of property of any sort, or as to her

¹⁹⁴ Revised Code of the Statute Laws of the State of Mississippi (1871), Chapter 23, Article V. Property of the Wife, section 1780.

¹⁹⁵ Edward Mayes, "The Legal and Judicial History," in *Biographical and Historical Memoirs of Mississippi: Embracing an Authentic and Comprehensive Account of the Chief Events of the History of the State and a Record of the Lives of Many of the Most Worthy and Illustrious Families and Individuals*, ed. Goodspeed Brothers (Chicago: Goodspeed, 1891), 124.

¹⁹⁶ *Netterville v. Barber*, 52 Miss. 168 (1876), 173-174.

¹⁹⁷ *Netterville v. Barber*, 52 Miss. 168 (1876), 170.

¹⁹⁸ "Radical Legal Changes--Married Woman's Rights in Mississippi."

capacity to make contracts, and do all acts in reference to property, which she could lawfully do, if she was not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she was not married.¹⁹⁹

The law's author was Josiah A. P. Campbell, a justice of the Mississippi Supreme Court.²⁰⁰ He was appointed by the state legislature to write a new code of statutes for the state of Mississippi in 1878, and Dunbar Rowland described this endeavor in a 1935 history of judges and courts in Mississippi: "[The code] was adopted with but little change by the legislature of 1880. The Code of 1880 abounds in reformatory laws which have proved of great value to the people. It contains nearly two hundred sections written solely by Judge Campbell, which were adopted as written."²⁰¹ Although Campbell's motivations behind including a new MWPA in the 1880 Code are unknown, he was widely known as a reformer, and as a Mississippi Supreme Court justice, he would have been keenly aware of the legal difficulties that piecemeal laws created.

In 1890, a convention dominated by Redeemer Democrats wrote a new constitution for Mississippi that gave the 1880 MWPA the weight of constitutional provision. This convention was by no means a progressive one; it introduced literacy tests and poll taxes that would prevent most African Americans from voting. Yet, the MWPA included in the constitution passed with apparently little controversy. One delegate did propose extending the vote to some women (with property and education requirements), but this proposal never made it out of committee.²⁰²

The context for the passage of the 1880 and 1890 MWPAs had also changed with regard to concern for debtors and debt relief. While the 1890 Constitution did include a prohibition on imprisonment for debt (carried over from its 1868 Constitution), there were no other provisions relating to debt relief and the issue was not a major point of debate at the Constitutional Convention.²⁰³ By 1880, the debt relief origins of Mississippi's 1839 law had disappeared. The law made no reference to a married woman's husband's debts, and she now had the right to invest her separate property in his business ventures or secure his loans as she pleased. Accordingly, many of the protective aspects of the early MWPAs disappeared. For instance, in *Toof v. Brewer*, the Court ruled that a husband and wife could join together in a business partnership, and the wife would be personally liable for debts so incurred, as would her separate property.²⁰⁴ In another example, the Court found in 1904 that married women were no longer protected

¹⁹⁹ Revised Code of the Statute Laws of the State of Mississippi (1880), Chapter 42, section 1167.

²⁰⁰ "Removal of the Disabilities of Married Women in Mississippi," 115.

²⁰¹ Dunbar Rowland, *Courts, Judges, and Lawyers of Mississippi, 1798-1935* (Jackson, MS: Press of Hederman Bros., 1935), 107.

²⁰² *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi, 1890*, (Jackson: E. L. Martin, 1890), 220.

²⁰³ Constitution of Mississippi (1890); *ibid.*

²⁰⁴ *Toof v. Brewer*, 96 Miss. 19 (1888).

against claims of adverse possession in court – after the 1880 act, they were to be treated exactly like men, with no special protections.²⁰⁵

However, despite the broad language of the 1880 and 1890 MWPAs, these statutes were limited by the Mississippi courts to property rights only. For example, in a 1924 case, the Mississippi Supreme Court ruled that a wife could not sue her husband for negligence, writing that “It was not the purpose of the makers of our Constitution nor of the legislature to entirely destroy the unity of man and wife with all the incidents flowing there from.”²⁰⁶ Thus, the transformation of married women’s property law in Mississippi had its limits. As in New York, legislators and judges balanced liberalization with the continuing order of gender hierarchy. That said, these laws did set the stage for married women to participate more fully in the economy as businesswomen with equal rights and responsibilities.

III. South Carolina: Changing Course Between Constitutional Conventions

South Carolina experienced a path toward reform with more ups and downs than in New York and Mississippi. It passed its initial law later than many southern states, at the Reconstruction constitutional convention after the Civil War. The constitutional provision passed there, as well as early South Carolina Supreme Court interpretations, were actually quite broad and granted substantial economic rights to married women. However, as the political climate changed, South Carolina’s legislature responded to rights-granting court rulings swiftly, with statutes that increasingly narrowed the potential of the initial constitutional provision. The Supreme Court quickly fell in line, issuing narrower rulings in line with the new statutes. However, as in Mississippi and New York, this led to an increasingly problematic legal environment, with complex and difficult-to-implement standards. By South Carolina’s Redeemer Constitutional Convention in 1895, delegates that were otherwise very conservative were ready to expand married women’s property rights substantially.

Reform During Reconstruction

South Carolina passed its first MWPA in the wake of the Civil War, as part of its new state constitution in 1868 (see Table 3). This constitution was focused on equal opportunity and written largely by Radical Republicans.²⁰⁷ At two points, delegates raised the issue of women’s property rights specifically. Early on in the Convention, on the fifth day that delegates met, delegates debated a variety of debt relief proposals, aimed in particular at wartime debts. For instance, one delegate proposed a resolution directing the military to suspend collection of debts for three months, until the economy was in less chaos.²⁰⁸ The Convention did not move forward with this proposal, and another delegate then proposed a series of resolutions aimed at debt relief: a provision

²⁰⁵ *Southworth v. Brownlow*, 84 Miss. 405 (1904).

²⁰⁶ *Austin v. Austin*, 136 Miss. 61 (1924), 71.

²⁰⁷ Walter Edgar, *South Carolina: A History* (Columbia, SC: University of South Carolina Press, 1998), 386.

²⁰⁸ *Proceedings of the Constitutional Convention of South Carolina*, vol. 1 (Charleston, S.C.: Denny & Perry, 1868), 62-63.

exempting \$1000 per resident from debt collection, a homestead exemption exempting up to \$2,500 worth of property and housing, a homestead exemption specifically benefiting widows or women who had been abandoned by their husbands, and a separate estates provision exempting the separate property of wives from liability for the debts of their husbands.²⁰⁹ Clearly these proposals, which ultimately did not pass as a unified debt relief policy, were aimed primarily at relief of war debt rather than advancing the interests of married women specifically.

When the Convention's delegates next took up the topic of married women's property rights, the debate focused more specifically on the women themselves, but this time with an eye toward the protection of married women from irresponsible and unscrupulous husbands. One delegate argued:

I appeal to you who have lived here all your lives, and seen women suffer from the hands of the fortune hunters; the plausible villains, who, after securing the property of their wives, have squandered it in gambling and drinking; a class of men who are still going about the country boasting that they intend to marry a plantation, and take the woman as an incumbrance [sic].²¹⁰

The debate continued in a similar fashion, with another delegate accusing those opposing a married women's property provision of being "unmarried members of the Convention who may be looking for rich wives," and arguing that delegates with female relatives would have the primary concern of looking out for their protection.²¹¹ The provision ultimately passed 88-8, with 25 abstaining.²¹² It gave married women the right to separate estates not subject to their husband's debts.²¹³

As in New York, a concern for female family members and the protection of family property was raised, with delegate B.F. Randolph arguing:

[There] are those here...who have mothers, sisters and daughters, all of whom may come into possession of property; and I ask if it is just that those who are so near and dear to us, shall be left in a position where a man without principle may, by marriage, take possession of their property, and leave them dependent upon the cold charities of the world?²¹⁴

This interest in protecting female family members and their property was particularly acute in the years immediately after the Civil War. With the South experiencing military deaths three times that of the North (approximately one-fifth of military-age white men in the Confederacy), single women often either remained unmarried longer or had to turn to 'less desirable' classes for marriage prospects.²¹⁵

²⁰⁹ Ibid., 64-65.

²¹⁰ Ibid., 785-86.

²¹¹ Ibid., 786.

²¹² Ibid., 787.

²¹³ *Constitution of South Carolina* (1868). Article XVI, Section 8: Woman's property.

²¹⁴ *Proceedings of the Constitutional Convention of South Carolina*, 1: 786.

²¹⁵ J. David Hacker, Libra Hilde, and James Holland Jones, "The Effect of the Civil War on Southern Marriage Patterns," *Journal of Southern History* 76, no. 1 (2010).

Historians J. David Hacker, et. al. note that “After the war, wealth became less important in the economically devastated South when contracting marriages, and many women married below their social class.”²¹⁶ With wealthy women now facing the prospect of marrying men from lower classes who could bring less of their own property to the marriage, it was now more important than ever to ensure that family property passed on to daughters would be protected.

Delegates at the Convention did note, however, that the new provision opened the door to fraud, abuse, and legal uncertainty over exactly what property was owned by a wife versus her husband (and thus exempt from debts).²¹⁷ In fact, over the next few decades, this is precisely the legal situation that would develop around married women’s property in South Carolina, with a confusing legal system in which married women could own property, but under which it was never exactly clear what they could legally do with that property or what potential creditors could expect. Indeed, the legal problems arising from partial property rights for married women was a major motivator of expanded married women’s property rights at South Carolina’s constitutional convention in 1895.

It is important to note here that despite the seemingly expansive language of the constitutional text – providing rights to married women over her property “as if she were unmarried,”²¹⁸ the delegates were largely concerned with protecting victimized women, particularly relatives, or protecting the property interests of indebted men – not putting forward a liberal view of married women as full, equal citizens. When women’s suffrage was raised, it was to criticize a proponent of the provision for being too liberal, a charge he quickly denied.²¹⁹

After passage, the South Carolina House and Senate, both dominated by Republicans, quickly took up the issue of married women’s property rights.²²⁰ The 1870 Act laid out the right to separate property specified in the Constitution, and further stated that married women could buy and sell property, write wills, and make contracts as if single.²²¹ In the years that followed, a series of court rulings and statutes narrowed the law considerably, putting in more and more provisions that limited women’s ability to utilize their separate property, often with the justification of protecting married women from making financial mistakes.

Broad Court Interpretation Followed by Swift Legislative Responses

Initially the courts in South Carolina interpreted its MWPA expansively, and with more deference to creditors. In 1881, the South Carolina Supreme Court held that a married woman was liable for a debt she contracted on behalf of her son’s business.²²² In discussing the history of MWPAs, the Court writes:

²¹⁶ *Ibid.*, 46.

²¹⁷ *Proceedings of the Constitutional Convention of South Carolina*, 1: 783-84.

²¹⁸ *Constitution of South Carolina* (1868). Article XVI, Section 8: Woman’s property.

²¹⁹ *Proceedings of the Constitutional Convention of South Carolina*, 1: 785.

²²⁰ Michael J. Dubin, *Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006* (Jefferson, NC: McFarland, 2007), 170.

²²¹ “An Act to Carry into Effect the Provisions of the Constitution in Relation to the Rights of Married Women,” *Acts and Joint Resolutions of the General Assembly of the State of South Carolina, 1869-1879*: 325-326.

²²² *Pelzer v. Campbell*, 15 S.C. 581 (1881).

Most of the states of the Union originally adopted the old common law of the mother country, modified as it had been by the introduction of trusts and the peculiar doctrine of ‘the separate estate’ of married women, created by act of the parties and administered exclusively in courts of equity. But later, as property increased and the relations of a highly civilized society become more complex, there was developed a tendency to escape what was regarded as the hard and unbending rules of the common law, and to bestow upon the wife a larger capacity to hold property in her own right, and to dispose of it without regard to the wishes of her husband.²²³

According to the Court, then, the expanding property rights of married women were largely in response to a growing commercial economy with more complex economic interactions among citizens. The Court writes that the law clearly gives married women the right to contract with regard to her property as if she were single (and certainly a plain reading of the text would concur with this statement), and quickly dismisses the impact this might have on the protection of married women and/or its impact on possible debt-relief intentions behind the law:

It has been strongly urged upon us that to give a married woman the unrestricted right to bind herself by contract must result in the destruction of her separate estate...that every good wife will contribute her last cent to promote the success or to maintain the credit and honor of her husband...[But given] the right to contract, [married women] assume the liabilities of contractors.²²⁴

Thus, the Court took a stance that had implications for both married women and their creditors. On the one hand, the ruling took a less paternalistic stance toward married women; they had the right to contract with that property even to their own detriment or the detriment of their separate estate. On the other hand, this ruling also obviously benefited creditors, who would be able to collect on the debts of married women as if they were single; the ruling reduced uncertainty in a growing commercial economy that more frequently involved married women as economic actors.

Even as the Court made a more expansive ruling in favor of married women’s property rights, it seemed to signal to the legislature that it could be more narrow in its legislation if it so chose. Referring to the intentions of the delegates at the recent constitutional convention, the judges write: “The main object of the provision in the constitution seems to have been, not so much to declare the rights of *the wife*, as to negative those of *the husband* in regard to her property—not to *enable her*, but to disable *him and his creditors*.”²²⁵ Thus, while the law passed by the legislature was broad both as written and as interpreted by the court, the Court seemed to signal that a narrower law

²²³ Ibid., 588-589.

²²⁴ Ibid., 601.

²²⁵ Ibid., 596.

focused on debt relief would not be considered invalid under the state constitution if the legislature chose a different path.

The South Carolina legislature responded quickly to *Pelzer*, passing a new law curtailing married women's general power to contract (and limiting it to contracts specifically concerning her separate estate) in its next session.²²⁶ The 1882 legislature was now overwhelmingly Democratic, a major shift since the 1870 MWPA had passed.²²⁷ As discussed in the New York example, the definition of a married woman's separate estate could often be construed quite narrowly, and indeed, this is the path the South Carolina courts took after 1882. The South Carolina Supreme Court would later write of the amendment:

Its manifest purpose was to protect the wife by limiting her power to contract...if left to her own will, experience conclusively shows that a devoted and confiding wife could be very easily induced to sacrifice her all in, perhaps, what every one else would regard as a desperate attempt to shield a reckless or improvident husband from financial distress.²²⁸

Specifically, the Supreme Court ruled that contracts made by married woman must directly concern their separate property rather than merely making mention of it or using it to guarantee a debt unrelated to the separate estate.²²⁹ That is, after the 1882 amendment, married women were not only denied a general right to contract, but also the right to contract with regard to their separate estates in all but the most limited circumstances. In *Aultman v. Rush*,²³⁰ the Court extended this same principle to mortgages on separate estates. Subsequently, the Court also held that that a married woman had no right to her earnings, and thus they could be claimed by a creditor for her husband's debts.²³¹ In *Bridgers v. Howell* (1887), the Court argued that neither the 1868 Constitution nor the ensuing MWPA explicitly gave married women ownership of their earnings, and so the common law rule that earnings belonged to the husband still stood.²³²

The posture of the state legislature and courts toward debt relief is interesting here. After 1882, there was a clear concern for protecting women from their creditors when the women themselves acted to mortgage their separate property or otherwise make contracts that would endanger that property. However, when it came to satisfying a husband's creditors, the justices were less willing to designate property as belonging to the wife and thus not accessible by creditors. Part of the story here may relate to changing definitions of property in the broader society. According to Scott (1977), it was only in the decades just prior to the Civil War that Americans started viewing wages as

²²⁶ *Code of Civil Procedure of the State of South Carolina* (1882): 93; *Habenicht v. Rawls*, 24 S.C. 461 (1886), 464-465.

²²⁷ Dubin, *Party Affiliations*: 171.

²²⁸ *Gwynn v. Gwynn*, 27 S.C. 525 (1887), 538. Of course, at least in the cases that made it to court, the opposite was often true: women were trying avoid repaying debts they had taken out, sometimes for their own business pursuits, by retroactively claiming they were not competent to have signed the contract.

²²⁹ *Habenicht v. Rawls*, 24 S.C. 461 (1886), 466-467.

²³⁰ *Aultman v. Rush*, 26 S.C. 517 (1887).

²³¹ *Bridgers v. Howell*, 27 S.C. 425 (1887).

²³² *Ibid.*, 429-430.

property (and wage-earners as property-holders) at all.²³³ These cases make it clear that the courts in the 1880s still viewed wages as being property of a different sort.

For instance, the Court in *Bridgers* argues that the question in this case is not really about property but rather about the proper relationship between husband and wife under common law, referring to the doctrine of marital service and writing that the argument that married women have a property interest in their earnings:

assumes...that a married woman's personal services belong to herself and not to her husband, whereas the reverse of this proposition was undoubtedly true at common law, and, as we have seen, neither the constitution nor any statute has made any change in the common law doctrine. Hence, as the services of the wife belong to her husband, all acquisitions made by such services belong to him also.²³⁴

Thus, wages were not seen as property in the same way that a tract of land was property; rather, they were payment for services rendered, and those services properly belonged to a woman's husband. The Court reiterates this point in *Gwynn v. Gwynn* (1887)²³⁵, this time siding with the debtors in the case. In *Gwynn*, a husband and wife had signed a contract to enter into a business partnership together. When the business failed, creditors sued for both the husband's property and the wife's separate property. The Court ruled for the wife, first reiterating the argument from *Habenicht* that a married women had no general right to contract. The Court continued its ruling with a distinction between property and labor, writing that a business partnership is "an agreement that each of the parties named should combine their labor and skill in the proposed enterprise, [and] it is quite certain that no such partnership could be formed between husband and wife, for the simple reason that her labor and skill already belong to the husband."²³⁶ The Court describes this labor arrangement as being central to "the very foundations of civilized society."²³⁷ However foundational to civilization, this state of affairs was not to last long, as at the end of 1887, the legislature ruled that earnings were part of a wife's separate estate and would thereafter be treated according to the usual rules for separate estates.²³⁸ However, this new statute did not seem to be about liberating women to use their earnings as they pleased, as it did not remove any of the other liabilities of previous statutes and court rulings; women still remained unable to make general contracts as before. Rather, the new statute simply clarified that a married woman's earnings would not be subject to her husband's debts. Indeed, the legislature continued along a protectionist path, specifying in 1891 that married women were not permitted to assume or guarantee the debts of any other person.²³⁹

A "Much Tangled Issue"

²³³ William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington: Indiana University Press, 1977).

²³⁴ *Bridgers v. Howell*, 27 S.C. 425 (1887), 430-431.

²³⁵ *Gwynn v. Gwynn*, 27 S.C. 525 (1887).

²³⁶ *Ibid.*, 540.

²³⁷ *Ibid.*, 541.

²³⁸ *South Carolina Acts* (1887), 819; *Mitchell v. Mitchell*, 42 S.C. 475 (1894).

²³⁹ *Acts and Joint Resolutions of the General Assembly of the State of South Carolina* (1891), 1121.

Together, the set of statutes and court rulings beginning in 1882 led to a complex and confusing legal environment when it came to the status of married women in the economy. Married women were clearly participating in the economy in various ways, but creditors could never be sure of whether they would be able to collect on loans since lengthy legal battles could ensue when married women could not afford to pay their debts. As a result, married women's property rights were raised at the 1895 Constitutional Convention.

The new Constitution affirmed the right of married women not only to hold separate property, but also to make contracts and have any other rights with regard to her property that "an unmarried woman or a man" would have.²⁴⁰ In examining the motivations behind the constitutional change, it is important to note that this was not in general a rights-granting document. Like Mississippi's Redeemer convention, it disenfranchised large portions of the African American population in South Carolina, mandated segregated schools, and also failed to grant suffrage rights to women. Women's rights activists submitted petitions to the convention on the subject of women's suffrage, but these documents were not even forwarded to the suffrage committee, much less seriously considered.²⁴¹

Rather, the delegates at the convention were more concerned with simplifying and rationalizing the legal status of married women's property ownership. In reporting on the convention, the *Charleston News and Courier* wrote that "everyone hopes [the married women's property clause] will settle the now much tangled issue." One delegate argued that "the Acts of the Legislature tinkering with the laws relating to the property of married women had caused more litigation and expense to the people of the State than any other one thing. He then pointed out in detail the dreadful botches the Legislature had made until now a Philadelphia lawyer could not tell what the law in this State on the subject was." The delegates differed as to the solution to this problem, ranging from a return to coverture, to various compromise positions that would have limited the rights of married women in ways similar to previous statutes on the subject, to formal legal equality with regard to property rights. Ultimately, the delegates adopted the latter approach by a handy margin.²⁴² The new MWPA would have the same property rights as "an unmarried woman or a man," as well as "the power to contract and be contracted with in the same manner as if she were unmarried."²⁴³

South Carolina's path of married women's economic rights reform illustrates the tension between liberalism and gender hierarchy particularly well. Its Supreme Court initially interpreted early MWPA's from a liberal perspective, when elected officials had justified these provisions on paternalistic, protection-focused grounds that painted married women as vulnerable rather than independent actors. However, once the legislature pulled back from the Court's liberal interpretation and tried to define married women's economic rights as expanded but limited, the resulting complex and confusing court rulings revealed the problematic nature of partially liberalized economic rights.

²⁴⁰ South Carolina Constitution of 1895, Article XVII, Section 9.

²⁴¹ Edgar, *South Carolina: A History*: 445.

²⁴² *Charleston News and Courier*, October 1, 1895.

²⁴³ Constitution of South Carolina (1895), Article XVII, section 9.

Eventually, convention delegates were pressured to simplify and liberalize the law of married women's economic rights.

IV. California: Modelling Statutes on Examples from Elsewhere on the Frontier

California is an example of a state that developed its married women's property laws largely through the adoption of statutes and constitutional provisions originally developed in other states (see Table 4). California's history with married women's property rights began in the Spanish era, and when American settlers came to the state, they left unchanged the community property system that was based on Spanish law.²⁴⁴ When California became a state, it adopted in its Constitution an MWPA that was taken verbatim from the Texas Constitution:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.²⁴⁵

Although this provision provided for married women's ownership of separate property, it did not specify whether she could control or manage that property, and whether it might be liable for some or all of her husband's debts. The debates surrounding the inclusion of married women's property rights in the California Constitution involved proponents of both the old Spanish community property system and the English common law system.²⁴⁶

As mentioned above, the text of the new California constitutional provision was taken directly from the Constitution of Texas, and delegates at the convention praised the experience of other states with passing MWPA's. For instance, Mr. Tefft argued: "This very section not only stands upon the statute books of many of the old States, but is inserted in the Constitution of some of them."²⁴⁷ Another delegate, Mr. Jones, agreed, arguing that the common law, as judge-made law, was too complicated and that a statute clarifying the rights of married women was needed:

State after State has adopted this principle....For forty or fifty years the States of the American Union have been trying to modify and simplify this principle of the common law....[Californians] want a code of simple laws which they can understand; no common law, full of exploded principles,...they want something that the people can comprehend. The gentleman forgets that the law is the will of the people properly expressed,

²⁴⁴ Rosamond Parma, "The History of the Adoption of the Codes of California " *Law Library Journal* 22(1929): 12.

²⁴⁵ Constitution of the State of California, 1849, Article XI, section 14. See Table 4 below.

²⁴⁶ Orrin K. McMurray, "The Beginnings of the Community Property System in California and the Adoption of the Common Law," *California Law Review* 3, no. 5 (1915): 369.

²⁴⁷ J. Ross Browne, ed. *Report of the Debates in the Convention of California on the Formation of the State Constitution* (Washington: Towers, J.T., 1850), 258.

and that the people have a right to understand their own will and derive the advantage of it, without going to a lawyer to have it expounded. It is absurd to require them to apply for legal advice to learn how they are to collect a debt of fifty dollars.²⁴⁸

In addition to these appeals to the experiences of other states, the delegates made arguments both for and against the new provision that echo those made at conventions discussed above. Opponents of the MWPA argued that the new rights were “a dangerous subject of experiment,” likely to destroy the marital relationship and encourage fraud.²⁴⁹ Meanwhile, supporters of the provision largely stressed the need to protect women from husbands who were “idle, dissipated, visionary, or impractical,” with one delegate arguing that it was only fair that the Constitution “protect frail and lovely woman.”²⁵⁰ Still, feminist arguments were not entirely absent, such as Mr. Dimmick’s statement in support of reform:

The time was, sir, when woman was considered an inferior being; but as knowledge has become more generally diffused, as the world has become more enlightened, as the influence of free and liberal principles has extended among the nations of the earth, the rights of woman have become generally recognized.²⁵¹

Delegates also argued that California and other Western states had particular concerns not present in Northeastern and Southern states. “[W]ild and hazardous speculations” on the frontier were commonplace and brought with them great risk of family ruin, which an MWPA would help mitigate.²⁵² The gender balance of the state, and the desire to attract female settlers, also played an important role, both in the abstract and for individual delegates. Mr. Halleck stated:

I am not wedded either to the common law or the civil law, nor as yet, to a woman; but having some hopes that some time or other I may be wedded, and wishing to avoid the fate of my friend from San Francisco, (Mr. Lippitt [a delegate who opposed the MWPA],) I shall advocate this section in the Constitution, and I would call upon all the bachelors in this Convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce into the Constitution.²⁵³

Finally, it was clear that in California’s case, a failure to include any sort of MWPA would alter the rights of married women currently living in California under the community property system.²⁵⁴ Because the common law was being adopted in the state

²⁴⁸ Ibid., 264.

²⁴⁹ Ibid., 257-59, 62, 68-69.

²⁵⁰ Ibid., 259, 65-67.

²⁵¹ Ibid., 263.

²⁵² Ibid., 258.

²⁵³ Ibid., 259.

²⁵⁴ Ibid., 258.

as a general rule when it gained statehood, any exceptions to this based on civil law would need to be expressly spelled out in the Constitution. Ultimately, the MWPA passed as part of the new Constitution.

The next year, the California legislature passed the bill mentioned in the constitutional provision that called for the registration of married women's separate property (see Table 4). Along with outlining the procedure for registration, the bill also clarified the distinction between separate and community property, exempted the wife's separate property from her husband's debts, and gave the husband control and management rights over his wife's separate property.²⁵⁵ Like the MWPA in the 1849 Constitution, the 1850 Act was also modelled on Texas law regarding married women's property rights.²⁵⁶

Through the late 1860s and early 1870s, California embarked on a process of codification, attempting to rationalize its body of law. Much of the code, particularly the civil code, was drawn from the Field Code, a collection of statutes developed in New York.²⁵⁷ This code was drafted by David Dudley Field, who was commissioned to write a systematic code for the state of New York.²⁵⁸ Field's efforts covered all aspects of law from civil to criminal to political, but he did write about women's rights reform specifically. Peggy Rabkin writes that "[he] blamed the common law for its retention of 'feudal tenures with all their burdensome incidents...land...inalienable without livery of seisin, and wives...[having] only the rights which a barbarous age conceded them.'"²⁵⁹

Accordingly, the Field Code contained a substantial number of sections dealing with married women's economic rights, providing that a husband had no interest in his wife's property, that she had the right to contract with regard to property as if single, and that she had the power to mortgage or otherwise deal with her property as if single.²⁶⁰ The Code also contained sections that called a married woman's economic status as an equal partner into question, naming the husband the head of the household, responsible for the financial support of his wife. Nonetheless, Field noted that in his proposed code, "the disability of coverture is completely taken away, and a married woman may execute during coverture any power which may be lawfully conferred upon any person."²⁶¹

Although New York largely failed to adopt significant portions of the codes Field prepared, they had considerably more influence in the western states.²⁶² Numerous states adopted at least some portion of the Field Code, and five states adopted Field's civil code

²⁵⁵ Statutes of California (1850), Chapter 103

²⁵⁶ McMurray, "Beginnings of Community Property," 377.

²⁵⁷ Parma, "History of the Codes of California," 14-15.

²⁵⁸ Henry M. Field, *The Life of David Dudley Field* (New York: C. Scribner's Sons, 1898), 74-75, 78.

²⁵⁹ Rabkin, "Origins of Law Reform," 715.

²⁶⁰ *The Civil Code of the State of New York*, vol. III, New York Field Codes 1850-1865 (Union, NJ: The Lawbook Exchange, Ltd., 1998). See sections 75-85, 320-321, and 337.

²⁶¹ *Ibid.* See sections 76-77 and 320.

²⁶² Field, *Life of David Dudley Field*: 86-88. See also Daun van Ee, *David Dudley Field and the Reconstruction of the Law*, ed. Harold Hyman and Stuart Bruchey, American Legal and Constitutional History: A Garland Series of Outstanding Dissertations (New York: Garland Publishing, Inc., 1986), 332-35, on the Field's failure to have his codes adopted in New York. See also Alison Reppy, "The Field Codification Concept," in *David Dudley Field: Centenary Essays*, ed. Alison Reppy (New York: New York University School of Law, 1949).

in large part.²⁶³ California was one of these, adopting significant portions of the Field Code, including elements of its approach to married women's property.

Field's brother, Stephen J. Field (later a U.S. Supreme Court justice), moved to California and became a member of the state legislature and later a justice on the California Supreme Court. As a member of the California legislature, he sat on the judiciary committee and was responsible for drafting various codes for the state in the 1850s, which he based largely upon his brother's work.²⁶⁴ Field was not a member of the 1871 Commission that drafted the California Codes that included major revisions to married women's property rights. But this commission also based these codes in large part on the Field Codes, and Stephen Field did oversee an examination of the draft codes for the governor, in which he recommended them strongly.²⁶⁵

The provisions in California's new code concerning married women's property rights included passages taken directly from the Field Code, combined with elements of the community property regime and the separate property regime outlined in the 1849 Constitution and 1850 MWPAs.²⁶⁶ Like the Field Code, the California Code extended to married women the right to sell and mortgage their separate property without spousal permission and the right to contract as if single. Married women's earnings were also added to her list of separate property, not liable for her husband's debts. Husbands retained management and control of community property, but married women still made significant gains in terms of their separate property and their rights to contract with third parties (see Table 4). Overall, California's experience with passing MWPAs demonstrates the importance of borrowing models from other states in extending property rights to married women.

V. Conclusion

These cases illustrate the importance of considering multiple orders and multiple venues in understanding the path of married women's economic rights reform. Both elected officials and judges struggled with balancing paternalistic justifications for MWPAs rooted in a tradition of gender hierarchy with growing demands for rights liberalization. Constitutional conventions, state legislatures, and state courts worked together in a largely cooperative manner to work out the practical details of how expanding economic rights for married women would fit into a growing commercial economy that needed stable, simple property rights to function efficiently. At the same time, they sought to retain some paternalistic protections for women under the law, as I explore further in Chapter 4. MWPAs liberalized married women's interactions with the market economic significantly but not completely.

²⁶³ California, Montana, Idaho, South Dakota, and North Dakota adopted large portions of Field's civil code, which included his provisions on married women's property and economic rights. See Maurice E. Harrison, "The First Half-Century of the California Civil Code," *California Law Review* X, no. 3 (1922): 187. Alison Reppy also adds Georgia to this list, see Reppy, "The Field Codification Concept."

²⁶⁴ William Wirt Blume, "Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History," *Hastings Law Journal* 17(1966): 701-02.

²⁶⁵ *Ibid.*, 707.

²⁶⁶ Albert Hart, *The Civil Code of the State of California* (San Francisco: Sumner Whitney and Company, 1880). See sections 155-181.

Table 1: Key Amendments and Statutes in New York

Title	Date	Text/Importance
New York Revised Statutes, part 2, chapter 2, title 2, article 2, sec. 45	1836	“Uses and trusts, except as authorized and modified, in the Article, are abolished; and every estate and interest in lands, shall be deemed a legal right, cognizable as such in the courts of law...” Limits use of trusts in equity courts, making it more difficult for women to use these courts to protect property brought into the marriage.
Third Constitution of New York, Article VI, sections 2-4	1846	Equity courts are abolished, eliminating any protection of married women’s property through this court system. Note: Delegates at this convention debate but do not pass an MWPA.
Married Women’s Property Act	1848, amended 1849	<p>“An act for the more effectual protection of the property of married women:</p> <p>§1. The real property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the sole disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.</p> <p>§2. The real and personal property, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband; but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted.</p> <p>§3. Any married female may take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts.”</p>

<p>An Act Concerning the Rights and Liabilities of Husband and Wife [Earnings Act]</p>	<p>1860</p>	<p>“§2. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name.</p> <p>§3. Any married woman possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, but no such conveyance or contract shall be valid without the assent, in writing, of her husband, except as hereinafter provided.</p> <p>...</p> <p>§7. Any married woman may, while married, sue and be sued in all matters having relation to her property, which may be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or the gift of any person except her husband, in the same manner as if she were sole. And any married woman may bring and maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if shewere sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property.”</p>
<p>Laws of New York, Chapter 381</p>	<p>1884</p>	<p>“A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary. This act shall not affect or apply to any contract that shall be made between husband and wife.”</p>
<p>Laws of New York, Chapter 537, section 1</p>	<p>1887</p>	<p>“Any transfer or conveyance of real estate hereafter made by a married man directly to his wife, and every transfer or conveyance of real estate hereafter made directly by a married woman to her husband, shall not be invalid because such transfer or conveyance was made directly from one to the other without the intervention of a third person.”</p>

<p>Amendment to the Domestic Relations Law, Article III, section 30</p>	<p>1902</p>	<p>“A married woman shall have a cause of action in her own sole and separate right for all wages, salary, profits, compensation or other remuneration for which she may render work, labor or services, or which may be derived from any trade, business or occupation carried on by her, and her husband shall have no right of action therefor, unless she, or he, with her knowledge or consent, has otherwise expressly agreed with the person obligated to pay such wages, salary, profits, compensation or other remuneration. In any action or proceeding in which a married woman or her husband shall seek to recover wages, salary, profits, compensation or other remuneration for which such married woman has rendered work, labor, or services, or which was derived from any trade, business or occupation carried on by her, or in which the loss of such wages, salary, profits, compensation or other remuneration shall be an item of damage claimed by a married woman or her husband, the presumption of law in all such cases shall be that such married woman is alone entitled thereto, unless the contrary expressly appears.”</p>
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Table 2: Key Amendments and Statutes in Mississippi

Title	Date	Text/Importance
An Act for the protection and preservation of the rights and property of Married Women	1839	<p>“Sec. 1. <i>Be it enacted by the legislature of Mississippi,</i> That any married woman may be seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property: <i>Provided,</i> the same does not come to her from her husband after coverture.</p> <p>Sec. 2. <i>And be it further enacted,</i> That hereafter when any woman possessed of a property in slaves, shall marry, her property in such slaves and their natural increase shall continue to her, notwithstanding her coverture; and she shall have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of her husband.</p> <p>Sec. 3. <i>And be it further enacted,</i> That when any woman, during coverture, shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves, together with their natural increase, shall enure and belong to the wife, in like manner as is above provided as to slaves which she may possess at the time of marriage.</p> <p>Sec. 4. <i>And be it further enacted,</i> That the control and management of all such slaves, the direction of their labor, and the receipts for the productions thereof, shall remain to the husband, agreeably to the laws heretofore in force. ...</p> <p>Sec. 5. <i>And be it further enacted,</i> That the slaves owned by a feme covert under this act, may be sold by the joint deed of husband and wife, executed, proved, and recorded, agreeably to the laws now in force in regard to conveyance of the real estate of feme coverts, and not otherwise.”</p>

	1846	Married women gain the right to the profits of their lands and slaves, as well as a limited right to contract. The law “provided that, jointly with her husband, she might make any contract for the sale or hire of her slaves or for their necessary clothing, care maintenance and support, and for the employment of any agent or overseer for their management; and that all contracts for supplies for either the plantation or the slaves, made by either husband or wife, should bind both, and might be enforced out of the wife’s income.” ²⁶⁷
Revised Code of the Statute Laws of the State of Mississippi, Section V, On the Separate Property of Married Women, Articles 23-26	1857	“Art. 23: Every species and description of property, whether consisting of real or personal estate, and all money, rights, and credits, which may be owned by or belong to any single woman, shall continue to be the separate property of such woman as fully after her marriage as it was before, and all such property or rights, of whatever name or kind, which shall accrue to any married woman by will, descent, distribution, deed of conveyance, recovery, or otherwise, shall be owned, used, and enjoyed by such married woman, as her own separate property, and such property whether owned by her before marriage, or which may have accrued to her afterwards, shall not be subject or liable to be taken in satisfaction of the debts of the husband, nor shall such property, or any part thereof, be sold, conveyed, mortgaged, transferred, or in any manner encumbered by the husband, unless the wife shall join in the conveyance thereof, and acknowledge such conveyance in the manner directed by law for the acknowledgment of conveyances of real estate by married women. Provided, that any deed from the husband to the wife for her use, shall be void as against his creditors, who were such at the time of executing the deed; and no conveyance or incumbrance, for the separate debts of the husband, shall be binding on the wife beyond the amount of her income.”

²⁶⁷ Mayes, "The Legal and Judicial History," 123.

	<p>Art. 24: The rents, issues, profits, products, and income, of either real or personal estate, or of both, owned by any married woman at the time of her marriage, or which may have accrued to her afterwards, shall also inure to the wife as her separate property, and shall not be liable to be taken in satisfaction of the debts of the husband. And any married woman may purchase property, real or personal, with her own money, which she may have had at the time of her marriage, or which may have accrued to her afterwards, either as rents, issues, or profits of her estate, or otherwise, and may take a conveyance thereof in her own name, and in like manner hold and enjoy the same as her separate property. ...</p>
	<p>Art. 25: Any married woman may hire out her slaves, rent her lands, or make any contract for the use thereof, and may loan her money and take securities therefor in her own name. And all contracts made by the husband and wife, or by either of them, for supplies for the plantation of the wife, or for the maintenance, clothing, care, and support of her slaves, and for the employment of an agent or overseer for their management, may be enforced, and satisfaction had out of her separate estate. And all contracts made by the wife, or by the husband, with her consent, for family supplies or necessaries, wearing apparel of herself and her children, or for their education, or for household furniture, or for carriage and horses, or for buildings on her land or premises, and the materials therefor, or for work and labor done for the use, benefit, or improvement of her separate estate, shall be binding on her, and satisfaction may be had out of her separate property, and her separate property shall be liable for debts contracted by her before marriage; and the husband shall not be liable for debts contracted by the wife before marriage, nor shall he be liable for debts contracted by her after marriage, if she hold separate property under this act.</p>

		Art. 26: In addition to the remedies now existing by the common law, by and against married woman, the husband and wife may sue jointly, or if the husband will not join her, she may sue alone for the recovery of any of her property or rights, and she may be sued jointly with her husband, on all contracts or other matters for which her individual property is liable, but if the suit be against husband and wife, no judgment shall be rendered against her, unless the liability of her separate property be first established. ...”
Constitution of Mississippi, Article I, Sec. 16	1869	“The rights of married women shall be protected by law in property owned previous to marriage; and also in all property acquired in good faith by purchase, gift, devise, or bequest after marriage; Provided, That nothing herein contained shall be so construed as to protect said property from being applied to the payment of their lawful debts.”
Revised Code of the Statute Laws of the State of Mississippi, Chapter 23, Article V. Property of the Wife	1871	Sec. 1778 updates the types of property that are included in a married woman’s separate property to include “the fruits of her personal service, and the fruits of suits for damages to her person.” Section 1780: “Any married woman may rent her lands, or make any contract for the use thereof, and may loan her money, and take securities therefor, in her own name, and employ it in trade or business And all contracts made by the husband and wife, or by either of them, for supplies for the plantation of the wife, may be enforced, and satisfaction had out of her separate estate; and when a married woman engages in trade or business as a <i>femme sole</i> , she shall be bound by her contracts, made in course of such trade or business, in the same manner as if she was unmarried.”

<p>Revised Code of the Statute Laws of the State of Mississippi, Chapter 42.</p>	<p>1880</p>	<p>“Sec. 1167. The common law, as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not be held to impose and disability or incapacity on a woman, as to the ownership, acquisition or disposition of property of any sort, or as to her capacity to make contracts, and do all acts in reference to property, which she could lawfully do, if she was not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she was not married. Sec. 1168. Husband and wife may sue each other. Sec. 1169. A married woman may dispose of her estate, real and personal, by last will and testament, in the same manner as if she were not married.”</p>
<p>Constitution of Mississippi, Article III, Sec. 94.</p>	<p>1890</p>	<p>“The legislature shall never create by law any distinction between the rights of men and women to acquire, own, enjoy, and dispose of property of all kinds, or their power to contract in reference thereto. Married women are hereby fully emancipated from all disability on account of coverture. But this shall not prevent the legislature from regulating contracts between husband and wife; nor shall the legislature be prevented from regulating the sale of homesteads.”</p>

Table 3: Key Amendments and Statutes in South Carolina

Title	Date	Text/Importance
Constitution of South Carolina, Article XVI, section 8	1868	<p>“The real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband’s debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried: <i>Provided</i>, That no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors.”</p>
An Act to Carry into Effect the Provisions of the Constitution in Relation to the Rights of Married Women	1870	<p>“§1. ...the real and personal property of a married woman, whether held by her at the time of her marriage or accrued to her thereafter, either by gift, grant, inheritance, devise, purchase or otherwise, shall not be subject to levy and sale for her husband’s debts, but shall be her separate property.</p> <p>§2. A married woman shall have power to bequeath, devise or convey her separate property as if she were unmarried; and if dying intestate, her property shall descend in the same manner as the law now provides for the descent of the property of husbands, and all deeds, mortgages and legal instruments of whatever kind, shall be executed by her in the same manner, and have the same legal force and effect as if she were unmarried.</p> <p>§3. A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to contract and be contracted with in the same manner as if she were unmarried: <i>Provided</i>, That the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for her necessary support.”</p>

Code of Civil Procedure of the State of South Carolina, section 135	1882	<p>“When a married woman is a party, her husband must be joined with her, except that—</p> <p>1. When the action concerns her separate property, she may sue or be sued alone: <i>Provided</i>, That neither her husband nor his property shall be liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole.</p> <p>2. When the action is between herself and her husband, she may sue or be sued alone...”</p>
An Act to Amend Section 2037 of the Revised Statutes Relating to the Power of Married Women to Make Contracts...	1891	<p>“A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to bind herself by contract, in the same manner and to the same extent as though she were unmarried, which contracts shall be legal and obligatory, and may be enforced at law or in equity by or against such married woman in her own name, apart from her husband: <i>Provided</i>, That nothing herein shall enable such married woman to become an accommodation indorser, guarantor, or surety, nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person: and <i>provided further</i>, That the husband shall not be liable for the debts of the wife contracts prior to or after their marriage, except for necessary support, and that of their minor children residing with her.</p> <p>§2. That Section one (1) of an Act entitled ‘Act to declare the law regarding the separate estate of married women,’ approved December 24, 1887, be, and the same is hereby, repealed.”</p>

<p>Revised Statutes of South Carolina</p>	<p>1894</p>	<p>“Sec. 2164. The real and personal property of a married woman, whether held by her at the time of her marriage or accrued to her thereafter, either by gift, grant, inheritance, devise, purchase, or otherwise, shall not be levy or sale for her husband’s debts, but shall be her separate property.</p> <p>Sec. 2165. All the earnings and income of a married woman shall be her own separate estate, and shall be governed by the same provisions of law as apply to her other separate property.</p> <p>Sec. 2166. A married woman shall have the power to bequeath, devise or convey her separate property in the same manner and to the same extent as if she were unmarried...all deeds, mortgages and legal instruments of whatever kind shall be executed by her in the same manner and have the same legal force and effect as if she were unmarried.</p> <p>Sec. 2167. A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to bind herself by contract in the same manner and to the same extent as though she were unmarried, which contract shall be legal and obligatory, and may be enforced at law or in equity by or against such married woman in her own name, apart from her husband: <i>Provided</i>, That nothing herein shall enable such married woman to become an accommodating endorser, guarantor or surety, nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person: <i>And provided, further</i>, That the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for necessary support, and that of their minor children residing with her.”</p>
<p>Constitution of South Carolina, Article XVII, section 9</p>	<p>1895</p>	<p>“The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried.”</p>

Table 4: Key Amendments and Statutes in California

Title	Date	Text/Importance
Constitution of the State of California, Article XI, section 14	1849	“All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.”

<p>Statutes of California, Chapter 103</p>	<p>1850</p>	<p>“Sec. 1. All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards, by gift, bequest, devise, or descent, shall be common property.</p> <p>Sec. 2. All property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property.</p> <p>Sec. 3. A full and complete inventory of the separate property of the wife shall be made out and signed by the wife, acknowledged or proved in the manner required by law for the acknowledgement or proof of a conveyance of land, and recorded in the office of the Recorder of the county in which the parties reside.</p> <p>...</p> <p>Sec. 5. The filing of the inventory in the Recorder’s office shall be notice of the title of the wife, and all property belonging to her, included in the inventory, shall be exempt from seizure or execution for the debts of her husband.</p> <p>Sec. 6. The husband shall have the management and control of the separate property of the wife, during the continuance of the marriage; but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance [sic] created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband...</p> <p>...</p> <p>Sec. 8. If the wife has just cause to apprehend that her husband has mismanaged, or wasted, or will mismanage or waste, her separate property, she, or any other person in her behalf, may apply to the District Court for the appointment of a trustee, to take charge of and manage her separate estate...</p> <p>Sec. 9. The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate. The rents and profits of the separate property of either husband or wife shall be deemed common property.</p> <p>...</p>
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<p>The Civil Code of the State of California, Chapter III: Husband and Wife</p>	<p>1872</p>	<p>Sec. 155. Husband and wife contract towards each other obligations of mutual respect, fidelity, and support.</p> <p>Sec. 156. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.</p> <p>Sec. 157. Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.</p> <p>Sec. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other...</p> <p>Sec. 159. A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation...</p> <p>...</p> <p>Sec. 161. A husband and wife may hold property as joint tenants, tenants in common, or as community property.</p> <p>Sec. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.</p> <p>Sec. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.</p> <p>Sec. 164. All other property acquired after marriage, by either husband or wife, or both, is community property.</p> <p>Sec. 165. A full and complete inventory of the separate property of the wife may be made out and signed by the wife, acknowledged or proved in the manner required by law for the acknowledgement or proof of a grant of real property by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside.</p> <p>...</p>
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	<p>Sec. 167. The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband...</p> <p>Sec. 168. The earnings of the wife are not liable for the debts of the husband.</p> <p>Sec. 169. The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.</p> <p>...</p> <p>Sec. 171. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts, contracted before or after marriage.</p> <p>Sec. 172. The husband has the management and control of the community property, with the absolute power of disposition (other than testamentary) as he has of his separate property.</p>
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Appendix 1: Political Cartoon



MRS. T. B. J. HADLEY
WHO KEPT A BOARDING HOUSE IN
JACKSON

WAS INSTRUMENTAL IN THE PASSAGE
OF A BILL GIVING PROPERTY RIGHTS TO
MARRIED WOMEN

HER BOARDERS WERE MEMBERS OF THE
LEGISLATURE, AND THOSE OPPOSED TO THE BILL
WERE PUT ON SHORT RATIONS, AND HAD NO
COMFORT UNTIL THEY GAVE IN TO HER
"POINT OF VIEW"

From: Lockwood, Nettie. *Jackson Jewels and Jackson Today: As Appeared in the Clarion-Ledger and the Jackson Daily News*. Jackson, Miss: Jackson Printing, 1936.

Chapter Three: Married Women's Property Acts in the States: A Broader Look

In this chapter, I explore broader patterns of activity related to these married women's property acts (MWPAs). Using event history analysis, I analyze partisan, constitutional, and regional variables to explore factors that may have influenced the passage of these MWPAs. I find that the partisan composition of state legislative bodies and state voters has little influence on the passage of these statutes, while other factors affecting the political context in which laws were passed were more influential. Specifically, states were more likely to pass initial MWPAs during constitutional conventions, political moments when rights would have been most salient. Because Southern states ratified at least one and often multiple new constitutions in the years after the Civil War, I take a closer look at Southern constitutions during Reconstruction and Redemption to examine the passage of MWPAs in two very different political environments.

Finally, I examine the spread of MWPAs between states. Despite the fact that there was never a federal law or federal court decision mandating married women's economic rights reform, every state passed at least some legislation in this area. These laws ranged from fairly limited legislation that provided married women the right to own separate property, but not much more, to fairly expansive legislation like Mississippi's, stating that "Married women are hereby fully emancipated from all disability on account of coverture."²⁶⁸ I find that states were more likely to pass an MWPA when a neighboring state had already passed such a law, which I explain using the literature on policy diffusion.

I. Why Expand Rights? A Look at Research on Economic and Paternalistic Variables

Women largely did not have the vote during the period when MWPAs were passed. Figure 1 displays the dates of passage for two types of MWPAs: laws allowing a married woman to keep property in an account separate from her husband and not liable for his debts (i.e. debt-free estates) and laws extending to married women control and management rights over their separate property.²⁶⁹ These acts expanding married women's economic rights were passed before women gained suffrage in all but two states.²⁷⁰ Although women's organizations in some states pushed for economic rights expansion, their demands often differed from the final form MWPAs would take, and their efforts were typically more focused on suffrage at either the state or national level.²⁷¹ Further, the formation of strong state-level women's suffrage organizations

²⁶⁸ Mississippi Constitution (1890), Article III, section 94.

²⁶⁹ Dates for debt-free estate acts are taken from Hoff, *Law, Gender, and Injustice*. Dates for acts granting control and management rights are taken from Geddes and Tennyson, "Passage of the Married Women's Property Acts."

²⁷⁰ Dates for state-level women's suffrage are taken from McCammon et al., "How Movements Win." The vertical line in the figure indicates the passage of the 19th Amendment.

²⁷¹ Siegel, "Home as Work."

tended to occur after the passage of MWPAs (see Figure 2).²⁷² The mean year of passage for debt free estate laws was 1861, for ‘effective’ MWPAs was 1874, and for the formation of women’s suffrage organizations was 1880. As indicated in Table 1, in only 17% of states did women’s suffrage organizations precede the passage of an MWPA. In the majority of states (60%), ‘effective’ MWPAs were passed before women’s suffrage organizations were formed, while in a further 23% of states, debt-free MWPAs (but not ‘effective’ MWPAs) preceded the formation of MWPAs.

Rather than women and women’s organizations being the primary driver behind MWPAs, male voters, legislators, and judges crafted these acts for purposes often unrelated to feminist motivations. As I discuss in Chapters 1 and 2, male political actors were primarily motivated by economic and paternalistic concerns. I present qualitative evidence that many of the men pushing for reforms had a particular concern for daughters or other vulnerable women who might fall victim to ‘fortune hunting’ or irresponsible husbands. I would expect this concern to be greater in states with a larger amount of wealth, since the potential losses to these women would be greater. States with greater per-capita wealth also might be expected to have larger commercial economies. Scholars have found mixed results with regard to per-capita wealth’s impact on the passage of MWPAs.

Geddes and Lueck (2002) argue that men will have an incentive to expand women’s economic rights as women’s ability to earn market wages and overall wealth increases, because of efficiency losses under strict common law rules. Where the productive potential of women is large, economic growth will be limited if women are not incentivized to maximize that productive potential.²⁷³ Using probit and linear probability models, they find that states with more of the population living in cities, with greater per-capita wealth, and with higher rates of girls’ schooling tended to pass MWPAs earlier.²⁷⁴

Fernandez (2009) derives a model that combines both economic and paternalistic motivations, arguing that men considering expanding women’s rights must balance their interests as a husband (pushing them to prefer a system with less economic rights for women) and as a father (pushing them to prefer a system with greater economic rights for women). She predicts that as capital accumulation increases and fertility decreases, men will be increasingly incentivized to pass laws expanding women’s economic rights.²⁷⁵ Fernandez finds that lower levels of fertility do lead to earlier passage of MWPAs, but does not recover the significant result on per-capita wealth that Geddes and Lueck find.²⁷⁶ The finding on fertility fits with the idea that father’s wanted to protect family wealth through MWPAs; with falling fertility rates, men would have been less likely to have sons, and thus would have needed to find a way to ensure that daughters could keep family wealth protected.

²⁷² Data on the formation of state-level suffrage organizations was generously shared by Holly McCammon. The years indicated in Figure 2 as “Suffrage Organization” indicate the first year in which a state-level woman’s suffrage organization was formed that lasted for at least 5 years.

²⁷³ Rick Geddes and Dean Lueck, "The Gains from Self-Ownership and the Expansion of Women's Rights," *The American Economic Review* 92, no. 4 (2002): 1082.

²⁷⁴ *Ibid.*, 1091.

²⁷⁵ Fernandez, "Women's Rights and Development".

²⁷⁶ *Ibid.*, 26.

Of course, growing wealth was not the only important economic factor during this period. Based on my qualitative and case study research, state-level measures of indebtedness would be particularly interesting to examine here, although this data is difficult to recover for this time period. Nonetheless, the importance of both economic growth *and* economic crisis as distinct explanations for MWPAs in different states and at different times may explain why the results on per-capita wealth are mixed.

II. When Expand Rights? Political and Constitutional Explanations

Many issues in American politics have been sharply divided along party lines, while other issues have been championed by both parties or neither. Because the passage of MWPAs had an economic component, we might expect to see Republicans and Democrats approach the issue differently. However, different forces pushing for the passage of the acts might appeal to different parties. We might expect Democrats and Populists to be especially concerned with the debt-relief aspects of these bills, while Republicans would be particularly motivated to expand rights fully once some rights are granted since creditors and business owners might have been particularly concerned about reducing legal confusion around property and capital issues. In my case studies, I did not uncover strong partisan divides over MWPAs. I also examined national party platforms 1840-1920 to look for evidence of party attention to MWPAs.²⁷⁷ Both parties during this period included planks that made gestures toward acknowledging women's role in the economy and in public life.

In its 1872 platform, the Republican party included a plank expressing general support for women's employment and the women's movement, writing: "[Women's] admission to wider fields of usefulness is viewed with satisfaction, and the honest demand of any class of citizens for additional rights should be treated with respectful consideration."²⁷⁸ Its 1876 platform was even more specific and spoke to the passage of MWPAs in the states:

The Republican party recognizes with approval the substantial advances recently made toward the establishment of equal rights for women, by the many important amendments effected by Republican legislatures in the laws which concern the personal and property relations of wives, mothers, and widows, and by the appointment and election of women to the superintendence of education, charities, and other public trusts. The honest demands of this class of citizens for additional rights, privileges, and immunities should be treated with respectful consideration.²⁷⁹

The Republican party was then silent on women's issues for a number of years, until 1896 when they again included a plank referencing women's rights quite expansively: "The Republican party... believes that [women] should be accorded equal opportunities, equal pay for equal work, and protection to the home. We favor the

²⁷⁷ John Woolley and Gerhard Peters, "The American Presidency Project," <http://www.presidency.ucsb.edu/platforms.php>.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

admission of women to wider spheres of usefulness...”²⁸⁰ In 1908, the party called for an investigation into the working conditions of women and children, and in 1912 it called for labor protections for women and children. By 1916, the Republicans were calling for an extension of suffrage to women, a call that was repeated in 1920. In 1920, the party also included a plank on “Women in Industry,” calling for equal pay in federal jobs, limited hours legislation for women, and closer study of the particular issues surrounding women in the working world.²⁸¹

The Democratic party paid less attention to women’s work in its national platform, but still included it starting in the early 1900s. Its platform in 1908 referenced “millions of working men and women” in calling for a reduction in government spending. In 1916, the Democratic party called for labor laws providing for “decency, comfort and health in the employment of women as should be accorded the mothers of the race.”²⁸² In 1920, the platform continued to advocate protections for women in the working world, alongside other provisions aimed to benefit women’s welfare, but Democrats never called specifically for an MWPA. The Democratic party did also called for women’s suffrage in 1916 and 1920.²⁸³

Thus, it would seem that both parties spoke favorably of women’s economic rights when they were mentioned at all, and married women’s property rights rarely reached the level of salience needed to be mentioned in a national party platform. This evidence from party platforms suggests that party may not have played a major role in the passage of MWPA. I also examine this question using event history analysis, using data on state legislatures and state voting patterns to confirm the suggestive evidence discussed above. I outline these political variables, as well as the method used, below. Ultimately, I do not find substantial evidence of partisan organization around these issues, indicating that other factors influenced the timing of these laws independent of the partisan leanings of state-level political institutions.

In addition to partisanship, other characteristics of the political environment may have been important. Many states ratified one or more new constitutions during this period. State-level constitutional conventions are likely to be times when actors are particularly engaged in discussions about rights for various groups and may be more inclined to consider changes to major legal principles like the common law principle of coverture that governed married women’s economic rights. Though constitutional conventions were called for various reasons, they may have been, at times, focusing events when changes to women’s property rights were considered. Accordingly, I also include data on state constitutions in my analysis, as I discuss below.

Core Variable of Interest: Married Women’s Property Acts

I consider two measures of my key outcome of interest: the passage of Married Women’s Property Acts. I examine the passage of two types of Married Women’s Property Acts. First, I identify debt-free estate laws based on the listing in Hoff

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

(1991).²⁸⁴ These acts allowed married women to hold property separately from their husbands, and exempted this property from liability for the husband's debts. Often passed as debt-relief measures, debt-free estate acts might or might not be linked to broader control and management rights on the part of married women. For each state-year observation, DEBTFREE is coded as 0 before a debt-free estate act was passed, and 1 in the year the act was passed and each subsequent year.

Second, I use Geddes and Tennyson (2013)'s compilation of 'effective' MWPA's to identify the first act in each state that granted at least some control and management rights over property to married women.²⁸⁵ These laws were typically broader rights-granting acts, though they were typically not the 'final word' and later MWPA's might expand married women's property rights even further. As with the debt-free estates variable, EFFECTIVE is coded as 0 before the first MWPA granting control and management rights in a state was passed, and 1 in the year the act was passed and each subsequent year.

Political Measures

I gathered three types of data on the political environment in the states. First, I coded variables on state legislatures, describing party control in upper and lower houses. Second, I coded variables on gubernatorial elections as another measure of party support in the states. Finally, I created a variable indicating the years when states ratified new state constitutions – as discussed above, constitution conventions may create a context favorable to rights-granting actions for women.

I used Dubin (2007) to collect data on state legislative bodies.²⁸⁶ I created two dummy variables measuring party control, one for state upper chambers and the other for state lower chambers (D-SENATE and D-HOUSE, respectively). This variable is coded 1 if Democrats controlled the legislative chamber in question, and 0 otherwise. The entry is coded as missing in years before a state joined the union, and for Southern states during secession.

I used Rusk (2001)'s data on gubernatorial elections to gather data on state governors.²⁸⁷ I created a variable for the Democratic two-party vote share in the most recent gubernatorial election (DSHARE-GOV), using the data provided in Rusk. This variable provides an estimate of Democratic party *support* in each state. Following Rusk's coding of party labels, votes are assigned to the Democratic party if the candidate ran as part of a wing or faction of the Democratic party (i.e. "Benton Democrat"); as an independent member of the Democratic party (i.e. "Independent Democrat"); as a fusion candidate with the Democratic party (i.e. "Democrat-Greenback"); as a candidate endorsed jointly by the Democratic party and a minor party; or when a candidate is listed under both parties (i.e. cross-filing in California) but principally affiliated with the

²⁸⁴ Hoff, *Law, Gender, and Injustice*.

²⁸⁵ Geddes and Tennyson, "Passage of the Married Women's Property Acts."

²⁸⁶ Dubin, *Party Affiliations*.

²⁸⁷ Jerrold G. Rusk, *A Statistical History of the American Electorate* (Washington, D.C.: CQ Press, 2001); *Gubernatorial Elections: 1787-1997*, (Washington, D.C.: Congressional Quarterly Inc., 1998).

Democratic party.²⁸⁸ As with the state legislatures, data on governors is coded as missing in years before a state joined the union, and for Southern states during secession.

Finally, I created a variable indicating when a new state constitution was ratified, based on information in Dubin (2007).²⁸⁹ CONSTITUTION is coded 1 in years when a state ratified a new state constitution, and 0 otherwise. We might expect constitutional conventions to be more likely than state legislatures to consider, debate, and potentially pass a variety of measures impacting the rights of various groups, including women.

Control Measures

I include two additional measures in my analysis for control purposes. SOUTH is a regional variable, coded 1 for states that were part of the Confederacy plus Kentucky (the exclusion of Kentucky from this variable does not substantively affect any of the results). I also initially included a variable indicating years before a state entered the Union: TERRITORY is coded 1 when a geographical area is a territory, and 0 otherwise (i.e. upon achieving statehood). Ultimately, this variable had to be excluded from analysis because data on political variables is missing in precisely those years in which a state is a territory; thus, this variable was essentially replicating that information.

I also control for the legal context in which MWPA's were passed. Following the coding of Fernandez (2009), COM-PROP is coded 1 for states with a community property regime and 0 for states without this type of arrangement.²⁹⁰ Some territories switched from a common law to a community property regime upon gaining statehood, in which case they are coded 0 before statehood and 1 thereafter. Although this is not a primary variable of interest for me, I include it as a potentially important control.

I considered including a measure for states with separate equity courts, which some authors include, since equity law provided the potential for courts to apply less strict rules than allowed for under the common law. However, the existence of equity courts was not a guarantee that married women would have access to these tools (for example, between 1936 and 1846, New York had separate equity courts but limited the use of them by married women to protect separate property in trusts). Furthermore, most state court systems that did not allow for separate equity courts did allow common law courts to consider some issues under equity rules, which would have allowed somewhat more flexibility for married women (though in practice this was accessible only to a limited number of wealthy women and had significant limitations, both in states with and without separate equity courts).²⁹¹ Ultimately, it was not the existence of this separate court system that provided more flexible equity rules for married women, but rather the specific rules developed in each state, which might be employed in separate equity courts or combined courts of law and equity.

Method and Results: Event History Analysis

²⁸⁸ _____, *Statistical History*: 7.

²⁸⁹ Dubin, *Party Affiliations*.

²⁹⁰ Fernandez, "Women's Rights and Development".

²⁹¹ Elizabeth Bowles Warbasse, *The Changing Legal Rights of Married Women: 1800-1861*, ed. Harold Hyman and Stuart Bruchey, *American Legal and Constitutional History* (New York: Garland Publishing, Inc., 1987).

I estimate two models using survival or event history analysis. First, I estimate models with the passage of MWPAs as the dependent variable. I test whether there is a significant association with a range of independent variables related to the political context of the state, as described above, controlling for region and the legal environment. In both cases, I use a Cox Proportional Hazard Model using the Efron method to deal with ties.²⁹² This method allows me to examine the relationship between my independent variable of interest and the time of passage of MWPAs. Specifically, these models tell us whether the independent variables are associated with earlier dates of passage, later dates of passage, or neither.

Tables 2 and 3 present the hazard models using debt-free estate acts and ‘effective’ MWPAs as the dependent variable, respectively. In both cases, all three political variables are statistically insignificant. Both Democratic and Republican legislatures passed MWPAs, and the level of Democratic-party support among voters was also not a major factor that affected the passage of these laws. This makes sense when considering that both parties had good reasons to favor these reforms. Both Democratic-majority and Republican-majority legislatures and constitutional conventions pushed for and passed these reforms, and thus party control and party support in the states was not a major factor influencing the timing of MWPA passage.

When turning to constitutional reforms, the results are significant for both types of laws. Hazard ratios greater than 1 indicate that risk is increasing with the covariate, so these positive and significant results indicate that the probability of an MWPA passing increases in years in which a new state constitution is ratified. It seems likely that constitutional conventions provided an environment ripe for the consideration of new or expanded rights for married women. I discuss state constitutional conventions in more detail below, with specific attention to Southern constitutions in the postbellum period.

Although used as a control variable, the results on region are also interesting. Southern states looked very similar to the rest of the nation when considering debt relief laws, with no significant association between Southern states and early or late passage of debt relief MWPAs. This makes sense given the case studies presented in Chapter 2: Southern states responding to economic crises with debt relief bills were not typically concerned with feminist motivations. Instead, legislators passed these laws alongside other debt relief measures. Southern states did, however, lag in the passage of more meaningful, rights-granting MWPAs that expanded the rights of women in more meaningful ways. This makes sense considering the generally more conservative politics of the region. Even though partisanship may not have played a strong role in the passage of laws, it makes sense that a more conservative region would delay expanding debt relief provisions to allow women significant management and control powers. Southern states also lagged the rest of the country in economic development, possibly making the problems created by partial reform less pressing to resolve in a timely manner.

Overall, these results confirm qualitative findings that MWPA support was not divided along partisan lines. Both parties were willing to support the creation and expansion of married women’s economic rights throughout this period. Contextual

²⁹² Janet M. Box-Steffensmeier and Bradford S. Jones, *Event History Modeling: A Guide for Social Scientists* (Cambridge: Cambridge University Press, 2004).

factors like constitutional conventions were more important, as key political moments when these rights were debated and often expanded.

III. Southern Constitutions: Reconstruction versus Redemption

An examination of Southern constitutions from Reconstruction through 1900 demonstrates both the importance of constitutional conventions for pushing married women's economic rights forward, and the bi-partisan nature of these measures. During this period, most Southern states ratified at least two (and sometimes more) new constitutions. Immediately after the Civil War, most states were forced to accept military-imposed constitutions in order to be readmitted to the Union. These typically brief documents dealt only with the basics. Then, Reconstruction conventions met to lay out new constitutions on much broader terms. These conventions were filled with Republican delegates and included many African Americans. Of eleven states that seceded from the Union, all but two (Virginia and Tennessee) incorporated an MWPA in their new Reconstruction constitution. Over the subsequent decades, almost every Southern state ratified yet another constitution. With Reconstruction abandoned in the South, 'Redeemer' Democrats met to debate and pass constitutional provisions that sharply limited the civil rights of African Americans and rolled back many more progressive measures found in Reconstruction constitutions. These generally conservative documents took a very different stance toward married women's economic rights, however.

Table 4 outlines the married women's rights provisions in Southern constitutions during the Reconstruction and Redemption periods. Nine of eleven states included an MWPA in at least one of these documents, and seven included one in both.²⁹³ Of those states including an MWPA in both their Reconstruction and Redeemer constitutions, four actually expanded married women's economic rights in the Redemption constitution (South Carolina, Mississippi, Florida, and Arkansas), while three included identical or near-identical provisions (Alabama, Georgia, and Texas). These results are summarized in Table 5. This record confirms the null results presented above on the influence of political parties. Reconstruction and Redeemer constitutional conventions approached their work from opposite ends of the political spectrum, but married women's property rights were one area where they were apparently in consensus.

The bi-partisan nature of support for reforms is particularly interesting when considering that the parties were sharply divided even on other issues related to marriage and property. For example, in his analysis of miscegenation laws in the United States, Peter Wallenstein discusses the role of courts in recognizing interracial marriages for the purposes of inheritance by non-white spouses and mixed-race children. While Republican judges in some southern states were willing to acknowledge interracial marriages for the purposes of inheriting property, courts quickly reversed course after Reconstruction ended.²⁹⁴ And, it was not only the Constitutions of Republicans and

²⁹³ Louisiana included an MWPA in its 1868 Constitution but not in its 1879 Constitution. North Carolina included an MWPA in its 1868 Constitution, and did not ratify a new constitution until 1971, although Democrats did add several amendments rolling back Reconstruction reforms in 1873 and 1875.

²⁹⁴ Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law -- An American History* (New York: Palgrave Macmillan, 2002), 162.

Democrats that looked similar, but also the judicial interpretations of married women's property provisions, with judges from both parties tending to interpret these provisions relatively narrowly – i.e. neither striking them down nor giving them radical, feminist interpretations.²⁹⁵

The inclusion of MWPAs was apparently relatively uncontroversial for at least many states. Likely this is at least in part because most Southern states had at least some experience with MWPAs before the post-Civil War conventions. Only three states, Georgia, North Carolina, and South Carolina, passed their first MWPA as part of their 1868 Constitution.²⁹⁶ Other states were typically giving MWPAs constitutional status, but not necessarily fundamentally changing state law. For instance, at the Arkansas Constitutional Convention in 1868, the main opposition to including an MWPA was that exemption laws in general (both homestead exemptions and exemptions for married women's property) were legislative matters that should not be included in the constitution itself.²⁹⁷ Instead, the substantive debates around women's rights centered on whether to include a provision providing for women's suffrage in the Constitution, a much more controversial matter. Mr. Langley, the primary supporter of this measure, was determined by convention leadership to be out of order by even trying to introduce the measure, as was an attempt by another delegate to debate the matter.²⁹⁸ When the women's suffrage clause was debated, the discussion was apparently heated, with interruptions from both sides.²⁹⁹ Langley was openly mocked, with one delegate proposing a substitute amendment that would have denied men the right to vote if they permitted their wives to go to the polls.³⁰⁰ Ultimately, the women's suffrage amendment died without ever getting a formal vote.³⁰¹ This treatment stands in stark contrast to the uncontroversial manner in which the delegates treated married women's property rights – no extended debate and no laughter at even the idea of expanding these rights.

Constitutional conventions were important moments when state-level elites were involved in the process of considering the political system as a whole. Particularly in the South, women's rights were clearly not the reason these conventions were called – rather, they were a response to the Civil War and the end of Reconstruction. Yet, they provided a political opening for elites to consider how best to define married women's property rights. Many states that already had MWPAs on the books elevated them to constitutional status, protecting these rights from possible legislative reversals. And others introduced these laws for the first time, using the opening of a convention to bring their laws more in line with their neighbors.

IV. The Spread of MWPAs through the States

²⁹⁵ Ranney, *In the Wake*: 119.

²⁹⁶ Lebsock, "Radical Reconstruction," 196. Convention Reports from Georgia and North Carolina reveal little about the debates that occurred over including an MWPA, if there were any. South Carolina's convention is discussed in more detail in Chapter 2. Debates there centered around debt relief and the protection of vulnerable women.

²⁹⁷ John G. Price, ed. *Debates and Proceedings of the Convention which Assembled at Little Rock, January 7th, 1868* (Little Rock: J. G. Price, 1868), 206-07.

²⁹⁸ *Ibid.*, 701-02.

²⁹⁹ *Ibid.*, 704-07.

³⁰⁰ *Ibid.*, 708.

³⁰¹ *Ibid.*, 724.

Constitutions offer an important window into another aspect of MWPA passage: the transmission of MWPA text and content among states. Because these laws were not mandated at the federal level, states had the opportunity to experiment with different forms of MWPA, and to borrow practices from other states that seemed to be working well. Looking at the text of these provisions just in Southern constitutions, borrowing of language among states is clear. For example, in their 1868 Constitutions, South Carolina, Arkansas, and Alabama all passed near-identical MWPA (see Table 4). Throughout the South, delegates often used similar language and to describe married women's new economic rights, and included similar types of protections in their constitutions. Six states included a constitutional debt-free provision, ensuring that married women's separate property could not be seized by her husband's creditors. Five included language guaranteeing women the right to make at least some decisions with their property "as if she were unmarried" or "as if she were a *feme sole*."

Beyond southern constitutions, this practice seemed to be fairly common. Sometimes, borrowing is clear from MWPA text, as in California's earliest MWPA, which duplicated text almost exactly from Texas's constitution (see Chapter 2 and Table 6 below). Similarly, Maine's first MWPA was passed five years after Mississippi's, and the text was a close duplicate aside from the slavery provisions (see Table 6).³⁰² Although lawmakers did not always acknowledge the origins of these passages in debates, the language itself indicates that they must have been aware of these other MWPA and used them as a model.

In other cases, the transmission of MWPA between states had a more personal link, often through family relationships. The Hadley family, so influential in the passage of Mississippi's MWPA, may have also played a role in the passage of Texas's first MWPA, at its 1845 Constitutional Convention. One of the delegates to this convention, and a prominent committee chair, H.G. Runnels, was Mrs. Hadley's brother-in-law.³⁰³ Although it is not entirely clear from Convention debates who initially raised the idea of including an MWPA in the new Constitution, the presence of at least one delegate with close personal experience with this type of legislation is clearly relevant. Similarly, as discussed in Chapter 2, California's 1872 MWPA was influenced by David Field's brother, Stephen Field. Thus, the movement west of family members of influential legislators in eastern and southern states seems to have been one mode of transmission of MWPA language and content.

Although these anecdotes are suggestive, I also gather broader data on the transmission of MWPA among neighboring states. Based on the MWPA dates data described above, I created a new variable, NEIGHBOR, that takes a value of 0 in years when a neighboring state has not adopted an MWPA, and a value of 1 in years when at least one neighboring state has adopted an MWPA. Although the copying of MWPA models clearly could and did take place between states that were not neighbors (such as Mississippi and Maine), this variable allows for a rough measure of geographic closeness, with the idea that neighboring states may be most likely to observe the passage of MWPA, engage in communication among political elites, and experience similar conditions encouraging the passage of these laws.

³⁰² Moncrief, "Mississippi Married Women's Property Act," 125.

³⁰³ *Ibid.*, 123-24.

I estimate survival models as in Section III, above, to examine the relationship between neighboring states in the passage of MWPAs. I present both the bivariate models and models with the full set of covariates from the models in section 3 (see Tables 7-10). Turning first to debt-free estates MWPAs, NEIGHBOR is significant, positive, and substantively large in both models. Neighboring a state with an MWA is associated with an over 400% higher chance of passing a debt-free estates MWA. For ‘effective’ MWPAs, the results are weaker. Although a similarly strong relationship is found in the bivariate regression, this relationship disappears when controls are included. It may be that because ‘effective’ MWPAs made larger and more substantial changes to gender relationships and roles, and had different economic implications, that these laws were less amenable to simple copying from other jurisdictions. Alternately, it is clear from my analysis above that these laws were more regional in nature, tending to occur later in southern states, while debt-free estates MWPAs do not share this regional pattern. Because the variable NEIGHBOR has obvious connections to region since it is also based on geography, it may be that the regional variable, SOUTH, is picking up the effect in the multivariate model. Despite these weaker results for ‘effective’ MWPAs, it does seem that the borrowing or copying of MWPAs among neighboring states was occurring on a broader scale for at least some types of these laws.

How were MWPAs transmitted between the states? Scholars have examined various methods of transmission in considering the passage of other types of state laws. Virginia Gray defines *diffusion* as “the process by which [a policy] innovation spreads; it consists of the communication of a new idea in a social system over time...[as] decisionmakers emulate or take cues from legislation passed by other states.”³⁰⁴ In their formal model of policy diffusion, Craig Volden et. al. add to this cue-based copying an element of learning; states may not simply be emulating the policies of other states, but actively learning from other states about which policies work well or are popular among the public.³⁰⁵ Finally, Andrew Karch discusses three possible mechanisms at work in policy diffusion: the emulation and learning processes described above, as well as a third mechanism – competition. States may not simply copy successful policies from other jurisdictions for reasons of good public policy, but may see the adoption of these policies as necessary for remaining competitive.³⁰⁶

Alternately, Volden et. al. have argued that “much of the evidence of diffusion could instead arise through a process of similar governments responding to a common policy problem independently, without learning from one another's experiences.”³⁰⁷ That is, if states are facing similar economic problems in similar patriarchal and paternalistic cultures, they very well may come to pass similar MWPAs in response to these similar problems and political environments. Rather than actively learning from the experiences of other states, each state is essentially operating independently. Volden et. al. develop formal models modelling both learning-based diffusion and independent state decision-making, and find that policy outcomes are similar in both situations: “similar

³⁰⁴ Virginia Gray, "Innovation in the States: A Diffusion Study," *American Political Science Review* 67, no. 4 (1973): 1175-76.

³⁰⁵ Craig Volden, Michael M. Ting, and Daniel P. Carpenter, "A Formal Model of Learning and Policy Diffusion," *American Political Science Review* 102, no. 3 (2008).

³⁰⁶ Andrew Karch, "Emerging Issues and Future Directions in State Policy Diffusion Research," *State Politics & Policy Quarterly* 7, no. 1 (2007): 55.

³⁰⁷ Volden, Ting, and Carpenter, "Formal Model of Learning," 319.

states are expected to adopt similar policies.”³⁰⁸ Their models indicate that the results presented above may be consistent with both learning-based diffusion and ‘myopic’ decision-making on the part of state elites based only on the conditions in their own state.

In the case of the passage of MWPAs, the quantitative evidence available does not provide a solid answer as to whether the significant state-level shifts observed during this period were the result of copying, learning, competition, or simply independent responses to the economic and political landscape. Qualitative evidence suggests that the process likely combined a combination of these factors. For example, in the case of Maine’s MWA, copied almost verbatim from Mississippi, emulation or learning would seem to be the likely mechanism. These states were in different regions and likely faced little direct competition from one another, and Mississippi had a slave economy that influenced the passage of its law, while Maine did not. Facing different economic and political conditions, it seems unlikely that Maine’s politicians simply came up with a near-identical law independently. Thus, in this case, diffusion through emulation or learning makes the most sense. In contrast, California’s adoption of its first MWA clearly showed evidence of competition, with delegates at its constitution convention repeatedly emphasizing the need to attract women to the state (See Chapter 2). Similarly, at South Carolina’s 1868 Constitutional Convention, one of the delegates noted that “Nearly all the States of the Union have passed laws for the protection of women’s property; and shall we, when we have passed page after page of enactments, explaining the rights of man, stop here and make a wry face at a single clause?”³⁰⁹ This evidence indicates that there were multiple pathways and mechanisms for policy diffusion of MWPAs.

V. Conclusion

This chapter takes a broader look at MWPAs to explore patterns relating to the passage of these laws in the nation as a whole. These reforms were bipartisan in nature, with legislatures and constitutional conventions dominated by both parties passing MWPAs. Even conventions with dramatic differences in party composition and policy goals, Southern conventions during Reconstruction and Redemption, took similar stances on the expansion of married women’s economic rights. These conventions, both in the South and elsewhere, were important moments for introducing or reinforcing MWPAs. At conventions and in legislative bodies, states often borrowed both specific language and policy innovations from other states. This policy diffusion operated through different mechanisms for different states: sometimes, simple copying or emulation seems to have been at work, while other times, states adopted these reforms in an attempt to stay competitive.

³⁰⁸ Ibid., 327.

³⁰⁹ *Proceedings of the Constitutional Convention of South Carolina*, 1: 784-85.

Figure 1: Married Women's Property Acts in the States

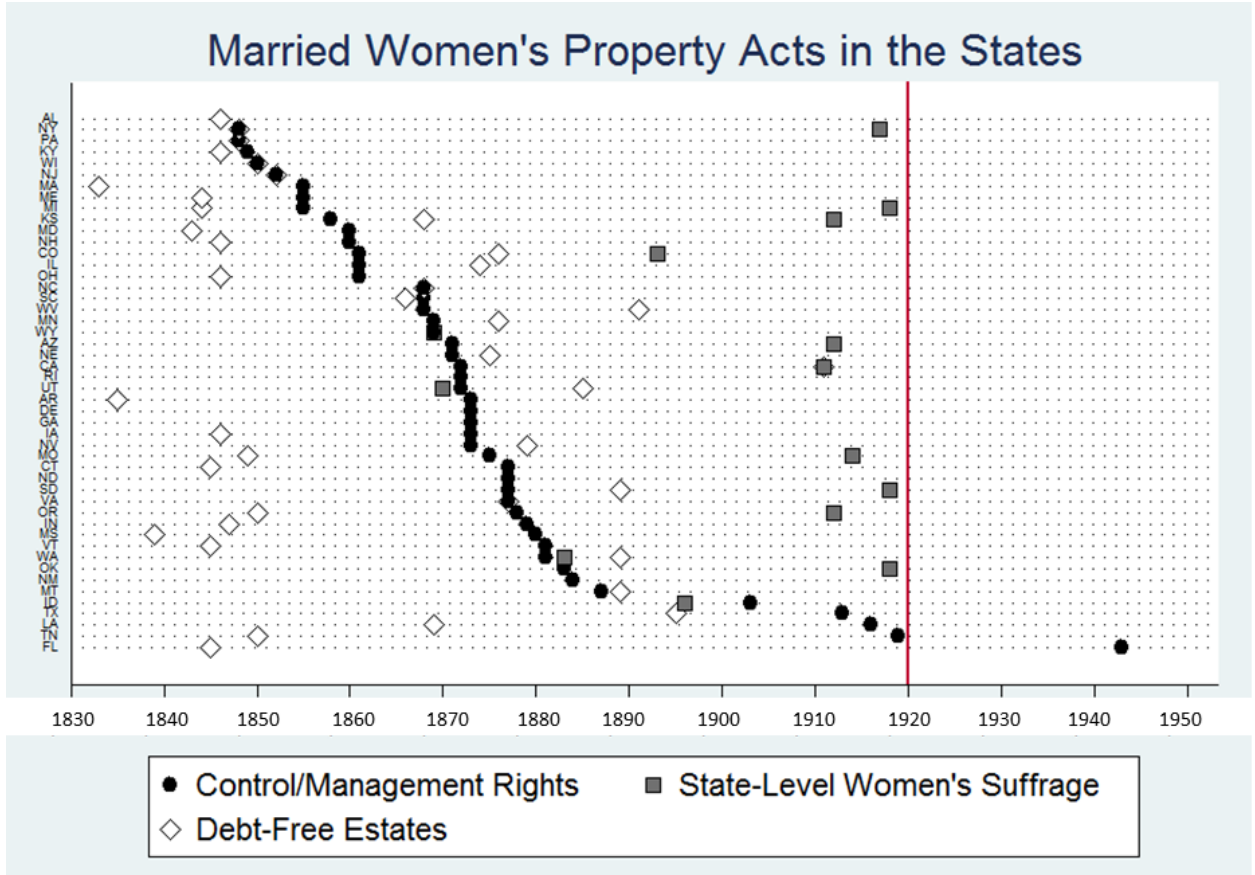


Figure 2: MWPAs and State-Level Suffrage Organizations

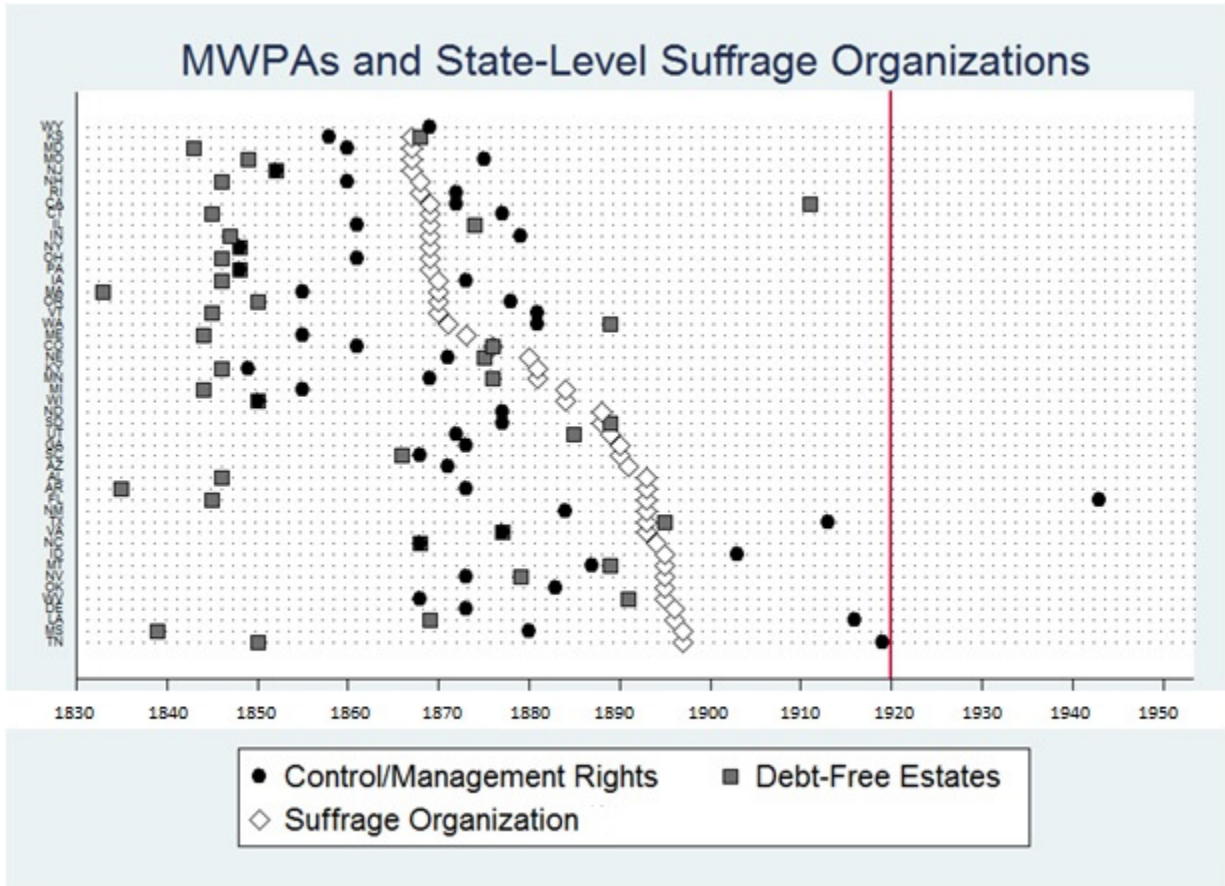


Table 1: Dates of MWPA Passage and the Formation of State-Level Women’s Suffrage Organizations

Effective MWPA precedes the formation of a woman’s suffrage organization	Debt-Free MWPA but not Effective MWPA precedes the formation of a woman’s suffrage organization	Woman’s suffrage organization precedes the passage of both types of MWPAs
AZ, AR, CO, DE, GA, IL, KS, KY, ME, MD, MA, MI, MN, MS, MT, NH, NJ, NM, NY, NC, ND, OH, OK, PA, SC, SD, WV, WI, WY (29 states, 60%)	AL, CT, FL, IN, IA, LA, MO, OR, TN, UT, VT (11 states, 23%)	CA, ID, NE, NV, RI, TX, VA, WA (8 states, 17%)

Table 2: Political Context and Debt-Free Estates

	Hazard Ratio	P-Value
D-SENATE	.77	.618
D-HOUSE	1.04	.946
DSHARE-GOV	.99	.560
CONSTITUTION	1.99 *	.022
SOUTH	.88	.767
COM-PROP	.64	.405

Table 3: Political Context and 'Effective' MWPAs

	Hazard Ratio	P-Value
D-SENATE	1.72	.368
D-HOUSE	.44	.203
DSHARE-GOV	1.00	.660
CONSTITUTION	4.62 *	.048
SOUTH	.27 *	.010
COM-PROP	1.03	.965

Table 4: Reconstruction vs. Redeemer Constitutional Provisions

State	Reconstruction	Redeemer
South Carolina	<p>* 1868: Article XVI, section 8. The real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried: <i>Provided</i>, That no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors.</p>	<p>1895: Article XVII, section 9. The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried.</p>
Mississippi	<p>1869: Article I, section 16. The rights of married women shall be protected by law in property owned previous to marriage; and also in all property acquired in good faith by purchase, gift, devise, or bequest after marriage; <i>Provided</i>, That nothing herein contained shall be so construed as to protect said property from being applied to the payment of their lawful debts.</p>	<p>1890: Article III, section 94. The legislature shall never create by law any distinction between the rights of men and women to acquire, own, enjoy, and dispose of property of all kinds, or their power to contract in reference thereto. Married women are hereby fully emancipated from all disability on account of coverture. But this shall not prevent the legislature from regulating contracts between husband and wife; nor shall the legislature be prevented from regulating the sale of homesteads.</p>
Florida	<p>1868: Article IV, section 26. All property, both real and personal, of the wife, owned by her before marriage, or acquired afterward by gift, devise, descent, or purchase, shall be her separate property, and not liable for the debts of her husband.</p>	<p>1886: Article XI, section 1. All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing executed according to the law respecting conveyances by married women.</p>

		Section 2. A married woman's separate real or personal property may be charged in equity and sold, or the uses, rents and profits thereof sequestrated for the purchase money thereof; or for money or thing due upon any agreement made by her in writing for the benefit of her separate property; or for the price of any property purchased by her, or for labor and material used with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon, with her knowledge and consent.
Alabama	1868: Article XIV, section 6. The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may afterwards be entitled by gift, grant, inheritance, or devise, shall be and remain the separate estate and property of such female, and shall not be liable for any debts, obligations, and engagements of her husband, and may be devised or bequeathed by her, the same as if she were a femme sole.	1875: Article X, section 6. The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may afterwards be entitled by gift, grant, inheritance, or devise, shall be and remain the separate estate and property of such female, and shall not be liable for any debts, obligations, and engagements of her husband, and may be devised or bequeathed by her, the same as if she were a femme sole.
Georgia	* 1868: Article VII, section 2. All property of the wife, in her possession at the time of her marriage, and all property given to, inherited, or acquired by her, shall remain her separate property, and not liable for the debts of the husband.	1877: Article III, section XI. All property of the wife at the time of her marriage, and all property given to, inherited, or acquired by her, shall remain her separate property, and not be liable for the debts of her husband.
Louisiana	1868: Title VI, article 123: The general assembly shall provide for the protection of the rights of married women to their dotal and paraphernal property, and for the registration of the same; but no	1879: no MWPA

	<p>mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated. The tacit mortgages and privileges now existing in this state shall cease to have effect against third persons after the first of January, 1870, unless duly recorded. The general assembly shall provide by law for the registration of all mortgages and privileges.</p>	
Texas	<p>1869: Article XII, section XIV. The rights of married women to their separate property, real and personal, and the increase of the same, shall be protected by law; and married women, infants and insane persons, shall not be barred of their rights of property by adverse possession, or law of limitation, of less than seven years from and after the removal of each and all of their respective legal disabilities.</p>	<p>1876: Article XVI, section 15. All property, both real and personal, of the wife, owned or claimed by her before marriage; and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.</p>
Virginia	<p>1870: no MWPA</p>	<p>1902: no MWPA</p>
Arkansas	<p>1868: Article XII, section 6. The real and personal property of any female in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain the separate estate and property of such female, and may be devised or bequeathed by her the same as she were a <i>femme sole</i>. Laws shall be passed providing for the registration of the wife's separate property, and when so registered, and so long as it is not entrusted to the management or control of her husband, otherwise than as an agent, it shall not be liable for any of his debts, engagements, or obligations.</p>	<p>1874: Article IX, section 7. The real and personal property of any <i>femme covert</i> in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a <i>femme sole</i>; and the same shall not be subject to the debts of her husband.</p>

Tennessee	1870: no MWPA	No amendments until 1953
North Carolina	* 1868: Article X, section 6. The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised or bequeathed, and, with the written assent of her husband, conveyed, by her, as if she were unmarried.	No new constitution until 1971, but major amendments in 1873 and 1875 accomplish many of the same policies as other Redeemer constitutions.

Constitutional provisions marked with an asterisk (*) designate those states in which the constitutional provision listed was the first MWPA of any sort in the state (Reconstruction constitutions of South Carolina, Georgia, and North Carolina).

Table 5: Summary of Southern Constitutional MWPAs

	Reconstruction	Redemption
States Ratifying a New Constitution	SC, MS, FL, AL, GA, LA, TX, VA, AR, TN, NC (11/11)	SC, MS, FL, AL, GA, LA, TX, VA, AR (9/11)
Constitutions Including an MWPA	SC, MS, FL, AL, GA, LA, TX, AR, NC (9/11)	SC, MS, FL, AL, GA, TX, AR (7/9)
MWPAs that Include Substantial Expansion of Rights (Only relevant for second set of constitutions)		SC, MS, FL, AR (4/7)

Table 6: Transmission of MWPA Language between States

<p>Texas (1845): All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property. --Constitution of Texas, Article VII, section 19</p>	<p>California (1849): All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property. -- Constitution of the State of California, Article XI, section 14</p>
<p>Mississippi (1839): Sec. 1. <i>Be it enacted by the legislature of Mississippi,</i> That any married woman may be seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property: <i>Provided,</i> the same does not come to her from her husband after coverture. Sec. 2. <i>And be it further enacted,</i> That hereafter when any woman possessed of a property in slaves, shall marry, her property in such slaves and their natural increase shall continue to her, notwithstanding her coverture; and she shall have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of her husband. -- An Act for the protection and preservation of the rights and property of Married Women (1839), Sections 1-2.</p>	<p>Maine (1844): Sec 1. Any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property; provided it shall be made to appear by such married woman, in any issue touching the validity of her title, that the same does not in any way come from the husband after coverture. Sec 2. Hereafter when any woman possessed of property real or personal, shall marry, such property shall continue to her, notwithstanding her coverture, and she shall have, hold and possess the same, as her separate property exempt from any liability for the debts or contracts of the husband. -- Maine Public Laws (1844), Chap 117</p>

Table 7: Debt-Free Estates and 'Diffusion,' Bivariate Regression

	Hazard Ratio	P-Value
NEIGHBOR	4.14 *	.035

Table 8: Debt-Free Estates and 'Diffusion,' Multiple Regression

	Hazard Ratio	P-Value
NEIGHBOR	4.73 †	.072
D-SENATE	.787	.654
D-HOUSE	.983	.975
DSHARE-GOV	.992	.518
CONSTITUTION	1.42 *	.019
SOUTH	1.02	.956
COM-PROP	.818	.717

Table 9: 'Effective' MWPAs and 'Diffusion,' Bivariate Regression

	Hazard Ratio	P-Value
NEIGHBOR	3.70 *	.008

Table 10: 'Effective' MWPAs and 'Diffusion,' Multiple Regression

	Hazard Ratio	P-Value
NEIGHBOR	1.89	.314
D-SENATE	1.69	.385
D-HOUSE	.47	.254
DSHARE-GOV	.99	.635
CONSTITUTION	4.87 *	.044
SOUTH	.31 *	.027
COM-PROP	1.15	.816

Chapter Four: Gender Hierarchy and Protective Labor Legislation: Women's Economic Rights in the *Lochner* Era

The political energy around Married Women's Property Acts began to wind down in the early twentieth century. The majority of states had laws that granted meaningful property and other economic rights by the 1870s, and all but six states passed these laws by 1900. Although states continued to pass additional laws clarifying and expanding rights, and although state courts continued to work out the practical details of how these laws would apply to real-world situations, reform efforts around the issue of married women's property rights were fading. However, the political and legal arguments that were developed around these issues did not disappear.

The *Lochner* Era describes a period from the late 1800s through 1937 during which the U.S. Supreme Court and state courts struck down a number of labor reforms as unconstitutional, typically citing a constitutionally protected liberty: "the right to contract." *In Re Jacobs* (1885), decided in New York, was the first ruling by a state's highest court or the Supreme Court to use a constitutional right to personal liberty and property rights to one's own labor as the justification for striking down labor legislation, in this case a prohibition on cigar manufacturing in tenements.³¹⁰ In the subsequent decades, state and federal judges developed this concept into the 'right to contract,' most famously in *Lochner v. New York* (1905).³¹¹ This period ended with *West Coast Hotel v. Parrish* (1937), in which the U.S. Supreme Court overturned a previous decision striking down a women's minimum wage law and thereafter substantially removed itself from reviewing economic regulations.³¹²

This chapter explores the role of gender in the struggle for labor reform during a period when courts were sharply opposed to legislative enactments on labor policies. During the *Lochner* Era, courts, legislatures, and activists came into intense conflict over laws regulating working conditions, maximum hours, minimum wages, and union activity. While courts consistently ruled against unions during this period, the results of court cases dealing with so-called 'protective' legislation were more mixed.³¹³ Both state courts and the U.S. Supreme Court were sometimes, though not always, willing to accept legislative intrusions into the right of contract when done so for protective reasons, particularly when the laws in question concerned 'vulnerable' populations such as women, minors, and individuals employed in occupations deemed to be unusually dangerous.

This period presents an important interaction between two reform paths: the more diffuse and decentralized reform of married women's economic rights that had been occurring since the late 1830s, and the more active, strategic, and centralized politics around labor reform that often centered around women's groups and women's role in the labor market. The protective justifications used by legislators, constitutional convention delegates, and judges with regard to MWPA were also commonly used by women's groups, labor activists, and judges interpreting the laws that resulted from these activists'

³¹⁰ *In Re Jacobs*, 98 N.Y. 98 (1885).

³¹¹ *Lochner v. New York*, 198 U.S. 45 (1905).

³¹² *West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379.

³¹³ Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *The Journal of American History* 72, no. 1 (1985).

efforts. While these justifications were based in a tradition of gender hierarchy, as I discuss in Chapter 1, they were also often highly effective in securing the passage of MWPAs. So too were these justifications useful to reformers who pushed for the passage of minimum wage and maximum hours laws that benefited female workers. However, while the path of MWPAs was one that ultimately led to meaningful, if incomplete, liberalization of married women's economic rights, the use of protection-based and paternalistic justifications for protective labor legislation was both more contested and ultimately more problematic for women's economic status.

In this chapter, I first discuss the continuity and clashes between two overlapping but distinct reform paths: MWPAs and protective labor legislation. I argue that despite the different modes of reform, important political and legal justifications based in a tradition of gender hierarchy were carried over from the earlier period. I then discuss in more detail the strategies of both women's groups and labor groups in approaching labor reforms, in particular their debates over the strategy of pursuing reforms that specifically applied to women versus more general protections. Next, I examine court rulings from this period. I argue that courts were often willing to uphold protective legislation pertaining to women because of paternalistic justifications, but were also prepared to acknowledge a role for women in the economy that was dramatically more liberal than the one they had prior to the MWPA reforms. Finally, I look at the long-term effects of protective strategies during the Progressive Era on women's role in the workplace. Once courts stepped back from striking down labor reforms and took a more deferential attitude toward legislatures on issues of labor law, they also continued to use paternalistic justifications to allow the persistence of gender discrimination in employment law.

I. Two Reform Paths Converge

In this chapter, I specifically look at struggles over protective legislation, which included such topics as maximum hours laws (for example, limiting the number of hours in a legal day of work to eight or ten), minimum wage laws, laws prohibiting women (or other groups) from working in certain occupations, and night work laws (limiting work during the night). Although labor reforms during the *Lochner* Era covered a broad set of topics, protective legislation hit on the issue of gender most specifically, as many of these laws were written so as to apply only to women. While some protective laws were more general, many applied only to certain groups; in addition to women, children and individuals working in especially dangerous jobs (such as miners) were often targeted.

Demands for maximum hours legislation first appeared in the United States in 1825, initially for policies that did not apply specifically to women. The earliest laws were demanded by male tradesmen who argued that these laws would both allow workers to use their leisure time to become "an educated and aware citizenry" and also "ensure that available jobs were shared."³¹⁴ Thus, the justifications were neither inherently based in gender-specific rationales nor were they centered around the idea that workers were in need of paternalistic protection; instead, maximum hours laws were argued to have more general benefits for society as a whole.

³¹⁴ Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 1982), 182.

However, beginning in the 1880s and continuing throughout the *Lochner* Era, states began to see their hours laws that covered all adult workers struck down by courts. Advocates for these laws thus turned to hours laws that covered only certain groups, including women. The first hours law that was specific to women was passed in Ohio in 1852, and these laws became common by the early 1900s, especially after the Supreme Court ruled in favor of hours legislation for women in 1908.³¹⁵ However, although these laws were beginning to gain traction in the legislative and judicial arenas, enforcement was often limited or ineffective in practice.³¹⁶ By 1917, 39 states had some type of maximum hours legislation applying to women, and all but five had passed such laws by 1924.³¹⁷ Further, enforcement efforts increased as states began to treat these laws with higher priority.³¹⁸

As hours laws for women became more popular, legislatures also began to pass other legislation placing limits on women's work, typically with protection as the justification. These included bans on work during nighttime hours and laws barring women from specific occupations that were deemed overly dangerous to either their health or morals. The first of these was an 1881 California law that prohibited women from being employed in places selling alcohol. While the California law was struck down, many similar laws were passed and upheld in other states throughout this period, including laws prohibiting women's work as bartenders, miners, letter carriers, and elevator operators.³¹⁹

Finally, demands for a minimum wage grew out of success around hours legislation, because limited hours meant that workers needed to be paid a certain wage in order to make a living from eight or ten hour work days. Women's groups began to work for a 'living wage' in the early 1900s.³²⁰ By 1915, twelve states had passed minimum wage laws, with most of these applying specifically to women and/or children. However, minimum wage legislation for women proved more controversial both in legislatures and in the courts than had maximum hours rules. Particularly after World War I, opposition from business interests increased and public approval for minimum wage restrictions decreased.³²¹ Minimum wages were the last type of protective legislation to receive Supreme Court approval, only at the end of the *Lochner* Era.

The judicial response to protective legislation for female workers involved a tension between a developing liberal view of women as independent economic actors and a continued attachment to a tradition of gender hierarchy that viewed women as being in need of paternalistic state protection. As Karen Orren lays out in *Belated Feudalism*, "most of the [labor] laws passed since the 1880s, including the legislation affecting the employment of adult males and the activities of labor unions, were invalidated as violating common-law rights of both workers and their employers."³²² Similarly, Melvyn

³¹⁵ Ibid., 186-87. See also Judith A. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* (Westport, Conn.: Greenwood Press, 1978).

³¹⁶ ———, *Chains of Protection*: 31. On lack of enforcement, see also Forbath, "The Shaping of the American Labor Movement," 1142.

³¹⁷ Kessler-Harris, *Out to Work*: 188.

³¹⁸ Baer, *Chains of Protection*: 97.

³¹⁹ Kessler-Harris, *Out to Work*: 185.

³²⁰ Ibid., 195.

³²¹ Baer, *Chains of Protection*: 92.

³²² Orren, *Belated Feudalism*: 29.

Dubofsky describes the Supreme Court's rulings during this period as decisions that "cripple[d] union power and...invariably decided against labor."³²³ Yet labor legislation affecting only female workers was treated differently by the courts, often with more deference to legislative judgment and an attitude that women's workplace rights were not as absolute as those of men. Although state courts did not always address these issues uniformly, most ruled that "broad, class-based legislative initiatives would not pass constitutional muster," while laws applying to only "dependent" or "vulnerable" workers typically would.³²⁴ Thus, even in a period of heightened conflict between the legislative and judicial branches, courts were more deferential and cooperative when it came to laws applying to women.

MWPAs provide an important backdrop to this judicial response. Although MWPAs were specific to married women and did not concern the legal rights of single women, practically this distinction concerned few women. 90 percent or more of women over 35 were married during this period, meaning that the vast majority of women could expect to fall under the rules for married women at some point during their lives; after 1890, married women were employed in the labor force with increasing frequency.³²⁵ By the 1920s, Nancy Cott writes that "single women made up only a little over half of those employed."³²⁶ Thus, the fact that married women had a legal right to sign and enforce contracts after the passage of MWPAs was an important one for courts and one that had broader implications for the role of all women in the economy. Many rulings during this period cited state MWPAs as evidence that women now had a constitutional 'right to contract' just as men did.³²⁷

Despite acknowledging the changed legal environment that female workers operated in after the passage of MWPAs, many courts did not reach the conclusion that protective legislation must treat men and women equally. Both activists arguing in favor of protective legislation for women and judges analyzing these laws borrowed arguments that had been marshalled in support of MWPAs and that were rooted in a tradition of gender hierarchy. Arguments that women required special attention and protection from the legislature had been successfully used in defense of MWPAs for decades, and thus provided a ready option for defending protective legislation. Indeed, Eileen McDonagh argues that the "longstanding cultural tradition of republican motherhood was powerfully bolstered during [the Progressive Era] and reached a political high."³²⁸

This approach was not uncontroversial. As I discuss below, women's groups were sharply divided on the best approach to labor reform. While some groups argued that any departure from strict equality was ultimately dangerous, many took stock of the legal options available to them and strategically settled for gender-specific laws because more general laws were clearly not going to be successful in court. Although this approach was successful in obtaining improved working conditions for many women in the short-run, it also had longer term implications for the way courts would approach

³²³ Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill: The University of North Carolina Press, 1994), 45.

³²⁴ Forbath, "The Shaping of the American Labor Movement," 1144.

³²⁵ Kessler-Harris, *Out to Work*: 184.

³²⁶ Nancy F. Cott, *The Grounding of Modern Feminism* (New Haven: Yale University Press, 1987), 129.

³²⁷ See, for example, *Ritchie v. People* (1895) and *New York v. Williams* (1906).

³²⁸ Eileen L. McDonagh, "Gender Politics and Political Change," in *New Perspectives on American Politics*, ed. Lawrence C. Dodd and Calvin Jillson (Washington, D.C.: CQ Press, 1994), 67.

women's work throughout the twentieth century. With gender-specific justifications for differential treatment readily available, courts continued to approve laws that barred women from certain occupations and even from colleges and juries until the Equal Employment Opportunity Commission ruled state protective legislation illegal in 1969.³²⁹

Whereas women's organizations played a less central role in the passage of MWPAs, women's groups were among the primary drivers of changes when it came to protective labor legislation. Alice Kessler-Harris describes their role:

As in many other Western industrial countries, in the United States women were key players in the debates over labor legislation. According to one formulation, they may have played a greater role in the United States than elsewhere because in the early twentieth century a relatively weak American state encouraged the growth of powerful women's organizations with important political clout....[M]iddle-class women acting in their own individual and class interests, sometimes in alliance with trade unionists, succeeded to an unprecedented degree in providing state-based 'maternalist' legislation designed to protect the roles of working-class and poor mothers.³³⁰

Thus the politics of protective legislation looks more like the strategic interest group-based story that often describes narratives of reform and rights expansions. However, the use of paternalistic justifications by female reformers and other advocates for protective legislation, however important strategically, ultimately had long-lasting implications for how legislatures and courts approached gender-specific labor law long after the *Lochner* Era.

II. Legislative Strategies

Both women's groups and unions were divided on the appropriate strategy for improving working conditions for women. The larger women's organizations, including the Women's Trade Union League, the National Consumer's League, and the League of Women Voters, all advocated for protective legislation for women. These groups made arguments in favor of such legislation that can be broken into two broad themes, one based on economic competition and the other based on physical differences.

First, groups argued that women were unionized at lower rates than men and faced other disadvantages in market employment such as significantly lower wages. Since women were blocked from being employed in certain jobs, either by law or custom, they also often faced more intense competition for available jobs. As such, they required protective legislation in order to avoid being exploited by employers. According to these types of arguments, there was nothing specific about women as a gender that made them more vulnerable or in need of protection, but economic, societal, and cultural forces placed them at a disadvantage in finding quality employment; legislation could help correct this imbalance.

³²⁹ Baer, *Chains of Protection*.

³³⁰ Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (Oxford: Oxford University Press, 2001), 15.

Second, many women's groups argued that inherent physical differences between the sexes, and specifically women's role as mothers, required the paternalistic hand of the state to step in.³³¹ Arguments based on the eugenics movement fueled concern that "race suicide" would occur if women were overworked in occupations dangerous to their health.³³² Proponents of Oregon's maximum hours law for women amassed evidence from the medical community regarding women's special health concerns that placed them in need of state protection: "Neurasthenia, back troubles, pyrosis, constipation, vertigo, and headaches...[as well as] edema, varicose veins, displacement of the uterus, throat and lung diseases were said to follow from excessive work."³³³ Some female reformers argued that feminine qualities like "compassion, nurturance, [and] a better-developed sense of morality...unfitted [women] for the competitive economic struggle," thus necessitating state protection to ensure that women were not taken advantage of.³³⁴ And married women in particular argued that limitations on hours were needed to provide them the necessary time for household chores and child rearing.³³⁵ Women's groups formed coalitions with each other and with unions to pursue a strategy of "state-by-state efforts to improve the conditions of women workers."³³⁶

In contrast, the more radical National Woman's Party argued for equality under the law and the elimination of legal distinctions between men and women; the NWP did not argue against labor legislation in general, but rather that it should be applied equally to all workers, regardless of gender.³³⁷ The debate over protective labor legislation led to a sharp divide in the women's movement between the NWP, which supported a constitutional equal rights amendment in the 1920s and 1930s, and most other women's groups, who testified against such an amendment on the grounds that it would outlaw the protective legislation they had fought so hard for.³³⁸ The NWP argued that limitations on women's right to contract hurt both poor and upper class women by limiting their economic opportunities and giving the competitive advantage to male workers who did not face such restrictions. For example, Fannia Cohn, a leading female unionist, believed that unionization and organization of female workers was a surer path to success than protective legislation.³³⁹

However, given the animosity toward more general protective legislation in the courts, "most advocates of protection were not willing to risk hard-won legislation for an abstract commitment to equality."³⁴⁰ Indeed, the repeated failure of general protective legislation to pass judicial muster was clearly one important reason for seeking gender-specific protective laws, both among women's groups and unions. Even though many reformers might have preferred laws applying to both men and women, and indeed

³³¹ _____, *Out to Work*: 206.

³³² *Ibid.*, 185.

³³³ *Ibid.*, 187.

³³⁴ *Ibid.*, 185.

³³⁵ *Ibid.*, 189.

³³⁶ Suzanne Mettler, "Federalism, Gender, & the Fair Labor Standards Act of 1938," *Polity* 26, no. 4 (1994).

³³⁷ Kessler-Harris, *Out to Work*: 206.

³³⁸ Cott, *Modern Feminism*: 126. See also Kathryn Kish Sklar, "Why Were Most Politically Active Women Opposed to the ERA in the 1920s?," in *Women, the Law, and the Workplace: Social Feminism, Labor Politics, and the Supreme Court in the 1920s*, ed. Sybil Lipschultz (New York: Routledge, 2003).

³³⁹ Kessler-Harris, *Out to Work*: 205.

³⁴⁰ *Ibid.*, 208.

initially supported such laws, court rulings throughout the *Lochner* Era narrowed the scope of their efforts to focus on legislation that stood a reasonable chance of surviving judicial scrutiny and being implemented and enforced.³⁴¹

Many reformers also believed that pursuing limited, gender-specific protective legislation would create a 'wedge' leading to broader legislation and other benefits for workers. This was particularly true for early laws. For example, Florence Kelly and the Chicago Foundations pushed for and won an hours law in Illinois in 1893, and both "envisioned the 1893 law bill strategically, as an entering wedge for broader hours legislation that would ultimately cover men as well as women."³⁴² Melvin Urofsky describes this strategy in similar terms, writing that "[by] emphasizing the special restraints on women, as well as their unique status as 'mothers of the race,' Progressives were able to establish a bridgehead, as it were, before striking out in pursuit of their larger goal, an eight-hour day for all workers."³⁴³

In addition to the potential that sex-based protective legislation might open the door to more general legislation, some reformers saw these laws as having immediate benefits for workers of both genders and the economy as a whole. For example, reformers in the National Women's Trade Union League argued that "male workers, too, benefitted from limits on women's hours in factories where men and women worked at interdependent tasks."³⁴⁴ Similarly, the major cotton trade association, the Cotton Textile Institute, fought to end night work for women in Southern mills in hopes that it would reduce or eliminate the operation of mills at night and "[break] a cycle of over production and price-cutting that had beset the industry through the 1920s."³⁴⁵

Women's groups like the national Consumer's League saw protective labor legislation as a first step not only to more general labor legislation but also to furthering broader feminist goals. Higher wages and shorter hours would provide women with greater opportunities to unionize or pursue further education and training.³⁴⁶ However, whether based in a strategic desire to use women's hours laws to open the door to more general laws and goals or in paternalistic concern for women specifically, the arguments around women's hours legislation often centered on physical differences between the sexes and women's role in child bearing and child rearing. It was this focus that often caused more radical feminist groups to be wary of gender-specific protective legislation.

The National Woman's Party argued that that limiting the 'right to contract' only for female workers hurt women at both ends of the class structure. For women living on the economic margins, protective laws made them less competitive in the labor market and prevented poor women from working enough hours to support themselves.³⁴⁷ White collar workers were hurt as well: Harriot Stanton Blatch, a reformer in the NWP, argued that protective legislation had the ultimate impact of limiting women's potential rather

³⁴¹ Forbath, "The Shaping of the American Labor Movement."

³⁴² Ibid., 1137. See also Kessler-Harris, *Out to Work*: 184.

³⁴³ Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," 71.

³⁴⁴ Cott, *Modern Feminism*: 127.

³⁴⁵ Landon R. Y. Storrs, "Gender and the Development of the Regulatory State: The Controversy over Restricting Women's Night Work in the Depression-Era South," *Journal of Policy History* 10, no. 2 (1998): 179. Simply replacing female night workers with male workers was thought to be too expensive.

³⁴⁶ ———, *Civilizing Capitalism: The National Consumer's League, Women's Activism, and Labor Standards in the New Deal Era* (Chapel Hill: University of North Carolina Press, 2000), 42.

³⁴⁷ Kessler-Harris, *Out to Work*: 189-90.

than shielding them from exploitation. She argued that “in many highly paid trades women have been pushed into the lower grades of work, limited in earning capacity, if not shut out of the trade entirely by these so-called protective laws.”³⁴⁸

Some female reformers tried to split the difference, as with Mabel Raef Putnam’s efforts to pass an equal rights bill in Wisconsin that “grant[ed] women the same rights and privileges as men *except for* ‘the special protection and privileges which they now enjoy for the general welfare.’”³⁴⁹ But, this approach proved problematic as well. The Wisconsin bill was used in 1905 to justify a ban on female state legislators, on the grounds that “legislative service required ‘very long and often unreasonable hours.’”³⁵⁰ Although the state legislature was clearly not the sort of exploitative working environment that reformers had in mind when advocating for protective legislation, the logic was easily extended by male elites seeking to exclude women from elected office.

The debate over gender and protective legislation had an important class component. Cott writes: “Spokeswomen from the [Women’s Trade Union League] and the Women’s Bureau attacked the [National Woman’s Party]’s vision as callously class-biased, rooted in the thoughtless outlook of rich women or at best relevant to the experience of exceptional skilled workers or professionals.”³⁵¹ Indeed, poor women who worked long hours in factories or laundries for low wages did not necessarily have the luxury of debating legal equality, and instead needed solutions that addressed the exploitation they faced from employers regardless of the broader implications for gender equality; in fact the majority of “wage-earning women wanted and valued sex-based labor legislation.”³⁵² Since paternalistic justifications based on a vision of gender hierarchy were often the only practical way to get protective legislation through the courts, it makes sense that so many women’s groups pursued this strategy in approaching labor reforms.

Unions had their own reasons for supporting gender-specific labor legislation. As with the passage of MWPAs, for many of the men involved in pushing for and passing protective legislation for women, motivations were a mix of economic self-interest and paternalism. While some labor organizers supported limited protective legislation in the hopes that these laws would be the ‘wedge’ that encouraged more general protective legislation, others supported these laws because they reduced competition for jobs from female workers. Kessler-Harris writes:

Fear of competition from women and reluctance to invest in organizing them led [male] trade unionists to distinguish sharply between men and women when it came to legislation...Regulatory legislation would limit women’s access to jobs by discouraging employers from hiring them. Prohibitive or restrictive legislation would eliminate competition from women altogether.”³⁵³

³⁴⁸ Cott, *Modern Feminism*: 121.

³⁴⁹ *Ibid.*, 120-21.

³⁵⁰ *Ibid.*, 124-25.

³⁵¹ *Ibid.*, 127.

³⁵² *Ibid.*

³⁵³ Kessler-Harris, *Out to Work*: 201-02.

Cott also argues that the AFL was largely motivated by a desire to exclude women from high-paying union jobs.³⁵⁴

Indeed, unions showed little interest in organizing female workers, who were often seen as being temporary members of the work force rather than family breadwinners who could be reliable union members throughout their lives. Many occupations were highly segregated by gender, and unions had minimal footholds in female-dominated workplaces.³⁵⁵ Because women were unionized at lower rates, and because unions showed little interest in changing this situation, legislation seemed to be the main path forward for securing improved working conditions for women.³⁵⁶ Beginning in the 1890s, the AFL fought for protective legislation for women, typically using the rationales of physical differences between the sexes necessitating different protections for women as well as the desire to reduce competition from women.³⁵⁷ Although women's groups were often skeptical of union motivations, groups like the Women's Trade Union League and the National Consumer's League worked with unions to advocate for women's protective legislation.³⁵⁸

Ultimately, the choices made by the most prominent women's groups of the Progressive Era made a great deal of practical, strategic sense: gender-specific protective legislation was often the only legal route forward for improving women's working conditions, and coalitions with labor unionists with questionable motivations were often the best way to achieve these goals. Yet, at the same time, the long-term implications of this strategy enshrined in law the principle that gender differences justified labor laws that ultimately limited the employment opportunities of many women.

III. Court Responses: Gender Hierarchy and Paternalism as a Major Exception to the Right to Contract

As discussed above, three of the major categories of protective legislation were hours legislation, night work prohibitions, and a minimum wage. Each of these types of legislation followed similar trajectories in the courts, but at different times. Initially, state rulings were scattered, with some states approving of the legislation and others disapproving. Eventually, the Supreme Court would approve of each type of protective legislation for women, using gender-specific justifications for upholding the law. However, the path for judicial approval always involved a tension between the idea that women had the same right to contract as did men, largely based on legal developments such as MWPA's, and the idea that despite being legally emancipated from coverture, women still needed special protections from the state in the labor market. The reasons for protection varied, and included many of the justifications raised by women's groups and labor leaders: physical differences, bargaining disadvantages, and the social role women played as mothers and homemakers.

³⁵⁴ Cott, *Modern Feminism*: 126. This opposition also led the AFL and other unions to oppose an Equal Rights Amendment in the 1920s and 1930s.

³⁵⁵ Mettler, "Federalism, Gender, & the Fair Labor Standards Act of 1938."

³⁵⁶ Storrs, *Civilizing Capitalism*: 43.

³⁵⁷ Kessler-Harris, *Out to Work*: 202-03.

³⁵⁸ *Ibid.*, 203.

The legacy of married women's property and economic rights reforms impacted judicial doctrine in a variety of ways. First, the fact that women might possess a 'right to contract' at all depended on her having a legal right to make and enforce contracts, which would not have existed before the period of MWPA reforms. Courts during this period differed on whether women's right to contract their labor might be limited to a greater extent than men's right to the same, but all accepted that women possessed this right and that it must thus be carefully weighed against the reasons a legislature might have for limiting it. These reasons fell into three broad categories. First were gender-neutral reasons, which were sometimes mentioned in cases concerning gender-specific laws, but were also outlined in cases concerning labor laws that applied to workers of either gender in specific occupations. Second were reasons that focused on protecting the woman herself – often based on physical differences between the genders, but also focusing on women's morals or relative economic bargaining power. These reasons harken back to reasoning for MWPA that noted women's total inability to protect themselves from reckless and irresponsible husbands under the then-governing common law system, but now evil husbands had been replaced with evil employers who exploited women and placed them in morally questionable situations. Finally, judges highlighted the broader consequences for society if female workers were exploited.

The earliest hours laws were non-gender-specific, and covered groups of workers including adult men. The early rulings against these laws shaped the types of demands made by reformers, as discussed above, and so are important to examine for their influence over the eventual focus on women's work protections. State courts were initially unfriendly to hours legislation. In *Luske v. Hotchkiss* (1870), for example, the Connecticut Supreme Court ruled that a general maximum hours law, applying to all workers, did not prevent an employee from working for more than eight hours, but instead meant that an employer was not required to pay for more than eight hours of work; any additional work done was considered to have been done "voluntarily."³⁵⁹ Indiana's high court made a similar ruling in 1892.³⁶⁰ Over time, courts began to strike down hours legislation all together on the grounds that it violated a worker's freedom to contract. For instance, in 1894, Nebraska's Supreme Court struck down an eight-hour law on the grounds that it arbitrarily limited the right to contract for those covered by the law, with the caveat that laws concerning only women or minors might be acceptable since those classifications were "reasonable and not arbitrary."³⁶¹ For male workers, however, the standard was stricter. Courts tended to see general hours legislation as being a matter of personal decision-making between employer and employee, rather than a matter of public interest on which it was appropriate to legislate. While state legislatures had broad police powers to make laws concerning public health, morals, safety, and general welfare, the number of hours worked by employees was seen by these courts as a private matter that had limited impact on health and safety. In an advisory opinion, the Colorado Supreme Court wrote: "In so far as the bill [an eight-hour law] attempts to abridge the right of contract between parties in regard to matters personal to

³⁵⁹ *Luske v. Hotchkiss*, 37 Conn. 219 (1870), 221.

³⁶⁰ *Helphenstine v. Hartig*, 5 Ind. App. 172 (1892).

³⁶¹ *Charles G. Low v. Rees Printing Co.*, 41 Neb. 127 (1894), 136-137. An Ohio Circuit Court struck down a similar law in the same year, on similar grounds. See *Wheeling Bridge and Terminal Railway Co. v. Gilmore*, 4 Ohio Cir. Dec. 266 (1894).

themselves...it is clearly an infringement of...constitutional guarantees [contained in the Due Process Clause].”³⁶²

Despite this background, when an hours case covering male workers reached the U.S. Supreme Court, the outcome was different. *Holden v. Hardy* (1898) dealt with a Utah hours law that applied to miners and smelters.³⁶³ The Court upheld the law, arguing that although workers did possess a constitutional right to contract, it could be limited under certain circumstances: “those engaged in dangerous or unhealthful employments...have been found to be in need of additional protection.”³⁶⁴ The court compared this hours law to laws covering women and minors, distinguishing it from more general laws covering hours restrictions for all employees. While general hours laws might be unconstitutional (this was left unsettled), ‘vulnerable’ groups like women, children, and those engaged in particularly dangerous occupations could be legally covered by maximum hours rules.³⁶⁵

Indeed, when the Court considered a more general hours law in *Lochner*, it ruled the restriction unconstitutional. *Lochner* dealt with a maximum hours law covering bakers, and the Court argued that because work in bakeries was not unusually dangerous or unhealthy (like work in mines), and because bakers as a class were not unusually unintelligent or incapable of asserting their own rights and negotiating contracts, the restriction was an unlawful infringement on their liberty.³⁶⁶ With *Lochner*, the two-tiered approach to labor law was reinforced: everyone had a right to contract, but for women and other groups seen as particularly in need of protection, this right was more easily violated. On the one hand, this system may have brought important protections to some working women; on the other, it made it more difficult to employ women and treated them as legally less competent and independent than male workers.

Court cases concerning protective legislation governing women only (or women and children only) touched on some of the same arguments. Although few courts followed its precedent, the Illinois Supreme Court did strike down an hours law applying only to women. In *Ritchie v. People* (1895), the Illinois Court considered an eight-hour law for women working in manufacturing jobs. The decision was made on the same ‘right to contract’ grounds that decisions concerning general hours legislation were made, but here the Court found no reason to treat women differently with respect to this “right.” Citing the state’s MWPA, Justice Magruder wrote:

The Married Woman’s Act of 1874 authorizes a married woman to sue and be sued without joining her husband, and provides that contracts may be made and liabilities incurred by her and enforced against her to the same extent and in the same manner as if she were unmarried...Section 5 of the Act of 1893 [the hours legislation under consideration] is broad enough to include married women and adult single women, as well as minors...But inasmuch as sex is no bar, under the constitution and the law, to the endowment of woman with the fundamental and inalienable rights

³⁶² *In Re Eight-Hour Law* (1895), 21 Colo. 27.

³⁶³ *Holden v. Hardy* (1898), 169 U.S. 366.

³⁶⁴ *Ibid.*, 385.

³⁶⁵ *Ibid.*, 395.

³⁶⁶ *Lochner v. New York*, 198 U.S. 45 (1905), 57-59.

of liberty and property which include the right to make her own contracts, the mere fact of sex will not justify the legislature in putting forth the police power of the State for the purpose of limiting her exercise of those rights...³⁶⁷

More common than cases like *Ritchie* were cases that upheld hours legislation covering women's work on the grounds that women had special characteristics making them in greater need of protection than male workers. These differences put women in a separate class that could be legitimately treated differently by legislatures with regard to their legal rights, as in the Pennsylvania case *Commonwealth v. Beatty*, where the Court wrote that "Adult females are a class as distinct as minors, separated by natural conditions from all other laborers, and are so constituted as to be unable to endure physical exertion and exposure to the extent and degree that is nor harmful to males..."³⁶⁸

The Supreme Court weighed in on hours legislation for women in 1908 and upheld an Oregon hours law applying to women in factories and laundries in *Muller v. Oregon*. After 1908, state courts were consistent in following *Muller* and upholding similar hours restrictions.³⁶⁹ Justice Brewer's opinion in *Muller* acknowledged that women in Oregon had "equal contractual and personal rights with men," noting the passage of that state's MWPAs had emancipated married women from common law disabilities.³⁷⁰ Nonetheless, physical differences between the sexes permitted the legislature to make different rules as to their working conditions. The Court noted both a woman's personal health, as well as her societal role as a mother:

That woman's physical structure and the performance of maternal functions places her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.³⁷¹

The Court then argued that these inherent physical differences between the sexes meant that women were in an inherently unequal bargaining position with employers regardless of whether they were the legal equals of men.

In the years after *Muller*, state courts continued to uphold hours legislation that applied to women (and often children). The Illinois Supreme Court reversed its *Ritchie* decision, now arguing that women's right to contract could be abridged more easily than men's, on account of "(1) The physical organization of woman; (2) her maternal functions; (3) the rearing and education of children; and (4) the maintenance of the

³⁶⁷ *Ritchie v. People*, 155 Ill. 98 (1895), 113.

³⁶⁸ *Commonwealth v. Beatty*, 15 Pa. Super. 5 (1900), 19.

³⁶⁹ Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," 75.

³⁷⁰ *Muller v. Oregon* (1908), 208 U.S. 412, 418.

³⁷¹ *Ibid.*, 421.

home.”³⁷² The California Supreme Court emphasized these latter two points in a similar decision upholding hours legislation, arguing that most women “have household or other domestic duties to perform which oblige them to continue at work each day for a much longer period than their time of service.”³⁷³

The Nebraska Supreme Court upheld a ten-hour law for women in 1902, and the justices’ opinion in that case illustrates the tension courts saw between MWPAs and protective legislation. The Court wrote that, on the one hand, “Women in recent years have been partly emancipated from their common-law disabilities. They now have a limited right to contract.”³⁷⁴ At the same time, physical differences between the sexes limited women from performing the same roles in the labor market that men did: “Certain kinds of work which may be performed by men without injury to their health, would wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home.”³⁷⁵ The Nebraska Supreme Court also considered women’s unequal place in the economy, noting that because women were more limited in the types of jobs they were legally able to hold, there was more competition for the available positions. Thus, women approached employers from a more difficult bargaining position than did men, potentially inducing them to accept “hardships and exactions which they would not otherwise endure.”³⁷⁶ This unequal bargaining power as well as women’s physical limitations led the Court to conclude that the state had the power to step in and protect women in this position, despite their growing economic independence stemming from MWPAs.

Although the typical hours case was brought against an employer for violating the law by employing female workers for longer than the proscribed limit, and involved women working in industries like laundries and factories, women in more professional occupations were sometimes also affected by these laws. In these cases, the rules did seem to be restrictive on female workers rather than protecting them from exploitative employers. For instance, in 1915, a California pharmacist challenged California’s hours law, arguing that the hospital was a clean, safe environment where she ought to be able to work as long as her male colleagues.³⁷⁷ The Court disagreed, arguing that because of the “extreme importance to the public that [pharmacists’ duties] should not be performed by those who are suffering over-fatigue,” the restriction was reasonable even though female pharmacists were limited to eight-hour days while male pharmacists were permitted to work ten hours.³⁷⁸ Since there was a legitimate connection to the public welfare in either case, the differing treatment of men and women was not addressed.

Prohibitions on night work presented courts with similar dilemmas. In this case, though, women were not merely limited in how *long* they could work, but were effectively excluded all together from certain occupations. A New York case struck down a prohibition on night work by women and children as unconstitutional, writing that it was inappropriate to group women and minors together into a group needing

³⁷² *Ritchie v. Wayman*, 244 Ill. 509 (1910), 530. Also see *Riley v. Massachusetts*, 232 U.S. 671 (1914) for a similar ruling relying on *Muller*.

³⁷³ *Ex Parte Miller*, 162 Cal. 687 (1912), 697.

³⁷⁴ *Wenham v. Nebraska*, 65 Neb. 394 (1902), 405.

³⁷⁵ *Ibid.*, 405.

³⁷⁶ *Ibid.*, 405.

³⁷⁷ *Bosley v. McLaughlin*, 236 U.S. 385 (1915).

³⁷⁸ *Ibid.*, 392.

protection. “That women have not yet been accorded equal liberty under the laws with men must be admitted. They never were, however, in the same class as to wardship with children, and the whole trend of modern legislation has been toward their emancipation from legal disabilities and a continued enlargement of their rights, particularly of property and of contract.”³⁷⁹ Less than ten years later, New York’s highest court reversed that decision in *People v. Charles Scwheinler Press* (1915), writing that medical research and other expert investigation into the impact of night work revealed that there was indeed a significant health cost to women engaging in this type of work, thus making this an appropriate area for legislative regulation.³⁸⁰ The Court focused on the health of female workers, but also on their domestic role and role as mothers, noting that women working at night would need to complete household work during the day, limiting the amount they could sleep. Further, the Court wrote that the restriction on night work:

is not only for their [women’s] own sakes but, as is and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called on to bear and who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken down mothers.³⁸¹

The New York law from *Charles Scwheinler Press* was later amended to cover women in more occupations, and was again challenged. This time, the case reached the Supreme Court and the night work restriction was upheld in *Radice v. People* using similar legal justifications but requiring a looser standard of evidence.³⁸² The Court wrote: “The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination.”³⁸³ Thus, the fact that women’s physical characteristics made them different from men was still relevant, but here the Court would allow the legislature to make that decision rather than conducting an independent review.

Minimum wage laws presented a trickier problem for courts than did maximum hours and night work laws. Because these regulations did not deal directly with the health and well-being of the employee on the job, but rather their more general economic welfare, courts were more reluctant to approve these laws. For example, while courts cited medical testimony that long hours at work were physically dangerous to women, the connection between low wages and health or morals was less direct. The Oregon Supreme Court did find in favor of Oregon’s minimum wage for women in 1914, with particular concern for the corrupting influence of low wages on the morality of female employees. The Court highlighted saleswomen in stores, for example, as being particularly likely to turn to prostitution when their wages were not sufficient to support

³⁷⁹ *New York v. Williams*, 51 Misc. 383 (1906), 390-391.

³⁸⁰ *People v. Charles Scwheinler Press*, 214 N.Y. 395 (1915).

³⁸¹ *Ibid.*, 405.

³⁸² Wortman, *Women in American Law*: 333-34.

³⁸³ *Radice v. People*, 264 U.S. 292 (1924), 294-295.

them and they could easily meet potential clients through their work.³⁸⁴ The U.S. Supreme Court affirmed this case without a written opinion, with state courts largely following the ruling over the next decade.³⁸⁵

The U.S. Supreme Court reversed this trend in 1923, with *Adkins v. Children's Hospital*.³⁸⁶ The Court invalidated a Washington, D.C. minimum wage law for female workers, arguing that:

[W]hile the physical differences [between men and women] must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation...by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.³⁸⁷

Because a minimum wage law could not be justified by medically relevant physical differences between the genders, the restriction on women's right to contract was considered unconstitutional.

In 1936, the Supreme Court struck down another minimum wage law for women on similar 'right to contract' grounds in *Morehead v. New York ex. Rel. Tipaldo*.³⁸⁸ Here, unlike the night work case *Radice v. People*, a legislative determination that women's health would be protected by a minimum wage law was not sufficient. And, instead of focusing on physical differences between the sexes, the Court argued that men and women were on equal standing when it came to bargaining over wages and dealing with potentially "unscrupulous" employers.³⁸⁹ Instead, it was the minimum wage law itself that put women at a competitive disadvantage, by requiring employers to pay them a certain wage that was not required for male employees.

There was significant public outcry to the *Tipaldo* decision, with opposition to the decision coming from both Republicans and Democrats, as well as the vast majority of major newspapers.³⁹⁰ Just the next year, however, in 1937, the U.S. Supreme Court upheld a minimum wage law for women, in a case that overturned *Adkins*, rejected the idea of a constitutionally-protected right to contract, and ended the *Lochner* Era. *West Coast Hotel v. Parrish* did not merely abandon the right to contract and argue that all minimum wage laws, for men and women, would be considered constitutional, although that would be the eventual impact of the ruling. Justice Hughes also argued that the state had a "special interest" in women's working conditions due to both their physical

³⁸⁴ *Stettler v. O'Hara*, 69 Ore. 519 (1914), 534.

³⁸⁵ Baer, *Chains of Protection*: 92.

³⁸⁶ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

³⁸⁷ *Ibid.*, 553.

³⁸⁸ *Morehead v. New York ex. Rel. Tipaldo*, 298 U.S. 587 (1936).

³⁸⁹ *Ibid.*, 616-617.

³⁹⁰ Suzanne Mettler, *Dividing Citizens: Gender and Federalism in the New Deal* (Ithaca, NY: Cornell University Press, 1998), 181.

limitations and their unequal bargaining power in economic interactions. Although the Court did address physical differences between the sexes, more attention was paid to economic inequality, noting “that [women] are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances.”³⁹¹

As Julie Novkov highlights, the fact that *West Coast Hotel* concerned a protective law covering women specifically and used gender-based arguments in its analysis is important for understanding the significance of this case not only for the Court’s stance toward labor laws in the twentieth century, but also judicial approaches to laws that kept women out of the workforce and negatively impacted those in the workforce over the next several decades. Novkov writes:

By centering the gender of regulated workers in the analysis of the legal battles, we see that the 'constitutional revolution' of 1937 consisted of the extension and general application of a standard for judgment that had been meticulously constructed during the second and third decades of the century to apply principally to female workers.³⁹²

Thus, even though *West Coast Hotel* represented a significant constitutional moment in the Court’s treatment of labor law, its treatment of female workers did not look so different from earlier cases. Indeed, throughout the contentious *Lochner* Era, courts had been willing to accept a variety of intrusions into the supposedly unassailable right to contract, so long as the workers in question were women or otherwise painted as ‘vulnerable.’ In these cases, courts were often much more deferential to legislatures.

IV. Conclusion: Long-Term Impacts of Gender Hierarchy-Based Justifications for Labor Protections

Although the Supreme Court and other courts dramatically changed their attitude toward labor legislation after 1937, largely removing themselves from these issues and deferring to legislative choices, its approach to women’s role in the economy was much less altered. The ‘protection’ trope remained one that limited individual women’s economic choices even after battles over the right to contract had been settled in the courts. *Muller* was cited as precedent in a number of cases limiting women’s full economic and civic equality, even after the specific concerns over women’s physical frailties and the health of the children of working women outlined in that case had lessened. These included court rulings that upheld bans on women in public universities, differential treatment in occupational licensing, and the exclusion of women from juries.³⁹³ Mettler writes that although protective legislation was “created to improve

³⁹¹ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), 398.

³⁹² Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* (Ann Arbor: University of Michigan Press, 2001).

³⁹³ Jo Freeman, "From Protection to Equal Opportunity: The Revolution in Women's Legal Status," in *Women, Politics and Change*, ed. Louise Tilly and Patricia Gurin (New York: Russel Sage, 1990). See also: Wortman, *Women in American Law*.

women's individual lives, [these laws] served to institutionalize women's marginal status in society and politics" well into the 1960s.³⁹⁴

For example, in a 1948 case, the U.S. Supreme Court upheld a ban on female bartenders who were not related to a male bar owner (including female bar owners themselves), writing:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic., [Bartending] by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventative measures.³⁹⁵

These types of laws and court rulings that purported to shield and protect women from unsafe or unsavory employment by limiting their employment opportunities were commonplace until 1969, when the Equal Employment Opportunity Commission interpreted the Civil Rights Act of 1964 as outlawing gender-specific protective legislation. At the time of the EEOC's ruling, these laws existed in some form in every state. The EEOC's ruling was upheld by federal and state courts, in rulings that struck down laws limiting women's hours, the amount of weight they could lift on the job, and specific jobs they could take (such as bartending).³⁹⁶

Paternalistic, protection-based justifications for laws concerning women's role in the economy had a long-lasting influence on how women were viewed by legislators and judges. These justifications, developed by male advocates for MWPAs and later adopted by women's groups in defense of protective legislation, relied on a political order of gender hierarchy to make claims that gender-specific legislation was necessary and appropriate. Reforms surrounding protective labor legislation for women illustrate the limits of liberalization for women's role in the economy in the early twentieth century. Even as political elites recognized an increasing role in the market economy for women and expanded their ability to engage in that economy in a variety of ways, they still maintained a paternalistic approach to women that fell short of true equality.

³⁹⁴ Mettler, *Dividing Citizens: Gender and Federalism in the New Deal*.

³⁹⁵ *Goessaert v. Cleary*, 335 U.S. 464 (1948), 465-466.

³⁹⁶ Baer, *Chains of Protection*: 4-13.

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